STATE OF ILLINOIS)
) SS.
COUNTY OF SANAGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RUSSELL SLIGHTOM,

Petitioner,

vs.

NO: 14 WC 015253

TRI COUNTY COAL, LLC,

Respondent.

19IWCC0066

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 occupational disease and permanent disability and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below.

The Arbitrator found Petitioner failed to prove by a preponderance of the evidence that he had any occupational disease that arose out of and in the course of his employment. Petitioner introduced into evidence interpretations of his chest x-rays made by Dr. Henry Smith and Dr. Michael Alexander, both B-readers, as well as the testimony and medical records made by Dr. Glennon Paul, Petitioner's treating pulmonologist. All three independently concluded that Petitioner had contracted coal workers' pneumoconiosis ("CWP"). Dr. Paul, additionally, concluded that Petitioner's working in a coal mine also negatively affected Petitioner's pulmonary function, finding that Petitioner's emphysema, chronic bronchitis, and chronic obstructive pulmonary disease (COPD) resulted from him working in that environment. Respondent introduced medical opinions that ran counter to those of Dr. Smith, Dr. Alexander, and Dr. Paul. Dr. Christopher Meyer and Dr. James Castle, both B-readers, interpreted Petitioner's chest x-rays as showing no evidence of CWP. Dr. Castle is also a board-certified pulmonologist. He found Petitioner exhibited no signs of any pulmonary impairment. The Arbitrator relied primarily on Dr. Meyer's serial review of Petitioner's chest x-rays from 2005 through 2014 in finding Petitioner failed to show evidence of CWP. Dr. Meyer noted Petitioners'

2005 chest x-rays showed no signs of coal workers' pneumoconiosis nor did Petitioner's subsequent chest x-rays through 2014. In finding that Petitioner suffered from no pulmonary impairment, the Arbitrator relied on the opinions of Dr. Castle. The Commission finds no reason to disturb the finding of the Arbitrator as it pertains to CWP, but the Commission disagrees with Arbitrator's finding with regard to pulmonary disease.

The Commission agrees with the Arbitrator that Dr. Castle's interpretation of Petitioner's chest x-rays are more persuasive than Dr. Paul's regarding the presence of CWP in Petitioner's lungs but would not go so far as to say, as the Arbitrator did, that Dr. Paul's interpretation of Petitioner's chest x-rays was "not at all credible." Dr. Paul, by his own admission, is not a B-reader. It was noted in Dr. Meyer's testimony that to become a B-reader a course on x-ray interpretation for the presence of CWP must be taken and an examination on B-reading must be passed. The Commission recognizes Dr. Paul's long history of treating coal miners for coal mine-induced lung disease and equally long history of interpreting chest x-rays of coal miners, but those histories cannot be said to be the same as taking the B-reading course and passing the B-reading test. If they were, it would seem a physician with the experience of Dr. Paul could become a B-reader based on experience alone. Dr. Paul's experience makes his opinion as credible as one can be without the requisite training that a B-reader possesses.

With respect to the chest x-ray interpretations of Petitioner's certified B-readers, Dr. Smith and Dr. Alexander, the Commission notes that, as Dr. Meyer testified to, there can be disagreement between B-readers concerning the presence of small opacities on a chest x-ray. The Commission finds it instructive to have testimony of a B-reader that explains what goes into a B-reading and, more specifically, a positive and/or negative B-reading finding. For this reason, the Commission finds Dr. Meyer's testimony helpful and more persuasive than the x-ray interpretation reports of either Dr. Smith or Dr. Alexander.

The Arbitrator and the Commission are in conflict with respect to the evidence demonstrating pulmonary disease. It was noted by the Arbitrator that, contrary to Dr. Paul's diagnoses of emphysema and chronic bronchitis, none of the physicians who reviewed Petitioner's x-rays found them to exhibit emphysema and Petitioner's medical records do not reflect Petitioner with complaints consistent with chronic bronchitis. The Commission agrees that the medical records do not support a finding of either emphysema or chronic bronchitis. It does, however, finds the medical records support a diagnosis of COPD and, later, of restrictive lung disease.

Petitioner presented to Dr. Barbara Mulch at Springfield Clinic on January 2, 2014 with a complaint of shortness of breath with exertion, a condition that was said to have been present for six months. Dr. Mulch, after conducting a physical examination of Petitioner that day, assessed him as having COPD and prescribed Symbicort and a complete pulmonary function test. Subsequent to undergoing the pulmonary function test, Petitioner returned to Dr. Mulch on April 28, 2014, and Dr. Mulch again assessed Petitioner as having COPD and again prescribed Symbicort. On this occasion, Dr. Mulch also prescribed Proventil for Petitioner.

Petitioner underwent a pulmonary function test conducted by Dr. Samiu Patel at Hillsboro Area Hospital on May 2, 2014. Dr. Patel interpreted the results of the test as

demonstrating a moderately severe restrictive lung defect with relatively preserved lung volumes. Restrictive lung disease was added to his list of active problems, a list that included COPD, when he returned to Springfield Clinic on May 16, 2014. Petitioner's subsequent Springfield Clinic visits reveal his condition steadily improved over time and to such a degree that Petitioner was regularly exercising and not consistently using either Symbicort or Proventil. Despite Petitioner's improved condition, COPD and restrictive lung disease continued to be listed among Petitioner's active problems.

Concurrent with his treatment at Springfield Clinic, Petitioner was seen by Dr. Paul at the Central Illinois Allergy and Respiratory Service on June 18, 2014 and underwent what was referred to as a black lung evaluation. Included in the evaluation were pulmonary function studies that revealed Petitioner had "a moderate degree of obstructive airway disease with little change after bronchodilators. He also had decreased carbon monoxide diffusing capacity." Dr. Paul found the results of the pulmonary function studies consistent with both emphysema and CWP. It appears as if Dr. Paul made these diagnoses prior reviewing Petitioner's chest x-rays as he made no reference to doing so. The Commission notes Dr. Paul detected pulmonary impairment as a result of the pulmonary function studies even if it was ultimately shown that he misdiagnosed the cause of the impairment.

Petitioner underwent further testing with Dr. Paul on August 14, 2014 that was interpreted as showing there to be a minimal obstructive lung defect, a mild restrictive lung defect, and a mild decrease in diffusing capacity. No narrative accompanied the test results that would have offered insight as to how Dr. Paul reconciled these findings with Petitioner's then-current condition.

Dr. Castle, during his evidence deposition, was asked if Dr. Paul's tests were valid. He answered there was no way for him do validate Dr. Paul's diffusion tests. He indicated Dr. Paul failed to record certain testing results that would allow him to determine the validity of those tests. He later indicated that results of the spirometries were invalid and that diagnoses were not to be based on the testing that was not valid. It is noted that both technicians who had administered the respective spirometries found the testing data to be "ACCEPTABLE and REPRODICIBLE." (Emphasis in the original.) The Commission finds Dr. Castle's finding Dr. Paul's tests to be invalid does not necessarily equate to a finding that it is inaccurate.

Dr. Castle, allowing for the possibility that Dr. Paul's tests were valid, concluded the that test results were not due to a permanent and irreversible process, noting the results of the spirometry testing that was performed at Methodist Hospital on December 18, 2014. Those tests results were interpreted as being a normal spirometry that showed normal lung volumes and normal diffusing capacity. The Commission interprets those results as evidence of an improving pulmonary condition, not evidence of one not existing.

The medical records from Springfield Clinic continued to list both COPD and restrictive lung disease as active problems and noted, as late as December 1, 2015 that he was being prescribed Proventil, Spiriva, and theophylline. Petitioner's Springfield Clinic record from October 4, 2016 indicates that Spiriva and theophylline had been discontinued and also that Petitioner did not feel that he needed to see the pulmonologist because he was doing very well.

That same record indicated that Petitioner was taking Proventil. The January 30, 2017 Springfield Clinic record indicates Petitioner was taking Proventil infrequently but still listed COPD and reactive lung disease among Petitioner's active problems. Springfield Clinic listed COPD and reactive lung disease among Petitioner's active problems as recently as August 8, 2017. The Commission agrees with the sentiment expressed by Dr. Castle during his evidence deposition that a doctor who has all the historical information and can perform a hands-on physical examination would be in a better position to make the most accurate assessment. The Commission finds Petitioner's treating physicians at Springfield Clinic to have been in the best position to ascertain whether Petitioner had pulmonary impairment and, repeatedly, they found that Petitioner did.

The trajectory of Petitioner's complaints since leave mining on June 14, 2012 is seen as being downward. Overtime, Petitioner's complaints have been less frequent. Several of his most recent visit to Springfield Clinic included no complaints of any respiratory issues and of Petitioner infrequently taking medication for them. The Commission recognizes the improvement to Petitioner's health the more distant his mining career has become but also recognizes the ill-effects of that career still linger. COPD and restrictive lung disease continuing to be listed among Petitioner's active medical problems and Petitioner taking Proventil as needed are evidence of that.

The Commission, based on the evidence, finds Petitioner's employment as a roof bolter exposed him to coal mine dust and other mining substances that result in him developing COPD and reactive lung disease, conditions that he continues to live with. The Commission finds the evidence supports a finding that Petitioner suffered a permanent partial disability as a result of his employment with Respondent.

Section 8.1(b) of the Act requires the Commission to consider five factors to determine the extent of Petitioner's permanent partial disability. In accordance with the Act, the Commission finds as follows:

(i) Impairment Rating - Neither party provided a permanent partial disability impairment report; as such, the Commission gives no weight to this criterion;

(ii) Occupation – Petitioner is retired, but his occupation at the time of exposure was a roof bolter; the Commission gives this some weight;

(iii) Age at the Time of Injury – Petitioner was 61 years old at the time of injury; the Commission gives this some weight;

(iv) Future Earning Capacity – No future earning is anticipated as Petitioner retired from working; the Commission gives this no weight; and

(v) Evidence of Disability Corroborated by Treating Medical Records – Petitioner's treating medical records indicate Petitioner's condition has improve over the years since he was last in a mine, but those same medical records indicate COPD is still among Petitioner's active problems and something he treats with medication on

occasion.

The Commission, after reviewing the evidence, concludes Petitioner's forty-plus year career as a roof bolter introduced him to exposures that resulted in injuries to his pulmonary system and resulted in him suffering a 10% loss of a person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated February 5, 2018 is reversed and that it is found that Petitioner contracted a disabling occupational disease as a result of an exposure that arose out of and in the course of his employment under the Act;

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $587.53 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 10% loss of the use of a 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; and

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 $29,500.00. 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 1 - 2019
KWL/mav
O: 12/4/18
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Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SLIGHTOM, RUSSELL
Employee/Petitioner

Case# **14WC015253**

TRI COUNTY COAL LLC
Employer/Respondent

19IWCC0066

On 2/5/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

RUSSELL SLIGHTOM
Employee/Petitioner

v.

TRI COUNTY COAL, LLC
Employer/Respondent

Case # 14WC 015253

Consolidated cases: _____

19IWCC0066

An *Application for Adjustment 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 **Springfield**, on **December 21, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Sections 1(d)-(f) of the Occupational Diseases Act**

FINDINGS

On **June 14, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's earnings were **$36,790.16** and his average weekly wage was **$979.21.**

On the date of accident, Petitioner was **61** years of age, ***single*** with **0** dependent children.

Petitioner claims no medical.

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

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

ORDER

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

2/5/18
Date

ICArbDec p 2

FEB 5 - 2018

Findings of Fact:

Petitioner lives in Hillsboro, Illinois. He was 66 years old at the time of arbitration and was divorced. Petitioner graduated from Hillsboro High School. He did not have any education after high school. Petitioner worked for 40 plus years in coal mining with all of that time being underground. In addition to coal dust, he was regularly exposed to and breathed silica dust, roof bolting glue fumes and diesel fumes.

Petitioner's last date of employment in the coal mine was June 14, 2012, for Respondent at its Crown III Mine. He was 62 years old at that time. He testified that his job classification was roof bolter. Petitioner testified that he was exposed to and breathed coal dust on his last day in the coal mine. That was the last day he worked in the coal mine because he had knee surgery and could not go back to work underground. Petitioner did not work anywhere after he left the coal mine.

Petitioner started working in the coal mines in late 1969 at age 18. He went to work at Freeman Coal's Crown I Mine as a roof bolter. He was a roof bolter throughout his entire career. As a roof bolter, Petitioner used a machine to drill a hole in the roof of the mine and then a bolt would be inserted into the hole to support the mine roof. Petitioner testified that it created dust when they drilled into the ceiling. At some point they started using the roof bolting glue pins. The glue pin would be inserted into the hole and then the roof bolt would be inserted into the ceiling and would break the glue cap. The glue would then seal up the pin. Petitioner testified that the glue had a strong odor to it. He testified that he would put in 250 bolts per day. There was coal dust in the area where he was working.

Petitioner worked for one year at the Crown I mine. He then went to River King for Peabody. Next he worked at Coffeen for Consol for 12 years. He then worked at Arch Minerals Mine for five years. After that he worked at Rend Lake Mine for Consol for five years. He quit there and went to work for Freeman at its Crown III Mine in 2000. He worked at Crown III for approximately 12 years.

Petitioner first noticed breathing problems around 2004. He testified that the power was off one time and he had to walk the slope out of the mine. He had to stop every 20 feet to catch his breath. He testified that from the time he first noticed his breathing problems at work to when he left the mine, his problems worsened. He testified that since leaving the mine, his breathing has gotten worse. He testified that he could walk on level ground at a normal pace about 100 yards before he would become short of breath and start to shake. He testified that he could climb a flight of stairs before having to stop and rest. Petitioner was not taking any breathing medications as of the time of arbitration. He testified that he had taken three different kinds of breathing medication in the past including Spiriva, but they were not doing him any good.

Petitioner testified that because of his breathing problems he had to give up deer hunting which he loves to do. He cannot walk to his stand and climb a tree. Petitioner testified that any strenuous activity he does causes breathing difficulties. He testified that he cannot mow his own lawn anymore. Petitioner fishes from a boat. Petitioner testified that he has a boat and trailer. He fishes at Hillsboro Lake. He also does some wood carving as a hobby.

Petitioner testified that Dr. Paul in Springfield was his treating physician and now he sees Dr. Billington in Hillsboro. Petitioner was initially sent to Dr. Paul by his attorney. After that Dr. Paul treated him for a period of time until Dr. Paul retired. He probably saw Dr. Paul 15 times. Petitioner testified Dr. Paul gave him the inhalers and all kinds of breathing tests. Before that his treating doctor was Dr. Barbara Mulch with Springfield Clinic. Petitioner testified that he was honest with Dr. Mulch when he told her about when his shortness of breath began.

Petitioner testified that he smoked for about 20 years. He smoked less than a pack a day because he could not smoke underground at work. He worked six days a week so he did not smoke that much. He has not smoked in 16 years. Petitioner takes medication for blood pressure. He also has had two knee replacements.

Petitioner had a left knee replacement in April 2012. He went off work in March 2012 and came back in June 2012 and handed in his resignation. When he resigned, he severed all rights of recall to the mine. All the mines Petitioner worked for were UMW of A mines so he was able to get a UMW of A pension. Petitioner received a full vested pension. Petitioner also signed up for Social Security when he was old enough, which was about five months after his retirement. Petitioner had a right rotator cuff repair in May 2013. He hurt his shoulder at work when a rock fell on it. Petitioner had hernia repair in October 2015. At the time of the hernia repair he gave a history of using a 20 pound cross bow for deer hunting and also lifting heavy wood. He testified that he was rolling the wood over and sitting it up in the log splitter.

Dr. Glennon Paul testified that he is the senior physician at the Central Illinois Allergy and Respiratory Clinic. He testified that the doctors there specialize in allergy and pulmonary diseases and take care of patients with respiratory diseases, critical care, allergic diseases and some internal medicine problems. (Petitioner's Exhibit No. 1, p. 7). Dr. Paul testified that as of the time of his deposition he was semi-retired. He still was in the office a couple of days a week, and saw medical patients occasionally. He is also doing black lung evaluations. Dr. Paul was also working with a clinic that handles DUI evaluations. (Petitioner's Exhibit No. 1, pp. 46-47). Dr. Paul is board certified in allergy, immunology and asthma. (Petitioner's Exhibit No. 1, p. 9). Dr. Paul testified that at the time he did his fellowship in 1970 to 1972 there were not any pulmonary fellowships

developed. He testified that it was strictly in allergy, asthma and respiratory disease. (Petitioner's Exhibit No. 1, pp. 9-10). Dr. Paul is not a B-reader of films. He is not board certified and has never been board certified in pulmonary medicine. (Petitioner's Exhibit No. 1, pp. 55-56).

Dr. Paul examined Petitioner on June 19, 2014, at the request of his counsel. (Petitioner's Exhibit No. 1, p. 46, Deposition Exhibit No. 2). Dr. Paul has seen hundreds of individuals for Petitioner's counsel. (Petitioner's Exhibit No. 1, p. 46). After that initial examination, Dr. Paul became Petitioner's treating pulmonologist until Dr. Paul retired in Spring 2016. (Petitioner's Exhibit No. 1, pp. 11-12). In that time, Dr. Paul gave Petitioner more pulmonary function testing, took patient histories and did physical examinations. (Petitioner's Exhibit No. 1, p. 12). When Petitioner initially saw Dr. Paul, he gave a history of taking Proventil and Symbicort which had not improved his situation. Dr. Paul testified that during his treatment of Petitioner he switched him to ProAir and Spiriva. Dr. Paul testified that Petitioner had some improvement while he was taking those medications. (Petitioner's Exhibit No. 1, p. 13).

Dr. Paul testified that at the time of his examination, Petitioner's pulmonary function showed a moderate degree of obstructive airway disease with little change after bronchodilator and a decreased diffusing capacity. Dr. Paul testified these findings were compatible with emphysema. Dr. Paul testified that Petitioner probably also had some restrictive abnormality. (Petitioner's Exhibit No. 1, p. 14). Dr. Paul testified that Petitioner had emphysema. He testified that one would not have emphysema without some element of bronchitis. Dr. Paul testified that Petitioner gave a history of smoking a pack a day for 30 years quitting eight years prior to the examination. He testified that Petitioner quit smoking six years before he quit mining. (Petitioner's Exhibit No. 1, p. 15).

Dr. Paul testified that Petitioner had coal workers' pneumoconiosis caused by the coal mine environment. (Petitioner's Exhibit No. 1, pp. 15-16). Dr. Paul testified that Petitioner had emphysema, COPD and chronic bronchitis caused by cigarette smoking and the coal mine environment. Dr. Paul testified that Petitioner's obstructive airways disease and probable restrictive airways disease were caused by the coal mine environment. (Petitioner's Exhibit No. 1, pp. 16-17). Dr. Paul testified that in light of Petitioner's coal workers' pneumoconiosis, emphysema, COPD and chronic bronchitis, Petitioner could not have any further exposure to the environment of a coal mine without endangering his health. (Petitioner's Exhibit No. 1, p. 17).

In order to have pneumoconiosis, one must have, in addition to coal mine dust deposited in his lungs, a tissue reaction to it. That tissue reaction can be called scarring or fibrosis. The scarring of coal workers' pneumoconiosis cannot perform the function of normal healthy lung tissue. (Petitioner's Exhibit No. 1, pp. 19-20). Dr. Paul testified that

by definition if one has coal workers' pneumoconiosis, he has an impairment in the function of the lung at the site of the scarring whether it can be measured by spirometry or not. (Petitioner's Exhibit No. 1, p. 20). Dr. Paul testified that a person could have coal workers' pneumoconiosis and have a normal chest x-ray. Coal workers' pneumoconiosis is something that can be found on both pathology and autopsy that did not show up on the x-ray. (Petitioner's Exhibit No. 1, p. 37).

Dr. Paul testified that Petitioner denied cough in Dr. Paul's questioning of him. (Petitioner's Exhibit No. 1, p. 47). Dr. Paul did not review any records regarding Petitioner other than his treatment records from Central Illinois Allergy and Respiratory. (Petitioner's Exhibit No. 1, pp. 47-48). Dr. Paul testified that Petitioner had a significant smoking history. When that habit results in an impairment in pulmonary function it is typically an obstructive condition. An individual can have dyspnea on exertion due to causes other than pulmonary disease. (Petitioner's Exhibit No. 1, p. 48). Deconditioning is one of the possible causes. Petitioner did not tell Dr. Paul that he left work at the time he did on the advice of a physician. Petitioner did not relate to Dr. Paul an inability to perform his last job duties in the coal mine. Dr. Paul did not know what Petitioner's last job was in the coal mine. (Petitioner's Exhibit No. 1, p. 49). Dr. Paul testified that on his testing Petitioner had a decreased total lung capacity and a reduced diffusing capacity. Dr. Paul testified those findings could be due to the scarring of his lung from pneumoconiosis or could be due to emphysema. He testified that those conditions would be permanent. (Petitioner's Exhibit No. 1, pp. 50-51). Dr. Paul did not know the inhalation time for the tracer gas or what the hold time for the gas was with regard to the diffusing capacity. (Petitioner's Exhibit No. 1, p. 51).

Dr. Paul testified that he reviewed a chest x-ray for Petitioner, but he did not include it in his report. Dr. Paul's chart also contained interpretations of chest x-rays that were taken subsequent to the initial examination in June 2014. A film taken on November 10, 2015, was interpreted by Dr. Vince Zata, board certified radiologist. Dr. Zata's impression was indeterminate nodular opacity projecting over the mid thoracic spine on lateral view not well localized on frontal view. He recommended CT of chest with contrast. Dr. Paul testified that there was also an x-ray taken on November 11, 2014 that was interpreted by Dr. Anton Johnson, board certified radiologist. Dr. Johnson interpreted that film as the heart and pulmonary vasculature being within normal limits. He noted no evidence of acute pulmonary infiltrates. (Petitioner's Exhibit No. 1, pp. 53-54). Dr. Paul testified that he was not concerned about the nodular opacity which had developed between November 11, 2014, and November 10, 2015, other than it was associated with Petitioner's black lung. (Petitioner's Exhibit No. 1, p. 54).

Dr. Paul did not know the date of the film that he interpreted. He testified that it would have been the film that Petitioner brought with him, and he did not keep those records. Dr. Paul testified that he interpreted that film as positive for pneumoconiosis.

Dr. Paul testified that he does not make a big deal out of the opacity types as it doesn't matter when one has black lung what type of opacity he has, whether it is circular, triangular, rectangular or what not. (Petitioner's Exhibit No. 1, p. 55). Dr. Paul did not record the profusion of the film. He testified that it is either positive or negative. He testified that the profusion does not matter. He testified that which lung fields are involved also does not make any difference. (Petitioner's Exhibit No. 1, p. 55).

Dr. Henry K. Smith, board certified radiologist and B-reader, interpreted chest x-ray of January 21, 2014, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. (Petitioner's Exhibit No. 2). Dr. Michael S. Alexander, board certified radiologist and B-reader, interpreted chest x-ray of January 21, 2014, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. (Petitioner's Exhibit No. 3).

Chest x-ray interpretations from NIOSH which were taken as part of the Coal Workers' Health Surveillance Program were admitted into evidence. Chest x-ray of February 1, 1972, was interpreted by a B-reader as being completely negative. (Respondent's Exhibit No. 3, p. 3). Chest x-ray of September 17, 1984, was interpreted by a B-reader as being completely negative. (Respondent's Exhibit No. 3, p. 4). A chest x-ray of August 16, 1989, was interpreted by an A-reader and a B-reader as being completely negative. (Respondent's Exhibit No. 3, pp. 5-6). Chest x-ray of January 26, 1999, was interpreted by an A-reader and a B-reader as being completely negative. (Respondent's Exhibit No. 3, pp. 7-8). The chest x-ray of January 19, 2000, was interpreted by two B-readers as being completely negative. The chest x-ray of September 28, 2005, was interpreted by two B-readers as having no abnormalities consistent with pneumoconiosis. (Respondent's Exhibit No. 3, pp. 11-12).

Dr. Cristopher Meyer reviewed chest x-ray of Petitioner dated January 21, 2014, from Central Illinois Allergy and Respiratory and a chest x-ray dated September 28, 2005, which was supplied by NIOSH. Dr. Meyer testified that the films were of diagnostic quality. The 2014 examination was quality 1. The examination supplied by NIOSH was quality 2 due to some limitations in contrast. Dr. Meyer testified that the films revealed that the lungs were clear. There were no findings of coal workers' pneumoconiosis. (Respondent's Exhibit No. 1, pp. 41-42). Dr. Meyer testified that he had an opportunity to compare the two films side by side. Dr. Meyer testified that based on that comparison he concluded that the follow up chest x-ray in 2014 showed no interval change from the 2005 examination with the exception of mild elevation of the right diaphragm. He testified that mild elevation of the right diaphragm was not a sequela of dust exposure. (Respondent's Exhibit No. 1, pp. 42-43).

Dr. Meyer has been board certified in radiology since 1992. (Respondent's Exhibit No. 1, p. 8). Dr. Meyer has been a B-reader since 1999. Dr. Meyer was asked to

take the B-reading exam by Dr. Jerome Wiot. (Respondent's Exhibit No. 1, pp. 21-22). Dr. Wiot was part of the original committee that designed the training program which is called the B-reading program. (Respondent's Exhibit No. 1, p. 23). Dr. Meyer has recently been asked to have a more active academic role in the B-reading program. Dr. Meyer is on the American College of Radiology Pneumoconiosis Task Force which is engaged in redesigning the course and the exam and submitting cases for the B-reading training module and exam. (Respondent's Exhibit No. 1, p. 33).

Dr. Meyer testified that the B-reader looks at the films of the lung to decide whether there are any small nodular opacities or linear opacities and based on the size and appearance of those small opacities, they are given a letter score. (Respondent's Exhibit No. 1, pp. 22-24). Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis characteristically presents with small round opacities. (Respondent's Exhibit No. 1, pp. 29-30). The distribution of opacities is also described because different pneumoconioses affect different regions of the lung. Coal workers' pneumoconiosis is typically an upper zone predominant process. (Respondent's Exhibit No. 1, p. 24). The last component of the interpretation is the extent of the lung involvement or the so-called profusion. (Respondent's Exhibit No. 1, p. 24). Dr. Meyer testified that the profusion is basically trying to define the density of the small opacities in the lung. (Respondent's Exhibit No. 1, p. 31). Dr. Meyer testified that radiologists have about a 10% higher pass rate on the B-readings exam than other specialties. In Dr. Meyer's opinions radiologists have a better sense of what the variation of normal is. Dr. Meyer testified that one of the most important parts of the B-reader training and examination is making a distinction between a 0/1 and 1/0 film. (Respondent's Exhibit No. 1, pp. 35-36).

At the request of Respondent's counsel, Dr. James R. Castle reviewed medical records and chest x-ray dated January 21, 2014, regarding Petitioner. (Respondent's Exhibit No. 2, pp. 21, 46). Dr. Castle is a pulmonologist and is board certified in internal medicine and the subspecialty of pulmonary disease. (Respondent's Exhibit No. 2, p. 4). Dr. Castle testified that board certification in pulmonary disease was established in 1941. (Respondent's Exhibit No. 2, p. 58). Dr. Castle practiced in Roanoke, Virginia for 30 years. His practice was limited to pulmonary disease and chest disease, which encompassed critical care medicine. (Respondent's Exhibit No. 2, p. 7). Dr. Castle's practice included treating patients with occupational lung disease. He had some patients in his practice who had coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 8). Dr. Castle has been certified as a B-reader since 1985. (Respondent's Exhibit No. 2, p. 14).

Dr. Castle reviewed a chest x-ray for Petitioner dated January 21, 2014. Dr. Castle testified that there were no parenchymal abnormalities consistent with pneumoconiosis. He testified that the film showed evidence of an elevated right hemidiaphragm and

scoliosis. (Respondent's Exhibit No. 2, p. 46). Dr. Castle reviewed the reports of the x-rays taken of Petitioner at Dr. Paul's request in 2014 and 2015. Dr. Castle testified that Dr. Johnson's interpretation of the November 11, 2014, film was pretty much the same as Dr. Castle's interpretation of the January 21, 2014, film. Dr. Castle noted that Dr. Paul testified that the indeterminate nodular opacity that Dr. Zata saw on the November 10, 2015, film was due to pneumoconiosis. Dr. Castle testified that Petitioner did not have findings of small opacities indicating pneumoconiosis. Dr. Castle testified that any large opacity develops by an accumulation or coalescence of nodules that are present. Dr. Castle noted that this was something that appeared on an x-ray within a one year period of time and it is not physically possible for a large opacity of pneumoconiosis to develop in that time frame. (Respondent's Exhibit No. 2, pp. 51-52). Dr. Castle noted that neither Dr. Johnson, in his interpretation of the November 11, 2014, chest x-ray or Dr. Zata in his interpretation of November 10, 2015, chest x-ray found emphysema present. He noted that none of the B-readers who interpreted Petitioner's chest x-rays found emphysema. Dr. Castle testified that if the B-readers had seen emphysema, they would have noted it in the ILO classification form. (Respondent's Exhibit No. 2, pp. 52-53).

Dr. Castle testified that for a proper reading of a chest x-ray for pneumoconiosis, one looks at the quality of the film. He then determines whether or not there are any opacities in the parenchyma of the lung which would be consistent with pneumoconiosis. If there are, then they are characterized based upon their size and if they are linear or irregular-type opacities. The reader then notes the areas of the lung where they are involved. Then the patient's film is compared to the standard films to determine the profusion using the ILO 12-point system. The reader determines whether there are any pleural abnormalities and if there are any obligatory abnormalities to be noted. (Respondent's Exhibit No. 2, pp. 46-47). Dr. Castle disagreed with Dr. Paul's testimony that the profusion does not matter. Dr. Castle testified that profusion is very, very important. He testified that one of the most important parts of the film interpretation is determining whether or not the film is a 0/1 or a 1/0 in terms of profusion. (Respondent's Exhibit No. 2, p. 47). Dr. Castle testified that there are two classifications for the shape of opacities that the ILO system uses. The reader looks for either round, regular opacities or linear, irregular opacities. He testified that certain pneumoconioses produce a given type of opacity as opposed to the other type. Coal workers' pneumoconiosis typically causes a round, regular opacity. Dr. Castle testified that there are no triangular or rectangular opacities. He testified that there is no such thing as radiographically apparent pulmonary impairment. Dr. Castle testified that pulmonary impairment according to the American Thoracic Society is determined by valid physiologic studies of pulmonary function, not by radiographic means. (Respondent's Exhibit No. 2, pp. 48-49).

Dr. Castle testified that a valid diffusion capacity study requires that there be an inhalation of the tracer gas in four seconds or less, a breathhold time of eight to twelve seconds and the inhalation volume should be at least 85% of the best vital capacity. He

did not know whether the testing performed by Dr. Paul was valid. There was no way for him to validate that study as the foregoing was not recorded and there were no tracings from the study. Dr. Castle testified that the diffusion capacity testing performed at Methodist Hospital was a valid study. Dr. Castle agreed with Dr. Paul that when the scarring of the lungs due to dust exposure causes a reduction in diffusion capacity or a reduction in total lung capacity, same is permanent. (Respondent's Exhibit No. 2, p. 44). Petitioner underwent a pulmonary function study at Methodist Hospital on December 18, 2014. (Respondent's Exhibit No. 2, p. 43). Dr. Castle testified that the diffusion capacity and the total lung capacity performed at Methodist Hospital were both normal. He testified that based upon the testing at Methodist Hospital, Petitioner did not suffer from a restriction. (Respondent's Exhibit No. 2, pp. 44-45). Dr. Castle had an opportunity to review the 14 pages of treatment records of Dr. Paul regarding Petitioner. All of the spirometries in that data set were invalid. Dr. Castle testified that they were invalid because of less than maximal effort in the tracings that were present. He also noted that there was an inadequate number of tracings in each of the studies with which to validate it. Dr. Castle testified that diagnoses cannot be based upon testing that is not valid. (Respondent's Exhibit No. 2, pp. 45-46). Dr. Castle testified that cough is required to make the diagnosis of chronic bronchitis. (Respondent's Exhibit No. 2, p. 45).

Dr. Castle testified that it is very unlikely for simple pneumoconiosis to progress once the exposure ceases. He testified that there is really not a clinical significance to subradiographic pneumoconiosis. Subradiographic means that there is not enough dust retained in the lungs to show up on an x-ray. He testified that in that situation it is generally of insufficient severity to cause any physiologic abnormalities. Dr. Castle testified that in the medical he reviewed regarding Petitioner, there was no pathologic evidence of pneumoconiosis. Petitioner's valid diffusion capacity was measured at 97%. Dr. Castle testified that this means that there was not any evidence of clinically significant scarring in the lungs. (Respondent's Exhibit No. 2, pp. 49-50). Dr. Castle agrees with the position taken by the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working in currently permissible exposure levels until he reaches retirement age. (Respondent's Exhibit No. 2, p. 50).

Dr. Castle noted that Petitioner underwent NIOSH screening for black lung with chest x-rays taken six times from 1972 to 2005. All these x-rays were negative. Dr. Castle testified that it would be very unlikely for an individual who was a susceptible host for pneumoconiosis not to develop pneumoconiosis over 30 plus years of exposure and then develop it in the last years of his employment. Dr. Castle testified that once pneumoconiosis is there, it is permanent. (Respondent's Exhibit No. 2, p. 50).

Dr. Castle concluded based on the review of all the submitted data that Petitioner did not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. He noted that Petitioner worked in or around the

underground mining industry for sufficient amount of time to have developed coal workers' pneumoconiosis if he were a susceptible host. (Respondent's No. 2, pp. 53-54). Dr. Castle testified that tobacco use is a risk factor for the development of pulmonary disease. Petitioner had a history of smoking for at least 35-pack years. This was sufficient enough history to have possibly caused him to develop chronic obstructive pulmonary disease including chronic bronchitis/emphysema and/or lung cancer if he were a susceptible host. Another risk factor for the development of pulmonary abnormalities was a dysfunctional or elevated hemidiaphragm. Petitioner was found to have a chronically elevated right hemidiaphragm. Dr. Castle testified that a dysfunctional hemidiagraphm may result in some reduction in the forced vital capacity and FEV1. (Respondent's Exhibit No. 2, p. 54). Dr. Castle testified that Petitioner did not have consistent physical findings indicating the presence of an interstitial pulmonary process. He did not have consistent findings of rales, crackles or crepitations. On most occasions his physical examination of the chest was entirely normal. The vast majority of radiographic reports were thought to be entirely normal other than the finding of some elevation of the right hemidiaphragm. (Respondent's Exhibit No. 2, p. 55).

Dr. Castle testified that the study by Dr. Paul from June 18, 2014, did not demonstrate validity of all the studies. There was a significant reduction in both the forced vital capacity and FEV1. There was no evidence of airway obstruction. The total lung capacity appeared to be mildly reduced. The diffusing capacity was normal after correction for alveolar volume. Dr. Castle testified that the study obtained at Methodist Hospital on December 18, 2014, was essentially normal showing no evidence of obstruction, restriction or diffusion abnormality. Furthermore, there had been any marked improvement between the time of Dr. Paul's study and the most contemporary study. Dr. Castle testified that Petitioner had no evidence of obstruction, restriction or diffusion abnormality. (Respondent's Exhibit No. 2, pp. 56-57). Dr. Castle also noted that the changes from the earlier study, if valid, were not due to a permanent and irreversible process such as pneumoconiosis as demonstrated by the marked improvement in the most contemporary pulmonary function study. (Respondent's Exhibit No. 2, p. 57). Dr. Castle testified that based upon the pulmonary function testing performed at Methodist Hospital, from a ventilatory standpoint Petitioner was capable of heavy manual labor. (Respondent's Exhibit No. 2, p. 58).

Dr. Castle testified that there are studies that have shown that as many as 50% of long term coal miners have pathologic coal workers' pneumoconiosis that is not appreciated by radiographic studies during their life. (Respondent's Exhibit No. 2, p. 65). Dr. Castle testified that no matter what he saw on the chest x-rays, he could not rule out the possibility that Petitioner could have pneumoconiosis that could be found pathologically or at autopsy. (Respondent's Exhibit No. 2, p. 64). Dr. Castle testified that the abnormality of coal workers' pneumoconiosis is basically a trapped coal dust in a part of the lung which ends up wrapped in scar tissue and can be accompanied by

emphysema around it. Dr. Castle testified that the scar tissue itself cannot perform the function of normal healthy lung tissue. By definition if a person has coal workers' pneumoconiosis, he would have an impairment in the function of his lungs at the site of the scarring. (Respondent's Exhibit No. 2, p. 79). Dr. Castle testified that coal workers' pneumoconiosis can progress after cessation of coal mining, but it is very uncommon. (Respondent's Exhibit No. 2, p. 82).

Medical records of Springfield Clinic were admitted into evidence. Petitioner underwent a preop examination for total left knee replacement on March 19, 2012. He underwent the total knee replacement surgery on April 4, 2012, without complication. (Respondent's Exhibit No. 5, pp. 238, 239, 249-250). At a checkup on November 26, 2012, Petitioner reported that his right arm and shoulder had been giving him issues for a month, but he declined physical therapy. (Respondent's Exhibit No. 5, pp. 215-216). On January 21, 2013, Petitioner was continuing to complain of right shoulder pain and was seeking surgery as a permanent result. (Respondent's Exhibit No. 5, pp. 202-203). Dr. Greatting performed right shoulder arthroscopy on March 11, 2013. (Respondent's Exhibit No. 5, pp. 164-165).

Petitioner was seen by Dr. Mulch on January 2, 2014, at which time he told her he had shortness of breath with exertion present for the past six months. He reported that he had stopped smoking seven years prior and that he had spent 43 years in the coal mine. He had no cough or signs of chest pain. Dr. Mulch recommended a complete pulmonary function test as well as recommended Symbicort, Spiriva and ProAir. He was started on Symbicort on that date. He reported to Dr. Mulch that he was applying for black lung benefits. He was scheduled for chest x-ray on January 21, 2014. (Respondent's Exhibit No. 5, pp. 40-41). Petitioner returned on April 28, 2014, for continued shortness of breath. He had stopped using the Symbicort due to financial strain. (Respondent's Exhibit No. 5, pp. 132-133). The Petitioner underwent pulmonary function testing on May 2, 2014. The summary stated that the patient demonstrated a moderately severe restrictive lung defect with relatively preserved lung volumes. The findings were consistent with either early interstitial lung disease, obesity or other chest wall restriction. (Respondent's Exhibit No. 5, p. 130). A chest x-ray taken on May 2, 2014, was interpreted as showing no acute cardiopulmonary process. (Respondent's Exhibit No. 5).

Petitioner was seen on May 16, 2014, with indication for same being restrictive lung disease. It was noted that pulmonary medicine had been consulted to evaluate Petitioner's progressive shortness of breath and normal pulmonary function tests. His symptoms had been present for more than a year. He first noticed dyspnea on exertion one to two years prior. He did not have any dyspnea at rest. Petitioner had dyspnea on moderate activity and when he leaned forward. He also had mild intermittent cough without any significant sputum production. Petitioner admitted to leading sedentary lifestyle. He reported that he first noticed his dyspnea about a year prior when he went

deer hunting. His oxygen saturation was 97% on room air. Physical examination of the chest demonstrated symmetrical air entry without any obvious wheezes or crackles. It was noted that the pulmonary function testing showed a restricted ventilatory defect. His chest x-rays were reviewed. There was poor inspiration without any evidence of interstitital lung disease. He possibly had a slightly elevated right hemidiaphragm. His differential diagnosis remained very broad. The possibilities included COPD, CTEPH, and diaphragmatic dysfunction. He was advised to continue his Symbicort. (Respondent's Exhibit No. 5, pp. 125-126). Petitioner underwent a sniff test on May 20, 2014. Same revealed normal excursion of both hemidiaphragms. There was no evidence of diaphragmatic paralysis. There was mild elevation of the right hemidiaphragm which appeared to be chronic. (Respondent's Exhibit No. 5, p. 122). Ventilation profusion imaging was also performed on May 20, 2014, and same was unremarkable. (Respondent's Exhibit No. 5, p. 123).

Petitioner was seen on June 13, 2014, for six week follow up for chronic obstructive pulmonary disease and other medical problems. He was doing better and stated that he was no longer using Symbicort and Proventil on a regular basis. He overall was doing pretty well and was exercising regularly. His O2 saturation on room air was 96%. Physical examination of the chest revealed the lungs to be clear to percussion and auscultation with prolonged expiration but no wheezing or rhonchi. The assessment was hypertension and chronic obstructive pulmonary disease. (Respondent's Exhibit No. 5, pp. 118-119). Petitioner was seen by the pulmonologist on June 16, 2014. His oxygen saturation on room air was 96%. He had lost 10 pounds since his last visit. He was exercising regularly and noticed a significant day to day improvement in his exercise tolerance. He had no dyspnea at rest. He had had progressive improvement in his dyspnea with regular exercise and weight loss. The doctor noted that his initial workup did not reveal any obvious cardiopulmonary pathology. Petitioner had improved with the increase in exercise and weight reduction. The doctor charted that regular exercise had been shown to be beneficial for Petitioner and he had noticed an improvement of same. (Respondent's Exhibit No. 5, pp. 114-116).

Petitioner was seen for checkup on January 30, 2015, for COPD and other medical problems. He had been seeing Dr. Paul for his pulmonary condition. Dr. Paul had stopped Symbicort and started Theophylline and Spiriva. Physical examination of the lungs showed that they were clear to percussion. There was slightly prolonged expiration but no wheezing and rhonchi. (Respondent's Exhibit No. 5, pp. 110-112). Petitioner's lungs were clear to auscultation and percussion when examined on May 15, 2015, and June 5, 2015. (Respondent's Exhibit No. 5, pp. 100-103). Petitioner was seen for a possible ventral hernia on October 8, 2015. He had been shooting 150-pound crossbow and also lifting a lot of heavy wood. Otherwise, he was feeling fine and he was breathing ok. On physical examination the lungs were clear to auscultation and percussion. (Respondent's Exhibit No. 5, pp. 83-84). On December 1, 2015, Petitioner had a six-month checkup and

was doing well. His breathing was described as ok. He remained active. Physical examination of the lungs remained clear to auscultation and percussion. (Respondent's Exhibit No. 5, pp. 81-82).

Petitioner returned for his annual health maintenance visit on June 3, 2016. He denied any shortness of breath. He quit taking his Spiriva and Theophylline because he felt he did not need it. Physical examination of the lungs remained clear to percussion. (Respondent's Exhibit No. 5, pp .77-79). Petitioner was seen on October 4, 2016, for a lesion on his forehead. Lungs remained clear to percussion with decreased breath sounds. There was also prolonged expiration. (Respondent's Exhibit No. 5, pp. 75-76). Petitioner was seen on January 30, 2017, for ventral hernia that was getting bigger and more painful. It was noted that he had reactive airways disease from working in a coal mine. He was using his Albuterol frequently. Physical examination of the lungs remained clear to auscultation. (Respondent's Exhibit No. 5, pp. 73-74). Petitioner was seen for abdominal pain on June 13, 2017. Review of systems pulmonary showed no pulmonary symptoms. Physical examination of the chest showed the lungs were clear to auscultation bilaterally with no intercoastal retraction or use of accessory muscles. The plan was set in place to repair the hernia. (Respondent's Exhibit No. 5, pp. 68-70). On July 6, 2017, Petitioner underwent an open repair of the ventral hernia without complication. (Respondent's Exhibit No. 5, p. 62).

Medical records of Hillsboro Area Hospital were admitted into evidence. Petitioner was admitted to Hillsboro Area Hospital on August 22, 2005, for chronic knee pain and swelling of the lower leg. A Doppler study confirmed a DVT. Under Petitioner's social history, it was noted that he smoked about two packs of cigarettes per week. On physical examination his lungs were clear to auscultation and percussion. (Respondent's Exhibit No. 6, pp. 154-155). On June 19, 2017, Petitioner underwent chest x-ray, EKG and lab work. Same was in preparation for surgery to be performed on July 6, 2017. EKG showed normal sinus rhythm with left axis deviation. It was noted that it could not rule out anterior infarct that was of an undetermined age. (Respondent's Exhibit No. 6, p. 4). The findings on chest x-ray included relatively low lung volumes, with very mild chronic-appearing interstitial change. There was no pleural effusion or pneumothorax. The impression was no evidence of an acute cardiopulmonary abnormality. (Respondent's Exhibit No. 6, p. 3).

Medical records of Memorial Medical Center in Springfield were admitted into evidence. Petitioner presented to the emergency room on September 25, 2006, complaining that a piece of roof rock fell on his head at work. On examination his lungs were clear to auscultation bilaterally. (Respondent's Exhibit No. 7, pp. 17-19). Petitioner underwent right total knee arthroplasty on November 19, 2008. On the preoperative history form it was noted that Petitioner smoked zero to one pack per week. He denied cough or shortness of breath. On examination he had normal respiratory

movement and his lungs were clear to auscultation and percussion. (Respondent's Exhibit No. 7, p. 12). Petitioner underwent preop physical for his left total knee arthroplasty on March 19, 2012. He wanted to be off work. He had returned to work since he saw his surgeon in January, however, he reported that the work he did in the mine was becoming more and more difficult for him to be mobile with his knee. He was noted to be a former smoker. He smoked a pack per week for more than 20 years, quitting in 2009. On examination his lungs were clear. Petitioner was taken off work for two weeks pending the surgeon's recommendations for surgery. (Respondent's Exhibit No. 7, pp. 2-3). Petitioner underwent left total knee arthroplasty on April 4, 2012. (Respondent's Exhibit No. 7, pp. 6-8).

CONCLUSIONS OF LAW

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

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

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he has an occupational disease arising out of and in the course of his employment. The Arbitrator finds the x-ray interpretations by Drs. Meyer and Castle and the NIOSH B-readers to be more credible than the interpretations by Drs. Paul, Smith, and Alexander. Dr. Paul's interpretation of the chest x-ray is not at all credible. Dr. Paul is not a B-reader. Dr. Paul did not know the date of the chest x-ray that he reviewed. Also, he did not describe the opacities that he saw on the chest x-ray in a manner consistent with pneumoconiosis. Furthermore, in the report that he prepared at the time of his examination, there was no indication that he read a chest x-ray for Petitioner. The chest x-ray taken on September 28, 2005, as part of the Coal Workers' Health Surveillance Program was interpreted by two NIOSH B-readers as having no abnormalities consistent with pneumoconiosis. Dr. Meyer had the opportunity to compare that film side by side with the chest x-ray taken on January 21, 2014. Dr. Meyer testified that the chest x-ray taken in 2014 showed no interval change from the 2005 examination with the exception of mild elevation of the right diaphragm. Petitioner introduced no evidence to contradict the negative B-readings of the September 28, 2005, chest x-ray. The Arbitrator finds that Petitioner's chest x-ray was negative as of September 28, 2005, and since Dr. Meyer found that there was no change between the 2005 and 2014 chest x-rays, the Arbitrator finds Petitioner's chest x-rays to be negative for pneumoconiosis.

At arbitration Petitioner testified that he first noticed breathing problems in about 2004. He testified that his breathing problems worsened from the time he first noticed them until he left the mine and have continued to worsen since leaving the mine.

Petitioner testified that he was honest with Dr. Mulch, his primary care physician, when he told her about when his shortness of breath began. According to records from the Springfield Clinic, Petitioner reported to Dr. Mulch on January 2, 2014, that he had shortness of breath with exertion for the past six months. On this same date, Petitioner also reported to Dr. Mulch that he was applying for black lung benefits. On May 16, 2014, Petitioner reported that his symptoms of progressive shortness of breath had been present for more than a year. He reported that he had mild intermittent cough without any significant sputum production. He reported that he first noticed his dyspnea about a year prior when he went deer hunting. Petitioner did not relate to Dr. Paul an inability to perform his last job duties in the coal mine. Dr. Castle testified that he could not validate the pulmonary function studies performed at Dr. Paul's office. He testified that a diagnosis cannot be based on an invalid study. Dr. Castle testified that based on the most contemporary pulmonary function study, Petitioner had no evidence of an obstruction, restriction or diffusion abnormality. Dr. Castle further testified that if the changes on pulmonary function noted on Dr. Paul's testing were valid, they were not due to a permanent and irreversible process such as pneumoconiosis as there was marked improvement in the pulmonary function study performed at Methodist Hospital in December 2014.

Dr. Paul also diagnosed Petitioner with emphysema, COPD and chronic bronchitis. Dr. Castle noted that none of the B-readers who interpreted Petitioner's chest x-rays found emphysema. If the B-readers had seen it, they would have noted the emphysema on the ILO classification form. Furthermore, neither of the radiologists who interpreted the x-rays taken as part of Dr. Paul's treatment found emphysema. Dr. Castle testified that cough is required to make the diagnosis of chronic bronchitis. Petitioner actually denied cough in Dr. Paul's questioning of him. A review of the medical records also reveals that while Petitioner made complaints of shortness of breath to his treating physicians, he did not complain of consistent coughing. Dr. Castle testified that he could not confirm the validity of the pulmonary function testing performed at Dr. Paul's office. A diagnosis cannot be based on invalid testing. The testing performed at Methodist Hospital was valid and showed no evidence of an obstruction. The Arbitrator finds that Petitioner has failed to prove that his current condition of ill-being is causally related to his employment with Respondent.

Issue (o): Other: Whether Petitioner proved timely disablement pursuant to Sections 1(e) and (f) of the Occupational Diseases Act?

Petitioner testified that he first noticed breathing problems around 2004. He testified that the power was off one time and he had to walk the slope out of the mine. He had to stop every 20 feet to catch his breath. Petitioner's medical records indicate complaints of shortness of breath beginning in 2014. Petitioner noted when he was complaining of shortness of breath that he was leading a sedentary lifestyle. The medical

records indicated that Petitioner had a progressive improvement in his dyspnea with regular exercise and weight loss. Petitioner's physician noted that the initial workup did not reveal any obvious cardiopulmonary pathology. There was no evidence that any physician ever restricted Petitioner from work due to a pulmonary condition. Petitioner was continuing to perform his job duties in the coal mine up until he went off work for a total left knee replacement. Following said surgery, Petitioner was released to return to work but opted to take his retirement. The Arbitrator concludes that Petitioner failed to prove a timely disablement pursuant to Sections 1(e) and 1(f) of the Occupational Diseases Act.

Petitioner's claim for compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DENISE DUGAN-EDWARDS,

Petitioner,

19IWCC0067

vs.

NO: 14 WC 16364

STATE OF ILLINIOIS/MURRAY DEVELOPMENTAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact and Conclusions of Law

The Commission views the evidence regarding Petitioner's cervical spine different from the Arbitrator. As such, the Commission strikes the Arbitrator's Facts and Conclusions on pages one through eight and the Arbitrator's Order and substitutes the following:

Facts

At the time of the injury the Petitioner was a 43-year-old mental health aide at Respondent's Warren G. Murray Developmental Center. (Ax1, T, p. 9) The parties stipulated to an accident occurring on September 30, 2013, however, the Respondent disputed the causal connection of the cervical spine to the accident. Petitioner testified "I was changing one of the residents, and he grabbed my neck and he threw me across the room during a behavior. He started to have a behavior." (T, p. 10) When asked on direct examination when she started noticing cervical complaints, Petitioner testified: "I started noticing cervical complaints within a month or two, actually, 4 weeks, 5 weeks." (T, p. 12) She described the feeling as "Numbness, tingling down my arm, headaches, severe--severe neck pain, throbbing up through my head." (T, pp. 12-13)

According to the witness report, as Petitioner tried to get away from the resident, she slammed her arm/elbow on the wall. According to the Supervisor's report, the patient pushed Petitioner as she tried to pull away causing her to hit the wall with her elbow and arm. (Rx1) Petitioner signed a Workers' Compensation Form dated September 30, 2013 that asked her to describe the Extent of injury and the Classification/Severity of Injury. Petitioner reported "left elbow pain/contusion left forearm pain" and "mild" respectively. (Rx1)

Petitioner went to St. Mary's Centralia Hospital where she reported that she "was working with a client that was grabbing at her. She moved back to avoid being hit and having her hair pulled and ended up hitting a wall injuring her left elbow." The pain location was noted to be the left elbow and forearm. An x-ray was taken of her left elbow. The x-ray showed no fracture or dislocation and "a suggestion of mild inflammatory change at the posterior elbow soft tissues. Correlate with clinical exam." (Px3, 9/30/13)

Petitioner consulted Dr. Jeffrey McIntosh for six visits from October 4, 2013 through January 9, 2014. On October 4, 2013, four days after the accident, the history stated: "Denise is a patient well-known to me last seen approximately one year ago in November who sustained an injury to her left elbow last Monday, September 20th. She was toileting a resident, who reached for her hair and as she pulled away she hit her elbow, specifically the posterior aspect of her elbow." (Px4)

On physical examination, Dr. McIntosh noted that Petitioner had tenderness at the medial epicondyle as well as the lateral epicondyle. She complained of some numbness and tingling in the middle three fingers. (Px4)

On October 10, 2013 Dr. McIntosh noted that Petitioner had complaints of more pain in her forearm and her wrist and that she "has analgesic medication for her back." (Px4) On October 24, 2013 Dr. McIntosh noted that Petitioner is "status post carpal tunnel in the past." He ordered nerve conduction studies to further evaluate the ulnar nerve. (Px4)

By November 7, 2013, Dr. McIntosh was awaiting nerve conduction studies noting a positive Tinel's test at the cubital tunnel. (Px4) Petitioner began physical therapy on December 11, 2013. The December 11, 2013 history notes Petitioner was: "at work trying to change a resident when he tried to pull her hair. She quickly moved to get out of the way and hit (her) left elbow against the wall, then fell into wall with left upper extremity." (Px5) The latter part of this description of the accident was the first departure from Petitioner's initial medical histories.

On January 9, 2014, Dr. McIntosh felt it was reasonable to repeat x-rays and upon review, he noted a persistent radial head fracture, intra-articular in nature, involving the outer one-third of the radial head. Dr. McIntosh noted that the fracture was in good position but not appreciated on the initial visit in October and opined that the fracture did not need surgical intervention and appeared to be healing. He felt it was reasonable to continue her in her exercise program and to put her on anti-inflammatory medication for stiffness and analgesic medical for pain. He also assigned work restrictions of no lifting with the left upper extremity and no answering phones. (Px4)

On December 31, 2013 the Petitioner underwent an electromyography and nerve conduction study (EMG/NCV) that showed:

> 1) A diagnosis of mild carpal tunnel syndrome. The finding was suggestive of conduction slowing, no denervation changes but mild loss of motor unit recruitment were seen in the abductor pollicis brevis; and
> 2) No significant slowing seen across elbow on ulnar motor study. Left Ulnar Dorsal cutaneous sensory amplitude was mildly decreased. No denervation changes but mild loss of motor unit recruitment were (sic) seen in left ulnar innervated muscles. Clinical correlation is recommended for possible minimal left ulnar neuropathy at elbow. The remainder of the study is considered within normal limits. (Px6)

Petitioner then chose to treat with Dr. Frank Lee at the Bonutti Clinic. She completed a History of Injury/Complaint handwritten intake form on January 31, 2014 that documented her description of injury/problem as Left Radial Head Fracture. She wrote she had "severe left shoulder/neck pain" on the second blank line and on the same line wrote "fingers tingly/numb." Petitioner's surgical history intake listed "C-5-6 replacement on 8/11-Left carp tunnel release 7/12-Lapband 12/12." (Px7) On the same date, the typed Description of Injury/Problem was listed as "Left radial head fracture." The History of Present Illness described:

> "43-year-old female presents with Left elbow pain. DOI: 9/30/13. Pt at work and behind a patient who became combative. Pt hit elbow against wall and also fell into the wall. She went to St. Mary's Hospital in Centralia and was treated with x-rays. Was told no fracture. She followed up with Dr. McIntosh at Southern Ill Orthopedic Center and treated with elbow pads, and told elbow was bruised. Followed up 5 weeks later and given a wrist splint. Pt still no better. Then treated with an injection-no help. EMG done on 12/31/13 and was told mild carpal tunnel.

Pt states had release prior to injury on July of 2012. Was then re-x-rayed and told she had a radial head fracture. Pt still with pain on constant basis. Painful popping. Movement is worse. She has locking symptoms. Tingling was to all 5 digits, now over time only to the last 2 fingers. Unable to fully extend arm. She has been in therapy. She is currently working light duty with right hand work only." (Px7)

Dr. Lee ordered an MRI of the left elbow-to rule out loose bodies and to diagnose the random symptoms of locking. Petitioner was to return to him after she had the MRI with the disc and report. If no obvious loose bodies were seen on MRI, he would consider [C]elestone injection into the joint to help the generalized pain around the elbow as well as the lock if synovitis is the culprit. He noted that Petitioner's past medical history was also positive for migraines. (Px7)

At the next visit with Dr. Lee on March 7, 2014, he reviewed the MRI results which showed no effusion, the ligaments were intact, and no loose body. The MRI Impression showed: "status post radial head fracture with contracture 20 degrees. Possible plica or loose body not detectable on MRI." Dr. Lee administered a left elbow joint [C]elestone injection. Petitioner reported that her popping was noticeably less painful after injection. No change in her range of motion (ROM) however. Dr. Lee noted that if the injection was successful in reducing pain, he would consider trying additional injections. If the results were favorable but very short lived, he would consider arthroscopic intervention. (Px7)

On March 7, 2014, Petitioner was noted to get very little relief from the injection of [C]elestone and had random snapping to the elbow. She also complained of numbness/tingling to the entire hand, all fingers, that was intermittent and that was occurring more frequent since her last office visit. Her Social History was noted for being married, "drinks alcohol, has been advised to quit/cut down consumption, does not use drugs, no HIV risk behavior, uses seatbelt regularly, uses cigarettes, has exposure to passive smoke, current every day smoker, does not require counseling for smoking, does not exercise regularly, counseled to exercise regularly." Dr. Lee's impression was that her symptoms in the elbow were consistent with possible loose bodies or symptomatic plica. The MRI might be unable to depict this. The lateral forearm pain was consistent with radial tunnel syndrome but may be an extension of her elbow injury. He wrote: "The numbness in the hand is nonspecific but could be due to her neck as she is status post multilevel fusion." (Px7)

On April 18, 2014 Dr. Lee recommended diagnostic elbow arthroscopy if Petitioner had no improvement after one week after a second injection. At the next visit on May 16, 2014, Petitioner reported no improvement. (Px7)

Petitioner was first examined by Dr. Ryan Calfee at Respondent's request on July 7, 2014. The history states: "She works as a mental health technician with developmentally disabled adults and was trying to help a resident in the bathroom stall and hit her left elbow against a wall." Petitioner reported she went to Dr. McIntosh whom she had seen previously for a right wrist fracture and carpal tunnel syndrome on the left side. She reported having had eleven Occupational Therapy visits and nerve conduction testing being done because she was getting numbness in the

tips of the small finger as well as the ring finger as well as some in the thumb. She also reported a past history of migraine headaches, hypertension and a past surgical history that included C5, C6 and C7 disc replacements after a traumatic injury to the neck in 2011. Left carpal tunnel release was done in July 2012 by Dr. McIntosh. Her outpatient medications included Ambien, topiramate for migraine headaches and oxycodone for pain as needed. (Rx2)

Under "Current Complaints" Petitioner denied any new neck pain or return of neck pain. She demonstrated very good range of motion of the neck with no radiating symptoms into the left arm. No change in neurologic symptoms in the left small finger or ring finger. On her left wrist she had a well-healed carpal tunnel incision, non-tender. The physical exam revealed no catching or crepitus, grip strength was 70 pounds on the right, 40 pounds on the left. No muscular atrophy noted in the left hand. She had tenderness and a positive Tinel test over the ulnar nerve at the left elbow and was tender over the radiocapitellar joint when pressing over the radius with supination and pronation. (Rx2)

Dr. Calfee answered various interrogatories and opined the (then) current diagnosis was left radial head fracture with likely soft tissue plica causing mechanical symptoms in the left elbow versus small cartilage flap from the fracture and left cubital tunnel syndrome. He believed both of those conditions are causally related to the reported injury at work on September 30, 2013. Specifically, it was Dr. Calfee's opinion that the ulnar nerve compression is likely the result of the swelling and subsequent scarring around the ulnar nerve from the trauma to the left elbow. Dr. Calfee found Petitioner had more pain in the left elbow than he would expect from this fracture. Nonetheless, he also agreed with Dr. Lee's recommendations to surgically address the left elbow with arthroscopy, specifically looking to debride soft tissue plica or small cartilage flaps that may be unstable, causing the intermittent but consistently occurring mechanical symptoms in the left elbow. He also recommended decompressing or transposing the left ulnar nerve for her cubital tunnel symptoms. (Rx2)

Petitioner underwent surgery on September 2, 2014 consisting of a left elbow arthroscopy with partial synovectomy and excision of plica. (Px9) Petitioner had post-surgical visits to Dr. Lee on September 15, 2014 and October 10, 2014 with continued complaints. On October 10, 2014 Petitioner had continued complaints of "popping deep in the elbow joint" and ring finger tip numbness. She was "wondering if she hurt her neck when she fell. She had previous neck surgery C5/6 and C 6/7."

Dr. Lee's "Plan" on October 10, 2014 noted that Petitioner was ready for Occupational Therapy and they discussed her symptoms other than her left elbow pain involving her left hand, upper extremity and neck. Dr. Lee noted that he had no records in his chart from the emergency visit after the first fall/injury. He noted they discussed her previous neck surgery before this injury. He prescribed Mobic and she was to return in four weeks. (Px7)

On October 24, 2014, Petitioner had her first post-surgical Occupational Therapy evaluation at St. Mary's Centralia. The Commission notes Petitioner's history of accident was significantly different than the first histories immediately following the incident. Petitioner

reported that she: "injured (her) elbow in sept (sic) of 2013 while at work fell on outstretched arm and then twisted it under her. And had surgery in sept (sic) of 2014 with a plica debridement and Synovectomy and scope to left elbow." (Px3, p. 40)

Petitioner returned to Dr. Lee on November 7, 2014 and reported she was the same. Her pain was reportedly not any better. She now reported pain in the neck as well as down the extremity. She tried OT, and this did not help; they used a stim on her neck and this helped. She was working with restrictions. She complained of numbness and tingling in the last two fingers and tingling top of hand. His primary diagnosis was cervicalgia. Dr. Lee's Impression stated: "Pt has different symptoms affecting her extremity. The pain symptoms and numbness is (sic) most likely due to the cervical spine. Referral to Dr. Daniel Riew in St. Louis."

On January 21, 2015, Petitioner was seen by Dr. Daniel Robson at Respondent's request, for an independent medical evaluation regarding the Petitioner's cervical spine. Petitioner reported she was assisting a resident when the resident grabbed her hair causing them to fall down to the ground. As she fell to the ground, she extended her left hand and arm and began having severe left elbow pain. After the injury, she reports she began having left- sided neck and shoulder pain. (Rx 4, p.1)

Dr. Robson noted Petitioner has a prior history of an anterior cervical disc replacement and fusion C5-6, C6-7, performed by Dr. Matthew Gornet in August 2011. She reported she saw Dr. Gornet on a regular basis until May 2013 regarding her neck. She took medications on a regular basis as well his before the injury. (Rx4, p. 1)

She described her neck pain as aching, stabbing and burning in nature. She added that the pain will radiate to the left shoulder, arm and hand. She reported burning and numbness in the left hand. (Rx4, p. 1)

In response to interrogatories, Dr. Robson opined that he did not recommend any further treatment regarding the September 30, 2013 injury concerning the cervical spine. He did not have any medical documentation proving that Petitioner followed up for neck pain within a timely fashion following the September 30, 2013 injury. Dr. Robson opined the first mention of the patient having neck pain did not occur until Dr. Lee's office notes on October 10, 2014.

Dr. Robson opined he did not have any medical records from Dr. Gornet in the years prior to the September 30, 2013 injury and he could not, with any degree of medical certainty, link the September 30, 2013 injury to the cause of her neck pain. He also opined that her diagnosis was "status post C5-6 total disc replacement, at C6-7 anterior fusion, juxtafusional degenerative disc disease, none of which are related to the September 30, 2013 injury. The patient did not have any objective findings on physical exam to support her subjective complaints. Additionally, the patient took over a year to report neck pain. Dr. Robson believed she reached MMI regarding the cervical spine for the September 30, 2013 injury. (Rx4, pp. 4, 5)

Petitioner never went to Dr. Riew in St. Louis. The Petitioner did, however, return to Dr. Gornet, her previous spine surgeon, approximately one year later. (Px11) Five months after he made the referral to Dr. Riew, Petitioner returned to Dr. Lee on April 20, 2015. She now reported pain in the neck as well as down the left arm with continued complaints of numbness and tingling in her small and ring two fingers and tingling on the top of her hand. The "Plan" stated that they were "waiting on WC to approve a visit to spine surgeon in St. Louis. Continue light duty. Depending on spine surgeon opinion, we may consider repeating the EMG to see if ulnar sided numbness and pain is due in part to cubital tunnel syndrome. Prior EMG reportedly showed carpal tunnel." (Px7)

On July 20, 2015, she returned to Dr. Lee who noted that Petitioner did see a C-spine IME who did not recommend spine intervention. She hasn't seen the spine surgeon in St. Louis that was recommended at last OV 4/20/15 D/T still waiting on WC approval. Still having neck pain with radiation down the left arm, N/T small and ring fingers. Left elbow no better, still pops and catches. Still has pain, especially with activity/lifting. States pain is deep in elbow and aches constantly. (Px7)

Dr. Lee's Impression stated: "when patient was seen by Dr. Calfee previously, he recommended releasing the cubital tunnel at the time of elbow arthroscopic. Since her neck has been cleared by the IME, I would consider repeating the EMG to see if the cubital tunnel has become positive over time. Alternatively, we could release the nerve with the hope that her ulnar sided numbness and tingling would improve. What is uncertain is the relief of elbow pain with this type of intervention." He also noted she could return to work limiting her lifting to 5 pounds and allowing keyboarding. (Px7)

Dr. Calfee re-examined Petitioner on August 14, 2015 at Respondent's request. He noted Petitioner underwent a left elbow arthroscopy and debridement with partial synovectomy and excision of plica on September 2, 2014 and that ulnar nerve surgery was not done at the same time. On review of the operative report there was a plica that was debrided and cartilage irregularities there were noted on the lateral side of the elbow from the prior trauma. She continued to complain of pain of clicking, discomfort with loading the left elbow reporting that she continued to get numbness and tingling in the small finger and ring finger on the left side that she described as "like electricity coming through those fingers." She reported some pain and the electric sensation in her wrist and some burning pain on the lateral side of the elbow. She reported that Dr. Lee had noted some neck pain as well and that he wanted her to be evaluated for the cervical spine before doing anything to the ulnar nerve in the arm. She reported she had a history of cervical spine surgery back in 2012, that was largely done for neck pain and pain shooting into the upper part of the left arm. She reported disc replacement at C5-6 and C6-7. This was also done for headaches. Since then the symptoms decreased but never completely went away. She said this has been aggravated since her injury September 30, 2013 but that she was having more substantial symptoms in her arm. (Rx3)

Dr. Calfee opined Petitioner should undergo cubital tunnel surgery for the left elbow before reaching maximum medical improvement (MMI). Regarding causation to the cervical spine, Dr.

Calfee opined that "the neck pain seems to have predated the accident in September 2013 and although subjectively aggravated by the accident in September 2013, the cervical spine symptoms are more likely caused by degeneration that preexisted the injury and had prompted the prior surgery." He opined an evaluation by her cervical spine surgeon would be warranted to determine if there is anything different to intervene with her cervical spine. Dr. Calfee thought the Petitioner was capable of working light duty work doing office-type duties with papers and filing and typing, no lifting greater than five pounds. He anticipated she would reach maximal medical improvement within six months of surgical treatment for the cubital tunnel syndrome left elbow. (Rx3)

Dr. Lee's August 24, 2015 history reflected that Petitioner told him that she had an IME on August 14, 2015 at Barnes with Dr. Ryan Calfee. She stated over the last week her symptoms became a little worse. She reported a constant ache in the hand wrist and forearm. She complained that the numbness/tingling in her ring and small finger had become constant. She told Dr. Lee that Dr. Calfee basically opined surgery should have been done earlier. His recommendations remained the same. Her current medications were Topamax, Imitrex, Ambien. The plan was to await the IME report and surgical authorization.

At the next visit, on September 21, 2015, Petitioner reported that her symptoms continued to go into her forearm and hand. She was having severe neck pain as well. Dr. Lee prescribed prednisone for her recent exacerbation of pain from neck down to hand.

Petitioner underwent a left cubital tunnel release on October 1, 2015. She followed up with Dr. Lee's office and saw the physician's assistant (PA-C) on October 14, 2015 and she denied noticing much improvement over symptoms. She was still having some numbness and tingling to her fingers. Work restrictions were completed. She was advised she could "do motion to elbow but avoid repetitive use. Avoid pressure of medial side of elbow. No forced gripping. Lifting < 5 lbs." and to follow-up with Dr. Lee in a couple weeks. (Px7)

She saw Dr. Lee two weeks later on October 28, 2015 for follow-up and reported no improvement. She still had numbness in the tips of her fingers and reported a "deep ache" in the palm of her hand and some aching along the medial elbow and reported that the left elbow will catch, especially in the mornings when she is getting dressed. On that day she also reported the elbow seemed like it was "caught" and needed to uncatch, "but it won't." Work restrictions included motion to the elbow, avoiding repetitive use, avoid pressure of medial side of elbow, no forced gripping, lifting less than 5 pounds. She was taking Flexeril and Percocet and reported that "they don't help much." (Px7)

His "Impression" noted that so far, the patient was not seeing neurologic improvement in her hand. Her lack of full extension was worrisome for development of contracture, so he ordered therapy to help distract and restore range of motion (ROM). She was to see her cervical spine surgeon on 11/18/15. "Hopefully they can help address the residual numbness in her fingers. Follow-up 1-2 weeks after spine surgeon evaluation." He prescribed Neurontin (Gabapentin). (Px7)

Petitioner returned to Dr. Gornet for the first time on November 19, 2015. (Px11) Dr. Gornet testified Petitioner:

> ...first became my patient on February 28, 2011 with the main complaint of neck pain, headaches, base of her neck, left shoulder, down her left arm into her elbow with tingling in her middle finger. And she also had some low back symptoms. She related her problem at that time to an injury while working at Murray Center on January 22, 2011 in which she was struck and slapped repeatedly on the side of the head, face and pushed against the wall. I ended up performing a disc replacement surgery at C5-6 and C6-7 on August 17, 2011. Her recovery for the most part was moderate. She had clinical improvement in her symptoms. She still had what we felt was some mild foraminal stenosis at C5-6, and this still accounted for some left shoulder and arm symptoms. As of my last follow up on May 16, 2013 her neck symptoms were tolerable. Nerve function studies did not reveal any evidence of lumbar radiculopathy, and she was at full duty, no restrictions. And I told her the best option was to live with those symptoms, even though they may be chronic in nature and I released her from care. (Px17)

Dr. Gornet's November 19, 2015 office note reflects the history of accident Petitioner provided Dr. Gornet: "She states that her symptoms, at least at their current level of severity, result from an accident on 9/30/13. She was involved in an altercation with a combative inmate. The resident caused her to fall. She landed on her left elbow. She was initially off work and seen by the employer insured physicians." Dr. Gornet also noted "It was our original belief that she still had some mild foraminal stenosis at C5-6." He also remarked "If the treatment notes indicate that she did complain of neck or shoulder pain from the beginning, then obviously her symptoms would be causally connected." He ordered an MRI and after review added an addendum noting:

> "This reveals obvious significant artifacts, so it is difficult to determine what pathology is present at C4-5. There is a small left-sided herniation at C3-4, best seen on left foraminal image #8. Her most recent MRI that I have on file was from 2/28/11. This is directly compared and I do see a change on the left side at the C3-4 level, as there appears to what may be a new foraminal herniation, best seen on images #7 and #8 at C3-4." (Px11)

On November 25, 2015, Petitioner returned to Dr. Lee. She still reported having 4/10 constant ache "deep ache" all over and numbness and tingling in the small, ring and long fingers. Petitioner complained of popping and catching in the elbow that sends a shooting pain down to hand. She reported taking Percocet for pain two/day and going to therapy two days per week at St. Mary's Hospital helping ROM. She was given Gabapentin and stated "it does not give her much relief. Working light duty. Not much has improved since surgery." Dr. Lee noted that she did not experience any relief of neurologic symptoms in the hand. She still had unexplained pain in the palm as well. Her posterior elbow pain and stiffness could be related to joint inflammation. (Px7)

Petitioner returned to Dr. Lee two months later on January 18, 2016. Her chief complaints were left wrist pain status post left cubital tunnel release on October 1, 2015 and she continued to report no change in her pain level. She continued to take Percocet from her primary care doctor. She reported she was still continuing with OT at St. Mary's and noticed some difference with her range of motion and she was working with restrictions (light-duty). He noted she had a Celestone injection on November 25, 2015 and said it helped that day, but went back to the same pain level the next day. Her medications included: Voltaren gel, Percocet, Lyrica, Neurontin, Topamax, Imitrex, and Ambien. Dr. Lee noted that potential cervical etiology for her remaining symptoms may be revealed after her myelogram which was due to be completed in a few weeks. (Px7)

Petitioner returned to Dr. Lee one month later on February 17, 2016 with no change in her condition. She stated she did have the myelogram, and that she was to have some injection due to some narrowing. They discussed the possibility of cervical injections that were recommended based on the myelogram finding (and that) helping with the left upper extremity (LUE) pain. She was to follow-up when her neck intervention was completed two months (or sooner).

On February 8, 2016 Petitioner saw Dr. Gornet. Her CT myelogram was reviewed and Dr. Gornet diagnosed some residual foraminal stenosis bilaterally at C5-6, which was at the level of the PRODISC. Her symptoms were predominantly left-sided. He believed she had an increasing size disc herniation at the C4-5 level compared to her previous MRI scan. In addition, her MRI from November 19, 2015 also showed on the left side some foraminal narrowing. He recommended an epidural steroid injection at left C5-6 and left C4-5 tracking up to C3-4. He causally connected her symptoms to her accident of September 30, 2013. He opined she aggravated her underlying condition of foraminal stenosis at C5-6 and sustained a new disc injury at C4-5 and aggravation of some previous foraminal stenosis at C3-4. (Px11)

On April 20, 2016, Petitioner returned to Dr. Lee and reported that the elbow was no better and was locking up again more often that it clicked. She also reported that she hit her left elbow in the doorway and that it swelled up and had a black bruise for about 10 days. She stated that she still had tingling/numbness and felt like her carpal tunnel was getting worse. She had seen her neck surgeon. She had two injections in March and they did nothing for her. She requested an elbow joint injection and reportedly did feel some relief. She was to return in two months. (Px7)

She returned three months later on July 18, 2016. Dr. Lee noted that Petitioner received a Kenalog injection at her last visit on April 20, 2016. She reported that for 4-5 days her elbow swelled and was very painful. After the pain went away she couldn't tell a difference in pain. She also stated that her left elbow had been popping and catching. When she went to put a shirt on, she reported her elbow will catch and she had to use her right arm to slowly put it back down. She stated that when she types for two minutes she (was) getting terrible pains and shocking sensations in her left wrist and her left elbow. She also developed an enlarged lymph node under the left axilla that was painful. His plan was to see her after her cervical intervention. (Px7)

Nine months later, on April 7, 2017, Dr. Lee noted that the Petitioner did not (go) forward to Arbitration on April 5, 2017 due to presentation of new information. Petitioner made the subject

appointment to request a dictated letter addressing a chart entry that she made on her first visit as well as an opinion on her neck condition. Dr. Lee instructed the Petitioner to have her attorney submit a formal request for a narrative..." This is a standard of practice and will set the stage for specific that may come up in deposition and/or chart review. He should submit questions with regard to her case that I can address directly." (Px7)

Dr. Gornet testified his diagnoses was new disc injury C3-4, C4-5, as well as aggravation of some pre-existing foraminal stenosis at C5-6. He further testified:

> And those are working diagnosis. It is my opinion, within a reasonable degree of medical certainty that the injury she described occurring on or about September 30, 2013 at minimum has aggravated her underlying condition. We now know she has substantially more neck pain and headaches, whereas the visit she had in the near term prior to her new accident clearly stated her symptoms were tolerable. (Px17, p.8)
>
> I believe it aggravated her underlying condition of foraminal stenosis at C5-6. Clearly, she had symptoms present that were ongoing, and even in my notes I stated they were chronic in nature. (Px17, p. 9)
>
> But I do believe in knowing this patient both before and after the injury her symptoms have become worse. (Px17, p.9)
>
> And I also believe there is objective evidence on the MRI scan at C3-4 that is determined that there is new pathology out in the foramen at C3-4. And I believe there is radiographic evidence to support that there is increasing structural changes at C4-5. And those objective findings on x-ray would make the C4-5 level highly susceptible to a disc injury given the fact that that is progressed over a period of years since we have known her. (Px17, p. 9)
>
> I believe there is a new disc herniation at C3-4 and I believe that this was produced by the work injury. I also believe that there is an underlying disc injury at C4-5 that could not be objectively shown in large part due to the artifact from the disc replacement itself. (Px17, p.10)

Petitioner's attorney then asked:

> Q. Did it concern you after review of the medical records that Ms. Edwards did not have many neck complaints, if any, for at least a year after the work injury?

Dr. Gornet replied:

> A. Well, I think it would make it a lot simpler in this case if she did. But she clearly

had a mechanism of injury that could cause a neck problem. The injury that she described that occurred clearly is an injury that would potentially injure the structures of the cervical spine. I have treated like or similar patients with this type of injury where their head is pulled or moved around suddenly. And in that situation she clearly had cervical related symptoms of tingling and pain in her arms that was consistent with a disc injury.

Although I do agree she did not have significant neck pain, at least reported in the medical records. (Px17, p. 10)

Dr. Robson testified by evidence deposition on February 16, 2017. (Rx5, p. 2) Dr. Robson testified he is an orthopedic spine surgeon, seeing approximately 60 patients per week and performing approximately 300 surgeries per year. He performs five or six independent medical evaluations per week, a fraction of the 60 people he sees. (Rx5, p. 5) Dr. Robson reviewed Petitioner's treating medical records including those from Dr. Jeffrey McIntosh, Dr. Frank Lee, an EMG nerve conduction study report from December of 2013, St. Mary's Hospital physical therapy notes and an x-ray of her cervical spine. (Rx5, p. 8) Dr. Robson testified the history Petitioner gave to him was that "she was assisting a resident when unexpectedly-- unexpectedly the resident grabbed her hair and caused her to fall—them both to fall, to the ground. She extended her left hand." (Rx5, pp. 8, 9)

Based upon his review of the medical records, the history he obtained from Petitioner and his physical examination, Dr. Robson diagnosed prior disc replacement at C5-6 and C6-7 and had some degenerative changes at C4-5above her surgery. Dr. Robson opined her diagnoses was not related to her work injury of September 30, 2013. The basis for that opinion was "[t]hat she had a prior history of neck problems and ongoing complaints within months of this injury and that she did not report any significant change in neck symptoms until a year following the incident." (Rx5, p. 12)

Respondent obtained surveillance videos of Petitioner taken by Ronald Elkins of Frasco Investigative Services. (T, p. 24) Mr. Elkins testified that on May 12, 2017 he took video inside the Moose lounge in Centralia. He testified at the beginning the Petitioner was carrying "a couple unknown items." He could not get in to the lounge until 6:00 p.m. and he noted Petitioner was in the back with the 50/50 raffle table, and she was providing tickets to people and helping set up parts of the raffle. Elkins testified he noticed no restrictions in her movements at all and he could not recall if she lifted anything more than 10 pounds. (T, pp. 25, 26) The Commission notes that the video of inside the Moose lodge, shows Petitioner bending over, moving items, and sitting at the raffle table selling raffle tickets, talking, laughing and moving without restriction.

The Commission notes the remaining five videos show Petitioner conducting Facebook Live marketing segments selling cosmetics and jewelry while interacting with viewers. One of the five videos confirms Petitioner travelled and she was presenting on Facebook Live with a colleague at a Company meeting. Another video depicts Petitioner

on Facebook Live while she is in a moving truck with her husband driving. All of the videos show Petitioner moving fluidly and moving her neck and head without any evidence of pain.

Conclusions of Law

The Petitioner testified that the subject accident occurred when "I was changing one of the residents, and he grabbed my neck and he threw me across the room during a behavior. He started to have a behavior." (T, p. 10) Petitioner also testified: "I started noticing cervical complaints within a month or two, actually, 4 weeks, 5 weeks." (T, p. 12) The Commission compares the Petitioner's testimony to the initial Workers' Compensation Form she signed and dated September 30, 2013 that asked Petitioner to describe the Extent of injury and the Classification/Severity of Injury. Petitioner reported "left elbow pain/contusion left forearm pain" and "mild" respectively. (Rx1)

The Commission next compares Petitioner's testimony to the initial emergency room records at St. Mary's Centralia Hospital on the date of accident when Petitioner reported that she "was working with a client that was grabbing at her. She moved back to avoid being hit and having her hair pulled and ended up hitting a wall injuring her left elbow." The pain location was noted to be the left elbow and forearm. (Px3, 9/30/13)

The Commission next compares Petitioner's testimony that she was thrown across a room to the initial consult with Dr. Jeffrey McIntosh on October 4, 2013 where the history stated: "Denise is a patient well-known to me last seen approximately one year ago in November who sustained an injury to her left elbow last Monday, September 30th. She was toileting a resident, who reached for her hair and as she pulled away she hit her elbow, specifically the posterior aspect of her elbow." (Px4)

Finally, the Commission compares Petitioner's testimony to the history Petitioner reported when she was first examined by Dr. Calfee at Respondent's request on July 7, 2014, which states: "She works as a mental health technician with developmentally disabled adults and was trying to help a resident in the bathroom stall and hit her left elbow against a wall."

When asked on direct examination if she had an explanation in reading Dr. McIntosh's notes why he didn't mention her cervical pain, Petitioner testified "He was more concerned about my left elbow." The Commission finds this testimony is wholly unsupported by the totality of the treating medical records.

The Commission further finds Petitioner's testimony regarding the mechanism of injury is not credible and the lack of medical documentation regarding cervical pain complaints for months after the subject event is more persuasive than Petitioner's testimony that Dr. McIntosh was more concerned about her elbow, or so concerned about her elbow, that he failed to mention her cervical complaints.

The Commission also finds that the Petitioner changed her history of accident when she saw Dr. Gornet by adding "the resident caused her to fall," further eroding her credibility. She also changed the history of accident when she saw Dr. Robson at Respondent's request. Petitioner told Dr. Robson that she was assisting a resident when "the resident grabbed her hair causing them both to fall down to the ground. She extended her left hand and arm when she was falling and began having severe left elbow pain. After the injury, she reports she began having left- sided neck and shoulder pain." (Rx 5, pp. 8, 9) The Commission notes that the histories given to Dr. Robson and to Dr. Gornet appeared approximately sixteen months and more than two years respectively after the accident, thus the Commission rejects the later, embellished inconsistent histories and finds the contemporaneous medical histories more credible.

Further, the Commission finds Dr. Robson to be more credible than Dr. Gornet for several reasons, primarily because Dr. Robson reviewed the Petitioner's medical records and noted the inconsistencies in her accident histories especially as it pertained to the mechanism of injury. The issue of causation, including whether an accident aggravated or accelerated a preexisting condition, is a factual question to be decided by the Commission. *Sisbro*, 207 Ill. 2d at 206. In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999).

Dr. Gornet based his opinion on a mechanism of injury where "her head is pulled or moved around suddenly." (Px17, p. 10) Dr. Gornet later testified "I agree that there is no mention of neck complaints until about I think it was approximately a year later." (Px17, p. 15)

The Commission finds the history of injury given by Petitioner in all the initial injury reports and medical records was confined solely to an injury to Petitioner's left arm and elbow from hitting her left elbow on a wall while avoiding the combative resident. The first mention of any upper extremity pain was almost two months after the date of accident and the first shoulder pain complaint was later still. Petitioner's history of injury evolved only after an extended period of time elapsed during the Petitioner's prolonged left elbow treatment. The history Petitioner gave Dr. Gornet is unsupported by the initial injury and witness reports or the medical records. Therefore, the foundation for Dr. Gornet's opinion is faulty. Accordingly, the Commission finds Dr. Gornet's causation opinion is entitled to little weight. *See, e.g.*, S*unny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC, 14 N.E.3d 16, 383 Ill. Dec. 184 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.)

The Commission concludes that Petitioner's cervical condition is not related to the subject accident that occurred on September 30, 2013. The Commission, therefore, reverses the Arbitrator's findings and conclusions of law regarding the Petitioner's cervical spine on pages one through eight of the Arbitrator's Decision. The Commission further vacates the Arbitrator's Order regarding past and prospective medical services for the Petitioner's cervical spine.

Finally, the Commission notes Dr. Lee's April 20, 2016 office note documented Petitioner's report that the she hit her left elbow in the doorway and that it swelled up and she had a black bruise for about 10 days. The Petitioner had only two visits to Dr. Lee following that intervening accident to her left elbow, on July 18, 2016 and nine months later on April 7, 2017 when she told Dr. Lee that she made the appointment to request a dictated letter addressing a chart entry that she made on her first visit as well as an opinion on her neck condition.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 21, 2018 is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services solely for the Petitioner's left elbow condition as provided in Sections 8 (a) and 8.2 of the Act. Respondent shall have credit for any amounts previously paid and shall indemnify and hold Petitioner harmless from claims made by any health providers arising from the expenses for which it claims credit.

IT IS FURTHER ORDERED BY THE COMMISSION 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 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.

Based upon the named Respondent herein, this Decision and Opinion on Review of the Commission is not subject to judicial review. 820 ILCS 305/19(f)(1).

DATED: FEB 1 - 2019
KWL/bsd
O: 12/4/18
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

DUGAN-EDWARDS, DENISE
Employee/Petitioner

Case# **14WC016364**

SOI/MURRAY DEVELOPMENTAL CTR
Employer/Respondent

19IWCC0067

On 3/21/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.95% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 RICH RICH & COOKSEY PC
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0558 ASSISTANT ATTORNEY GENERAL
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BUREAU OF RISK MANAGEMENT
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CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

MAR 21 2018

RICHARD J. CASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DENISE DOUGAN-EDWARDS
Employee/Petitioner

v.

STATE OF ILLINOIS/MURRAY DEVELOPMENTAL CTR.
Employer/Respondent

Case # 14 WC 16364

Consolidated cases:

19IWCC0067

An *Application for Adjustment 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 **January 5, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **September 30, 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 **$29,179.73**; the average weekly wage was **$561.15**.

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

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

Respondent shall be given a credit of **$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 **$any benefits paid** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of **$71,327.97**, as provided in § 8(a) and § 8.2 of the Act.
Respondent shall have credit for any amounts previously paid and shall indemnify and hold Petitioner harmless from claims made by any health providers arising from the expenses for which it claims credit.

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

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

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

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

Edward Lee
Signature of Arbitrator

3/19/18
Date

ICArbDec19(b)

MAR 21 2018

FACTS

At the time of the injury, Petitioner was a 43-year-old mental health aide at Respondent's Warren G. Murray Developmental Center. (AX1; T.9) The parties stipulated that she sustained accidental injuries to her neck and left arm on September 30, 2013, when a resident threw a tantrum and attacked Petitioner while she was changing him. (T.10; PX3) The resident pulled Petitioner's hair and threw Petitioner, causing her to fall. *Id.* Respondent, however, disputed causal connection and prospective medical care with regard to Petitioner's cervical spine. (T.5-6) Petitioner testified that she suffered no prior injuries and received no prior treatment for her left arm. (T.10) Petitioner candidly testified, however, to receiving prior treatment for her neck in 2011, when she underwent a two-level disc replacement at C5-6 and C6-7. (T.10) Following her surgery, Petitioner returned to work full duty and was working without restrictions at the time of the injury on September 30, 2013. (T.11)

Following the incident, Petitioner presented to St. Mary's Good Samaritan Hospital, where the history of her being attacked and thrown against the wall by the recipient was taken. (PX3, 9/30/13) Petitioner presented with swelling and pain rated 8 out of 10 in her left elbow. *Id.* When x-rays of her elbow were negative for fracture, Petitioner was assessed with a contusion, prescribed ibuprofen, and instructed to apply ice to her elbow and forearm. *Id.* Petitioner then sought follow-up care with Dr. Jeffrey McIntosh on October 4, 2013, with complaints of elbow pain and upper extremity paresthesia. (PX4, 10/4/13) Petitioner testified that she also began having symptoms related to a cervical injury in the month following the injury. (T.12) She described symptoms of numbness, tingling down her arm, headaches, severe neck pain, and throbbing throughout her head. (T.12-13) Petitioner testified that she advised her first physician, Dr. McIntosh, about her symptoms, but he was more concerned about her left upper extremity. (T.13)

Petitioner reported persistent symptoms of elbow pain and left upper extremity paresthesia along with wrist and forearm pain, and she was referred for an EMG and nerve conduction study, which was positive for left carpal tunnel syndrome. (PX4, 10/24/13; PX6) Dr. McIntosh's clinical assessment included findings consistent with left carpal tunnel syndrome, left cubital tunnel syndrome, and epicondylitis. (PX4, 11/7/13) Dr. McIntosh treated Petitioner's left upper extremity complaints conservatively with injection, immobilization, therapy and medication, and placed Petitioner on restrictions of right handed work only and no phone answering. (PX4, 10/4/13-1/9/14) When Petitioner's symptoms continued to worsen, additional x-rays were taken, which demonstrated an acute fracture of the lateral 1/3 of the left radial head. (PX5, 1/9/14) Dr. McIntosh noted that this explained Petitioner's persistent pain and recommended that she remain on restricted status. (PX4, 1/9/14)

Petitioner then came under the care of Dr. Lee at the Bonutti Clinic. (PX7, 1/31/14) Petitioner completed an intake form that documented complaints of severe left shoulder and neck pain with numbness and tingling of the fingers, headaches, and muscle pain, joint pain, and

stiffness in the injured areas. *Id.* After taking a consistent history of the injury, noting the positive findings on diagnostic testing thus far, and reviewing Petitioner's past surgical history, Dr. Lee recommended an MRI of Petitioner's left elbow. *Id.* This showed no obvious loose bodies, so Dr. Lee recommended and administered injections in Petitioner's left elbow. (PX7, 3/7/14, 4/18/14; PX8) Dr. Lee also implicated Petitioner's neck as the possible source of her upper extremity paresthesia. (PX7, 4/18/14) When injections failed to bring adequate, lasting relieve, however, Dr. Lee recommended surgery. (PX7, 5/16/14)

Respondent then had Petitioner examined by Dr. Ryan Calfee on July 7, 2014, and he agreed that Petitioner's current condition of ill-being was related to the accidental injury and agreed that Petitioner would benefit from arthroscopy. (RX2) He also believed, however, that Petitioner would benefit from ulnar nerve decompression and/or transposition. *Id.*

Petitioner underwent surgery on September 2, 2014, consisting of a left elbow arthroscopy with partial synovectomy and excision of plica. (PX9) Despite this, Petitioner continued to have symptoms and clicking and catching, painful popping, and finger paresthesia in her left elbow with range of motion. (PX7, 9/15/14, 10/10/14) Petitioner once again directed attention to her neck, indicating that she worried that it was injured in the fall. (PX7, 10/10/14) Dr. Lee also considered the possibility that Petitioner's symptoms of numbness in her left upper extremity could be from cervical/foraminal stenosis. *Id.* On November 7, 2014, Dr. Lee finally recorded Petitioner's complaints of neck pain, although she clearly indicated these on her initial intake form, and agreed that her "pain symptoms and numbness is most likely due to the cervical spine." (PX7, 1/31/14, 11/7/14) Petitioner was prescribed Neurontin. (PX7, 11/7/14) This, however, brought no relief. (PX7, 4/20/15)

Respondent had Petitioner examined by Dr. David Robson on January 21, 2015, who noted that Petitioner began having left-sided neck and shoulder complaints after she was injured at work on September 30, 2013. His examination demonstrated tenderness of the neck and pain elicited by motion, but he did not believe Petitioner required any further treatment to her neck in reference to the September 2013 work injury, because he believed the "first mention of the patient having neck pain did not occur until Dr. Lee's office report on October 10, 2014," despite the fact that Petitioner clearly indicated neck pain on her intake form completed in January of 2014. He also stated that, since he did not have any prior treatment records from Dr. Gornet regarding her treatment in the years prior to the September 30, 2013 injury, he could not link the September 2013 injury to Petitioner's neck pain. (RX4)

On August 20, 2015, Petitioner returned to Dr. Lee with no relief in her symptoms, and she continued to report severe pain in her neck down through her left arm with numbness and tingling in her fingers. (PX7, 4/20/15-9/21/15) Dr. Lee noted that Petitioner had already been recommended for a cubital tunnel release by Dr. Calfee, but a second IME was pending. (PX7, 8/24/15) Dr. Lee proposed waiting until the second IME was conducted; and if the surgical

recommendations were unchanged and Respondent granted surgical authorization, he would schedule same. *Id.*

Respondent had Petitioner examined again by Dr. Calfee on August 14, 2015, and his diagnostic impression of Petitioner was persistent cervical spine pain and left cubital tunnel syndrome. (RX3) He noted that Petitioner had a history of disc replacement surgery at C5-6 and C6-7 and had a low level of symptoms since following same, but noted that Petitioner's neck condition was "aggravated since her injury September 30, 2013" and she began having "more substantial symptoms in [her] left arm." *Id.* He believed that Petitioner's left cubital tunnel syndrome was caused by swelling and scarring around the ulnar nerve from the work-related trauma to Petitioner's left elbow. *Id.* He also stated that although Petitioner's neck troubles and degeneration predated her work injury, these were "subjectively aggravated by the accident in September 2013." *Id.* When asked whether any additional medical treatment was necessary, Dr. Calfee believed that cubital tunnel surgery was reasonable and necessary to treat Petitioner's left elbow; but he acknowledged that this would likely not eliminate Petitioner's left elbow pain, and she would have some degree of pain and limitation in her left arm. *Id.* He also stated that the only remaining treatment "from a diagnostic standpoint" was evaluation by a cervical spine specialist to "determine if there was anything different to intervene with her cervical spine." *Id.* He confirmed that Petitioner was not at maximum medical improvement. *Id.*

Petitioner underwent her second elbow surgery on October 1, 2015, consisting of a left cubital tunnel release. (PX10) Following surgery, however, Dr. Lee continued to note Petitioner's difficulty with her left upper extremity with symptoms of pain, catching and numbness in her left hand. (PX7, 10/14/15, 10/28/15) Dr. Lee prescribed physical therapy. (PX7, 10/28/15) When Petitioner continued to report marked symptoms with no relief, Dr. Lee prescribed Lyrica in addition to Neurontin/gabapentin. (PX7, 11/25/15)

Petitioner finally obtained treatment for her neck with Dr. Matthew Gornet on November 19, 2015. (PX11, 11/19/15) He noted that he last saw Petitioner on May 16, 2013, when she was placed at maximum medical improvement following her surgery on August 17, 2011. *Id.* He noted that Petitioner was injured again on September 30, 2013, and that her neck was suspect as the cause of her persistent pain and paresthesia. *Id.* Dr. Gornet recommended an MRI of Petitioner's cervical spine. *Id.* With regard to causal connection, he stated, "Based on my knowledge of this patient, both before and after this accident, it appears as if the accident has aggravated her underlying condition, possibly producing a new injury." *Id.* Dr. Gornet obtained the new MRI and compared it to Petitioner's old MRI from 2011. (PX11, 11/19/15; PX12) Petitioner's C4-5 level was obscured by artifact, but Dr. Gornet noted a left-sided herniation at C3-4 that resembled a new foraminal herniation, best seen on images #7 and #8. (PX11, 11/19/15) He also noted that x-rays demonstrated deterioration of the C4-5 level with spurring when compared with earlier x-rays. *Id.* He sought to obtain all of Petitioner's treatment notes to gain a full picture of Petitioner's condition as it related to her work injury. *Id.*

When Petitioner returned to Dr. Gornet on February 8, 2016, he reviewed a prior CT myelogram in comparison with Petitioner's 2015 MRI, and noted an increase in size of her herniation at C4-5. (PX11, 2/8/16) He also noted increase in foraminal narrowing. *Id.* Dr. Gornet concluded that Petitioner aggravated her underlying foraminal stenosis at C5-6 and sustained a new disc injury at C4-5. *Id.* He recommended epidural steroid injections at C4-5 and C5-6. *Id.* Dr. Gornet disagreed with Dr. Robson's belief that Petitioner's symptoms were not causally connected because he thought that Petitioner did not report significant neck pain at or near the time of the accident. (PX11, 4/18/16) Dr. Gornet noted that Petitioner's initial complaints included left upper extremity numbness as reflected in the records. *Id.* Dr. Gornet stated that this was obviously emanating from Petitioner's cervical spine. *Id.* Petitioner improved temporarily from injections, but her pain returned fairly quickly. *Id.* Dr. Gornet recommended surgery. *Id.*

Respondent took the deposition of Dr. Robson, and he testified that the first mention of Petitioner's neck in the records he reviewed was Petitioner's office visit with Dr. Lee on October 10, 2014. (RX5, p.9) He believed Petitioner's diagnosis was prior disc replacement at C5-6 and C6-7 with some degenerative changes above the surgery site at C4-5. *Id.* at 11-12. He did not feel that any of Petitioner's neck complaints were related to the injury because she did not report any significant change in neck symptoms "until a year following the incident." *Id.* at 12.While he did not disagree with Dr. Gornet's recommendation for surgery, he did not feel it was related to the accident on September 30, 2013. *Id.* at 13.

On cross-examination, Dr. Robson stated that Dr. Gornet was an excellent spine specialist, the "second best" he knows. *Id.* at 15. He admitted that being grabbed by the hair and thrown could cause a neck problem. *Id.* at 16. He also acknowledged that Petitioner's EMG and nerve conduction studies did not include her neck, and that the electrodiagnostic studies of Petitioner's left elbow were essentially normal. *Id.* at 16-17. Additionally, he acknowledged that Petitioner did not gain any improvement from her elbow surgeries. *Id.* at 17. He admitted that he did not review the MRI of Petitioner's neck taken in 2015, and he admitted that he did not review any records from Dr. Gornet prior or post-accident. *Id.* at 17-18. He also did not have any records from Dr. Calfee, Respondent's first independent medical examiner. *Id.* at 18.

Dr. Gornet testified by way of deposition that he is a board certified spine specialist whose practice is devoted to spine surgery. (PX17, p.4) He first saw Petitioner on February 28, 2011, as a result of a patient assault injury at her work place. *Id.* at 5. He ultimately performed surgery on Petitioner on August 17, 2011, by way of a two-level disc replacement at C5-6 and C6-7. *Id.* at 5. Dr. Gornet testified that Petitioner reported that her symptoms were tolerable despite some residual mild foraminal stenosis at C5-6, and she was placed at maximum medical improvement. *Id.* at 5-6. Dr. Gornet testified that after seeing Petitioner following her second injury and obtaining and comparing current films to her old radiographic studies, he determined Petitioner suffered a small left-sided herniation at C3-4 and new pathology at C4-5 that was obscured by artifact; these were located at the levels *above* Petitioner's prior injury. *Id.* at 6-8. He testified that Petitioner's foraminal stenosis at C5-6 was also aggravated. *Id.* at 8-9. He thus

testified that Petitioner's entire work-related diagnosis was new disc injury at C3-4 and C4-5, and aggravation of preexisting foraminal stenosis at C5-6. *Id.* at 8-9. He stated that "in knowing this patient both before and after the injury that her symptoms have become worse." *Id.* at 9.

Dr. Gornet testified that Petitioner's case would have been "a lot simpler" if her neck complaints had been well-documented in her medical records, but he stated:

> [S]he clearly had a mechanism of injury that would cause a neck problem. The injury that she described that occurred clearly is an injury that would potentially injure the structures of the cervical spine. I have treated like or similar patients with this type of injury where their head is pulled or moved around suddenly. And in that situation she clearly had cervical related symptoms of tingling and pain in her arms that was consistent with a disc injury. . .
>
> . . . It is my opinion that in evaluating the sum total of all the information available, and knowing this patient before and after, as well as the objective radiographic studies, it's my opinion that the new accident has aggravated her underlying condition. It clearly has aggravated her underlying neck condition making her symptomatically worse. And I believe it also produced a new disc injury as I have already described. *Id.* at 10-11.

He testified that although Petitioner temporarily responded positively to conservative care through light duty and injections, based on Petitioner's persistent radicular symptoms, her only option would be new disc replacements at C3-4 and C4-5, and potentially foraminal decompression at C5-6. *Id.* at 8, 11.

Petitioner testified that her left elbow surgeries improved her condition somewhat, and she has been allowed to go back to work for brief periods of time. (T.13) Respondent, however, only allows her to work for six months on light duty, and Petitioner has yet to be released from her restrictions with respect to her left arm. (T.15) Petitioner also continues to have persistent pain in her neck with radicular symptoms. (T.17-18)

Respondent obtained surveillance videos of Petitioner taken by Ronald Elkins of Frasco Investigative Services. (T.24) He testified that he was dispatched to do surveillance of Petitioner after she posted a social media post about glow bingo. (T.24-25) Petitioner testified that the bingo event was a charity event for raising funds for children's playground equipment at the Moose Lodge. (T.28-29) During his first surveillance stakeout on May 12, 2017, Mr. Elkins could not recall Petitioner lifting anything greater than 10 pounds. (T.26) Petitioner testified on rebuttal that she did nothing that involved lifting more than 10 pounds. (T.27-28) Petitioner testified that she walked into the building carrying her jacket and a manila envelope, and she lifted nothing more than 10 pounds. (T.28)

CONCLUSION

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

Respondent disputes causal connection based on Petitioner's preexisting condition in her cervical spine and the delayed treatment for Petitioner's neck. Respondent obtained the opinion of Dr. Robson, who opined that Petitioner's neck condition was not related to or even aggravated by her accidental injury, because the first record he had of Petitioner voicing neck complaints was on October 10, 2014. (RX4) After a careful and thorough review of the record, however, the Arbitrator finds that the evidence links Petitioner's current condition of ill-being in her cervical spine to her accidental injury on September 3, 2013.

"The ultimate issue is not whether there was a gap in treatment but rather, whether the initial accident was a causative factor in the condition of ill-being which was produced." *William Gordon v. State of Illinois DOT Joliet Yard*, 07 I.W.C.C. 1599 (2007). The important issue is whether the symptoms and findings later in the treatment match up to the symptoms immediately following the accident, and whether the gap was logically explained. *Id.* 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' Comp. Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007). However, 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*, 207 Ill.2d 193, 205 (2003). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Construction v. Industrial Commission*, 227 N.E.2d 65, 67-68 (1967); *see also Illinois Valley Irrigation, Inc. v. Industrial Commission*, 362 N.E.2d 339 (Ill. 1977).

The Arbitrator notes that Dr. Robson believed that the first mention of neck complaints was on October 10, 2014. (RX4) This is simply incorrect. On her very first visit with Dr. Lee in January of 2014, Petitioner completed an intake form that documented complaints of severe left shoulder and neck pain with numbness and tingling of the fingers, headaches, and muscle pain, joint pain, and stiffness in the injured areas. (PX7, 1/31/14) Despite this being clearly marked on the intake form, Dr. Lee made no mention of Petitioner's complaints. *Id.* However, on April 18, 2014, Dr. Lee implicated Petitioner's neck as the possible source of her upper extremity paresthesia. (PX7, 4/18/14) Petitioner then voiced neck complaints once again regarding her neck on October 10, 2014, the third reference to her neck in the record, indicating that she worried that it was injured in the fall. (PX7, 10/10/14) However, her neck was not formally acknowledged until November 7, 2014, when Dr. Lee finally included Petitioner's complaints of neck pain in his findings, although she clearly indicated these on her initial intake form, and

agreed that her "pain symptoms and numbness is most likely due to the cervical spine." (PX7, 1/31/14, 11/7/14)

Following the Commission's guidance in *Gordon*, the Arbitrator notes that Petitioner's symptoms immediately following the injury correlate with her later symptoms and are consistent with cervical injury. Petitioner's complaints of left upper extremity paresthesia are well-documented in the records. Petitioner's symptoms of paresthesia were suspected to be emanating from her ulnar nerve, which led to her two elbow procedures. (PX4; PX7) However, this obviously was not the source of Petitioner's symptoms. When Petitioner's paresthesia complaints resolved, Dr. Lee opined that he believed Petitioner's complaints were coming from her neck. (PX7, 11/7/14) Dr. Gornet credibly opined that Petitioner had been exhibiting classic symptoms of cervical radiculopathy as a result of her work injury from the beginning of her treatment. (PX11, 4/18/16; PX17, p.10-11)

The Arbitrator also finds it significant that Dr. Robson was not only misinformed about the onset of Petitioner's neck complaint; he also lacked vital relevant treatment and diagnostic records. He admitted that he did not review the MRI of Petitioner's neck taken in 2015, and he admitted that he did not review any records from Dr. Gornet prior or post-accident. (RX5, p.17-18) He therefore did not have the opportunity to appreciate the post-accident changes in Petitioner's cervical spine clearly visualized on Petitioner's MRI. He admitted, however, that being grabbed by the hair and thrown could cause a neck problem. *Id.* at 16. He also acknowledged that Petitioner's EMG and nerve conduction studies did not include her neck; that the electrodiagnostic studies of Petitioner's left elbow were essentially normal; and that Petitioner did not gain any improvement from her elbow surgeries. *Id.* at 16-17. Dr. Robson also did not have any records from Dr. Calfee, Respondent's first independent medical examiner. *Id.* at 18. Even Dr. Calfee felt that diagnostic testing of Petitioner's neck was reasonable to assess or "determine if there was anything different to intervene with her cervical spine." (RX3) The record shows that the diagnostic studies did show a distinct difference as a result of the injury of September 2013.

Petitioner's 2015 MRI clearly showed a new herniation at the C3-4 level. (PX12) This fact was unrebutted. Dr. Gornet also appreciated changes at C4-5. (PX11, 2/8/16) This fact was also unrebutted. The Arbitrator gives significant weight to the fact that Petitioner sustained injury to the two levels *above* her prior surgical cites at C5-6 and C6-7. Given the obvious irrefutable evidence that Petitioner sustained new injuries, the Arbitrator finds Dr. Gornet's opinion that Petitioner's C5-6 level was aggravated by this work injury credible, as the mechanisms of being violently attacked via hair pulling and shoving are clearly consistent with cervical injury. The Arbitrator also gives weight to the circumstantial evidence, which clearly demonstrates that Petitioner was working full-duty without restrictions prior to her accidental September 2013 injury. This fact is likewise unrebutted. Based upon all of the aforementioned facts, the Arbitrator finds that Petitioner met her burden of proof in establishing that her current condition

of ill-being with respect to her cervical spine is causally connected to the accidental work injury on September 30, 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?**

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

Based upon the uncontroverted evidence in the record establishing that Petitioner's current condition of ill-being in her cervical spine is causally connected to her accidental work injury, the Arbitrator finds Petitioner entitled to recovery medical expenses and prospective medical care.

Both Dr. Calfee and Dr. Robson had no quarrel with Petitioner's medical care. (RX5-RX5) Dr. Calfee wholly agreed with Petitioner's course of care with respect to her left upper extremity and stated that diagnostic evaluation of Petitioner's neck was reasonable. (RX3; RX4) Dr. Robson opined that Dr. Gornet was an excellent spine specialist and stated that he agreed with the reasonableness of Dr. Gornet's course of treatment and proposed surgery aside from causal connection. (RX5, p.13) The Arbitrator notes that the attempts to resolve Petitioner's condition have been conservative and reasonable. Petitioner has attempted to manage her condition conservatively with medication and injections, but to no avail. Petitioner also testified that she continues to have persistent pain in her neck with radicular symptoms. (T.17-18)

Respondent shall therefore pay all reasonable and necessary medical expenses contained in Petitioner's group exhibit, and shall authorize and pay for the reasonable and necessary treatment recommended by Dr. Gornet, including but not limited to surgery.

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

STATE OF ILLINOIS)
) SS.
COUNTY OF 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

Illinois Workers' Compensation Commission,
Insurance Compliance Division,

Petitioner,

19IWCC0068

vs.

No. 12 INC 00660

Douglas L. Marick, Individually and d/b/a Square One Roofing,

Respondent.

DECISION AND OPINION REGARDING INSURANCE COMPLIANCE

Petitioner, Illinois Workers' Compensation Commission (the Commission), Insurance Compliance Division, brought this action by and through the office of the Illinois Attorney General against the above-captioned Respondent, alleging violations of section 4(a) of the Illinois Workers' Compensation Act (the Act). Proper and timely notice was provided by personal service on Respondent. (PX 2). An insurance compliance hearing on the merits was held before Commissioner Stephen Mathis on December 12, 2018, in Urbana, Illinois, with both parties appearing. After considering the entire record and being advised of the facts and law, the Commission finds that Respondent knowingly and willfully violated section 4(a) of the Act and shall pay a penalty of $500.00 per day for 1,479 days, plus the sum of $87,302.24, which represents the payout from the Injured Workers' Benefit Fund (the Fund) (PX 11).

Petitioner alleges that Respondent, who was in an extra hazardous business and subject to section 3(1) of the Act requiring workers' compensations insurance, knowingly and willfully lacked workers' compensation insurance coverage from August 18, 2008 to September 5, 2012. On June 18, 2008, Terry Petrick, an employee of Respondent, sustained work-related injuries, which the Commission found compensable under the Act. See *Petrick v. Square One, et al.*, 15 IWCC 0927. (PX 7). The Commission awarded temporary total disability benefits of $400.00 per week for a period of 24 1/7 weeks, medical expenses in the sum of $74,549.53, and permanent partial disability benefits of $360.00 per week for a period of 58.45 weeks (representing a 35 percent loss of use of a foot). (PX 7). The Fund ultimately paid out $87,302.24. (PX 11).

During the insurance compliance hearing, Petitioner called as a witness Michael Cummins, a compliance investigator for the Commission. Mr. Cummins testified that in the course of his investigation, he determined that Respondent's business was automatically subject to the provisions of section 3 of the Act because it conducted the hazardous business of roofing. Mr. Cummins's search of the insurance database maintained by the National Council on Compensation Insurance (NCCI) revealed that Respondent was uninsured from August 18, 2008 to September 5, 2012. (PX 3). Mr. Cummins continued his investigation to determine whether Respondent was self-insured under the Act and received a certification from the Commission's Office of Self-Insurance Administration indicating there was no certificate of approval to self-insure issued by the Commission. (PX 9).

Respondent Douglas Marick appeared and testified that he was the owner and operator of Square One Roofing and he only carried liability insurance on his business. Mr. Marick maintained that Respondent had no employees.

The Commission concludes that Respondent knowingly and willfully violated the insurance requirements of section 4(a) of the Act. Respondent's defense that it had no employees is contrary to the Commission's decision in *Petrick*. The Commission hereby assesses a penalty of $500.00 per day for 1,479 days, equaling $739,500.00. In addition, Respondent is liable to pay $87,302.24, which represents the payout from the Fund.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent Douglas L. Marick, Individually and d/b/a Square One Roofing, pay to the Illinois Workers' Compensation Commission the sum of $826,802.24 pursuant to section 4(d) of the Act and section 9100.90 of the Commission Rules. Pursuant to Commission Rule 9100.90(f), payment shall be made by certified check or money order made payable to the Illinois Workers' Compensation Commission. Payment shall be mailed or presented within 30 days after the final order of the Commission or the order of the court on review after final adjudication to:

Workers' Compensation Commission
Insurance Compliance Division
100 West Randolph Street, Suite 8-328
Chicago, Illinois 60601

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.

FEB 4 - 2019

DATED:
d-01/24/2019
SM/sk
44

Stephen Mathis

David L. Gore

Deborah Simpson

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 / CC	Second Injury Fund (§8(e)18)
			PTD/Fatal denied
		Modify	None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen Makowan,

Petitioner,

vs. NO: 16 WC 18591

The American Coal Company,

Respondent.

19IWCC0069

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner was a 34-year-old employee of Respondent, who described his job as a coal miner. Petitioner is currently employed at Hamilton County Coal, through a contractor, S&L. Petitioner has been employed by S&L since October 23, 2017. Petitioner works for Roger Adams doing outby work, special projects; whatever the foreman/supervisor says needs to be done. Petitioner previously worked for Respondent from 2010 through 2015 doing long wall (producing/pulling coal). His job duties then were everything on the longwall; the various aspects of what needed to be done. Petitioner had a high school diploma and a welding certificate from Rend Lake College.

- On the date of accident, November 26, 2014, Petitioner testified that he was working for Respondent. He stated on that day he was sent over to New Future to help set up the new long wall panel. Petitioner indicated that he had worked at New Era. Petitioner stated that both mines belonged to American Coal. Petitioner stated that he was sent to New Future

by Daryl Tolbert. His shift started at midnight and he clocked in at 11:55pm on November 25, 2014. Petitioner stated that he was to clock out after 9:00am on November 26, 2014. On that day, Petitioner was working with Justin Towle, Mike Respondek, and Jason Call. Petitioner testified that he broke his hand that day. Petitioner testified that they were putting on a steel cover on a tall drive. Petitioner stated they had a come-along to get them in the air and it got hung up. Petitioner stated he went to shove it up with both hands, but his left hit it and his right hand went under it and the metal cover sat in place on top of his right hand. Petitioner testified that the cover weighed 250-300 pounds. Petitioner stated the other three guys he was working with helped get it high enough for Petitioner to get his hand out and Petitioner got his shoulder under it. Petitioner testified that he yelled when it happened. He believed it occurred 6-7am; towards the end of the shift. He stated the other three guys were present when his hand was crushed. Petitioner stated they finished the shift and they took the bus back to New Era and he showered and dressed and had to then wait for his brother-in-law as they rode together; his brother-in-law stayed at New Era that night. After Petitioner cleaned up, he went home and took it easy and iced his hand. Petitioner testified that at that time he did not think he broke his hand. He stated he hoped that it was not broken; he thought it was maybe bruised. He stated the swelling was bad when he showered at New Era and when he had undressed he could barely get his shirt off his hand. Petitioner testified that he had been wearing gloves when the accident occurred. He stated they asked him to take off the glove and he tried to get it off, but he did not want to then as he could feel it swelling. Petitioner testified that when he did finally get the glove off they looked at it (Justin and Mike and Jason). Petitioner agreed he did not get any medical attention November 26, 2014; he just went home. He stated it was the long weekend (Thanksgiving) and he had off until Monday. He only went for Thanksgiving dinner at a relatives and returned home.

- Petitioner testified that they rotated shifts every seven days. When he returned he was working 2nd shift and he was at New Future with a different crew (Larry Hays). Petitioner did not then report the injury, he told the supervisor that his hand was hurting; not why his hand was hurting. Petitioner testified that he worked through Thursday andthen took off to go to the Franklin Hospital Emergency room (ER) on December 5, 2014. His hand was x-rayed, and they showed him the fractures on the x-ray (4th and 5th metacarpals). Petitioner was told not to return to work then and was referred to a hand doctor in Mt. Vernon. Petitioner reported to them that he was injured in a 4-wheeler accident (November 26, 2014), not as a work injury. Petitioner indicated he did not know why he told them that, he just figured that it was too late to do anything because he put it off so long, and the bonus money. Petitioner stated that the bonus money they were making was very good and whenever there was a lost time accident they (Respondent) would take the bonus for that period and you would not receive any until you returned to work. He stated your whole crew would also lose the bonus for the pay period they were in. Petitioner indicated when it happened he did not believe he had a major injury or a fracture. Petitioner stated that he was in denial and he just wanted to keep working but when he went to the hospital they kept him off of work, Petitioner remained off work and saw the hand doctor on Monday December 9, 2014 at the Orthopedic Center of Southern Illinois. Petitioner stated someone else filled out the paperwork for him because he could not write as he is right hand dominant. In the intake form he reported it as a 4-wheeler accident, but he stated he had

not ridden one then. Petitioner stated he had not ridden one before the accident; he rode it in the winter. Petitioner agreed they had the same mechanism of injury as he told the ER. He was kept off work until he saw Dr. Ahn on December 9, 2014. Petitioner went to Respondent with the note and told them he could not return to work. Petitioner then had to complete some paperwork. Petitioner filled out the paperwork for the sick and absence benefits. Petitioner indicated it would not surprise him if the paperwork indicated it was not a work-related injury. Petitioner followed up with Dr. Ahn the next day. Petitioner testified that Dr. Ahn said he was going to need surgery on his hand and likely he could not do it until January. Petitioner stated he asked as to the amount of time off he would be off and the doctor indicated a few months. Petitioner testified that was when he realized he could not be off that long as he had a family to support. Petitioner stated that he believed the S&A benefits were about $85.00 per day. Petitioner testified that he started panicking and knew he could not survive on that money, so he went to the long wall coordinator and told him about it. Petitioner testified that he was told to come to work the next day and they would file a report of what happened. Petitioner returned to Respondent on December 11, 2014 and reported to them what happened at work. Petitioner stated that he spoke toJoe Monteggia, Daryl Tolbert and Anita, the workers' compensation. Petitioner stated he told them the truth of what happened on November 26, 2014 about his hand being crushed while working the long wall. Petitioner testified that he filled out an accident statement at that time. Petitioner agreed that there are 2 different handwritings on that form as he could not write anymore so Anita wrote it for him. He was not then aware of witness statements from his co-workers. Petitioner stated that he believed to that time that he had worked with Jason on the same crew. Petitioner stated that the crews changed a lot at that time so he did not recall exactly. Petitioner testified that he did not recall the other guys on the crew other than his brother-in-law who was a mechanic on the crew and that they worked for Steve Tanner. On the day of hearing, Petitioner reviewed the witness statements and indicated that they were consistent with what happened November 26, 2014.

- Petitioner agreed Respondent had him examined by Dr. Howard in St. Louis. Petitioner indicated that he had answered all of the doctor's questions and cooperated for the exam. Petitioner indicated that the doctor examined him and looked at the x-rays. Petitioner stated that the doctor said he was going to get Petitioner into surgery quick; the doctor agreed Petitioner needed the surgery. Petitioner did not undergo surgery with Dr. Howard. Petitioner had surgery with Dr. Ahn about December 16, 2014. Petitioner testified that he had continuing complaints/issues after surgery; Petitioner thought a pin was coming out at one point. Petitioner testified that the doctor kept him off of work and had him go for therapy at Ultimate Therapy Solutions. Petitioner stated that was looked at there and returned to Dr. Ahh who kept him off work through February 18, 2015. At some point Petitioner was released to full duty and Petitioner returned to long wall about in early (February 18?) 2015. He did not recall if he had follow ups after that. Petitioner (per records) saw Dr. Ahn for the last time on March 16, 2015 when he was discharged. Petitioner testified that the surgery and therapy helped, but his hand still was not good. He had issues with swinging hammers and holding onto things; things fall out of his hand all the time. Petitioner indicated his hand still bothered him at work, but he tries not to think about it. Petitioner was no longer taking any medications for it.

- Petitioner testified that prior to the November 26, 2014 accident he had no problems with his right hand. Petitioner agreed that he had lied to Dr. Ahn and Franklin Hospital when he originally reported how the accident happened. Petitione stated that he also lied to the people at Orthopedic Center of Southern Illinois about the accident. Petitioner testified he guessed he lied about it as he was more concerned about the money and the guys he worked with losing money. Petitioner stated that it was before Christmas and they were making extra money, a performance bonus. He stated it was called a shield count and footage bonus. He stated the more footage you have the more money you made, and you get your shields. He believed about 1,800 shields was when bonus started at that time and they were running 3,000 per shift at the time, which was about $500-600 a day, per person. Petitioner stated he was making good money at the time of the accident. Petitioner agreed he testified that he was afraid of potentially losing those bonuses for reporting the accident. When he finally reported the accident December 11, 2014 he did not lie to anyone after that as there was no reason to lie about the accident; the cat was out of the bag. Petitioner had suffered no new accidents since to his right hand.

- On cross examination, Petitioner agreed he did not have to have a pre-employment physical before working for Hamilton County Coal as he worked through a contractor; they just put him straight to work. Petitioner indicated that he had a drug test and that was it. Petitioner indicated that after the cover landed on his hand, his hand immediately had swelling. Petitioner recalled taking off his glove for a few seconds and Justin looking at it. Petitioner was working with Larry Hays the Monday after. The first-person Petitioner actually reported the accident to was Joe Monteggia. Petitioner had first gone to his (Joe's) house after Petitioner spoke to Dr. Ahn and Joe told Petitioner to come in to work the next morning to get paperwork taken care of. On November 26, 2014 Petitioner worked until 9:00 or 9:30am; he had the rest of that day off and was not scheduled to work until December 1, 2014 (Monday, 2nd shift). Petitioner agreed the first medical treatment he sought was December 5, 2014. Petitioner agreed he initially lied at the ER and to Dr. Ahn. Petitioner testified the reason he lied was because of the money concerns; he did not want to lose the bonuses and he wanted to work. He stated that even without the bonuses he could not afford to miss work. Petitioner identified his signature on a form he filled out for Respondent; someone helped him fill that out, but his signature was with his broken hand. He agreed there was a question that asked whether it was injury or sickness due to employment and he had indicated it was not. He was aware of what that box was for; he had signed that document. Petitioner indicated he signed that so he could get the sickness and accident money; off work benefits, short term disability. Petitioner agreed he learned that those benefits paid at a much lower rate than working full time and his child support still came out of that. Petitioner did not initially report it as a work accident when he learned about that. Petitioner indicated he then went and found out how long he would be off and that was when he went back (to Respondent). Petitioner indicated that was when he became concerned about what he would be paid for the time off. Petitioner indicated that he would have been okay for a few week but when he found out he was going to be off that long he knew he had to talk to them (Respondent). He was told to go back (by Joe); he knew what happened. Petitioner indicated he thought he would go back to light duty.

- Medical records of Franklin Hospital from December 5, 2014 noted hand injury, boxers fracture, transverse mildly displaced fractures midshaft 4th and 5th metacarpals. Soft tissue swelling. History of 1 week ago hand injury while 4-wheeling.

- Medical records of The Orthopedic Center of Southern Illinois noted December 9, 2014 and December 10, 2014 a history of: wrecked 4-wheeler and landed on right hand, Patient did not think it was broken; complaints of pain, edema, and bruising. Accident November 26, 2014; 9/10 pain since.

- Petitioner's December 11, 2014 statement noted that he hurt his hand the day before Thanksgiving. It was long weekend, so he thought it would be good for 2nd shift Monday. Petitioner stated the crew and he had been making a lot of money on bonus and did not want to miss that. Petitioner's statement noted that he initially said hurt at home but was no better and he could not make it on S&A benefits. Noted that he went to Joe's house on December 10, 2014 and Joe told him to come in for a report.

- Witness statement of Mike Respondek from December 11, 2014 noted: they were working Wednesday midnight shift. Early a.m. he was working with Steve assembling tail drive covers, dropped in place and smashed Petitioner's hand. Petitioner was wearing gloves during last few hours of shift. He had asked Petitioner to remove glove and he did not see torn skin or immediate redness, it may have been his right hand. It was the only time he worked with Petitioner and no contact since. He had worked with Petitioner remainder of shift and he could tell Petitioner was in pain by his wincing.

- Petitioner's injury report of December 11 noted that Petitioner and 3 others were using come along to put together tail drive covers. Petitioner pushed cover and cover came down and right hand caught between cover and post

- Witness Statement of Justin from December 11, 2014 noted: Wednesday November 26, 2014 Petitioner and Jason were working midnight shift at New Future Coal mine. Petitioner working with Jason putting covers on tail and gearbox and drive motor. Petitioner was using come along to hoist cover onto gear box and hand caught between cover and gear box. Petitioner said he was okay; had him remove glove and did not notice cut or swelling at that time. Petitioner continued to work rest of shift; no contact with Petitioner since that night at work.

- Dr. Howard testified via deposition, he is a board certified orthopedic surgeon specializing in hand and upper extremity surgery. He has been in active practice since 1989. As part of his practice he does a couple of IME's per week; 1-2% of his practice. Dr. Howard had examined Petitioner December 15, 2014 at the request of Respondent carrier's case manager. Dr. Howard stated that he obtained a history from Petitioner. At time of the exam Petitioner was having right hand pain from fractures of the 4th and 5th metacarpals. Petitioner had relayed a history of injuring his right hand from a cover for a machine coming down onto his hand. Petitioner is right hand dominant. Petitioner was then in a splint and awaiting surgery. Petitioner had completed an intake form and a Quick-dash was done indicating impact of the problem on his life; he identified the forms. He does the

forms for treating patients as well. Dr. Howard had not looked at any medical records when he examined Petitioner. He saw x-rays; he did not recall if Petitioner had those or they were done there; they were of diagnostic quality and he stated it showed the fractures through the midshaft of the 4th and 5th metacarpals. At that time, Dr. Howard recommended Petitioner undergo surgical repair of those fractures. He did not think Petitioner could work at that time. Dr. Howard opined that the injuries were causally related to the work injury described. When he saw Petitioner, he had no other information about the mechanism of injury other than what Petitioner reported. Dr. Howard has treated those type of injuries in his practice. Dr. Howard stated that the type of injury is pretty painful, and patients cannot lift very well, and they cannot use their hand very effectively with the injury. He stated when you try to use the other fingers the muscle motion tends to make the fractures move and that is rather painful, so they have very limited function. He understood from Petitioner that he had been having symptoms continuously from the work injury. Dr. Howard, subsequent to his exam, reviewed some additional medical records. He saw the Dr. Ahn December 10, 2014 records and he generated another report. He noted those records noted a different mechanism of injury from what Petitioner had reported to him as those indicated an accident involving a 4-wheeler on November 26, 2014; Petitioner never reported to him a 4-wheeler accident injury. He stated the histories noted in those records did not reflect it as a work injury. Dr. Howard indicated that history changed his causation opinion given that history of a non-work-related injury with a 4-wheeler being mechanism of injury. Subsequent to that, September 5, 2017, he had reviewed additional medical records from Franklin Hospital from December 5, 2014 and he noted the history there indicated a 4-wheeler accident injury the week before that visit. He noted there was no history noted there about a work-related injury; he stated that further supported that the injury was from a 4-wheeler accident injury. He generated another report in that regard (September 5, 2017).

The Commission notes that Petitioner described a mechanism of injury that Dr. Howard indicated, in his initial report, as causally related to his condition of ill-being with the fracture and need for the ORIF surgery. Clearly, the most contemporaneous medical records indicated a 4-wheeler injury. It was not until Petitioner claimed he realized the severity of the injury, the need for surgery, the recovery time, and the little money he would receive for non-occupational lost time that he advised it was a work injury. The date of the alleged accident was the same. Petitioner's witness', whom clearly had no financial motivation and had not seen Petitioner since the date of accident, provided statements. Both statements noted the work accident as Petitioner described. Neither witness noted any cuts/abrasions, but Petitioner had a glove on at the time of the alleged accident. Dr. Howard, however, indicated there would be immediate pain and swelling but the swelling could worsen over time.

The Commission notes that Petitioner testified of the bonus he and the crew would receive for exceeding their goal and for not having any lost time work injuries; witness statements do not address that. The alleged accident occurred just before Thanksgiving and they were looking forward to the extra bonuses for the Holidays. Petitioner testified of making good money at that time and the bonuses were $500-600 a day. That clearly could be an obvious motivation to not want to report a work injury, as not only would Petitioner lose the bonus, but his crew would also

19IWCC0069

lose it. Petitioner's testimony is unrebutted on that. Respondent's policy for the bonuses clearly was designed to punish employees for lost time injuries and stifle reporting accidents there, and that flies in the face of the Workers' Compensation Act. However, Petitioner's credibility is clearly at issue as he was not forthcoming either with the initial medical providers or in his later reporting of a work-related injury and testimony. While the bonus may be a motivating factor, the same can be said for ultimately filing a workers' compensation claim. The witness statements indicating noticing nothing when Petitioner took off his glove in conjunction with Dr. Howard indicating the pain and difficulty there would be working after such an injury brings Petitioner's credibility further into question. Petitioner may well have had some injury to his hand at work if a heavy lid fell on it, but with the significant credibility issue, the Commission, herein, reverses the decision of the Arbitrator to find that Petitioner failed to meet the burden of proving he suffered an accident that arose out of and in the course of employment and, further, failed to meet the burden of proving a causal relationship between any work injury and his current condition of ill-being. All other issues, therefore, are rendered moot and the Commission denies any and all benefits under the Act.

IT IS THEREFORE 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 4 - 2019
d-12/6/18
DLG/jsf
045

Stephen J. Mathis

Stephen Mathis

Deborah L. Simpson

Deborah Simpson

Dissent

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

Petitioner's claim basically turns on credibility. Petitioner acknowledged originally reporting to the ER and his initial treator that the injury took place while riding a 4-wheeler. Petitioner explained that he gave those histories in an attempt to hide the injury from Respondent. Petitioner testified that reporting a lost time accident would result in he and his crew losing out on performance bonuses that were amounting to $500-600 a day. Petitioner's crew, whom he had not worked with prior to nor subsequent to the accident gave statements consistent with Petitioner's history of injuring his hand while placing a cover into position.

The Arbitrator had the opportunity to observe the Petitioner's demeanor and hear Petitioner's testimony live. After hearing Petitioner's testimony regarding his original false statements and weighing the totality of the evidence the arbitrator found that Petitioner proved accident. Ultimately, the basis of the majority's reversal of the Arbitrator's decision is Petitioner's credibility or lack thereof. I would defer to the credibility finding of the trier of fact who had the opportunity to hear the Petitioner's testimony in person. Accordingly, I would affirm the Arbitrator's well-reasoned decision in its entirety.

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MAKOWAN, STEPHEN
Employee/Petitioner

Case# **16WC018591**

AMERICAN COAL COMPANY
Employer/Respondent

19IWCC0069

On 4/4/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.90% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0810 BECKER HOERNER THOMPSON ET AL
AARON J CHAPPELL
5111 W MAIN ST
BELLEVILLE, IL 62226

5990 LITCHFIELD CAVO LLP
GREGORY S KELTNER
222 S CENTRAL AVE SUITE 200
CLAYTON, MO 63105

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Stephen Makowan
Employee/Petitioner

v.

American Coal Company
Employer/Respondent

Case # 16 WC 018591

Consolidated cases: ____

19IWCC0069

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **February 16, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On 11/26/14, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $96,332.78; the average weekly wage was $1,852.55.

On the date of accident, Petitioner was 34 years of age, *married* with 3 dependent children.

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

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 $5,518.82 for non-occupational indemnity disability benefits, for a total credit of $5,518.82.

Respondent is entitled to a credit of $18,393.97 under Section 8(j) of the Act.

ORDER

Respondent shall pay to Petitioner temporary total disability benefits in the amount of $1,235.04, per week for 10 5/7ths weeks for the time period of 12/05/14 to 02/18/15 in accordance with Section 8(b) of the Act. Respondent shall be given a credit of $5,518.82 for non-occupational indemnity disability benefits paid during that time period.

Respondent shall pay any reasonably related medical bills pursuant to the Illinois Medical Fee Schedule and/or any contracts that the Respondent may have with those individual providers. Respondent shall be given a credit for any and all bills paid prior to the hearing on this case.

Respondent shall pay Petitioner 20.5 weeks of permanent disability at the rate of $735.37 per week as Petitioner sustained a 10% loss of use of the right hand in accordance with Sections 8(e)9 of the Act.

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

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

Signature of Arbitrator

3/26/18
Date

APR 4 – 2018

STATE OF ILLINOIS)
)
COUNTY OF WILLIAMSON)

19IWCC0069

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION, continuation
Stephen Makowan v. American Coal Company
Case Number: 16 WC 018591

Findings of Fact and Conclusions of Law:

This matter was tried before Arbitrator Edward Lee in Herrin, Illinois on February 16, 2018. The issues in dispute were accident, causal connection, whether Respondent paid all appropriate charges for all reasonable and necessary medical services, whether Petitioner is entitled to temporary total disability benefits, and the nature and extent of Petitioner's injuries.

At the time of the accident Petitioner was 34 years of age and worked for Respondent from 2010 through 2017. Petitioner was employed as a coal miner for Respondent at the time of the accident on November 26, 2014. He was working the midnight shift at the New Future mine. Petitioner testified that around 6:00 or 7:00 AM of November 26, 2014 he and three other coal miners were putting a steel cover on a tail drive motor and gear box. Petitioner estimated that the cover weighed approximately 250 to 300 pounds. He was using a come-along to hoist a cover on top of the tail drive motor when his right hand became caught underneath the cover. He yelled in pain. Petitioner had to push his shoulder into the cover while his three coworkers assisted him in getting his hand from underneath it. Petitioner finished the next couple of hours of his shift in pain and then went home for the long Thanksgiving weekend.

Petitioner testified that Respondent paid coal miners a production bonus referred to as a "shield count" or "footage bonus." The more productive an employee and crew were the more money they would make. Up to the time of the accident, Petitioner and his crew were productive and making good bonuses, approximately $500.00 to $600.00 a day. Petitioner testified that Respondent would not pay an employee their footage bonus for that pay period if they suffered a lost time accident and the employee would not receive any bonus money until they returned to work. He further testified that the whole crew would also lose their bonuses for that pay period if anyone suffered a lost time accident.

Petitioner testified that he did not immediately report the accident to Respondent or seek immediate medical treatment because he did not believe that his hand was broken and hoped it would be better after the weekend. He testified that he iced his hand when he got home and hoped that rest would benefit him.

Petitioner returned to work on Monday, December 1, 2014 and worked through Thursday, December 4, 2014. He worked the second shift at a different mine that week. He reported to his shift supervisor that his hand was hurting but he did not report the accident that occurred on November 26, 2014. He attempted to work through the pain. Eventually, the pain was too much and he took off work on Friday, December 5, 2014 to seek medical treatment.

On December 5, 2014 Petitioner was evaluated at Franklin Hospital. He testified that he lied to the hospital personnel and reported that he injured his hand on November 26, 2014 while 4-wheeling. He complained of pain in the dorsum of the right hand. Swelling was noted. X-rays of the right hand were obtained and revealed transverse mildly displaced fractures of the mid-shaft of the fourth and fifth metacarpals, evidencing a boxer's fracture to the hand. There was soft tissue swelling about the hand. Petitioner was given a splint, a prescription of Keflex, and referred to an orthopedic surgeon. He was taken off work until December 8, 2014.

On December 9, 2014 Petitioner was evaluated at the Orthopedic Center of Southern Illinois. He testified that he again lied to the medical personnel about how the injury occurred. He reported that he injured his right hand on November 26, 2014 when he wrecked his 4-wheeler and landed on his right hand. Petitioner indicated that he did not think it was broken at the time. He complained of pain, bruising, and swelling. X-rays were reviewed and Petitioner was referred to orthopedic surgeon Dr. Ahn for surgical evaluation on December 10, 2014. He was to remain off work in the interim. He was given a prescription for Norco 5/325 ml.

Petitioner testified that following his evaluation at the Orthopedic Center of Southern Illinois he went to Respondent to advise them he was going to miss some work and to complete paperwork to receive sick and absence benefits during that time.

On December 10, 2014 Petitioner was evaluated by orthopedic surgeon Dr. Joon Ahn. Petitioner again testified that he lied to Dr. Ahn about how the injury occurred. He reported that he injured his right hand on November 26, 2014 when he wrecked a 4-wheeler and landed on his right hand. Dr. Ahn believed that because of the functional demand of Petitioner's work as a coal miner and because of his age Petitioner would require surgery in order to best allow him to resume those activities. Petitioner testified that Dr. Ahn advised him that it would take some time for him to get into surgery and that he would likely remain off work for several months.

Petitioner testified that after Dr. Ahn advised him that he would require surgery and would have to remain off work for several months he began to panic. He realized he could not provide for his family on the sickness and absence benefits alone so he went to meet with the long wall coordinator to discuss his work accident and reporting it to Respondent. Petitioner was advised by the Long Wall Coordinator to come to work the following day and report the accident.

On December 11, 2014 Petitioner went to work to report the November 26, 2014 accident. Petitioner testified that he reported the accident to Joe Monteggia and Daryl Tolbert. He then advised Anita, the workers' compensation representative, of his accident. Petitioner began to author a written statement but was unable to finish it due to pain in his right hand. His statement was completed for him by an employee of Respondent. Witness statements were then obtained from Mike Respondek and Justin Towle. Both Mike Respondek and Justin Towle reported that they were working with Petitioner on Wednesday, November 26, 2014 at the New Future Coal Mine during the midnight shift. It was reported by both witnesses that Petitioner was putting covers on the tail drive motor and gear box when his hand became trapped underneath a cover on the top of the gear box.

Petitioner was seen by Dr. Richard Howard on December 15, 2014 pursuant to Section 12 of the Act. Dr. Howard noted that Petitioner was a coal miner who was injured on November 26, 2014 when a cover of a machine came down and smacked his hand, trapping it against another piece of metal. It broke his fourth and fifth metacarpals. He had a small laceration and was wearing a bivalve ulnar gutter cast at that time. Dr. Howard opined that with two metacarpal fractures with this degree of displacement he would recommend open reduction and internal fixation. It was his opinion within a reasonable degree of medical certainty that this was a work-related injury and that he could not work using his left hand.

On December 16, 2014 Petitioner underwent surgery with Dr. Ahn. Dr. Ahn performed right fourth metacarpal fracture open reduction and internal fixation with 2.0-millimeter modular hand set screw in plate and a right fifth metacarpal fracture with open reduction and internal fixation utilizing modular handset 2.0-millimeter screw and plate set. Petitioner was kept off work.

Petitioner then returned to Dr. Ahn on several occasions for follow up treatment. Initially, following surgery, petitioner did not notice significant improvement. He remained off work and received pain medication.

On January 12, 2015 Petitioner was reevaluated by Dr. Ahn. It was noted that his finger motion was a little stiff particularly at the MP joint area. Dr. Ahn recommended that Petitioner begin therapy for aggressive active and passive range of motion. Petitioner was given light duty restrictions including no forcefully pushing or pulling and no more than 5-pound lifting. These restrictions were not accommodated by Respondent.

Petitioner underwent therapy at Ultimate Therapeutic Solutions on February 4, 2015. He reported that his injury occurred at work on November 26, 2014. Petitioner returned to Dr. Ahn after therapy. He reported that his discomfort decreased and he was otherwise doing well without complaints. Dr. Ahn allowed Petitioner to return to work full duty effective February 18, 2015. Petitioner testified that he returned to work on February 18, 2015.

Petitioner was last seen by Dr. Ahn on March 16, 2015. He had no complaints. His finger range of motion was good. He was discharged from Dr. Ahn's care and was to return on an as needed basis.

Dr. Howard's deposition was obtained on September 11, 2017. He testified that he examined Petitioner on December 15, 2014 at Respondent's request. Petitioner was having problems with pain in his right hand from fractures of his fourth and fifth metacarpals. He noted that Petitioner was right handed. Petitioner relayed a history of injuring his right hand on November 26, 2014 when a machine cover came down across the back of his hand. He recommended surgery to repair those fractures. He did not believe Petitioner could work. He further testified that Petitioner's condition was causally related to the smashing injury of November 26, 2014.

Dr. Howard testified that his causation opinion later changed after receiving a letter from nurse case manager Debbie Grimsley and reviewing medical records from Franklin Hospital and the Orthopedic Center of Southern Illinois. Dr. Howard testified that assuming that Petitioner

injured his hand in an ATV accident then that is likely the cause of his current condition of ill-being. However on cross-examination, Dr. Howard acknowledged that Petitioner may have been truthful to him and simply lied to Dr. Ahn about the mechanism of his injury. Dr. Howard testified that assuming that Petitioner was injured in the manner in which he described to him during his examination then that mechanism of injury is sufficient to cause his fractures to the fourth and fifth metacarpals.

A hearing was held on February 16, 2018. Petitioner was the sole witness testifying at trial. He testified that on November 26, 2014 he was injured at work when his right hand was caught between a steel cover on a tail drive motor and gear box. Petitioner's testimony at the time of hearing was consistent with his written injury statement and the written statements of his supervisors and witnesses to the accident, Mike Respondek and Justin Towle. Petitioner admitted at trial that he initially lied about the mechanism of injury to the medical providers at Franklin Hospital and the Orthopedic Center of Southern Illinois in order to hide his work injury from Respondent. He initially did not believe it was broken and hoped to work through the pain until it got better. He was also afraid of losing his bonus for reporting a lost time accident and causing his crew to lose their bonuses. Petitioner testified that after finding out from Dr. Ahn that he would miss several months of work he realized that he would not be able to provide for his family while off work and therefore reported the accident to his employer. He testified he could not afford to miss work, with or without the bonus, and hoped that he would be given light duty restrictions by Respondent after reporting the injury.

Based upon the testimony of Petitioner, the stipulations of the parties on their Request for Hearing and orally stipulated on the record, the medical records, and reports offered into evidence, the Arbitrator finds that Petitioner did sustain an accident on November 26, 2014 arising out of and in the course of his employment with Respondent and that his condition of ill-being to which he testified at the hearing was causally related to the event of November 26, 2014.

The Arbitrator further finds that Petitioner is entitled to temporary total disability benefits for the time frame of December 5, 2014 through February 18, 2015, representing 10 5/7 weeks. The parties stipulated that Petitioner is owed a credit of $5,518.82 for non-occupational indemnity disability benefits paid during this time frame.

With regard to the issue of medical bills, the Arbitrator finds that Respondent shall pay the reasonably related medical bills offered into evidence by Petitioner pursuant to the Illinois Medical Fee Schedule and/or any contracts that the Respondent may have with those individual providers. Respondent shall be given a credit for any and all bills paid through its group carrier prior to the hearing on this case.

Regarding the determination of permanent partial disability, the Arbitrator notes that no permanent partial disability impairment report was submitted into evidence by either party pursuant to Section 8.1(b)(a); Petitioner was employed as a coal miner and returned to full duty as of February 18, 2015; Petitioner was 34 years old at the time of the accident and sustained no loss of future earning capacity. Regarding the evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner suffered a boxer's fracture of the right fourth and fifth metacarpals in his dominant hand and successfully recovered from an open reduction

internal fixation with screws and plates. Petitioner testified that the surgery helped and he returned to work as a coal miner. However, he reported having issues swinging hammers and holding on to items while at work. He testified that things fall out of his hand all the time, but he is not taking any medication for pain and putting his symptoms in the back of his mind.

With regard to the nature and extent of the disability sustained by Petitioner, the Arbitrator finds that Petitioner is entitled to 20.5 weeks of permanent disability at the rate of $735.37 per week as Petitioner sustained a 10% loss of use of the right hand in accordance with Sections 8(e)9 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD ZALESKI,

Petitioner,

vs.

NO: 15 WC 09992

D & M ARCHITECTURAL METALS, INC.,

19IWCC0070

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the parties herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, temporary partial disability, benefit rate, and the nature and extent of the 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.

After considering the record in its entirely including testimony, exhibits, pleadings and arguments submitted by the parties, the Commission modifies the Decision of the Arbitrator finding Petitioner's award should be under Section 8(d)2 and that he has not met his burden of proving entitlement to an award of a wage-differential under Section 8(d)1 for the reasons explained below.

Findings of Fact and Conclusions of Law

It is undisputed that the Petitioner in the subject case sustained a work-related injury and was assigned permanent restrictions on March 12, 2015 by his treating doctor, Alexander Ghanayem. Dr. Ghanayem specified Petitioner was limited to occasional lifting up to 80 pounds, with a 60-pound weight restriction from floor to waist with remaining restrictions pursuant to the limitations he demonstrated while participating in a functional capacity evaluation (FCE). The subject dispute arises out of the issue of whether as a result of those restrictions Petitioner is prevented from pursuing his usual and customary line of employment or Petitioner's earning

capacity is diminished. Having reviewed the transcript and all of the evidence in its entirety, the Commission views the evidence different from the Arbitrator.

Permanent partial disability

Under the Act, when a claimant sustains a disability, an issue arises concerning what type of compensation (s)he is entitled to receive, a wage differential award (8(d)(1)) or a percentage-of-the person-as-a-whole award (8(d)(2)). 820 ILCS 305/8(d) (West 2012); *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 has expressed a preference for wage-differential awards. *Id.* (citing *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 438, 433 N.E.2d 671, 674, 60 Ill. Dec. 629 (1982)). The purpose of a wage differential award under section 8(d)(1) is to compensate an injured claimant for her reduced earning capacity. *Dawson v. Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586, 888 N.E.2d 135, 139, 320 Ill. Dec. 918.

The Commission finds that the Petitioner's permanent partial disability in the case at bar would fall under the umbrella of section 8(d)(2) because his injuries do not prevent him from pursuing the duties of his employment and further he has not demonstrated an impairment of earning capacity.

The Court's analysis in *Jackson Park v. the Il Workers' Compensation Comm'n* is instructive in the present case although the facts are readily distinguished. In *Jackson Park*, the employer did not dispute the Commission's finding that the claimant sustained a work-related permanent partial disability and the claimant could not return to her pre-injury profession as a stationary engineer. The employer continued to pay the claimant the same union pay rate she had earned at her job as a stationary engineer when, in fact, the claimant was working as a public safety officer. The employer's other public safety officers were earning significantly less per hour than that which Respondent was paying the claimant. The Arbitrator found that these stipulated facts were "not relevant to any kind of wage loss because she doesn't have a wage loss, at this time." In response, the claimant made an "offer of proof" by requesting that the facts be admitted for all purposes" and for a potential section 8(d)1 or wage differential consideration or award." *Jackson Park v. the Il Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC, P. 26 47 N.E.3d 1167, 1172, 400 Ill. Dec. 202, 207

The Appellate Court in *Jackson Park* took issue with the Commission's denial of the employee's wage-differential finding the decision was based "entirely on the post-injury wages that the employer paid the claimant at the time of the hearing." The Court held the Commission failed to consider and analyze all of the evidence that is relevant to the claimant's true earning capacity in the competitive job market." *Jackson Park Hosp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431WC, P48-P51. The evidence presented at the arbitration hearing on the issue of Petitioner's transferable skills was through the only vocational expert who testified at the hearing. The Petitioner's vocational counselor offered opinions that Petitioner's "job skills as a stationary engineer were not transferable because of her physical limitations." *Id* at 48.

The Jackson Park Court vacated the PPD award and remanded the case for a hearing on a wage-differential PPD award based on Petitioner's vocational counselor's unrebutted opinion

regarding the Petitioner's transferable skills given her physical limitations and eighth-grade education:

> ...the claimant might be able to procure entry level, unskilled employment as a cashier, gas station attendant, parking lot attendant, or central station monitor. In these positions, the claimant would earn between $8 and $9 per hour, far less than the $23.61 per hour the employer paid the claimant at the time of the hearing. The evidence presented at the hearing included testimony that the claimant did not actually meet the qualifications necessary to work as a public safety officer for the employer and that safety officers in the Chicago area, including all of the employer's other safety officers, typically earned between $8 and $11 per hour... that the claimant's earnings in excess of $23 per hour were not indicative of other security positions in the Chicago area. *Id.*

The *Jackson Park* Court further outlined the parties' positions:

> We acknowledge that the employer's argument on appeal raises a competing concern, *i.e.*, that the Commission's focus solely on the claimant's post-injury income is proper because, otherwise, there is a danger that a person could be awarded a wage differential award while still earning the same wages. However, under the Act, the claimant is entitled to a wage differential award if there has been an impairment of her earning capacity, and, as noted above, the supreme court has held that income and capacity are not synonymous. *Cassens Transport Co.*, 218 Ill. 2d at 531, 844 N.E.2d at 423. Therefore, the Commission's analysis cannot focus exclusively on a comparison of pre- and post-injury income when other evidence is offered that is relevant to the employee's earning capacity in the competitive job market.
>
> [*P51] Furthermore, under the employer's interpretation of the Act, an injured worker could be denied a wage differential award simply because the employer pays the injured worker an inflated wage in an employer-controlled job that does not otherwise exist in the labor market and which may be temporary in duration. [***26] If other employers would not hire the employee with her limitations at a comparable wage level, the post-injury wage cannot be considered an accurate reflection of the claimant's earning capacity. Denying such a claimant a wage differential award undermines the purpose of such awards, which is to compensate the injured worker for her reduced earning capacity. *Dawson*, 382 Ill. App. 3d at 586, 888 N.E.2d at 139. It is essential for the Commission to consider all of the evidence relevant to the claimant's actual earning capacity in the competitive job market in determining whether the claimant is entitled to a wage differential award. *Jackson Park Hosp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431WC, P50-P51.

Therefore, the Commission is compelled to examine all the evidence relevant to the subject Petitioner's earning capacity in a competitive job market to determine whether he is entitled to a wage- differential award. Initially, the Commission notes that the subject Petitioner is working for Respondent doing essentially the same work he was doing before the injury and earning the same

wages he was earning before his injury. While the Petitioner in *Jackson Park* was also earning her pre-injury wages, she was not working in the same capacity as she was before her injury and that is the primary and significant difference between the subject Petitioner and the claimant in *Jackson Park*. Further, the Petitioner in *Jackson Park* was earning an inflated wage for the job she was doing. There is no evidence the Respondent in the subject case is paying the Petitioner an inflated wage in an employer-controlled job that does not otherwise exist in the labor market or that his job may be temporary in duration.

It has long been held that an accommodation that is a "sham" or merely an avoidance of liability under the Act, will be rejected by this Commission and Reviewing Courts. (See *Reliance Elevator Co. v. Industrial Comm'n*, 309 Ill. App. 3d 987, 723 N.E.2d 326, 243 Ill. Dec. 294 (1999) wherein the wages accompanying Respondent's job offer to the Petitioner were higher than economically justifiable.) Therefore, the nature of the accommodation must be considered to avoid over emphasis on a claimant's wages at the time of the arbitration hearing. The *Jackson Park* Court also focused on the issue of whether other employers would hire the employee with the same limitations for a comparable wage level, thus the Commission notes the significance of the following testimony of the Petitioner and witnesses in the case at bar.

Petitioner's restrictions and job duties

In the subject case, there was ample testimony that the Petitioner continues to work for Respondent in his pre-accident job as an Ironworker Local 63 foreman and nothing to suggest that he was offered a high wage for "light duty" work. (1/27/17 T, p. 96) Petitioner testified that he is a glazing foreman doing storefronts, curtain walls, metal and glass and supervising other glazing ironworkers. (1/27/17 T, p. 98) Petitioner also testified he is a working foreman meaning during the eight hours he is "on the clock" he is required to install and be part of the crew. (1/27/17 T, pp, 99-100). Petitioner confirmed he has been a working foreman since he worked for Respondent. (1/271/7 T, p. 100)

Petitioner further testified that after his work-related injury he underwent physical therapy and eventually participated in a FCE on March 4, 2015. (1/27/17 T, p. 106) Petitioner testified Dr. Ghanayem released Petitioner to return to work pursuant to the FCE results lifting 50 pounds occasionally from floor to waist, occasionally lifting up to 80 pounds, carry up to 70 pounds and push/pull 55 pounds. (1/27/17 T, p. 107) Petitioner testified he has been working for Respondent since his release working within those restrictions. (1/27/17 T, p. 108)

Dr. Ghanayem's office notes reflect he restricted Petitioner's lifting from floor to waist to 60 pounds and occasional lifting up to 80 pounds. The FCE report reflects Petitioner demonstrated the ability to occasionally lift up to 80 pounds floor to waist, 60 pounds waist to shoulder, carry up to 70 pounds, push 65 pounds of force, and pull 55 pounds of force. (Px1, p. 1) The FCE shows Petitioner demonstrated the ability to lift 50 pounds frequently floor to waist, 40 pounds frequently waist to shoulder and that Petitioner meets the Heavy Physical Demand level. (Px5, p. 2)

Petitioner was asked on direct examination to compare his work capabilities before to after the injury. Petitioner testified "I'm not as fast. Slow." (1/27/17 T, p. 113) Petitioner also testified that although he was doing his job physically slower, "you could make up hours in different ways. I do it with smarts and ability and understanding of the trade, where other guys will do something

and then redo it because they don't understand what they're actually trying to install." (1/27/17 T, pp. 115-116) Petitioner testified that he is running the whole job site. His supervisor, Dan Lang, comes out once a week to give them supplies. (127/17 T, pp. 127-128) Petitioner testified that Mr. Lang is aware of his restrictions, that he and Mr. Lang have a good working relationship. (1/27/17T, p. 114)

Petitioner testified that he confers with his boss, Dan Lang every day to coordinate the performance and completion of job sites including discussion of materials. (2/2/4/17 T, p. 11) Dan Lang testified he his part owner, CFO, project manager and truck driver and that he has been working in those capacities for Respondent since 1999. (1/27/17 T, p. 196) Lang described Petitioner as an employee: "He's been a foreman for us, and he's very good as a foreman in terms of laying out, trouble-shooting the jobs, managing the people we've had on the jobs, and he's been a very good employee." (1/27/17 T, p. 197) Lang further described Petitioner as a "highly skilled employee." (1/27/17 T, p. 197) Lang testified there has been no change after the Petitioner's injury in the way he assigns or bids work and Petitioner is able to do what he was doing before. (1/27/17 T, pp. 217-218) Lang also testified that he has every plan to keep him because he is good at his job, trustworthy and Lang can rely upon him. (1/27/17 T, pp. 220, 221)

Petitioner testified that he obtained the job with Respondent through a friend. (1/27/17 T, p. 126) Petitioner further testified that Local 63 ironworkers can find jobs without going to the Union Hall to get called out. (1/27/17 T, p. 127) Petitioner confirmed on cross-examination that he works with Local 27, Glazers' union guys and that Respondent employs composite crews, which means Local 27 guys and Local 63 guys. (1/27/17 T, pp. 127-128)

Paul Thompson testified that he is president and business agent for the Architectural Ironworkers Local 63, holding that title for four years and having been a representative for 15 years and ironworker for 31 years. (1/27/17 T, p. 12) Thompson further testified he has been a business agent since 2001 and added the title of president to that role for the last four years. As a business agent, Thompson was required to visit job sites daily. As such he is familiar with the work requirements and duties of a Local 63 ironworker. (1/2/7/17 T, pp. 12-13)

Thompson testified that he has known Petitioner for 15 or 20 years or all the years he has been a Local 63 ironworker. (1/27/17 T, p. 14) Thompson testified Respondent is one of the union's signatories. Thompson further testified Respondent is a smaller company specializing in storefront and doors, smaller to medium curtain walls, storefront window work. (1/27/17 T, p. 15)

Thompson testified typically there are not "non-working" foremen in the industry and typically the job requires a 40-hour workweek. (1/27/17 T, p. 23) Thompson further identified Petitioner's exhibit number four and described it as a "some of the job requirements" including "lift 100 pounds." Thompson testified that they have the description to give to people coming into their trade. Thompson did not create the document. (Px4, T, p. 32)

Thompson further testified that if a member of Local 63 person cannot meet one of the physical demand requirements listed on Petitioner's exhibit number four, the Union does not tell the person that they are not welcome, but that limits their ability to earn a living. (1/27/17 T, p. 36) When asked if an ironworker with restrictions can keep working as Local 63 ironworker under those circumstances, get paid and pay union benefits and dues, Thompson replied "Well, typically

not, because if they're not productive workers on the job, then the contractors won't keep them, and they usually end up going to do something else." (1/27/17 T, p. 37) Thompson admitted, however, the union does not test individuals to confirm they meet the physical requirements listed on the job description nor does the union measure if an individual is physically capable of working as a Local 63 ironworker. Thompson explained if they (ironworkers) can't do the physical part of the job, they have a hard time getting a job or if the union dispatches someone that's not physically capable of doing the job, they would be laid off. (1/27/17 T, p. 39)

Thompson also testified within Local 63 there are different elements in different sectors of the work. (1/27/17 T, pp. 28-30). The structural ironworkers, for instance, do heavier work than the ironworkers who focus on the glass, the glazing and the extruded metal framing. (1/27/17 T, p. 30) The latter group described by Thompson, with focus on the glass, glazing and extruded metal framing is the type of work Petitioner has engaged in during his career. Petitioner testified that there are two different fields in the ornamental ironworking deal -installing fences and stairs (rails) and there is ornamental. Petitioner testified that he is a glazing foreman. Petitioner described it as a field that was created over time that the ironworkers took over doing storefronts and curtain walls and metal and glass. (1/27/17 T, p. 98)

Thompson also testified sometimes ironworkers don't have to lift that much at all and Local 63 ironworkers are also working often side by side with the glazer union contractors. (1/27/17 T, p. 30) Thompson was also not sure that within the contracts with the various signatories for jobs whether the ironworkers' requirements listed in Petitioner's exhibit number four are included or are even referenced in the contract anywhere. (1/27/17 T, p. 37)

Thompson conceded, however, if a union member cannot lift 100 pounds that restriction does not preclude the individual from being a member of Local 63 Ironworkers. (1/27/17 T, p. 40) Thompson also conceded that Petitioner has been able to remain a union Local 63 ironworker, "if he pays his dues, he's still a member." (1/27/17 T, p. 41) Thompson had met Petitioner on a job and Petitioner told him that he had hurt himself. He was allowed to stay a union member and keep working his Local 63 ironworkers' union job thereafter. Thompson admitted that was an issue the union is not involved in. (1/27/17 T, p. 43)

Thompson also admitted that besides getting called out of the union hall, there are other ways ironworkers get work, "by their reputation and their work ethic." He agreed Petitioner has a very good reputation and a very good work ethic and getting (Local 63) work is done through networking and someone may recommend them for a job. (1/27/17 T, pp. 44-45)

Thompson also conceded there might be some non-working foremen and someone out there bidding jobs that include non-working foremen. (1/27/17 T, pp. 47, 51) Thompson has had ironworkers with similar restrictions ask for help getting jobs and he helped them find a job, albeit on a limited basis. Thompson testified some ironworkers are "going back to school and becoming safety guys." He conceded that there are no guarantees, but work is good and — "the prospects of work are excellent for the next two years." "Pretty much, everybody is working." (1/2717 T, pp. 57-58)

Petitioner testified that he reviewed surveillance video of his job performance and testified that on the video he was working at a school in Tinley Park and they "were there for quite a while."

(2/24/17 T, p. 13) The Commission views the video different than the Arbitrator finding that the video is compelling and persuasive evidence of the fact that the Petitioner is pursuing his usual and customary line of employment. (Rx4a-e)

The Commission finds that Petitioner's and Thompson's testimony comport. There are different types of ironworkers and skill sets and each of them have varying degrees of physical demands. If overall a worker is not able to meet their particular job demand, that person will soon not get work. Petitioner, however, testified he always has a partner. (1/271/7 T, p. 118) Petitioner also testified, and proved, that he is capable with using his mind and modifications of getting his job done.

The Commission, therefore, finds that Petitioner can continue to work in his usual and customary line of work with his physical limitations. Even if, arguendo, Petitioner was not working for Respondent, the testimony from the Petitioner, the witnesses and the President of the Ironworkers, Paul Thompson compels this Commission to find that Petitioner can pursue his usual and customary job based on the following: 1) the Petitioner's expertise, skills and reputation are factors that enter into his employability; 2) obtaining work as an ornamental ironworker can be accomplished by networking and outside the Union Hall; 3) that to be an ironworker, no physical capabilities are tested by the Union; 4) there are three sub-types of ironworkers and Petitioner's expertise as an ornamental ironworker is lighter than the physical requirements of the structural ironworkers; and 4) that non-Union jobs do not have the same physical requirements as the union jobs.

Impairment of Earnings

The Commission further finds that Petitioner has not met his burden of proving he has an impairment in his earning capacity based upon the above referenced testimony. Local 63 Ironworkers' President and business agent Thompson testified the wages for a Local 63 ironworker are $45.75 per hour. (1/27/17 T, p. 23) Petitioner testified he is earning $47.50 per hour, receiving an extra $2.50 per hour as a foreman. (1/27/17 T, p. 131)

Furthermore, and distinguished from *Jackson Park*, there are competing vocational rehabilitation reports and testimony in the case at bar that the Commission has reviewed and considered. The Commission finds that the vocational counselor reports and testimony in this case are extraneous since the Petitioner is working in his pre-injury position with no evidence that he is precluded from performing his usual and customary job duties despite the physical restrictions assigned by Dr. Ghanayem and he is earning his pre-injury wage with no evidence that his restrictions will affect his future earnings capacity.

The Commission further finds both counselors' initial reports were flawed because they ignored the fact that Petitioner is doing his pre-injury job and earning pre-injury wages. Both counselors initially relied upon a comparison of Petitioner's physical limitations as described in the FCE to the Union job description in Petitioner's exhibit number four, and determined those eliminated Petitioner's prospects of continuing as an ornamental ironworker glazing foreman. The Petitioner's and Thompson's testimony confirms that there are other factors that also can determine whether any ironworker can get ornamental iron work as a glazing foreman when he has physical restrictions. The nature of the physical restrictions, and the ironworkers' experience and reputation

are some of those factors. Petitioner testified that he always has at minimum a second worker present at his job site and to make up for being slow, Petitioner can make up "with smarts and ability and understanding of the trade."

In addition, if arguendo the Petitioner was not working for Respondent, the Commission finds the vocational counselor, Sharon Babat's testimony to be more credible than James Boyd's testimony. Mr. Boyd testified per his report that Petitioner could be a metal fabricator with a little more training, however, Boyd's testimony contradicts the first page of Boyd's report documenting that Petitioner had learned metal fabricating in his first job at U.S. Aluminum. Boyd admitted that Petitioner's first job was not taken into consideration when he opined that Petitioner needed additional training to be a metal fabricator. (1/27/17 T, pp. 74-77) Further, the Commission discounts Boyd's testimony because Boyd also testified that he did not take the Petitioner's first job into consideration because the Petitioner's training was 20 years ago, however, Boyd admitted he did not know what changed in that field and he did not find out how Petitioner came to be employed at U. S. Aluminum. Boyd also admitted it is quite possible that Petitioner is capable of working in other positions beyond what the test scores showed. Finally, Boyd could not testify whether the Petitioner's test scores qualified Petitioner to work as a journeyman ironworker without additional research.

The Commission also finds Babat's testimony to be credible regarding the reasons she added Petitioner's skill as an ironworker foreman in her January 11, 2017 report. When Babat wrote her first report, she wrote "No available positions with Employer of Injury," and she explained "That was the knowledge I had at that time." (1/27/17 T, p. 152) It was her understanding at that time that Petitioner was not working in his current position and her understanding of that changed by the time she prepared her second report dated January 11, 2017. (1/27/17 T, p. 183)

The Commission also notes that neither counselor considered that Petitioner could be employed as a foreman or return for safety training as suggested by the President of the Local 63 Ironworkers, Paul Thompson. Thompson testified some ironworkers are "going back to school and becoming safety guys." He conceded that there are no guarantees, but work is good and — "the prospects of work are excellent for the next two years." "Pretty much, everybody is working." (1/2717 T, pp. 57-58)

The Commission also finds alternatively that Petitioner is also qualified to do some of the jobs Babat referenced that would provide training including the City of Chicago in a position as a sign painter, at a starting average weekly wage rate of $31.08. The subject Petitioner has been working as an ornamental ironworker for almost two years since he was declared at maximum medical improvement. Based on the testimony of the Petitioner and the witnesses, Petitioner's job with Respondent is secure and there is no evidence the job was created for him or that he cannot continue to perform his job if at some time in the future he could not work for Respondent.

Based upon all the other evidence relevant to his future earning capacity and the wages the claimant can earn in a competitive job market including the testimony by the Union business agent that the future job market looks good and unanimous testimony that the Petitioner's reputation is sterling and a factor that would play into whether or not he could find another position as a working foreman, the Commission finds the Petitioner can pursue the duties of his usual and customary line of employment despite the physical limitations he has documented in the FCE and Petitioner did

not prove a loss in his future earning capacity. He has a high school diploma and other transferable skills including experience with metal fabricating.

The Commission notes the *Jackson Park* analysis requires consideration of the nature of the post-injury employment in comparison to wages the claimant can earn in a competitive job market. The Commission finds the subject Petitioner's employment is readily distinguished from the Petitioner in *Jackson Park.* Petitioner was not offered a job created by Respondent to avoid its liability under §8(d)1 of the Act and instead is working in his usual and customary line of employment earning his same wages. Any other conclusion is speculative and based solely on conjecture.

If, however, arguendo, the Petitioner could not work for Respondent, there is also evidence that he would be marketable in the same capacity. The Commission finds Babat's January 11, 2017 labor market survey is credible because the Petitioner was doing his job for over one year, (21 months) since the March 2015 FCE and between her two reports Babat learned that the physical requirement some companies that employ non-union workers are less than the union described and specifically of the companies she listed one position described skills that were preferred not required. (1/27/17 T, p. 144, 173) The Commission notes the Petitioner's exhibit four Local 63 requirements included welding and using a torch and finds Babat's comments regarding the non-union jobs to be reasonable.

The Act is a remedial statute enacted to abrogate the common law rights and liabilities which previously governed an injured employee's ability to recover damages from his employer. *Sharp v. Gallagher*, 95 Ill. 2d 322, 326, 447 N.E.2d 786 (1983). It established a system of liability without fault under which injured employees gave up their common law rights to sue their employers in tort in exchange for the right to recover for injuries arising out of and in the course of their employment without regard to any fault on their part. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 172, 180, 384 N.E.2d 253 (1978).

As the Supreme Court articulated "The purpose of the Act is to compensate, or "make whole," an injured employee, not to provide a windfall." *Hasler v. Industrial Comm'n.*, (1983) 97 Ill. 2d 46, 52, 454 N.E.2d 307, 310, 73 Ill. Dec. 447, 450.

It is axiomatic that liability under the Act cannot be premised on speculation or conjecture but must be based solely on the facts contained in the record. Similarly, an award for loss of earnings cannot be based on speculation as to the particular employment level or job classification which a claimant might eventually attain. See *Deichmiller v. Industrial Comm'n* (1986), 147 Ill. App. 3d 66, 497 N.E.2d 452, 100 Ill. Dec. 474. *Forest City Erectors v. Industrial Comm'n* (Wajerski), 264 Ill. App. 3d 436, 441, 636 N.E.2d 969, 973, 201 Ill. Dec. 537, 541. Conversely, the Commission cannot base an award for loss of earnings on speculation that a claimant might not maintain a position that he has proven he can do for two years between the date of his medical release and the arbitration hearing when there is no indication that he is employed for the purpose of avoiding liability under the Act.

The Commission finds therefore, that the Petitioner is entitled to an award based on loss of use of person as a whole under section 8(d)2, thus an analysis under Section 8.1b(b) is warranted.

The Commission finds neither party submitted an impairment rating report or opinion into

evidence under Section 8.1b(b)(i), thus no weight is given to the first factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Commission notes that the petitioner was a foreman/laborer at a physically demanding job at the time of the injury. Petitioner has returned to his regular job working within his restrictions. This is the same position of employment that Petitioner had prior to his work accident. Petitioner also testified that he has help or makes adjustments, thus the Commission gives moderate weight to this factor.

With respect to Section 8.1b(b)(iii), the Commission notes that the Petitioner was 52 years old at the time of accident, thus he will have to work with his disability for a number of years until the age of retirement, however, Petitioner will not have to bear his disability for decades of his work life. Further, the Petitioner testified the Respondent is accommodating and/or they make adjustments and there is no indication that Petitioner would be unable to continue working his regular duty job with permanent restrictions, thus the Commission assigns this factor lesser weight.

Under Section 8.1b(b)(iv), as it relates to Petitioner's future earning capacity, the Commission finds that Petitioner has not proven that his future earning capacity will be diminished and the Commission assigns little weight to this factor.

With respect to the treating medical records as corroborative of Petitioner's disability under Section 8.1b(b)(v), the Commission notes the last visit, number 41, at Achieve Manual Physical Therapy documented the "Patient Status" wherein Petitioner reported "that back has been feeling really good lately, almost no pain." When Dr. Ghanayem saw Petitioner on February 12, 2015 he noted that Petitioner felt much stronger with the additional therapy and his neurologic exam is without motor or sensory deficits. Dr. Ghanayem recommended the FCE. The Commission finds that the therapy and Dr. Ghanayem's medical records that confirm Petitioner's condition required solely conservative treatment, his final neurologic exam was without motor or sensory deficits, and at his last physical therapy visit he reported that he had little or no pain, to be indicative of Petitioner's disability, and assigns moderate weight to this factor.

The determination of permanent partial disability is not simply a calculation, but an evaluation of all five factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, applying §8.1b of the Act, the Commission finds the Petitioner has sustained lumbar injuries that caused 30% loss of use of the person as a whole under Section 8(d)2 as the result of the August 22, 2014 work-related accident.

Accordingly, the Commission strikes that portion of the Arbitrator's Decision on pages seven through nine, under Conclusions of Law, "Issue (L), (O), What is the nature and extent of the injury?" and vacates the Arbitrator's award based on a wage-differential under section 8(d)1.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 11, 2017 is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of a wage-differential based upon Section 8(d)1 is vacated.

19IWCC0070

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 150 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 30% of a person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for payment of medical bills in the amount of $50.88 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 5 - 2019
KWL/bsd
O: 12/4/18
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ZALESKI, RICHARD
Employee/Petitioner

Case# **15WC009992**

19IWCC0070

D & M ARCHITECTURAL METALS INC
Employer/Respondent

On 5/11/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0391 HEALY SCANLON LAW FIRM
JACK CANNON
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY
DANIEL J UGASTE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

19IWCC0070

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

RICHARD ZALESKI
Employee/Petitioner

v.

D & M ARCHITECTURAL METALS, INC.
Employer/Respondent

Case # 15 WC 09992

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 **1/27/2017 & 2/24/2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **8(d)(1) wage differential**

FINDINGS

On **8/22/2014**, 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 **$94,889.08**; the average weekly wage was **$1,824.79**.

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

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

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

Respondent shall be given a credit of **$19,378.10** for TTD, **$4,051.45** for TPD, **$0** for maintenance, and **$5,178.85** for other benefits, for a total credit of **$28,604.40**. Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits, commencing **2/24/2017**, of **$820.00/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.

Petitioner's request for payment of medical bills in the amount of $50.88 is denied.

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

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

Signature of Arbitrator

5-11-2017
Date

MAY 11 2017

BACKGROUND

Richard Zaleski ("Petitioner") alleged injuries to his low back arising out of and in the course of his employment with D&M Architectural Metals, Inc. ("Respondent") occurring on August 22, 2014. By agreement of the parties, this matter proceeded to arbitration on the following disputed issues: liability for unpaid medical bills, nature and extent of the injury and 8(d)(1) wage differential or 8(d)(2) man as a whole. The following is a recitation of the facts adduced at trial.

FINDINGS OF FACT

The parties stipulated that Petitioner suffered a work-related injury within the meaning of the Act. The parties agreed in opening statements that Petitioner returned to work with the Respondent under permanent restrictions. The dispute is whether the matter falls under an 8(d)(1) wage differential or on an 8(d)(2) man award. (TR. pp. 10, 11).

Petitioner's Testimony

Petitioner is a 55-year-old high school graduate. He has been an ornamental ironworker since 1983. He is a member of Architectural and Ornamental Ironworkers Local 63 for 18 years. (TR. pp. 100, 101) He has been employed as a working foreman for the Respondent for 3 years.

It is undisputed between the parties that Petitioner injured his low back when he slipped off a ladder on August 22, 2014. He was eventually diagnosed with a herniated disc at L5-S1 by Dr. Alexander Ghanayem that was non-operated and treated conservatively. Px1:15-16. Dr. Ghanayem placed Petitioner on permanent restrictions of occasionally lifting up to 80 pounds, floor to waist 60 pounds, waist to shoulder 70 pounds, push 65 pounds of force and pull 55 pounds of force. *Id.* at 1, Px5:1.

Petitioner returned to work as a foreman for the Respondent in March of 2015. (TR. pp. 107, 108) Petitioner testified that he has modified his work activity due to his injury. He estimates that he works at 50% of his former capacity. (TR. p. 115) He avoids lifting anything over 60 pounds. He asks co-workers or delivery men to assist him in lifting anything over 60 pounds. (TR. p. 112) He testified that the job requires lifting up to 420 pounds with assistance. (TR. p. 102) He takes over the counter medication every day. He testified that he experiences pain every day. (TR. pp. 112, 113)

Dr. Ghanayem/Loyola University

The records from Dr. Ghanayem at Loyola University show that Petitioner reported injuring his low back while falling from a ladder. Px1:27. Petitioner denied prior low back complaints. *Id.* The MRI of October 9, 2014 showed a disc bulge at L5-S1 with superimposed focal point paracentral disc protrusion causing mild central stenosis and minimal left neural foraminal stenosis. The disc protrusion appears to encroach on the traversing left S1 nerve roots minimally. *Id.* at 23-24. Dr. Ghanayem diagnosed Petitioner with an L5-S1 disc herniation and referred him for physical therapy. *Id.* at 15-16, 40. Dr. Ghanayem placed Petitioner at MMI on March 12, 2015 and adopted the work restrictions per FCE of 80 pounds occasional lifting, 60 pounds floor to waist. The doctor noted that the prescribed work restrictions were permanent in nature. *Id.* at 22.

Functional Capacity Evaluation

The FCE states that Petitioner demonstrated the ability to occasionally lift up to 80 pounds, floor to waist 60 pounds, waist to shoulder 70 pounds, push 65 pounds of force and pull 55 pounds of force. Px5. Petitioner demonstrated consistent performance throughout the testing. The FCE reports that ironwork generally falls into the heavy physical demand classification. The definition of heavy physical demand category under the U.S. Department of Labor, Dictionary of Occupational Titles is exerting 50 pounds to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects. Physical demand requirements are more than those for medium work.

Dr. Frank Phillips

The Respondent sent Petitioner for a Section 12 exam with Dr. Frank Phillips. Px8. Dr. Phillips concurred with the permanent restrictions which were outlined in the functional capacity evaluation and adopted by Dr. Ghanayem.

Paul Thompson

Paul Arthur Thompson testified on behalf of Petitioner. Thompson is the President for the Architectural Ironworkers Local 63. He has been an ironworker for 31 years. He has been a business agent since 2001. (TR. pp 12 & 13) Thompson dispatches men to work, teaches school, visits jobs and helps negotiate contracts. He meets with the contractors, meets with the employees, and settles disputes.

Thompson has known Petitioner for 14 years. (TR. p. 14) Petitioner is an Ornamental ironworker. Ornamental ironwork includes glass work in various stages of the erections of storefront doors and everything. (TR. pp. 19, 20) He also knows the Respondent. He testified that the Respondent specializes in storefronts, doors, smaller to medium curtain walls and storefront window work. (TR. p. 15) The lifting requirement could be several hundred pounds. (TR. p. 20)

Thompson is familiar with work requirements and duties of a Local 63 ironworkers. Thompson submitted a pre-printed list of job requirements for Local 63 Ironworkers. Px4. In the document, Thompson noted that lifting 100 pounds was a requirement and that light duty was not a consideration for the iron worker industry. Thompson testified that Px4 is a list of essential job requirements for an ironworker and is a document the union created and not specifically created for Petitioner.

Thompson testified that there are no non-working foreman positions on any consistent basis. (TR. p. 51) Thompson testified that "jobs are bid tightly so everybody has to be pulling on the rope making things happen so nobody is standing around." (TR. pp. 47, 48). Thompson testified that light duty is not a consideration, that every man must be capable of doing all these things because otherwise he could put in jeopardy his fellow workers. (TR. p. 21). Thompson testified that a foreman in the industry are hands-on. They are working foreman. Light duty jobs are few and far between and not stable. Thompson called them "fleeting" (TR. pp. 24, 37, 45, 54, 56). He confirmed that the current hourly rate for Local 63 ornamental ironworkers is $45.75. (TR. p. 34).

Vocational Counselor James Boyd

On August 30, 2016, Petitioner was evaluated at the request of his attorney by vocational counselor James Boyd. Px6. PX6. The counselor noted that Petitioner had returned to his work with his preinjury

employer and had been accommodated with both part-time and full-time lighter duty work that has allowed him to continue working as an ornamental iron worker and earning union scale wages. However, the counselor noted that Local 63 clearly states a 100 pounds lifting capacity in their ironworker job requirements and that light-duty is not a consideration for the ironwork industry. In other words, if Petitioner was no longer employed by Respondent he would be unable to qualify for additional work through Local 63. As a result, the counselor identified the following jobs as entry and median hourly wage jobs available to Petitioner: stock clerk, billing clerk, order clerk, retail sales clerk and customer service representative. With additional coursework and certificate programs in areas of construction management technology and CAD technology additional jobs included: production expediting clerk, purchasing agent, cost estimator, procurement clerk, metal fabricator and CNC machine operator. James Boyd eventually testified at Arbitration on behalf of Petitioner. He is a certified vocational evaluator. He has over 40 years of experience in vocational rehabilitation. (TR. pp. 61, 62). Mr. Boyd was asked to assess Petitioner's employment prospects assuming he cannot be an ironworker. Mr. Boyd testified Petitioner has one year of college at Western Illinois University and completed an apprenticeship with Sheet Metal Workers' Local 73 in 1983. Petitioner's employment experience from that point on is exclusively within the ironworker trade. (TR. pp. 63, 64)

Mr. Boyd testified that Petitioner has very few transferable skills. Mr. Boyd testified that Petitioner doesn't have many skills that would apply to alternate skilled work and he would qualify for jobs basically in the billing, clerical, order customer services types of occupations. The starting wage ranges from $8.91 an hour to $21.14. (TR. pp. 69, 70), Px6.

Sharon Babat

On August 3, 2016, Sharon Babat issued a vocational assessment report and labor market survey on behalf of Respondent. Rx1. Babat opined that Petitioner had transferable skills and would be able to obtain employment in his local labor market. The jobs identified in the labor market survey included: machine operator, damage restoration technician, painter, lawn care technician, maintenance worker municipal or other, manufacturing worker or helper, construction worker, picker packer and warehouse stockroom worker.

On January 11, 2017, Respondent updated its labor market survey with Babat. Rx2. This time the identified job titles now also included an ironworker foreman and a welder. The twelve employer contacts included: Lamonaca Ornamental Ironworks, Mueller Ornamental Ironworks, Protech Water Damage, Environmental Restoration, Restore Restoration, Tech USA, City of Highland Park, Rainbow Property Maintenance, Vivint Smart Homes, City of Chicago, Servicemaster and Site Tech staffing. Babat confirmed with Respondent that Petitioner would not be required to lift more than 70 pounds and that the union does not test for physical abilities prior to job placement. In addition, Babat was able to secure and identify alternative occupational positions within his local labor market including: an ornamental iron worker, mold remediation technician, environmental technician, water fire restoration technician, MIG/TIG welder, maintenance worker, installation technician, sign painter and disaster restoration technician. Starting salaries range from $11 per hour to $31.08 per hour. Nonunion iron worker positions salaries range from $21.65 to $24.00 per hour to start. The second report was prepared 16 days before trial.

Babat eventually testified on behalf of Respondent at trial. She is a certified vocational counselor hired by the Respondent. Babat concluded that Petitioner's physical restrictions prevented him, on paper, from being an ironworker. (TR. pp. 145, 146) Babat performed two transferable skills analysis for Petitioner. Neither analysis stated Petitioner could work as a full-fledged ironworker or ironworker foreman. Babat admitted on cross that nothing in Petitioner's employability in physical capabilities had changed between the first and second analysis. Babat also conceded she wasn't sure that Petitioner could perform the higher paying jobs identified in

the second analysis. Petitioner took the stand a second time and pointed out multiple job requirements of the higher paying jobs in Babat's second analysis which he could not perform. (2nd TR. pp. 14 - 17).

Daniel Lang

Daniel Lang was called by the Respondent. Mr. Lang is part owner of the Respondent since 1999. (TR. p. 195) He is also a project manager. He estimates jobs, gets materials, and manages projects. (TR. p. 196). Mr. Lang testified that Petitioner has been a foreman for his company for three years. Mr. Lang has not noticed a diminution in Petitioner's work capacities since he returned to work with restrictions. (TR. pp. 203, 204). He testified that he believed Petitioner would be able to find similar work in the field if he left the Respondent's employment. (TR. p. 216). On cross, Mr. Lang admitted that he has little opportunity to watch Petitioner perform ironworker duties. Mr. Lang is only on the job site for 20 minutes a week and during this time, Petitioner, as his foreman, is consulting with him. (TR. pp. 223, 224). Mr. Lang testified that all foreman are working foreman and have to be on the tools. (TR. pp. 224 – 227). He believed Petitioner could find work with other companies but would not say if he knew that for sure. (TR. pp. 225, 226). Mr. Lang has not worked for anyone else since 1999 and he does not know what other contractors are requiring of their workers. (TR. pp. 232 – 233). Mr. Lang agreed that if he had a new worker who could not keep up, he would get rid of him. (TR. p. 226).

Pay Stubs

Petitioner testified that his regular work week is 40 hours. The Respondent is accommodating Petitioner's permanent restrictions. Petitioner submitted 26 pay stubs between the week ending August 18, 2015 and December 24, 2016 where the Respondent was unable to provide Petitioner 40 hours of work or provided less than 40 hours of work per week. Px7. Petitioner worked a total of 628 hours over that time period. A full forty work week would provide 1,040 hours of work over 26 weeks.

Michael Wallace

Michael Wallace testified on Respondent's behalf. Mr. Wallace is president and part owner of D&M Architectural Metals; he has been involved with the company since its inception. (2/24/17 Trans. p.33) He has estimated, bid projects, ordered material, project managed, and installed. (2/24/17 Trans. p.34) When bidding school projects, to determine what glass to order, there is a specification book provided by the architect, and everything is specified by the architect exactly what can and cannot be used; the size of the glass is then ordered based upon what is specified. (2/24/17 Trans. p.34-35) Altering that requires a submittal process through the architect and through the general contractor to try to get somebody to accept something alternate. To his knowledge, Respondent has never requested use of a different type of glass. (2/24/17 Trans. p.35-36) He explained most buildings have architect specifications that go along with them. Especially when working with a general contractor, the specifications are provided. An architect usually will do a drawing and create a specification package. Respondent has to bid the jobs according to the architectural drawing and the specification, whether it's a school or not. (2/24/17 Trans. p.40-41)

Mr. Wallace testified he was a member of Local 63 for 14 years. He deals with and is aware of Local 63 and how it functions. He stated Local 63 offers training: "They have industry upgrading classes within. You can go to school at night to be taught welding. You can become a certified welder if you were to choose to go to school at night where they teach you at no cost. They have other training for different areas within the trade, because it's a pretty wide varying trade. There is a lot of things that you can do." (2/24/17 Trans. p.39-40) Mr. Wallace stated he had not seen the surveillance video but he understands what Petitioner does for the company

day in and day out as an employee: "I do the scheduling. I schedule all of the employees for every project every day for all the field employees. He installs aluminum framing, glass, caulk, brake metal, doors, door hardware." (2/24/17 Trans. p.47-48).

Video Surveillance

Respondent submitted six hours of video surveillance. Rx4a-e. The surveillance takes place over a two day period when Petitioner is working for the Respondent. Petitioner is observed appearing to limp around to the other side of his truck, standing and walking around, using a cutting tool, a drill, a caulking gun and operating a lift. The Arbitrator notes that anything involving glass moving, installing and lifting was done witht the aide of a coworker. He is also observed taking a break, getting up in a slow fashion, limping somewhat and then laying down.

CONCLUSIONS OF LAW

ISSUE (L), (O) ***What is the nature and extent of the injury?***

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. The parties do not dispute that Petitioner sustained accidental injuries to the lower back/lumbar spine arising out of and in the course of his employment with Respondent on August 22, 2014. Nor do the parties dispute that Petitioner's current condition of ill-being, which resulted in permanent work restrictions, is casually related to this accident. There is also no dispute that Petitioner's permanent restrictions prevent him from performing all of the normal work duties of an ornamental ironworker, as Respondent is accommodating Petitioner's work restrictions. The dispute as to nature and extent centers over whether Petitioner's injuries entitle him to an award under Section 8(d)(1) or Section 8(d)(2).

There is no dispute that Petitioner suffered a work related injury within the meaning of the Act. There is also no dispute that he has permanent restrictions as a result of his work related injury. There is little dispute that the restrictions prevent him from performing all of the duties of an ornamental ironworker. The issue is whether the appropriate award is under 8(d)(1) or 8(d)(2) of the Act. The Arbitrator concludes the Petitioner has proven by a preponderance of the evidence that he is entitled to a wage differential award under Section 8(d)(1) because he has suffered an impairment of his earning capacity that prevents him from fully returning to his usual and customary work as a union ornamental ironworker.

Jackson Park Hospital noted that once the claimant proves that he has sustained a disability, the question of compensation under Section 8(d) arises. *Jackson Park Hospital v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431 WC ¶ 39. Here, the parties do not dispute Petitioner has sustained a disability as a result of his low back injury. The Supreme Court has expressed a preference for wage-differential awards. *Id.* (citing *Gallianetti v. Indus. Comm'n*, 315 Ill. App 3d 721, 727, 734 N.E. 2d 482, 487 (2000)). The purpose of a wage differential award under section 8(d) (1) is to compensate an injured claimant for his reduced earning capacity. *Id.*

Under Section 8(d)(1), an impaired worker is entitled to a wage differential award when (1) he is partially incapacitated from pursuing his usual and customary line of employment and (2) there is a difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he is earning or is able to earn in some suitable employment or business after the accident. 820 ILCS 305/8(d)(1) (West 2012), *Id.* at ¶ 40. Here, Petitioner has met both prongs of this test.

First, Petitioner is partially incapacitated from pursuing his usual and customary employment as a union ornamental ironworker. Whether a claimant has sustained an impairment of earning capacity cannot be determined simply by comparing pre and post injury income. *Id.* at ¶ 45. The analysis requires consideration of other factors, including the nature of the post-injury employment in comparison to wages the claimant can earn in a competitive job market. Here, Petitioner's undisputed FCE found Petitioner unable to return to his regular job. The FCE's job description used was not seriously challenged by Respondent. In addition, Petitioner's permanent restrictions were of the type that needed to be accommodated by Respondent and in fact were for some time prior to Babat's initial vocational evaluation. Px7, Rx1. Petitioner's partial incapacitation is also supported by vocational counselor Boyd, who credibly and persuasively testified that Petitioner does not have access to his former employment as his restrictions prevent him from full performance of those duties. Moreover, Respondent's initial vocational assessment and labor market survey conducted by Babat conceded that Petitioner's access to his local labor market did not include his usual and customary employment. Rx1. Babat's second survey came only after Petitioner obtained accommodated employment with Respondent and Babat then included ironworker jobs in that survey. Rx2. The second survey did not include union ironworker jobs and instead only included non-union ironworker jobs. Babat conceded that nothing had changed in terms of Petitioner's restrictions from her first report to her second report. Babat's second report also came several weeks before trial. Respondent asserts that Petitioner is not partially incapacitated from his usual and customary employment. However, that Respondent is accommodating a restriction in the first place suggests that Petitioner cannot fully perform his usual and customary employment duties. In addition, Respondent's surveillance videos show several instances where Petitioner is visibly seen with difficulty in getting up or rising and with some limping. Petitioner is observed laying down during a break at one point. In the Arbitrator's assessment of this evidence, this supports the conclusion that Petitioner cannot fully perform his job as a foreman ironworker. The Arbitrator also notes that Thompson credibly explained, as did Lang, that foreman are working foreman and need to perform on the job. In the videos, Petitioner is observed receiving assistance when lifting glass and performing less work that that described in Babat's labor market survey for similar positions. Rx2. The Arbitrator also notes Petitioner's employment with Respondent is essentially part time based upon the wages submitted. Px7. The foregoing, along with the record as a whole, is sufficient to show that Petitioner has suffered an impairment of earning capacity.

Second, the difference in Petitioner's earnings are readily demonstrated in both Boyd and Babat's first reports, which highlighted a reduced earning capacity in non-ironworker positions. In addition, Petitioner's post-injury employment scheme, while at the same or better hourly rate, is essentially part-time thereby creating a difference in pre- and post-injury earnings. And although he continues to hold the title of foreman, Petitioner's job duties and evidenced on video do not show him to be a working foreman, as noted to be required by both Thompson and Lang. The video depicts mostly hand tool work with assistance in most lifting activities. The Arbitrator concludes that Petitioner's post-injury earnings fail to reflect his true earning capacity. Respondent asserts that Petitioner should not be entitled to a wage differential award because he has returned to his same position and at the same rate. However, income and capacity are not synonomous. *Id.* at ¶ 50.

Petitioner is a 57 year old high school graduate with minimal transferable skills. Each of the vocational counselors concede that Petitioner's permanent restrictions prohibit him from being an ironworker. Petitioner's restrictions do not meet the stated job requirements identified in either the pre-printed job descriptions provided by the union or the job requirements identified in the FCE. Neither Respondent's nor Petitioner's certified vocational counselor contested these job requirements. Moreover, the Respondent's vocational counselor did not offer union ironworker jobs in her analysis.

In awarding 8(d)(1) benefits, the Arbitrator elects to adopt the analysis conducted by Boyd and the analysis conducted by Babat in her first report. The average wage Petitioner could earn based on Mr. Boyd's

analysis was $14.17 an hour. The average wage Petitioner could earn based on Babat's first analysis was $15.00 an hour. Babat's second analysis was flawed and not applicable. The current hourly rate for a journeyman ironworker is $45.75 according to Thompson. Respondent shall pay Petitioner permanent partial disability benefits, commencing **2/24/2017**, of **$820.00/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.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner offered into evidence Petitioner's Exhibit Number 3, a medical bill itemization from Loyola University Medical Center, and claiming entitlement to $50.88 in outstanding medical expenses. The Arbitrator has reviewed the exhibit and notes the charges at issue stem from a December 17 2015 date of service with Dr. Brent Scott Rieger. (PX 3, p.16) The exhibit further shows the charges associated with Petitioner's treatment with Dr. Ghanayem through March 12, 2015 had a zero balance. As there is no medical evidence to show the December 17, 2015 date of service was related to the accidental injury, the Arbitrator finds the $50.88 balance is not related and the bill is denied.

Signature of Arbitrator

5-11-2017
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eileen Budzban,

Petitioner,

vs.

NO. 11WC29053

19IWCC0071

School District #303,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both parties herein and proper notice given, the Commission, after considering the issue(s) of medical expenses, prospective medical care, permanent disability, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 13, 2018 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.

19IWCC0071

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.

FEB 5 - 2019

DATED:
SJM/sj
o-12/20/2018
44

Stephen J. Mathis

David L. Gore

DISSENT

I respectfully dissent from the Decision of the Majority affirming and adopting the Decision of the Arbitrator. The Arbitrator found that Petitioner sustained her burden of proving that she still had a condition of ill-being causally connected to her work-accident on December 6, 2010 and awarded her 285&6/7 weeks of temporary total disability benefits and 200 weeks of permanent partial disability benefits representing loss of 40% of the person-as-a-whole. I would have reversed the Decision of the Arbitrator, terminated her temporary total disability benefits as of August 4, 2011, and awarded Petitioner 50 weeks of permanent partial disability benefits representing loss of 10% of the person-as-a-whole.

Petitioner worked for Respondent as a school bus driver. On December 6, 2010, while inspecting her bus she slipped on ice and fell hitting the back of her head. She was taken to a hospital emergency department where she denied loss of consciousness or amnesia concerning the accident. She did not report any loss of consciousness until a month later when she reported that she thought she lost consciousness for up to 45 minutes to her primary care physician. In addition, in July of 2014, Petitioner reported to a doctor that she had not driven since the accident. However, medical records from 2010 and 2011 happen to refer to her driving and Petitioner testified that no doctor had restricted her driving.

Petitioner complained of severe symptoms and functional impairment throughout her medical treatment as well as in her testimony. However, all of her neurological/cognitive tests were normal and there were never any objective findings to support her subjective complaints. On July 23, 2014, Petitioner was examined by Dr. Schneck, a professor of neurology and neurosurgery. Dr. Schneck concluded that Petitioner likely had "somatization disorder" based on his exam. He disagreed that her symptoms were related to post-concussion syndrome, though that may have been an initial trigger. He did not think that she had post-concussion syndrome or a neurological disease but rather a "more complex long standing psychiatric syndrome."

Petitioner saw Respondent's Section 12 medical examiner Dr. Skaletsky, a neurosurgeon, on March 17, 2011, June 21, 2011, and December 1, 2014. He also reviewed her medical

records. During the last examination, he noted that Petitioner reported a completely different set of symptoms from those she reported in 2011, which he could not attribute to abnormalities in her nervous system. The symptoms that she reported "did not follow any known neuro pathways." He noted her various inorganic behaviors and concluded that "all of these things combined with objective normal finding, normal deep tendon reflexes, no atrophy, no sensory loss in a neurologic pattern would be inconsistent with any organic or medical" problem. Dr. Skaletsky agreed with Dr. Schneck's diagnosis of somatization disorder. He did not believe Petitioner had post-concussion syndrome as of June 2011 and she could have returned to work as of July 2011.

I find the opinions of Dr. Skaletsky more persuasive than those of Petitioner's treaters, Dr. Boblink, her primary care physician, and Dr. Sayyad, her physiologist/rehabilitation doctor. These doctors opined that Petitioner still suffered from post-concussion syndrome which impaired her functionality. Dr. Boblink, an internist, based his opinion largely on the apparent severity of injury because of her reported loss of consciousness for a substantial period of time, and Dr. Sayyad acknowledged that she did not review any other medical records and based her determination of Petitioner's impairment solely on her subjective reports.

In my opinion, Petitioner suffered a concussion in her work-related accident and her post-concussion syndrome resolved by August 4, 2011. For these reasons, I would have reversed the Decision of the Arbitrator, terminated temporary total disability benefits as of August 4, 2011 (as stipulated by Respondent), and awarded Petitioner 50 weeks of permanent partial disability benefits representing loss of 10% of the person-as-a-whole. Accordingly, I respectfully dissent from the Decision of the majority.

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BUDZBAN, EILEEN
Employee/Petitioner

Case# 11WC029053

SCHOOL DISTRICT 303
Employer/Respondent

19IWCC0071

On 6/13/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment: however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0147 CULLEN HASKINS NICHOLSON ET AL
DAVID MENCHETTI
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

2337 INMAN & FITZGIBBONS LTD
STEPHEN M McCLARY
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

19IWCC0013

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

Eileen Budzban

Employee Petitioner

v.

Case # **11WC029053**

Consolidated cases: **NOT APPLICABLE**

School District 303

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 **Geneva**, on **May 9, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent

paid all appropriate charges for all reasonable and necessary medical services?

K. ☒ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☒ TTD

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On December 6, 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 $33,966.92; the average weekly wage was $653.21.

On the date of accident, Petitioner was 51 years of age, *single* with __ 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 $33,581.00 for TTD paid from December 7, 2010 through May 8, 2012, $NA for TPD, $NA for maintenance, and $NA for other benefits, for a total credit of $33,581.00.

Respondent is entitled to any credit for any reasonable necessary and related medical expenses paid under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $435.47 per week for 285 & 6/7 weeks, commencing from December 7, 2010 through May 31, 2016 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $391.93 per week for 200 weeks, because the injuries sustained caused 40% 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.

KSSteffen — June 6, 2018

Signature of Arbitrator — Date

ICArbDec p 2

JUN 13 2018

Attachment to Arbitration Decision

Eileen Budzban v. School District 303

11WC029053

On December 6, 2010, the Petitioner Eileen Budzban (Petitioner) was working for the Respondent School District 303 (Respondent) as a school bus driver. The duties of a school bus driver include driving the bus and required walking around to check out the bus.

The parties stipulated that on December 6, 2010, the Petitioner sustained accidental injuries that arose out of and in the course of her employment by Respondent. Petitioner was walking around a bus checking it out when she slipped and fell and hit her head. Petitioner could not get up, could not roll over and noticed that it was black. A search ensued when Petitioner did not report for her bus pick-up route and Petitioner was discovered at the scene of her fall, approximately 45 minutes to an hour later.

Petitioner was brought by ambulance to Delnor Hospital Emergency Department. RX 2, pg. 1. It was reported in the history that Petitioner fell and struck the back of her head and she had no LOC. RX 2, pg. 1. Petitioner was complaining of severe occipital pain, and cervical and lumbar pain and wanting to go to sleep. RX 2, pg. 1. CT scan of the brain was negative for acute changes. RX 2, pg. 2. Petitioner was discharged with head injury instructions. RX 2, pg. 2. Discharge impressions were: acute closed head injury without loss of consciousness and acute cervical and lumbar strain. RX 2, pg. 3.

On December 13, 2010, Petitioner followed up with her primary care physician Dr. John K. Boblick of Loyola Medicine. PX 2, pg. 66. Petitioner reported falling at work

and losing consciousness. PX 2, pg. 66. Petitioner reported vomiting and going back to the emergency room. PX2, pg. 66. Petitioner reported dizziness, headache and feeling fuzzy. PX 2, pg. 66. Dr. Boblick assessed post-concussion syndrome and advised Petitioner to remain off work. PX 2, pg. 66. Dr. Boblick's records of treatment of Petitioner from prior to December 10, 2010 do not include any complaints of headache or dizziness prior to December 10, 2010. PX 2.

On December 27, 2010, Petitioner followed up with Boblick. PX 2, pg. 60. Petitioner reported being dizzy and having headaches. PX 2, pg. 60. Dr. Boblick diagnosed post-concussion syndrome and advised Petitioner to do gentle exercise and stay off work. PX 2, pg. 60.

On January 8, 2011, Petitioner followed up with Dr. Boblick. PX 2, pg. 54. Petitioner reported being dizzy and still having Aches. PX 2, pg. 54. Dr. Boblick diagnosed post-concussion syndrome. PX 2, pg. 55.

On January 22, 2011, Petitioner followed up with Dr. Boblick. PX 2, pg. 48. Petitioner reported symptoms of dizziness, problems with balance and fatigue since her fall in December. PX 3, pg. 48. Dr. Boblick assessed post-concussive syndrome, referred Petitioner to neurology and placed a hold on Petitioner's return to work. PX 2, pg. 49.

On February 6, 2011, Dr. Boblick reported that Petitioner was still having headaches and dizziness and Dr. Boblick continued to assess Petitioner as suffering from post-concussion syndrome. PX 2, pg. 43.

On February 14, 2011, Petitioner saw Dr. Murray Flaster for neurological evaluation as recommended by Dr. Boblick. PX 1, pg. 16. Dr. Flaster recounted history of injury and treatment to date. PX 1, pg. 16. Dr. Flaster noted that Petitioner's history and examination were consistent with mild post-concussive disorder. PX 1, pg. 17. Dr. Flaster noted that MRI of the brain was appropriate due to her progressive headaches. PX 1, pg. 17.

On February 16, 2011, MRI of the brain was normal pre- and post-contrast. PX 1, pg. 83.

On March 14, 2011 Dr. Flaster reported that Petioner had returned to see him for post-concussive disorder and Dr. Flaster agreed that the brain MRI was normal. PX 1, pg. 15. On May 9, 2011, Dr. Flaster reported that Petitioner was continuing to experience headaches, fatigue and inability to concentrate. PX 1, pg. 12. On May 23, 2011, Dr. Flaster reported that Petitioner was suffering from posttraumatic headache disorder that expected to be improving on its own. PX 1, pg. 12. Dr. Flaster recommended that Petitioner should not return to work until another opinion was had. PX 1, pg. 12.

On May 24, 2011, Dr. Boblick reported that Petitioner had what seemed to be a functional disorder and that Petitioner's symptoms started after head trauma. PX 2, pg. 32.

On June 14, 2011, Petitioner reported to Dr. Boblick that Petitioner was not driving due to dizziness. PX 2, pg. 26.

On August 30 2011, Dr. Boblick ordered neuropsychological evaluation. PX 2, pgs. 17 & 20.

On March 9, 2012, Petitioner underwent neuropsychological evaluation by Dr. Kyle Bonesteel PhD. of Loyola Medicine at the request of Dr. Boblick. PX 1, pg. 147. Dr. Bonesteel took a complete history and performed an examination. PX 1, pg. 148. Dr. Bonesteel's diagnostic impression included neurocognitive impairment beyond age expectation and post-concussive syndrome. PX 1, pg. 150. Dr. Bonestreel thought Petitioner was not neurologically fit to work as a bus driver. PX 1, pg. 150.

On April 6, 2012, Dr. Boblick continued to report that Petitioner was suffering from headaches and memory issues and that Petitioner needed brain rehab and Dr. Boblick's assessment was post-concussive encephalopathy. PX2, pg. 3.

On June 20, 2014, Dr. Boblick reported that Petitioner had not improved since her accident. PX 1, pg. 162.

On June 23, 2014 Petitioner saw Dr. Michael J. Schneck of Loyola for a neurological consultation at the referral of Dr. Boblick. PX 1, pg. 163. Petitioner reported to Dr. Schneck that she still had dizziness, difficulty finding words, anxiety, difficulty walking, headaches and photosensitivity. PX 1, pg. 164. Dr. Schneck noted that Petitioner had been seen by Dr. Flaster and by Dr. Bonesteel. PX 1, pg. 163. Dr. Schneck reported that Petitioner had somatization disorder. PX 1, pg. 171. Dr. Schneck disagreed with Dr. Bonesteel that Petitioner's symptoms were related to post-concussion syndrome at this time; Dr. Schneck noted that post-concussion syndrome might have been the trigger for Petitioner's problem. PX 1, pg. 171.

On July 30, 2014, Petitioner underwent neuropsychological examination by Dr. Susan Walsh, Psy.D Loyola at the request of Dr. Boblick. PX 1, pg. 173. Dr. Walsh took a history and performed an examination. PX 1, pg. 173. Dr. Walsh's impression was post-traumatic stress disorder and somatoform disorder. PX 1, pg. 177. Dr. Walsh reported that Petitioner's post-concussive syndrome, along with other trauma infused developmental history, would suggest a trauma related somatization style. PX 1, pg. 177.

On January 12, 2016, Petitioner was evaluated by Dr. Anjum Sayyad of Marionjoy Medical Group, Wheaton Franciscan Healthcare. PX 3, pg. 1. Petitioner complained of light and noise bothering her and tingling in the back of her head. PX 3, pg. 1. Petitioner reported that it was hard to find words and that her speech was slurred. PX 3, pg. 1. Post-concussion syndrome was listed as the current problem. PX 3, pg. 3. Trial of physical, occupational and speech therapy was ordered, in addition to neuro-optometry evaluation. PX 3, pg. 4. Petitioner continued to follow up with Dr. Sayyad in the day rehabilitation clinic at Marionjoy. PX 3, pg. 6. Problem list continued to include post-concussion syndrome. PX 3, pg. 7. On March 9. 2016, Petitioner reported to Dr. Sayyad that Petitioner was experiencing severe headache. PX 3, pg. 13. On May 3, 2016, Dr. Sayyad recommended that Petitioner continue a home exercise program. PX 3, pg. 17. On May 24, 2016 Petitioner was seen by Dr. Silpa Katta at Marionjoy; Dr. Katta diagnosed post-concussion syndrome and gave information to Petitioner about botox injections. PX 3, pg. 22. Petitioner continued to report to Dr. Katta that Petitioner was experiencing intermittent head ache and pain in her head. PX 3, pg. 24. On June 14, 2016, Dr. Katta assessed Petitioner as having chronic intractable headaches. PX 3,

pg 25. On July 12, 2016, Dr. Sayyaad reported that Petitioner was still under care for the treatment of post-concussive syndrome. PX 3, pg. 28. Petitioner continues to treat with Dr. Sayyad and saw Dr. Sayyad in January 2018.

Dr. Boblick, who is board certified in internal medicine, testified by evidence deposition by agreement of the parties on June 16, 2016. PX 5. Dr. Boblick testified that Petitioner had a significant head injury and a significant concussion and that Petitioner has been left with post-concussive encephalopathy, or post-concussive syndrome. PX 5, pg. 20. Dr. Boblick opined that the injury was the significant cause of the post-concussive encephalopathy. PX 5, pg. 20. Dr. Boblick testified that as of December 2015, it was not likely that Petitioner was going to recover from the symptoms of post-concussive syndrome. PX 5, pg. 21-22.

On cross-examination Dr. Boblick noted that all of Petitioner's imaging studies had been normal PX. 5, pg. 22. He also confirmed that there was significance to the fact that there was a loss of consciousness associated with the Petitioner's fall PX 5, pg. 23. He could not recall reviewing the initial emergency room records but notes that the Petitioner had initially reported to him that she had a loss of consciousness following the fall PX 5, pg. 24

Dr. Boblick also testified that he had seen the Petitioner on May 24, 2011 he had found no clear organic pathology for her functional disorder. She had no identifiable structural problems that he could identify through any of the diagnostic studies or otherwise PX 5, pp. 26-27.

Dr. Boblick stated that the Petitioner did not have the coordination or the thought processes to be able to perform her job of a bus driver after the fall PX 5, p. 29). He admitted that there was nothing she complained of that she did not have control over in terms of her behavior PX 5, pp. 29-30). He also stated that there was no way to test whether her complaints of headaches were genuine nor complaints of lacking steadiness PX 5. P. 30).

With regard to physical restrictions, Dr. Boblick was unaware of any other physician who had restricted the Petitioner's activities PX 5, p. 31). He further admitted that his opinion that the Petitioner was unable to work was based at least in part on the Petitioner's self-reported complaints. Dr. Boblick noted Dr. Schneck was of the opinion that the Petitioner was not suffering from post-concussive syndrome but instead from a somatoform disorder which was a psychiatric diagnosis

Dr. Sayyad (PX6)

Dr. Sayyad, who is board-certified in physical medicine and rehabilitation and brain injury medicine and was director of the brain injury program at Marionjoy Rehabilitation Hospital, testified by evidence deposition by agreement of the parties on April 25, 2017. PX 6. Dr. Sayyad testified that Petitioner has post-concussion syndrome for which she has a complicated headache history. PX 6, pg. 30. Dr. Sayyad opined that that there is a causal connection between Petitioner's injury and the post-concussion syndrome. PX 6, pg. 31. Dr. Sayyad believes that the injury exacerbated any psychological overlay that Petitioner has experienced. PX 6, pg. 32. Dr. Sayyad placed Petitioner at a modified independent level regarding Petitioner's activities of daily living.

PX 6, pg. 33. Dr. Sayyad has not prescribed a functional capacity evaluation for Petitioner. PX 6. Pg. 44.

During cross-examination, Dr. Sayyad stated that 45 minutes was a significant period of time for a loss of consciousness PX 6, p. 36). She stated that if the Petitioner had reported no loss of consciousness at the time of her initial treatment in the emergency room, then that history could be significantly inconsistent with the history provided at Marianjoy PX 6, p. 37). Dr. Sayyad stated she could not remember reviewing any medical records that predated Petitioner's appearance at Marianjoy PX 6, p. 37). Finally, Dr. Sayyad also stated that she had never placed physical restrictions on the Petitioner PX 6, pp. 46-47).

Dr. Gary Skaletsky (RX1)

Dr. Gary S. Skaletsky, neurosurgeon, examined Petitioner under Section 12 at the request of the Respondent on: March 17, 2011; June 21, 2011; and December 1, 2014. RX 1. Dr. Skaletsy testified by evidence deposition by the agreement of the parties on September 14, 2017. RX 1. Dr. Skaletsky testified that Petitioner had sustained cerebral concussion and acute cervical strain. RX 1, pg. 12. As of June 21, 2011, Dr. Skaletsky felt that Petitioner could not return to work as a bus driver. RX 1, pg. 14. Dr. Skaletsky testified that there can be symptoms of concussion syndrome even if there was no loss of consciousness. RX 1, pg. 31. Dr. Skaletsky testified that the symptoms of concussion include: persistent headache, emotional lability, difficulty with mood and cognitive and memory difficulties. RX 1, pg. 32. Dr. Skaletsky testified that the main complaints Petitioner had, including headache, nausea and dizziness

remained the same over his three examinations. RX 1, pg. 36. Dr. Skaletsky indicated that he reviewed a psychological examination that had two differential diagnoses for Petitioner: complex post-concussive syndrome; and psychophysiological symptoms with possible somatization and somatoform tendencies. RX 1, pg. 41. Dr. Skaletsky estimated that 5% of his practice involved long-term complaints of headaches and potential post-concussive syndrome. RX 1, pg. 31.

At the time of the hearing, Petitioner continues to notice head pain that stays with her all day. Petitioner notices that her vision is sensitive to light. Petitioner gets dizzy when she bends and uses a walker to balance herself. Petitioner has sensitive hearing. Petitioner notices that her speech is different. Petitioner does not drive now and does not have a valid driver's license.

Regarding her physical and medical condition, Petitioner described her health prior to December 2010 as being normal. For several years prior to December 2010, Petitioner had been driving school buses. Prior to driving school buses, Petitioner had a laundry business that required her to figure things, hire employees and fill out forms. The Petitioner testified that she had not worked since the accident date and had retired from her job effective May 21, 2016 (TR. 18). On June 14, 2016, Respondent notified Petitioner that it accepted her retirement as a bus driver. PX 7. There is no evidence that Respondent ever offered Petitioner any job after the stipulated accidental injuries.

Petitioner testified that since the accident she had head pain when she awoke in the morning that stayed with her all day. She was sensitive to light. She became dizzy when bending down. She used a walker because she felt unstable on her feet while

walking. Her hearing was very sensitive and that she could no longer drive. She could not remember when her drivers' license had expired.

The Petitioner further stated that she had difficulty with her speech. With respect to the pronunciation of words, the Petitioner stated that "it's either I drag them out or for some reason I don't get the other part of the word." She further described her health as normal before the accident and that she had driven school buses for several years before this incident (TR. 20-21). Before working for the respondent, she stated that she owned a laundry service (TR. 22).

On Cross examination, the Petitioner stated that she was told that it was 45 minutes to an hour before she was found after falling but she had not memory of that time (TR. 24). She said that she was unconscious during that period of time. She stated she could not recall providing a history at Delnor that she had not lost consciousness after the fall.

The Petitioner testified that she received no medical care between the date of the accident and when she was seen by Dr. Boblick on January 7, 2011 (TR. 27). As of the date of Arbitration, the Petitioner stated said that she had been seeing Dr. Boblick for 29 years (TR. 27).

The Petitioner stated that she was unable to recall when Dr. Boblick referred her to Marianjoy for care (TR. 29). She was advised that Dr. Boblick's deposition was taken in June 2016 but still could not remember when Dr. Boblick referred her there (TR. 29).

With reference to her testimony about not driving, she admitted that no physician was restricting her from driving (TR. 30), although she later stated she did not know if there was a record from a medical provider restricting her from driving (TR. 31).

FINDINGS/ANALYSIS

CAUSAL CONNECTION

The Petitioner, Eileen Budzban, had worked as a bus driver for Respondent School District 303 for several years. On December 6, 2010, Petitioner reported for duty as a bus driver and was walking around to check out the bus as required. She slipped and fell and hit her head on the ground. Almost 45 minutes to an hour later, (because Petitioner failed to report for her scheduled pick-ups) there was a search. Petitioner was discovered and transported to Delnor Hospital Emergency room via ambulance. RX 2, pg. 1. It was reported in the history that Petitioner fell and struck the back of her head and she had no loss of consciousness (LOC). RX 2, pg. 1. Petitioner was complaining of severe occipital pain, and cervical and lumbar pain and wanting to go to sleep. RX 2, pg. 1. CT scan of the brain was negative for acute changes. RX 2, pg. 2. Petitioner was discharged with head injury instructions. RX 2, pg. 2. Discharge impressions were: acute closed head injury without loss of consciousness and acute cervical and lumbar strain. RX 2, pg. 3.

On December 13, 2010, Petitioner followed up with her primary care physician Dr. John Boblick. She told him that she had lost consciousness due to her fall and testified in court that she surmised that she had lost consciousness based on conversation with a co-worker and the time lapse between her fall and the arrival of

medical help. She does not specifically recall a LOC. Her belief that she lost consciousness is honest and based on circumstances of her accident. She does not embellish the facts but plainly explains what she recalls and believes.

The parties have stipulated to an accident arising out of and in the course of employment. The remaining crucial issue is causal connection which is partly dependent of the issue of whether there is a LOC and Petitioner's prior medical neurological issues which may be (rather than her work-accident) responsible for Petitioner's current condition. Petitioner's current medical condition indicated a substantial mental and physical deterioration. Even without expert medical opinion, Petitioner's loss of mental capabilities is obvious in her extreme difficulty in answering questions, recalling facts and as she struggles to find simple words to answer basic questions. She walks with a walker and had obvious physical limitations. The former bus driver no longer drives due multiple factors including dizziness, balance and other cognitive issues. Although there is no clear medical testimony that a doctor has limited her from driving, there is no medical provider (including IME) who has proposed that Petitioner can or could have returned back to being a school bus driver. Petitioner's testimony about her current medical condition is credible and supported by the entirety of the medical reports.

As to causation, per Petitioner's personal physician, Dr. Boblick, Petitioner's continues to suffer from the effects of her post-concussion syndrome. Petitioner's brain injury specialist, Dr. Sayyad, opined that there is causal connection between the accident and Petitioner's current condition, because the accidental injuries exacerbated any psychological overlay that Petitioner was experiencing. Dr. Skaletsky, the IME,

opined that Petitioner had suffered a concussion and an acute cervical stain but that her current condition was not related to her post-concussion; however, the post-concussion syndrome might have triggered Petitioner's current problems. Specifically, his diagnosis was complex post-concussive syndrome; and psychophysiological symptoms with possible somatization and somatomform tendencies. RX 1, pg. 41 After reviewing and considering the opinions of all the medical providers, the medical records and the testimony of the witnesses, the Arbitrator concludes that Petitioner's current condition of ill-being, post-concussion syndrome, is causally related to the accidental injuries of December 6, 2010. In support of her position, the Arbitrator reasons as follows:

Currently, Petitioner continues to suffer from symptoms such as headache and dizziness that all the doctors agree are consistent with post-concussion syndrome. The major disagreement between Petitioner's doctors and the IME, Dr. Skaletsky, is focused of the severity of the accident, the slip and fall, and whether it resulted in LOC. Dr. Skaletsky places great emphasis on the fact that the Delnor records do not indicate a LOC. The Arbitrator (as the finder of facts) finds ample circumstantial evidence that leaves little doubt that Petitioner did suffer a LOC. (Detailed reasoning follows). Second area of contention between the treating physician and the IME is whether the concussion had resolved and Petitioner's condition is related to her other unrelated, pre-existing neurological issues. As to this point, the Arbitrator notes that the IME opinion on causation is not a clean opinion in that he does not discount the possibiiity that the concussion and the accident likely triggered Petitioner's current condition. Based on absence of a clear, supported contrary opinion the Arbitrator finds that Petitioner has met her burden of proving that her current condition is causally connected to her work

accident. As additional support for her decision on this point, the Arbitrator acknowledges that Petitioner likely had some pre-existing medical history prior to her accident. Although the exact nature of this is not clear from the evidence there appears to be some history of depression and ADHD. However, in spite of these issues, Petitioner was perfectly functional. She had worked for the Respondent as a bus driver for several years. She was able to drive and ambulate without any problems. There is no history of dizziness or headaches that interfered with her work. After the accident, her work life effectively ended. There is no great disagreement amongst the medical providers, that Petitioner can no longer work as a bus driver. Effectively, she has lost her profession.

This history of Petitioner's injuries and the resulting downward spiral in her health is amply supported by the medical records. The records show that Petitioner was initially diagnosed with acute closed head injury on the date of the accidental injuries in the emergency department at Delnor Hospital. Since then, the following treating doctors have diagnosed the Petitioner as suffering from post-concussion syndrome: Dr. Boblick, Dr. Flaster, Dr. Bonesteel and Dr. Sayyad. Dr. Schneck thought that the post-concussion syndrome might have been of a somatization style. The consistence and nature of Petitioner's health issues, following her accident, support the finding that work accident is the cause of Petitioner's current condition or at least contributed or triggered her condition to the point where she is no longer able to work. The Arbitrator also disagrees with Dr. Skaletsky that Petitioner's current condition is solely due to prior mental health issue. The unbroken medical and evidentiary chain suggests that the Petitioner's work accident caused or triggered her condition.

As to the second area of contention between the IME and treating physician's opinions, namely whether the Petitioner suffered a LOC, the Arbitrator finds that the Petitioner did suffer a prolonged LOC. Dr. Skaletsky's opinion is that Petitioner did not experience a LOC and therefore the concussion likely resolved and is not the cause of her current condition. The treating physicians including Dr. Boblick accept Petitioner's account that she suffered a LOC. He attributed significant weight to this fact and states that this is "a big deal". The Arbitrator agrees that this is a significant medical fact and disagrees with Dr. Skaletsky's conclusion based on the credible testimony and evidence presented at trial. It is uncontested that Petitioner slipped and fell hard and received a head injury. She is reported missing on her bus route and discovered fallen at the injury site. The Delnor records indicate that Petitioner did not report LOC. Petitioner testified that she has a fall and was told by her fellow employees that she was not discovered for 45 min. Petitioner states that she does not remember what happened after her fall until she was treated. The time-line indicated Petitioner was missing for a substantial period of time (45 min to 1 hour). She tells her doctor, during the first visit, that she had a LOC due to her fall. Petitioner is found lying at the sight of her fall. She did not call for help or report her injuries, rather co-workers or paramedics responded to the location. There are no fractures, sprains or other conditions that prevented Petitioner from getting up after her fall and seeking help. In order to discount evidence that she suffered a LOC, one would have to suppose that Petitioner choose to lay on an icy, cold parking lot and pretend to lay there for 45 minutes until someone, hopefully, would come and discover her. The Arbitrator has little doubt that Petitioner suffered a LOC that resulted in a severe concussion. The medical records from Delnor that are neither prepared or

reviewed by Petitioner for their accuracy are insufficient to impeach or discredit the testimony that Petitioner suffered a LOC. Per basic rules of evidence and reasoning, the Delnor reports prepared by the staff are not sufficient impeachment of Petitioner claim that she likely suffered a LOC. Any other finding defies logic and is counter to Petitioner's otherwise truthful presentation. Therefore, the Arbitrator disagrees with Dr. Skaletsky on this crucial issue.

In agreeing with Dr. Boblick on causal connection the Arbitrator notes that he treated the Petitioner both before and after the accidental injuries and therefore gives weight to his opinion. He is in a better position to establish a baseline for her pre-existing condition. Additionally, Dr. Boblick's opinion is supported by Dr. Sayyad who testified that there was a causal connection between the accidental injuries and the Petitioner's current condition of ill-being, post-concussion syndrome. Dr. Sayyad testified that the accidental injuries exacerbated any psychological overlay that Petitioner was experiencing. The Arbitrator notes that Dr. Sayyad is board certified in brain injury and is the director of a brain injury program and therefore gives weight to her opinion.

The Arbitrator further discounts Dr. Skaletsky's testimony because he fails to adequately explain why the cervical strain and not the concussion caused Petitioner's headaches and lingering problems of dizziness and cognitive limitations. Dr. Staketsky concurs that Petitioner suffered an acute cervical strain and a concussion at the time of the accidental injuries. He acknowledged that headaches were consistent with post-concussion syndrome but fails to persuasively explain why the headaches were caused by the sprain and not the concussion. Compared to the opinion of Dr. Sayyad, the

Arbitrator gives less weight to the opinion of Dr. Skaletsky. The Petitioner has been complaining of headaches consistently since the accidental injuries and Dr. Skaletsky's practice consists of only about 5% treatment of concussion, while Dr. Sayyad is board certified in brain injury and directs a brain injury program.

Therefore, the Arbitrator finds that that the Petitioner's current condition is causally related to her work accident.

MEDICAL TREATMENT

Based on the conclusion relating to causal connection above, the Arbitrator concludes that the medical treatment Petitioner has received from Dr. Boblick and from Dr. Sayyad has been related to the accidental injuries and has been reasonable and necessary.

TEMPORARY TOTAL DISABILITY

The Arbitrator concludes that that Petitioner was temporarily totally disabled (TTD) under Section 8(b) of the Act from December 7, 2010, the day after the stipulated accidental injuries, until May 31, 2016, the effective date of Petitioner's retirement as a school bus driver for Respondent, a period of 285 & 6/7 weeks.

Dr. Boblick never released the Petitioner to return to work. Dr. Sayyad testified that Petitioner was at a modified independent activity level requiring an assistive device. Petitioner does not have a driver's license. Respondent never offered to take Petitioner back to work in any job.

The Respondent paid TTD benefits through May 8, 2012. The Respondent now claims that Petitioner was entitled to TTD only through August 4, 2011, seemingly based on the opinion of Dr. Skaletsky, who reported that although Petitioner was not capable of competitive employment as a bus driver on June 21, 2011, suggested that Petitioner could return to work as a school bus driver after six weeks of treatment. The Arbitrator notes that Dr. Skaletsky was speculating regarding Petitioner's return to work and therefore gives little weight to this opinion. Even a cursory view of Petitioner's diminished capabilities in court make it abundantly clear that Petitioner cannot return to driving a school bus.

PERMANENT PARTIAL DISABILITY

The Arbitrator concludes that Petitioner sustained accidental injuries that caused 40% loss of use of her whole person pursuant to Section 8(d)2 of the Act. (The accidental injuries occurred prior to September 1, 2011, so the Arbitrator does not apply Section 8.1b of the Act.)

Dr. Boblick never released Petitioner to return to work. Dr. Sayyad has placed Petitioner at a modified independent level. Petitioner has head pain, sensitive vision and hearing, and dizziness. Petitioner continues to suffer from cognitive and neurological issues and has trouble communicating. Petitioner uses a walker to balance herself. Petitioner does not drive and does not have a valid driver's license. Petitioner's condition is not likely to improve and appears to be rapidly deteriorating. Petitioner was only 51 years of age at the time of her accident and has retired from employment. Prior to retirement, Respondent did not offer any modified employment to the Petitioner.

Petitioner continues to suffer from cognitive and neurological issues and has trouble communicating. All medical opinions and findings support that Petitioner can no longer drive, much less drive a school bus.

The Arbitrator finds that the accidental injuries Petitioner sustained partially incapacitate Petitioner from pursuing the duties of her usual and customary line of employment as a school bus driver.

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

David Tindall,

Petitioner,

vs. NO. 18WC001834

State of Illinois Menard Correctional Center,

19IWCC0072

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 issue(s) of accident, 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 May 14, 2018 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.

Pursuant to §19(f)(1) of the Act, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

DATED: FEB 5 - 2019

Stephen J. Mathis

David L. Gore

SJM/sj
o-1/10/2019
44

DISSENT

I respectively dissent from the majority decision affirming and adopting the Decision of the Arbitrator finding Petitioner proved he sustained a compensable accident on November 27, 2017. I would have found that Petitioner did not sustain his burden of proving his accident arose out of his employment and reversed the Decision of the Arbitrator.

Petitioner injured his right shoulder while ascending stairs, falling forward, and braking his fall with the right arm. He testified as he was coming into work, he was carrying a can of soda, and "flipping through his keys" and was looking down at his keys when he lost his balance on the stairs. He also testified that the door to his office was locked. However, in both the Form 45 and in the Employee's Report of Incident, there was absolutely no mention of Petitioner carrying keys at the time of the accident, even though both reports referred to his carrying the can of soda. In finding that Petitioner's accident arose out of his employment the Arbitrator specifically noted the fact that Petitioner had to use the keys to unlock his office was a factor supporting connecting the accident to his employment.

The normal use of stairs is not considered a risk specifically associated with a claimant's employment. In the instant claim, there was no evidence that the stairs at issue were in any way defective, slippery, or constituted any type of hazardous condition. The Arbitrator noted that while there was no evidence whether the public had access to the stairs, he "inferred" that they did not because the stairs were in a prison. I am not sure whether such an inference is permissible under Section 1.1(e). In any event, with or without such inference, I do not believe that Petitioner sustained his burden of proving his accident on November 27, 2017 arose out of

his employment. There was no evidence that the stairs were defective or dangerous, and there was no evidence that he had to use the stairs excessively in the course of his employment. Therefore, in my opinion the risk of falling on stairs was not a risk associated with Petitioner's employment and therefore non-compensable.

For the reasons above, I would have found that Petitioner did not sustain his burden of proving his accident arose out of his employment, reversed the Decision of the Arbitrator, and denied compensation. Therefore, I respectfully dissent from the decision of the majority

Deborah L. Simpson

Deborah L. Simpson

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

TINDALL, DAVID
Employee/Petitioner

Case# **18WC001834**

STATE OF IL/MENARD C C
Employer/Respondent

19IWCC0072

On 5/14/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.00% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
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 SERVICES
BUREAU OF RISK MANAGEMENT
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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 14 2018

Ronald A. Rascia, Acting Secretary
Illinois Workers' Compensation Commission

19IWCC0072

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David Tindall
Employee/Petitioner

Case # 18 WC 01834

v.

Consolidated cases: n/a

State of IL/Menard C.C.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on April 10, 2018. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, November 27, 2017, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $77,098.60; the average weekly wage was $1,482.66.

On the date of accident, Petitioner was 47 years of age, married with 1 dependent child(ren).

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00. The parties stipulated that at the time of trial, TTD benefits had been paid in full.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall authorize and pay for prospective medical treatment as recommended by Dr. George Paletta.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

May 11, 2018
Date

MAY 14 2018

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on November 27, 2017. According to the Application, Petitioner sustained an injury to the right hand, right shoulder and body as a whole when he tripped and fell (Petitioner's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and prospective medical treatment. Respondent disputed liability on the basis of accident (Petitioner's Exhibit 1).

Petitioner worked for Respondent as a Correctional Supply Supervisor and was employed by Respondent for approximately 25 years. Petitioner worked the day shift that began at 7:30 AM and ended at 3:30 PM. On November 27, 2017, Petitioner had just arrived at Respondent's facility. He initially walked up a flight of stairs on the outside to a door that was already open. He turned around to walk down a flight of stairs that led to his office. Petitioner was carrying his keys in his left hand and a cup of soda in his right hand. Petitioner then proceeded to walk down the stairs. While Petitioner was in the process of walking down the stairs, he was going through his keys to locate the key that unlocked the door to his office. At that time, Petitioner apparently caught his toe on one of the steps and fell forward. He reached out his left hand to grab the hand rail but was unable to do so. When he fell, Petitioner dropped the cup of soda and his right arm went back behind him which caused him to injure his right shoulder.

Petitioner testified that the door to his office was locked for security reasons because it was in a prison. Petitioner stated he was carrying a cup of soda because there was not a water fountain in or near his office so the only way he could get a drink was to take one with him.

Petitioner reviewed photographs of the stairs where he sustained the fall and noted that there were some chips and cracks on the surfaces of some of the steps (Respondent's Exhibit 3). On cross-examination, Petitioner stated he walked up/down the stairs every day and had never sustained a fall before. Petitioner agreed that there was nothing on the surface of the steps such as water or a foreign object which caused him to sustain the fall. Petitioner also stated he did not grab the hand rail when he fell.

The First Report of Injury was received into evidence at trial. According to it, at first landing, Petitioner tripped on stairs with a soda in his right hand, he grabbed the rail with his left hand, but did not fall, he put his right arm out to stop on the bottom landing and his arm slipped and went behind him. This report was prepared by Jennifer Boisselle on November 27, 2017 (Petitioner's Exhibit 9).

A Notice of Injury form was completed and signed by Petitioner on November 27, 2017. The Petitioner described the accident as occurring when he fell on the stairs, "...tried to break fall with right arm, arm was wrenched up and back behind me." (Petitioner's Exhibit 9).

An Incident Report was also prepared and signed by both Petitioner and Lieutenant James Powell on November 28, 2017. According to that report, Petitioner was about halfway down the stairs when he stumbled and fell forward grabbing the hand rail with his left hand while falling forward. He then reached up with his right arm to catch himself at the bottom of the stairs. When

his right hand landed on the floor, it caused his arm to go up and behind him (Petitioner's Exhibit 9).

A Supervisor's Report dated November 27, 2017, was completed by Richard Brueggemann, which noted he had received a call from Petitioner at 8:00 AM and was advised that Petitioner had fallen down "stair steps." The report erroneously stated Petitioner had injured his left shoulder (Petitioner's Exhibit 9).

Petitioner initially sought medical treatment in the ER of Chester Memorial Hospital on November 27, 2017. According to the ER record, Petitioner sustained an injury when he stumbled, grabbed a rail with his left arm and fell on his outstretched right arm. Petitioner was diagnosed with a shoulder sprain and directed to be seen by his primary care physician (Petitioner's Exhibit 3).

Petitioner was then seen by Dr. David Walls who ordered an MRI scan of Petitioner's right shoulder. The MRI was performed on November 30, 2017, and it revealed tears of the supraspinatus and subscapularis tendons (Petitioner's Exhibit 4).

Petitioner was subsequently seen by Dr. George Paletta, an orthopedic surgeon, on December 20, 2017. Dr. Paletta examined Petitioner and reviewed the MRI scan. He agreed that the MRI revealed a tear of the supraspinatus, but was not certain if there was a tear of the subscapularis. Dr. Paletta ordered an MRI arthrogram (Petitioner's Exhibit 5).

The MRI arthrogram was performed on December 28, 2017. According to the radiologist, it revealed full thickness tears of both the supraspinatus and subscapularis tendons as well as tendinosis of the supraspinatus and infraspinatus (Petitioner's Exhibit 6).

Dr. Paletta saw Petitioner on January 2, 2018, and reviewed the MRI arthrogram. At that time, Dr. Paletta recommended Petitioner undergo arthroscopic surgery (Petitioner's Exhibit 5).

Dr. Paletta performed arthroscopic surgery on January 16, 2018. The surgical procedure consisted of debridement of the labrum, subscapularis repair, subacromial decompression, bursectomy, acromioplasty, repair of the supraspinatus tendon and biceps tenodesis (Petitioner's Exhibit 7).

Following surgery, Dr. Paletta saw Petitioner on February 5, 2018, and ordered physical therapy. When Dr. Paletta saw Petitioner on March 19, 2018, he noted that the range of motion of the right shoulder was excellent. He authorized Petitioner to return to work at full duty, but noted Petitioner's job did not require him to do any overhead work or lift anything over 20 pounds. However, Dr. Paletta directed Petitioner to continue physical therapy and opined Petitioner was not at MMI (Petitioner's Exhibit 5).

At trial, Petitioner testified his right shoulder condition was much better now than what it was prior to surgery. Petitioner has continued with physical therapy.

Conclusions of Law

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

The Arbitrator concludes Petitioner sustained an accidental injury arising out of and in the course of his employment for Respondent on November 27, 2017.

In support of this conclusion the Arbitrator notes the following:

Petitioner credibly testified about the circumstances of the accident of November 27, 2017, when Petitioner fell down stairs while walking to his office.

Petitioner's testimony at trial regarding the accident of November 27, 2017, was consistent with the Notice of Injury form which was completed and signed by Petitioner.

The Arbitrator notes that the First Report of Injury and Incident Report both indicated that Petitioner grabbed the rail when he sustained the fall, and Petitioner's testimony at trial was that he did not grab the rail. While this is an inconsistency, the Arbitrator does not find it to be of any great significance.

The Arbitrator likewise finds the fact that the reports did not note Petitioner was looking through keys at the time he sustained the accident to be a significant omission.

It is clear from the evidence that Petitioner sustained a fall down the stairs leading to his office on November 27, 2017, and sustained an injury to his right shoulder.

There was no question that Petitioner's accident occurred while in the course of his employment for Respondent because it occurred while Petitioner was in the process of reporting to work and was on Respondent's premises. Sisbro v. The Industrial Commission, 797 N.E.2d 665 (Ill. 2003).

The critical issue in this case is whether Petitioner's accident arose out of his employment for Respondent. For Petitioner to prove that his accident arose out of his employment for Respondent, he must prove that his employment subjected him to a greater degree of risk than the general public. Caterpillar Tractor Co. v. Industrial Commission, 541 N.E.2d 665 (Ill. 1989).

Falling while traversing stairs is a neutral and an injury sustained as result thereof are generally not found to arise out of one's employment. However, if one's employment creates a risk to which the general public is not exposed, an injury will be found to arise out of one's employment. Village of Villa Park v. Illinois Workers' Compensation Commission, 3 N.E.3d 885, 890 (Ill. App. 2d Dist. 2013).

In the Villa Park case, the employee worked for Villa Park as a Community Service Officer. While on duty, the employee and another officer walked toward the back of the police station, turned and began to walk down a stairwell to the locker room which was located on the lower level. The locker room was for the use of the police officers in a secured area not accessible by the general public. When the employee reached the third step, his right knee gave out on him

which caused him to fall. The employee testified he had to continually use the stairway both for his personal comfort and to perform his work-related duties. Villa Park at 886-887.

The Appellate Court affirmed the award of compensation benefits and found that the frequency in which the employee had to traverse the stairs constituted an increased risk on a quantitative basis from that of the general public. Villa Park at 891.

In the case of Knox County YMCA v. Industrial Commission, 725 N.E.2d 759 (Ill. App. 3d Dist. 2000), the Appellate Court affirmed an award of compensation benefits to an employee who sustained an injury while descending a staircase. In that case, the employee worked for the YMCA as a childcare worker. As part of her job, Petitioner was required to attend a CPR class. Petitioner worked from 3:00 PM to 6:00 PM and the CPR class was at another location and was scheduled to begin at 6:00 PM. While on the way to the CPR class, Petitioner stopped and purchased a sandwich and soft drink. Petitioner attended the class for approximately 15 minutes and was then informed she could leave. When she left the class, she had her purse in one hand and the soft drink in the other hand, and while descending a staircase, she fell and sustained an injury to her left leg. YMCA at 761.

The Appellate Court affirmed the award of compensation benefits. The Court noted that descending a staircase at the employer's place of business does not establish a risk greater than that the general public. The Court went on to reason "However, as the Commission noted, the presence of the soft drink in one hand and the purse in the other, both of which claimant would not have had absent the mandatory CPR class, increased the risk to claimant. Absent the purse and the soft drink in her hands, claimant would have been able to grab onto the stairwell's railings." YMCA at 763.

In the instant case, Petitioner was descending stairs that led to his office. There was no testimony whether the stairs were available for use by the public; however, given the fact that they were located in a prison, the Arbitrator believes he can infer they were not, in fact, available for use by the public. Petitioner's office was locked for security reasons so it was necessary for him to use his key to unlock the door to his office. Petitioner's having a cup of soda in one hand was made necessary because there was not a drinking fountain in or near his office.

Based upon the preceding, the Arbitrator concludes that Petitioner was subject to a risk of injury greater than that of the general public and his accident arose out of his employment by Respondent.

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

The Arbitrator concludes that all the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

The Arbitrator concludes Petitioner is entitled to prospective medical treatment as determined by Dr. Paletta.

In support of this conclusion the Arbitrator notes the following:

When Petitioner was last seen by Dr. Paletta on March 19, 2018, Dr. Paletta opined Petitioner was not at MMI and should continue physical therapy.

William R. Gallagher, Arbitrator

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

Kristina Skeens,

Petitioner,

vs.

NO: 16 WC 039110

State of Illinois/Pontiac Correctional Center,

Respondent.

19IWCC0073

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of 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 July 17, 2018 is hereby affirmed and adopted.

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

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

19IWCC0073

Pursuant to §19(f)(1) of the Act, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

DATED: FEB 6 - 2019
SJM/sj
D-1/10/2019
44

Stephen J. Mathis

Deborah L. Simpson

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SKEENS, KRISTINA
Employee/Petitioner

Case# **16WC039110**

19IWCC0073

SOI/PONTIAC CORRECTIONAL CENTER
Employer/Respondent

On 7/17/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% 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:

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

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

6079 ASSISTANT ATTORNEY GENERAL
BRADLEY DEFREITAS
500 S SECOND ST
SPRINGFIELD, IL 62706

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUL 17 2018

Ronald A. Pasula
RONALD A. PASULA, ACTING SECRETARY
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

19IWCC0073

☐ 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

Kristina Skeens
Employee/Petitioner

v.

State of Illinois/Pontiac Correctional Center
Employer/Respondent

Case # 16 WC 39110

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 **Bloomington**, on **June 25, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8-21-16**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$81,599.96**; the average weekly wage was **$1569.23**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$29,366.98** for full pay Petitioner received while she was off work after her 8-21-16 accident.

Respondent is entitled to a credit of **$5876.75** under Section 8(j) of the Act.

ORDER

The parties stipulated, and the Arbitrator finds, that Petitioner was paid her full salary after her 8-21-16 work accident and that all benefits for lost time have been paid.

Respondent shall be given a credit for **$5876.75** for medical bills that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $613 to Duffy Ambulance, $6,487.85 to St. James Hospital, $1,765 to Twin Cities Behavioral (Dr. Miller), and $902 to Central Illinois Radiological Association, as provided in Sections 8(a) and 8.2 of the Act.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $775.18/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

D. Dyas McCarty

Signature of Arbitrator

July 12, 2018
Date

JUL 17 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 48-year-old correctional officer, sustained an accidental injury that arose out of and in the course of her employment by Respondent on 8-21-16. On that date, Petitioner was performing a cell compliance check with an inmate, Daniel Hadnot, as he had too much property to keep in his cell. Inmate Hadnot suddenly struck Petitioner twice in the head and she fell backwards striking her head on concrete. Five inmates became involved in an altercation with a total of 6 correctional officers and a mini riot ensued at Pontiac Correctional Center. After the altercation ended, Petitioner had vertigo and was too dizzy to stand. Petitioner was transported by ambulance to OSF St. James Hospital.

Numerous incident reports were filled out by various officers about the 8-21-16 incident. Officer Goldsmith stated that Inmate Hadnot struck Petitioner in the head area and charged at her. Petitioner then fell backwards and struck the concrete. Inmate Hadnot then struck Officer Goldsmith in the back of the head and the neck. Officer Goldsmith said that pepper spray was utilized and a warning shot was heard (PX 5, p. 1). Officer Horrom stated in his report that Inmate Hadnot struck Petitioner in the face with a closed fist. Officer Horrom was then struck by another unknown offender in the back of the head. A warning shot was later fired (PX 5, p. 5). The Form 45 was consistent with the incident reports (RX 2). On 1-30-18, inmate Hadnot was sentenced to 30 years for aggravated battery by Judge Bauknecht in Livingston County for the 8-21-16 incident (PX 6).

Petitioner was treated at St. James emergency room on 8-21-16. Petitioner gave a consistent history of the accident. The emergency room physician ordered a CT of Petitioner's head, or brain, without contrast which showed no evidence of acute intracranial abnormality (PX 4, p. 2). The emergency room physician ordered a CT of Petitioner's cervical spine which the radiologist read as degenerative spondylosis with no evidence of acute fracture or acute subluxation. Petitioner underwent an x-ray of her pelvis which the radiologist read as showing no acute fracture. Petitioner underwent an x-ray of her sacrum and coccyx which the radiologist stated showed a slight retrolisthesis of C1 which is commonly developmental but may be secondary to age-indeterminate trauma (PX 4, p.p. 3, 4). The emergency room physician diagnosed Petitioner as having head trauma and acute cervical strain (PX 4, p. 14).

On 8-22-16, Petitioner treated with her family doctor, Dr. Rinker. Dr. Rinker took a history of Petitioner having multiple contusions and sprains status post-battery at work. Dr. Rinker stated that Petitioner had back pain, tailbone pain, dizziness, neck pain, and left arm pain especially over the posterior aspect of her triceps. Dr. Rinker stated that this was all acute in nature, status post-battery (PX 8, p. 1). Dr. Rinker diagnosed

Petitioner as having a concussion, a neck strain, strain of the left triceps, lumbar strain, and a major depressive disorder. Dr. Rinker kept Petitioner off work and prescribed Tylenol 3 (PX 8, p.p. 4, 5).

On 8-29-16, Dr. Rinker ordered plain x-rays of Petitioner's pelvis area and lateral sacrum and coccyx. Dr. Rinker kept Petitioner off work and referred her to St. James Hospital for physical therapy (PX 8, p. 8). Dr. Rinker noted that Petitioner had dizziness and giddiness and that she had major depressive disorder, single episode, moderate (PX 8, p. 10).

On 9-1-16, Petitioner underwent physical therapy at St. James Hospital. The therapist took a consistent history of accident. The therapist stated that Petitioner had ongoing low back pain, neck pain, back of the head pain, and dizziness (PX 4, p.p. 15, 16).

On 9-6-16, Dr. Rinker stated that Petitioner had pain with flexion of her back, that she had neck pain, pain in her tailbone, pain in the left arm, and dizziness. Dr. Rinker stated that this was all acute in nature, status post-battery. Dr. Rinker stated that Petitioner presented with anxiety and that she was having serious issues with the battery. Dr. Rinker stated that Petitioner was angry and that she had a lot of anxiety regarding her employment and felt that she was "mentally raped" every day. Dr. Rinker stated that Petitioner's vertigo was peripheral and most likely due to crystals. Dr. Rinker stated that Petitioner had a number of symptoms that are suggestive of post-traumatic stress. Dr. Rinker recommended psychiatric care (PX 8, p. 11). Dr. Rinker stated that Petitioner had hyper-arousal and agitation from the post-traumatic stress disorder. Dr. Rinker found that Petitioner had high blood pressure and prescribed Atenolol. Dr. Rinker prescribed Alprazolam, or Xanax, for anxiety and panic disorders. Dr. Rinker recommended that Petitioner go to counseling to treat her PTSD and anxiety (PX 8, p. 13).

Petitioner treated with Dr. Cheri Miller, a psychologist, on 9-13-16. Dr. Miller took a history that Petitioner was seeking therapy after being assaulted at work on 8-21-16 as a correctional officer. Dr. Miller stated that Petitioner had a history of depression and anxiety. Dr. Miller stated that Petitioner sustained a concussion and a back injury as a result of the assault (PX 7, p. 17).

Petitioner underwent physical therapy at St. James Hospital through 10-12-16. At that time, the therapist stated that Petitioner was at maximum benefit of skilled therapy. The therapist noted that Petitioner had stiffness and difficulty getting out of bed after attending a festival on the previous Sunday for two hours. The therapist stated that Petitioner stretches to relieve her stiffness. The therapist stated that Petitioner had improved with regard to her cervical and lumbar pain and that she had partially met her goals for improvement. The therapist noted that Petitioner had decreased pain with an average of 2/10 or less and that she was able to stand with less difficulty. The therapist recommended a specific home exercise program (PX 4, p.p. 33, 34).

On 12-1-16, Dr. Rinker stated that Petitioner presented with memory loss. Dr. Rinker stated that Petitioner's depression was somewhat improved but that she was restless, that she was losing things, and that she had poor focus. Dr. Rinker stated that Petitioner was status post-closed head injury with concussion and that she was on Xanax which had a 30% chance of causing poor focus. Dr. Rinker stated that Petitioner presented with symptoms of post-traumatic stress and functional impairment after a highly traumatic event (PX 8, p. 38). Dr. Rinker diagnosed Petitioner with a concussion and discussed regarding a new direction in employment if return to work is too traumatic psychologically (PX 8, p. 41).

Petitioner testified that Dr. Rinker released her to return to modified duty on 1-6-17. Petitioner said that she returned to modified duty that required less contact with the inmates.

Petitioner underwent behavioral health psychotherapy directly related to the incident through 8-24-17. On 2-2-17, Dr. Miller's record states that contact with inmates is a trigger for Petitioner kicking up fear, startle response, and nauseousness (PX 7, p. 8). On 3-2-17, Dr. Miller stated that Petitioner was present when another officer was stabbed by an inmate and that she went into automatic pilot and reacted and followed procedures. Dr. Miller stated that afterwards Petitioner found herself being significantly more angry with a shorter fuse. Petitioner had difficulty sleeping and was taking a muscle relaxant (PX 7, p. 7). On 5-5-17, Dr. Miller stated that Petitioner was having a slight spike in anxiety as she will be returning to full duty on Sunday and will have direct contact with inmates. Dr. Miller stated that Petitioner needed to monitor being triggered and the return of acute stress symptoms (PX 7, p. 4). On 5-19-17, Dr. Miller stated that Petitioner experienced a spike in anxiety and muscle tension with disruption in sleep after she had been in the cell block recently. Dr. Miller discussed the pros and cons of seeking a promotion in order to reduce her contact with the inmates (PX 7, p. 3). On 6-29-17, Dr. Miller stated that Petitioner needed Xanax to sleep at night (PX 7, p. 2).

In a 2-page narrative report dated 1-8-18, Dr. Miller stated that Petitioner sustained an Acute Stress Disorder as a direct result of her assault. Dr. Miller stated that the diagnosis was based on the following criteria: Victim of a traumatic event, a response which included fear and helplessness; increased arousal; disturbance of sleep and appetite; fluctuations of mood, numbing to irritability; flashbacks; short term memory, problem solving and recall difficulties. Dr. Miller stated that Petitioner's victimization breached her sense of safety and control and that her sense of self was altered leaving her with limitations in trust, ability to relate to others, and difficulties performing the duties of her job and managing her household. Dr. Miller stated that healing from an assault/trauma can be a long and uneven journey and that Petitioner needed to learn new connections to others post-assault. Dr. Miller stated that since the assault, reconnecting with coworkers would take longer; however Petitioner had made significant strides in that area. Dr. Miller stated that Petitioner demonstrated a desire to heal from the assault and to address her depression and anxiety. Dr. Miller stated that Petitioner had been able

to reduce the acute stress symptoms. Dr. Miller stated that there were certain facets of Petitioner's job (i.e. being in the cell blocks with inmates) that are triggers and creates fear and safety concerns. Dr. Miller stated that there were many times that the symptoms were triggered and would reappear, but that Petitioner was becoming more effective at reducing and managing the symptoms (PX 1).

Petitioner testified that after her assault on 8-21-16, she experienced vertigo and dizziness. Petitioner said she underwent two physical therapy sessions to treat her vertigo. Petitioner said that she continued to experience a few episodes of vertigo after she completed her physical therapy. On 8-31-17, Petitioner treated at St. James emergency room for an acute onset of dizziness. The emergency room physician stated that Petitioner took a Xanax at home prior to arrival (PX 4, p. 42). Petitioner was treated with Zofran and Antivert in the emergency department with a resolution of dizziness (PX 4, p. 46).

Petitioner testified that prior to her work accident on 8-21-16, she had never been diagnosed with vertigo or acute stress disorder. Petitioner said that she did have some depression prior to her 8-21-16 accident. Petitioner testified that prior to her work accident she did not have any ongoing cervical pain or pain in her left shoulder or arm. Petitioner said that prior to her work accident, she had experienced some intermittent low back pain.

Petitioner testified that since her accident, her anxiety and depression has improved through treatment with Dr. Miller. Petitioner said that her anxiety is better than it was just after the battery, however she still has fear going to work and she is hyper alert when she is around prisoners. Petitioner said that she has a heightened sense of awareness and that her chest sometimes tightens while working. Petitioner said that since the incident, she experiences some dizziness on occasion. Petitioner said that since the incident, she is more forgetful and that she has difficulty processing information. Petitioner testified that since the accident, she has become less social and rarely goes out. Petitioner said that she has continued to treat with Dr. Miller once a month under her own insurance. Petitioner said that she did not treat psychologically before her 8-21-16 accident.

Petitioner said that she has continued to experience some pain in her neck, left shoulder pain, and low back pain since her work accident. Petitioner described her neck pain as an aching sensation and her low back pain as constant.

Petitioner testified that her job title on 8-21-16 was as a correctional lieutenant. Petitioner said that she underwent a 15 hour interview and was promoted to Major on the second shift a few months prior to the arbitration. Petitioner said that she received a $700 a month increase in pay with the title change.

(J) Were The Medical Services That Were Provided To Petitioner Reasonable And Necessary? Has Respondent Paid All Appropriate Charges For All Reasonable And Necessary Medical Services?

The Arbitrator finds that after Petitioner's 8-21-16 assault, she sustained an acute stress disorder as a direct result of the assault requiring counseling and psychological care with Dr. Miller. The Arbitrator further finds that Petitioner sustained concussion with dizziness/vertigo from the accident which required ongoing medical management.

The Arbitrator therefore orders Respondent to pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $613 to Duffy Ambulance, $6,487.85 to St. James Hospital, $1,765 to Twin Cities Behavioral (Dr. Miller), and $902 to Central Illinois Radiological Association, as provided in Sections 8(a) and 8.2 of the Act.

(L) What Is The Nature And Extent Of The Injury?

The Arbitrator finds that as a result of Petitioner's 8-21-16 assault, she sustained an acute stress disorder as diagnosed by Dr. Miller, a closed head injury with concussion, symptoms of post-traumatic stress with functional impairment per Dr. Rinker, and a cervical and lumbosacral strain with continuing low back and neck pain.

Based on the above, as well as the credible record, the Arbitrator finds that the Petitioner sustained a 10% loss of use of the person as a whole as provided in Section 8(d)2 of the Act as a result of the 8-21-16 accident. Pursuant to Section 8.1(b) of the Act, the Arbitrator, in determining the level of permanent partial disability, bases his decision 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.

With regard to (i), the parties did not offer into evidence a reported level of impairment pursuant to subsection (a). The Arbitrator therefore gives no weight to this factor.

With regard to (ii), Petitioner was employed as a correctional officer at the time of the injury and she returned to work as a correctional officer after her accident. In their records, both Dr. Rinker and Dr. Miller

stated that Petitioner suffered from increased symptoms of anxiety when she was in proximity to prisoners or in a cell block. Both Dr. Rinker and Dr. Miller suggested that Petitioner consider obtaining a supervisor position so that she would not have as much inmate contact or need to be in the cell block. Petitioner testified that in the last few months before arbitration, she had interviewed for and obtained a position as a major, or supervisor, which limits her contact with inmates. The Arbitrator gives some weight to this factor.

With regard to (iii), age at the time of the injury, the Arbitrator notes that Petitioner was only 48 years old. The Arbitrator finds that Petitioner will live longer with her disability than someone who is older. The Arbitrator gives some weight to this factor.

With regard to (iv), future earning capacity, the Arbitrator finds that Petitioner is making more money now than she was at the time of the accident. The Arbitrator gives some weight to this factor.

With regard to (v), evidence of disability as corroborated by the treating records, the Arbitrator finds that Petitioner's ongoing symptoms of forgetfulness and difficulty processing information is consistent with Dr. Rinker's diagnosis of concussion and post-traumatic stress and Dr. Miller's diagnosis of acute stress disorder. The Arbitrator finds that Petitioner's ongoing symptoms of anxiety, fear, and inability to sleep are consistent with Dr. Miller's records and report. The symptoms are also consistent with Dr. Rinker's records. The Arbitrator finds that Petitioner's use of Xanax periodically is causally related to her 8-21-16 accident and is consistent with Dr. Rinker's and Dr. Miller's records. The Arbitrator further finds that Petitioner's ongoing physical and low back pain is causally related to the work accident and the findings are corroborated by Dr. Rinker's records and the physical therapy records from St. James hospital. The Arbitrator gives greater weight to this factor.

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

Elizabeth Boyland,

Petitioner,

vs. NO. 13WC 12681

DCFS,

19IWCC0074

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of accident, medical expenses, causal connection, prospective medical care, permanent disability, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 9, 2018 is hereby affirmed and adopted.

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

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

19IWCC0074

Pursuant to §19(f)(1) of the Act, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

DATED: FEB 6 – 2019
SJM/sj
o-1/10/2019
44

Stephen J. Mathis

Deborah L. Simpson

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BOYLAND, ELIZABETH
Employee/Petitioner

Case# **13WC012681**

DCFS
Employer/Respondent

19IWCC0074

On 4/9/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.90% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2269 NEWCOMB LAW OFFICE
RAULA M NEWCOMB
PO BOX 753
BENTON, IL 62812

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

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

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

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

APR 9 - 2018

RICHARD 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

ELIZABETH BOYLAND
Employee/Petitioner

v.

DCFS
Employer/Respondent

Case # 13 WC 12681

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Herrin**, on **December 13, 2017**. After reviewing all of 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 18, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$76,799.84**; the average weekly wage was **$1,476.92**.

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

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

Respondent is entitled to a credit for any awarded medical expenses that were paid via the group carrier pursuant to Section 8(j) of the Act.

ORDER

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of her employment with the Respondent on January 18, 2013. The Arbitrator further finds that the Petitioner sustained injuries which, as outlined below, were causally related to the January 18, 2013 accident. The Arbitrator further finds that Petitioner provided the Respondent with timely notice of the accident and injuries within the requirements of Section 6(c) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$984.61 per week** for **4-4/7 weeks**, commencing **January 19, 2013 through February 19, 2013**, as provided in Section 8(b) of the Act.

While the Petitioner has indicated that medical expenses are at issue, Petitioner's Statement of Exceptions indicates that the Respondent has paid all due and owing medical expenses, either via workers' compensation or via group health coverage pursuant to Section 8(j) of the Act. Respondent shall be given a credit for all such 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 **$712.55 per week**, the maximum allowable statutory rate, for **3.225 weeks**, because the injuries sustained caused the **1.5% loss of use of the left leg**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$712.55 per week**, the maximum allowable statutory rate, for **3.225 weeks**, because the injuries sustained caused the **1.5% loss of use of the right leg**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$712.55 per week**, the maximum allowable statutory rate, for **25 weeks**, because the injuries sustained caused the loss of use of **5% of the person as a whole**, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **July 30, 2014** through **December 13, 2017**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

April 6, 2018
Date

APR 9 - 2018

STATEMENT OF FACTS

The Petitioner testified that she worked for the Respondent as a child protection specialist from 1994 to May of 2014, when she retired. The job required her to go out and check on families onsite, and she used her personal vehicle for travel. She would be assigned a request for investigation from her supervisor, and she was supposed to respond within 24 hours. Families under investigation are not notified of a visit.

On 1/18/13, the Petitioner visited a home in Murphysboro, Illinois for a child welfare investigation. She testified that there were "sweetgum balls" on the driveway that had fallen from a tree. While walking to the house, approximately about three to four feet away from her car, she slipped on the sweetgum balls and fell. She testified that she had paperwork in her hands at the time, and while she tried to break her fall, there was nothing she could grab onto. She testified that she fell forward landing on both knees and her right wrist, and she twisted her right ankle and injured her left arm. Noting she had to make sure the baby in the home was safe, she got up, went into the home and was able to at least complete her initial assessment. She then returned to her office in Murphysboro and reported the incident to her supervisor, Karena Gleason, and manager, Debbie Palmer Thomas. They advised her to go to the ER, which she did. The Petitioner is right hand dominant.

Petitioner's accident report for the Respondent indicates she was injured at 3:10 p.m. on 1/18/13 while initiating a report of child abuse/neglect when she "tripped/fell over/on sweetgum balls from sweetball tree covered driveway" at the client's home in Murphysboro. Respondent's Form 45 form states: "Worker slipped and fell in Client's driveway, injuring both knees, both hands, both arms and right ankle" on 1/18/13. (Rx1). A Supervisor's Report of Injury, dated 1/18/13, states that Petitioner reported going to a Murphysboro home to make contact with a possible victim and family, a "direct part of her duties", and she tripped on sweetgum balls

on the sidewalk that had fallen from a tree. She reported injuring her right ankle, left shoulder, right wrist and left knee ("swollen"), and that her left arm, right knee and both hands hurt. There were no witnesses. (Px1; Rx1).

At Herrin Hospital, Petitioner testified that her primary concern at that time was her left arm. The 1/18/13 records of the Herrin Hospital ER note the Petitioner slipped on a sweetgum ball from a tree at a client's house and fell. She complained of the bilateral knees and wrists, as well as right ankle pain. She denied any head injury. She noted she landed on both knees, and the left knee felt worse than the right. X-rays were taken of the right knee (normal), left knee (normal), right ankle (no acute problems, but noted corticated ossific densities adjacent to the medial malleolus that was most likely related to old trauma), left wrist (small ossific density adjacent to base of 5th metacarpal "may represent a small chip/avulsion fracture or be related to old trauma. Please correlate with pinpoint tenderness.") and right wrist (normal). She was diagnosed with acute multiple contusions and a right ankle sprain. It was noted that Petitioner initially refused pain medication, but the physician convinced her to at least take Ultram and Motrin. She was noted to have a history of GERD. (Px1; Px5).

Petitioner testified that she felt worse over the next couple days and sought treatment with an orthopedic physician. On 1/22/13, Petitioner saw Dr. Golz at the Orthopedic Institute of Southern Illinois. She reported she misstepped on some sweetgum balls at a client's home and twisted her right ankle, fell forward onto her knees, injuring the knees as well as her bilateral upper extremities. She complained of "multicentric" pain, including the left shoulder, right wrist, bilateral knees and right ankle. She had difficulty with weightbearing and felt unable to perform her work duties. Exam indicated an antalgic gait, slightly reduced left shoulder range of motion, diffuse dorsal right wrist tenderness, mildly reduced grip strength with mild swelling, some peripatellar left knee swelling with slow motion but no instability, and sharp intermittent right knee pain that was primarily patellofemoral. She also had diffuse right ankle tenderness with mild swelling but no instability. Dr. Golz noted the x-rays from Herrin Hospital of the knees, right wrist and ankle were all essentially unremarkable. He repeated the x-rays in his office, noting the knees showed early degenerative arthritis with some mild medial compartment narrowing and some moderate patellofemoral changes. The right wrist and left arm films were unremarkable. She had moderate diffuse osteopenia. Dr. Golz diagnosed multiple contusions and abrasions with exacerbation of degenerative bilateral knee arthritis, and right ankle and wrist sprains. Dr. Golz noted the Petitioner previously underwent a February 2011 left knee arthroscopy (medial and lateral meniscus tears, with grade 2 to 3 changes in the medial and lateral compartments and grade 4 in the patellofemoral compartment) and had a history of rheumatoid arthritis (RA), multicentric but primarily in her hands, and mild neck and back complaints. She did well post-knee surgery, but had returned with bilateral knee complaints in November 2012, which were more progressive on the left, and she wanted to continue conservative treatment at that time. Dr. Golz limited Petitioner to light duty and prescribed anti-inflammatories and physical therapy. (Px4).

At 1/30/13 follow up with Dr. Golz, the Petitioner reported her ankle symptoms resolved, her wrist pain was improved and her bilateral knee pain had also improved quite a bit. She continued to have problems with the left shoulder and upper arm in terms of range of motion, overhead activity and lifting objects away from her body. She did have prior neck problems, but denied any prior left shoulder problems or radicular symptoms into the left arm. Left shoulder x-rays reflected mild AC joint arthrosis, type 1 acromion and mild glenohumeral joint arthritis. The diagnoses were left shoulder tendonitis and resolving exacerbation of arthritis, bilateral knees, right ankle sprain and right wrist sprain. Noting he believed most of the left shoulder problem was soft tissue, an MRI was prescribed versus injection, and Petitioner was to continue Celebrex and therapy and was to progress her work restrictions regarding the knees and ankle. (Px4).

A disability form was completed at the Orthopedic Institute reflecting the prior 1/22 and 1/30/13 visits, noting: "ankle good, wrist better, knees improved quite a bit as well." Objective findings indicated were minimal left shoulder tenderness, improved knee swelling, and no swelling or tenderness at the wrist. A left shoulder MRI was prescribed, and she was to continue therapy and NSAIDs. This document also notes that she was seen on 11/28/12 for "different complaint." (Px3). Petitioner testified she had physical therapy and was off work for several weeks, though she could not specify exactly how long. She testified that she attended intermittent therapy, and continues to do so intermittently.

On 2/5/13, Petitioner's left shoulder MRI showed tendinopathy of the supraspinatus, infraspinatus and subscapularis without any tear appreciated, fluid which suggested subacromial/subdeltoid bursitis and degenerative changes of the glenohumeral and AC joints. (Px4).

On 2/11/13, Dr. Golz indicated Petitioner would need ongoing care, but released her back to unrestricted work duties as of 2/19/13. Dr. Golz's 2/19/13 progress note states Petitioner again had multicentric complaints, but was overall improved with ongoing left arm symptoms, including restricted shoulder range of motion and difficulty with lifting and outstretching the arm. She was back to work and scheduled to see her rheumatologist, Dr. Akhtar. Dr. Golz noted: "She again is very specific she had no prior shoulder complaints until her recent injury." His diagnoses were rotator cuff tendonitis and subacromial bursitis, and continued conservative treatment was recommended. Despite the 2/11/13 note to return to unrestricted work, Dr. Golz stated that he would keep Petitioner on light duty restrictions and in therapy. A form the doctor completed on 2/27/13 noted the shoulder MRI indicated subacromial bursitis but no full thickness cuff tear, and that the Petitioner was improved but still "bothered" by the left upper extremity. She was to progress through therapy with emphasis on a home exercise program, to continue NSAIDs and to follow up with her rheumatologist. (Px3).

On 3/13/13, Petitioner followed up with Dr. Golz for the left shoulder and arm, noting workers' compensation was not covering this injury. Petitioner reported feeling better overall, but she still had bad days at times when she would sleep on the shoulder/arm, and occasional difficulty with overhead lifting. Dr. Golz also noted: "In the past, we have also discussed knee complaints with her as well. She has good and bad days with this, worse when the Baker's cyst is 'more active' in the right knee. Most of her complaints are patellofemoral, mild to moderate in nature." Left shoulder exam revealed mild supraspinatus weakness, no significant tenderness, good range of motion with mild pain increase at the end points and minimal crepitus. Petitioner was not taking Celebrex, but noted Dr. Akhtar's prescribed 3 week round of Prednisone made her feel "wonderful." Multiple other unrelated medical conditions were also noted. As to the shoulder, Dr. Golz recommended therapy to continue into a home exercise program, as this had been benefitting her, and she was advised to continue seeing Dr. Akhtar. A left shoulder injection was offered to Petitioner but was declined, as Petitioner did not want it to impact unrelated medical studies. She was to follow up as needed. (Px3).

Petitioner returned to Dr. Golz on 8/27/13, noting she has had trouble tasking medications, and had chronic back and neck complaints. He noted she had previously been seen for bilateral upper and lower extremity complaints following her fall, and that she had multiple contusions and abrasions with exacerbation of her degenerative arthritis. While most of her complaints improved, she was left with left shoulder and arm pain. She reported intermittent left arm pain since March, which was "generally transient and self-limiting." Dr. Golz indicated Petitioner had trouble distinguishing her arm complaints from her RA symptoms. With no new injury or precipitating activity, Petitioner indicated that she woke up with severe arm pain about 6 months prior, noting this was in the arm itself, not the shoulder, and radiated to the arm and hand. She reported difficulty lifting the arm, that it "got stuck", and that she had popping in the arm in different places, "but on further questioning she could lift with an outstretched arm." Exam was essentially unchanged but she had a markedly positive

supraspinatus test. Dr. Golz believed her symptoms were "rotator cuff in nature, although somewhat atypical." The subacromial space was injected and she was referred for three weeks of physical therapy. (Px3).

On 10/8/13, Petitioner reported the injection helped "fairly well", and while she didn't attend therapy, she was doing her home exercise program. Two days before this visit Petitioner reported reaching down and hearing a pop. While she was previously to resume Celebrex, Petitioner indicated she did not do so and was not taking any RA medications. Noting he felt her problems seemed "very soft tissue in nature", Dr. Golz prescribed therapy and a Medrol dosepak. (Px3).

On 12/2/13, Dr. Golz again prescribed formal physical therapy. (Px3). Therapy records from Real Rehabilitation indicate the Petitioner had a 12/2/13 initial evaluation, and was discharged on 2/4/14 due to failing to attend scheduled therapy sessions. The last evaluation entry of 1/2/14 noted Petitioner continued to have high pain levels with minimal overall improvement in the left shoulder/arm. (Px6).

Petitioner saw Dr. Wood at the Orthopedic Institute on 2/18/14 due to a non-work related 2/16/14 right hand/thumb injury after falling through the floor of an old barn and trying to catch herself. Dr. Wood's 3/11/14 disability form indicates the Petitioner would be off work for 8 to 10 weeks (approximately 2/18/14 to 4/29/14), and references both the right hand injury as well as the left shoulder, right ankle and bilateral knees. He goes on to note that if she is "allowed" to return to work, she would need activity restrictions. Dr. Wood's subsequent 3/27/14 note holding Petitioner off work only mentions the right hand/thumb. She was ultimately returned to work as of 5/6/14. (Px3).

Petitioner again returned to Dr. Golz on 7/30/14 with left shoulder complaints. Petitioner reported a bad experience with anti-rheumatic drugs and that she had not returned to her rheumatologist. Petitioner had undergone a splenectomy and was diagnosed with sarcoidosis. She reported having adopted a healthier lifestyle, losing weight and having retired from her job, noting she was "quite busy in retirement. She does frequent crafting and woodwork." She continued to have intermittent left shoulder discomfort and occasional significant exacerbations, noting her biggest problem was sleeping on her left side. Dr. Golz noted the Petitioner looked much better, and she reported she was having a "good day." She had fairly good range of motion but was limited in internal rotation. Dr. Golz opined that she had a recalcitrant rotator cuff tendinitis, which was probably not bad enough to try an injection, so he again recommended she restart Celebrex and watch for GI upset, offering Petitioner the opportunity to return for an injection and/or repeat MRI in the future if needed. (Px3).

Within the records of the Orthopedic Institute was a 5/28/15 right ankle x-ray, ordered by a Dr. Buchman based on "injury." Intake form notes her symptoms began on 5/28/15 when she fell at home. Films were compared to 1/18/13 films, and noted a small chip/avulsion fracture of the distal fibular tip with lateral soft tissue swelling. (Px3). A 6/1/15 report of Dr. Wood's assistant noted right ankle pain and swelling after a fall on 5/28/15 at home. It appears that the chip fracture was indicated to be related, though there is no indication from a physician here in terms of the comparison of the film to films from 1/18/13. There may also have been a separate medial malleolus fracture. Petitioner was offered formal therapy, but declined. (Px3).

Petitioner testified that she broke the right ankle in this 5/28/15 incident, but that her right ankle condition had still not completely resolved from the 1/18/13 accident when this occurred, as she had continued to have swelling prior to this fracture. She did agree that she did not have therapy for the right ankle after the 1/18/13 accident.

The next, and last, note of the Orthopedic Institute submitted into evidence is dated 11/3/17, just prior to the hearing date, Petitioner saw nurse practitioner Robert Deaton. He noted she was being seen at the request of Dr.

McElheny for left shoulder pain. Noting she started having issues in 2013, Petitioner reported pain that was dull, sharp, achy, burning, stabbing and aggravated with daily activities and sleeping. She reported sporadic use of anti-inflammatories with relief, along with rest. Exam noted excellent left shoulder range of motion and strength. X-rays showed AC joint arthritis. The diagnosis was left rotator cuff tendinitis. Given a low suspicion for a rotator cuff tear, Petitioner was advised to maintain motion and strength and continued use of anti-inflammatories. Petitioner declined an offered injection. (Px7).

Petitioner's testimony was that Dr. Golz was mainly treating her left knee, but they would also discuss her left shoulder. She testified that the pain also went into the left forearm. Petitioner testified that her left arm remains intermittently problematic. At the time of the hearing, she was attending water therapy on her own for shoulder pain referred into the arm.

With regard to her post 1/18/13 physical therapy, Petitioner testified that she would get better for a period of time and then would get worse: "sometimes it's ok, and sometimes its not ok." While she at times went to other locations, most of her initial post-accident therapy took place at Real Rehab in Vienna.

Petitioner testified that following her prior left knee meniscus surgery, occurring sometime between 2009 and 2011, she had a good recovery, and she did not believe she was treating for the left knee when she fell in January 2013. Petitioner testified she returned to the Rehab Institute recently with her husband for his knee, and at that time she was offered a cortisone shot for her shoulder, which Petitioner testified she declined because she was having a knee replacement and "it was going to take a while." She goes to Real Rehab for pool therapy when her arm gets bad, as the pool activity seems to help her arm. Dr. Golz has provided her with a home exercise program and provides her medication. She indicated she has essentially full range of motion, but it's painful, and there are times she can't raise her left arm up high. Of all the injuries she sustained on 1/18/13, the left shoulder is the one that is a lingering problem. Petitioner denied any prior workers' compensation claims.

The Petitioner agreed on cross examination that she has sweetgum balls that fall on the ground at her own house in the fall, and that they are everywhere. She assumed the ones she slipped on had been on the ground since the fall, and testified that there were "thousands" of them on the ground at the Murphysboro location. She had never been to the home where she fell prior to 1/18/13.

As to the 1/22/13 report of the Orthopedic Institute indicating she had been a prior patient, while she didn't recall it, the Petitioner did not dispute if records indicated she treated there for bilateral knee complaints in November 2012, prior to the 1/18/13 accident. Asked about her restricted duty release from Dr. Golz, Petitioner testified the Respondent did not have light duty available and she would have needed a full duty release to return to work. As to the 2/19/13 note of Dr. Golz releasing Petitioner to unrestricted work duties, Petitioner testified this was because she wanted to go back to work and couldn't return without a full duty release. She did not dispute indicating to Dr. Golz on 3/13/13 that she was improving.

Petitioner acknowledged her preexisting RA diagnosis, and was certain that she discussed the condition with Dr. Golz in the context of her work injuries. She had stopped seeing her rheumatologist, despite Dr. Golz urging her to do so, because all they would do was prescribe medication for her that she was unable to take due to a severe GERD condition. While she did not see Dr. Golz between March and August of 2013, Petitioner testified that she called during this time but was unable to get an appointment. As to his August 2013 note indicating she reported awakening one day with severe left arm pain, the Petitioner testified: "The severe pain in my arm comes and it goes. Sometimes I can work it out. Sometimes I can't."

Asked about reporting reaching down and hearing a pop in her left arm on 10/8/13, Petitioner testified that the left arm continues to pop at times. In addition to the 2015 fall at her home where she injured her ankle, the Petitioner agreed she also fell in 2014 in a hole in the barn. After initially testifying she broke her left thumb, she then agreed she injured her right hand in the incident, but denied injuring her left knee or shoulder. Both of these incidents only impacted her right side.

Petitioner agreed that after the 1/18/13 injury, the next day she was scheduled to work was Tuesday, 1/22/13, and this would have been the first day she was off due to the injury. However, she testified that her weekly hours were compressed into four days of 9.5 hours with Monday off instead of five days of work. She agreed she was off work until 2/19/13.

As to Dr. Golz noting that since her retirement the Petitioner did woodworking and crafts, Petitioner testified her husband is the one who does this, though she may help him at times. As to whether she returned to full duty work, Petitioner testified "I would perform my job protecting kids, whatever I had to do", and that her supervisors were kind in helping her and working with her limitations. If she had to take custody of a baby, for example, they would send someone with her to lift and carry the baby. On redirect testimony, Petitioner could not say how long this help had been provided to her prior to her retirement, but estimated for 3 to 5 months.

Petitioner testified she attended physical therapy right after she initially saw Dr. Golz, and then probably went back again in December 2013, "because I was off work", for her arm. She did not believe this 12/13 therapy involved her knee or ankle. Her health insurance would only cover a certain amount of therapy visits per year. Because her claim was denied from the start by Respondent, she was treating through her health carrier.

On redirect and recross, the Petitioner initially testified that she fell around 4 p.m. or so on the date of accident, and that it was getting dark and hard to see. However, after reviewing her accident report she agreed that she reported the injury around 3:15 p.m., so the incident likely occurred around 3:10 p.m., and it likely not dark at that time.

Petitioner's husband, Patrick Boyland, testified on her behalf. He testified that he recalled her coming home after the accident and hospital on 1/18/13, "sore and complaining", and indicated that she still has shoulder problems, mainly if she sleeps on her left side or has to reach up for something. She doesn't lift heavy items. He was aware that she sometimes has gone for an injection, or water therapy and aerobics. Mr. Boyland agreed that sweet gum trees are everywhere in Southern Illinois, and so are the balls that fall from them.

As the "Demands of the Job" (Px1; Rx1) form prepared by the Respondent, Petitioner testified she had never seen it before the hearing, but agreed it generally indicates the physical demands of her job. The document indicates this includes liftin up to 70 pounds 4 to 6 hours per day, sometimes with help, and the use of her hands for fine and gross manipulation for 6 to 8 hours per day. It also notes bending and stooping for 2 to 4 hours per day. However, it also states that she drives for 4 to 6 hours per day and sits for 6 to 8 hours per day. Almost every entry by supervisor Karen Gleason indicates the numbers vary.

CONCLUSIONS OF LAW

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 the Petitioner has sustained her burden of proof that she sustained accidental injuries arising out of and in the course of her employment with the Respondent on 1/18/13.

At the time of the Petitioner's fall, according, she was to her testimony, she was in the process of visiting a home for a child welfare investigation. She testified that this is one of the main parts of her job with the Respondent. She was assigned this visit based on a call that had come into the Respondent's agency with a complaint. Based on this unrebutted information, the Arbitrator finds that the Petitioner fall in the home's driveway occurred in the course of her employment.

With regard to the "arising out of" aspect of this claim, the Arbitrator initially finds that, based on the preponderance of the evidence presented, the Petitioner should be categorized as a traveling employee at the time of the fall in the driveway. A traveling employee is one whose duties require them to travel away from their employer's premises. The determination of whether an injury to a "traveling employee" arose out of and in the course of employment is governed by different rules than are applicable to other employees. *Venture-Newberg Perini Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, 376 Ill. Dec. 823, 1 N.E.3d 535 (2013). "The test whether a traveling employee's injury arose out of and in the course of employment is the reasonableness of the conduct in which she was engaged at the time of the injury and whether or not that conduct might have been anticipated or foreseen by the employer." *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL 120411, 376 Ill.Dec. 536, 999 N.E.2d 711 (2013).

The facts in this case are somewhat similar to those presented in the *Mlynarczyk* case. In that case, a claimant, who had stopped home for lunch during a day of traveling to various homes to perform cleaning services, slipped and fell in her own driveway while on her way to her car to travel to the next home. In that case, the Appellate Court indicated that traveling employees "are compelled to expose themselves to the hazards of the streets * * * much more than the general public." Additionally, based on the facts of that case, the Court stated: "Since claimant is a 'traveling employee', her exposure to the hazards of the streets is, by definition, greater quantitatively than that of the general public, as long as her conduct at the time of the injury was reasonable and foreseeable to the employer." Id.

The Court in *Mlynarczyk* reversed a finding of the Commission that the employee was not injured in the course of her employment based on a manifest weight standard. In doing so, the Court found compensable a case where the claimant slipped on snow but wasn't certain if there was ice underneath it, and where she had been walking out of her own home and slipped on a public sidewalk area. While the Court found that the claimant slipped on a public sidewalk, they also noted that the employer in that case had cited no authority to support that a traveling employee injured on private property somehow is no longer subjected to the hazards of the streets.

Here, the Arbitrator believes the case is not as close as it appeared to be in *Mlynarczyk*. The Petitioner in this case was subjected to a massive amount, per her unrebutted testimony, of sweetgum balls on a property which she had been assigned to visit by the Respondent. The Petitioner testified that she had not been to the home before and had no familiarity with it, and she was carrying her paperwork with her on the way into the home. She had not yet entered the home, so she was clearly in the midst of her "travel." She testified that she was too far from her own car to try to grab hold of it, and that there was nothing else in the vicinity with which she could try to catch herself. The Arbitrator finds that it was reasonably and foreseeable that the Petitioner could slip and fall in a client's driveway and walk area, while visiting to determine the welfare of a child, due to the presence of what the Petitioner described as thousands of sweetgum balls. As such, the Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent on 1/18/13.

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

The Petitioner testified that she provided timely notice of the accident to both her supervisor, Karena Gleason, and manager, Debbie Palmer Thomas. Accident reports completed for Respondent were dated 1/18/13. (Px1; Rx1). The Arbitrator finds that there is ample evidence supporting the fact that the Petitioner provided the Respondent with timely notice of her 1/18/13 accident and injuries.

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

The Arbitrator finds that the Petitioner has sustained her burden of proof that she sustained accidental injuries which are or were causally related to the 1/18/13 accident.

Based on the facts in evidence, the Petitioner alleged that she sustained injuries to multiple body parts in the 1/18/13 fall: the bilateral knees, the bilateral hands, the left shoulder and the right wrist.

With regard to her knees, the Petitioner had a noted history of bilateral knee problems, and it appears that she last saw Dr. Golz for this, according to his 1/22/13 note, prior to the accident date in November 2012, just two months before the accident. He also noted that the left knee problems were more progressive than the right. She had previously undergone meniscal surgery to the left knee sometime between 2009 and 2011. The Petitioner's testimony was that she did not recall the November 2012 visit, but did not dispute it if it was noted by Dr. Golz. The Petitioner did undergo some level of treatment for the knees, but Dr. Golz's 1/30/13 follow up note states that Petitioner reported her knees had improved "quite a bit." The evidence indicates quite clearly that the Petitioner had preexisting bilateral knee problems, and there is no indication of any significant acute injuries to the knees related to the 1/18/13 accident.

The right wrist injury appeared to be a contusion. By the 1/30/13 visit, Dr. Golz noted that the wrist pain had improved, and there really was no significant mention of this body part after 1/30/13. The same goes for the Petitioner's right ankle sprain/strain, which Dr. Golz on 1/30/13 stated was resolved. The Arbitrator notes that the Petitioner subsequently sustained a fracture at the base of the right thumb near the right wrist in February 2014, and broke her right ankle in a subsequent incident at home in May 2015.

It also be noted that the Petitioner had a preexisting RA diagnosis.

Based on the above, the Arbitrator finds that the Petitioner sustained minor strains/sprains to the right ankle and right wrist that resolved with minimal evidence of ongoing sequelae. As to her knees, the Arbitrator finds the Petitioner did sustain contusions and minor aggravation of preexisting degenerative conditions in the knees, and that while there may be some level of permanency resulting from the accident, she has essentially returned to her baseline condition in both knees.

The Petitioner's main ongoing complaints are with regard to her left shoulder and arm. Ultimately, Dr. Golz diagnosed what he described as generally soft tissue injury including tendonitis/tendinopathy, as well as an aggravation of underlying arthritis. The Arbitrator finds that the Petitioner's left shoulder condition was causally related to the 1/18/13 accident. However, the Arbitrator finds that the Petitioner reached maximum medical improvement with regard to the left shoulder as of her 7/30/14 visit with Dr. Golz. At that time, he noted she was generally doing well with the arm and shoulder other than with certain motions, as well as sleeping on that side. However, the only real treatment offered to her was home exercise, anti-inflammatory medication and

possible injection. The records of Dr. Golz indicate that the Petitioner oftentimes would not take AIs, and rejected injections. While the Petitioner testified that she has attended therapy periods on her own subsequent to 7/30/14, no evidence was presented regarding such formal therapy.

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

While medical expenses were noted as an issue on Arbitrator's Exhibit 1, the Petitioner has indicated in her proposed decision that all medical expenses have either been paid directly by the Respondent or through the Respondent's group health coverage, and this is consistent with the Petitioner's testimony. The Respondent is entitled to credit for any medical expenses paid via this group health coverage prior to the hearing date, and shall hold the Petitioner safe and harmless from any claims for payment or reimbursement of any causally related medical expenses for which such credit is received.

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

This is a difficult issue for the Arbitrator to resolve based on the evidence presented. The best evidence appears to indicate that the Petitioner initially went off work on 1/19/13 and returned to work as of the 2/19/13 release from Dr. Golz. The Arbitrator finds the Petitioner was temporarily and totally disabled from 1/19/13 through 2/19/13.

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

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's (AMA) "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no AMA permanent partial impairment rating or opinion was submitted into evidence by either party. The Arbitrator therefore gives this factor no weight in the permanency determination

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 child protection specialist at the time of the accident, and was able to return, and did return, to that same job following the 2/19/13 release of Dr. Golz. The Petitioner did testify that her supervisors would help her due to her ongoing left shoulder/arm problems, such as sending someone with her to carry a baby if it was known that the child was going to be removed from a home. However, the Arbitrator notes that the Petitioner had multiple other medical conditions and ultimately retired from her job. The Arbitrator gives this factor some weight in the permanency determination.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 60 years old at the time of the accident. Neither party has submitted evidence in support of how the Petitioner's age may impact her permanent condition relative to the 1/18/13 accident. Therefore, the Arbitrator gives this factor no weight.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner has not presented any evidence which indicates that she has suffered a diminution in her earning capacity as a result of the accident. She was performing her regular job until her retirement in 2014. The Arbitrator gives this factor some weight in the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator incorporates the information noted in the "causation" section above. As noted, there is no significant evidence of any ongoing problems with the Petitioner's right thumb or right ankle which would be related to the accident. As noted, the Petitioner has sustained additional, and more severe, injuries to these body parts subsequent to 1/18/13.

The Petitioner did fall on her bilateral knees and had some ongoing complaints for a period of time with the knees subsequent to the accident. While she has continued to have intermittent bilateral knee complaints, the Arbitrator again notes with interest that she had preexisting problems with her knees, and had last visited Dr. Golz regarding these complaints in November 2012. The Arbitrator finds that the Petitioner sustained contusions to the knees with otherwise very mild aggravations of the bilateral knee degenerative conditions.

All of the injuries noted thus far did not receive any significant forms of treatment beyond anti-inflammatory medication. The treatment of Dr. Golz, the only doctor the Petitioner saw after the accident date for these injuries, was mainly, if not exclusively shortly after the accident, directed to the left shoulder and arm. Dr. Golz, following two MRIs, has opined that the Petitioner's shoulder condition involves soft tissue problems, such as tendinitis / tendinosis / tendinopathy and bursitis, as well as some level of aggravation of her underlying degenerative conditions in the AC and glenohumeral joints. The Petitioner continues to complain of left shoulder pain with sleeping on it, and difficulty with lifting and overhead use, but these complaints appear to be intermittent, she had no evidence of treatment for this between 7/30/14 and 11/3/17, and as of this latter visit was noted to have excellent range of motion and strength.

Based on the above factors, the record taken as a whole and a review of prior Commission awards with similar injuries similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of use of 1.5% of the left leg and 1.5% of the right leg pursuant to §8(e) of the Act, and to the extent of the loss of use of 5% of the person as a whole pursuant to §8(d)2 of the Act with regard to the left shoulder.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carolyn Ramsey,
Petitioner,

19IWCC0075

vs.

NO: 11 WC 21690

Northern Illinois University,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident temporary disability, permanent disability, medical, 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 August 10, 2027, 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.

FEB 6 - 2019

DATED:
o12/20/18
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0075

RAMSEY, CAROLYN
Employee/Petitioner

Case# 11WC021690

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

On 8/10/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.14% 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:

0293 KATZ FRIEDMAN EAGLE ET AL
FRANK J BERTUCA
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CHICAGO, IL 60602-2983

5604 ASSISTANT ATTORNEY GENERAL
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CHAMPAIGN, IL 61825

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801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9209

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

AUG 10 2017

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

19IWCC0075

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Carolyn Ramsey
Employee/Petitioner

v.

Northern Illinois University
Employer/Respondent

Case # 11 WC 21690

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 **Geneva**, on **June 14, 2017**. After reviewing all of 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 September 16, 2010, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $25,766.00; the average weekly wage was $495.50.

On the date of accident, Petitioner was 62 years of age, *single* with no dependent children.

Petitioner *has* received all reasonable and necessary medical services as explained *infra*.

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

Respondent shall be given a credit of $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

Accident & Causal Connection

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established that she sustained a compensable accident involving the right shoulder on September 16, 2010 as claimed and that there is a causal connection between Petitioner's current condition of ill-being and her accident at work.

Temporary Total Disability & Temporary Partial Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of $330.33/week for 26 & 3/7th weeks, commencing May 10, 2011 through August 9, 2011 and October 30, 2012 through January 30, 2013 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from September 16, 2010 through June 14, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall receive a credit for temporary total disability, as well as temporary partial disability, payments, if any, as agreed[1] by the parties. *See* AX1.

Medical Benefits

Respondent shall pay reasonable and necessary medical services as reflected in Petitioner's Exhibits from Swedish American Lundholm Orthopedics ($7,861.50) and out-of-pocket expenses ($450.00) that remain

[1] The parties stipulated that Petitioner is entitled to temporary partial disability benefits in the amount of $165.16 for 1 & 4/7th weeks for the period beginning January 31, 2013 through February 10, 2013. AX1.

unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall receive a credit as agreed, if any, for any payments made with respect to Petitioner's medical bills through the group insurance carrier.

Permanent Partial Disability: Schedule Injury

As explained in the Arbitration Decision Addendum, Respondent shall pay Petitioner permanent partial disability benefits of $297.30/week for 100 weeks, because the injury sustained caused 20% loss of use of the person as a whole (right shoulder), as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

August 3, 2017
Date

ICArbDec19(b) p. 3

AUG 10 2017

19IWCC0075

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Carolyn Ramsey
Employee/Petitioner

v.

Northern Illinois University
Employer/Respondent

Case # 11 WC 21690

Consolidated cases: N/A

FINDINGS OF FACT

The issues in dispute at this hearing include whether Petitioner sustained a compensable accident on September 16, 2010, whether there is a causal connection between Petitioner's current condition of ill-being and such an accident, Respondent's liability for payment of Petitioner's medical bills, Petitioner's entitlement to temporary total disability benefits commencing on May 10, 2011 through August 9, 2011 and October 30, 2012 through January 30, 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

Carolyn Ramsey (Petitioner) testified that she began working for Northern Illinois University (Respondent) on January 2, 2002. Petitioner testified that she is right-hand dominant. In September of 2010, Petitioner was employed as Secretary IV and Employment Relations Specialist. She explained that her job duties were to set up on-campus interviews, speak with employers, make schedules, and perform computer work. Petitioner testified that October is a busy season because there are a lot of employers that come on campus and she helps NIU graduates and undergraduates get internships.

Prior Medical Treatment

On May 5, 2009, Petitioner underwent right shoulder surgery. PX5 at 39-41. Specifically, Dr. Milos performed a right shoulder arthroscopic rotator cuff repair involving the supraspinatus and infraspinatus with subacromial decompression. *Id.* He released Petitioner to full duty work in 2009. Petitioner testified that she had full use of her shoulder and no pain after this surgery and medical treatment.

Accident

From January 12, 2010 through on September 16, 2010, Petitioner testified that she was assigned to the front reception desk from 9:00 a.m. to 12:00 p.m. While headed back to her own office down the dimly lit hallway, Petitioner fell. She explained that she was carrying a book with notes in her right hand, so that she could do her job in the front and continue work at the front desk. Petitioner testified that the carpeting is not uniform throughout the hallway and she was located about six feet from her office door at the time that she fell.

Petitioner testified that she stubbed her toe on the carpeting, lost balance, tumbled forward, and trying to recover but unable to do so with the weight of her belongings, she fell in front of her office. Petitioner testified

[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.

that she could not catch herself because of the book that she was carrying. Petitioner testified that she had her keys and book in her right hand, and her purse on her left shoulder. While Petitioner was on the floor, some co-workers came to her aid. Mary Bernardin (Ms. Bernardin) came to Petitioner's aid as well as Cathy Schneider (Ms. Schneider). Ms. Schneider asked Petitioner whether she was ok and what happened. Petitioner testified that she responded that she tripped on the carpeting, that she did not know, and she thought she was ok.

Report of Injury

Petitioner testified that she completed a report of injury, which she filled out on September 17, 2010. RX1. Petitioner testified that she did not recall the motion-activated light coming on.

Petitioner completed a "WORKERS' COMPENSATION EMPLOYEE'S NOTICE OF INJURY" report on September 17, 2010. RX1. The report was submitted to Petitioner's supervisor, Mary Myers (Ms. Myers). *Id.* Petitioner noted that she reported the accident to Ms. Myers on September 16, 2010 at 3:15 p.m. *Id.* Petitioner noted that she was injured while returning to her office from a secondary office location. *Id.* Specifically, Petitioner stated the following with regard to her injury in pertinent part:

> PLACE WHERE INJURY OCCURRED (BE SPECIFIC): In hallway just outside my office (CLB 240D).
>
> DETAIL HOW INJURY OCCURRED (USE REVERSE SIDE IF NECESSARY): Worked 8AM to 1PM at reception (220) and was returning to my office in 240. Getting key ready to open my door when I stubbed my toe of shoe on floor. Stumbled forward but could not catch my balance. Fell flat onto the floor, purse being carried on left arm so right side took most of the impact.
>
> DESCRIBE INJURY (INDICATE PART(S) OF BODY AFFECTED): Right hand, arm, shoulder, knee and neck.
>
> ANY WITNESS(ES) TO INJURY: Kathy Schneider, Mary Bernardin

Id.

RX1. On cross examination, Petitioner testified that it was not correct that she was already on her feet standing by the door. Petitioner testified that she did not drop the notebook, she was still holding onto it. On re-direct examination, Petitioner testified that there are two dates of notes. Petitioner testified that when she noted that the hallway lights were illuminated on January 23, 2011, this was a surprise to her because the lights were not on at the time that she fell. Neither Ms. Bernardin nor Ms. Schneider testified at the hearing.

Petitioner described the carpeting to be comprised of large squares with a lot of seams. The day after she fell, Petitioner testified that she went back and looked at the carpet and saw a seam. PX1 (September 17, 2010 photo of the seam in the carpet). Petitioner testified that the circle on Petitioner's Exhibit 1 reflects the seam in the carpeting on which she stubbed her toe. She explained that she was looking for the location where she stubbed her toe the day after she fell, and knew the location of the seam correctly reflects where she started falling.

Medical Treatment

Petitioner then sought treatment with at MedCare Health Center. PX4 at 16. She gave a history of falling and injuring her right arm. PX4 at 16.

On November 18, 2010, Petitioner saw Dr. Milos an orthopedic surgeon at Swedish American Lundholm Orthopedics. PX5 at 15. Dr. Milos' records indicate a history that Petitioner developed pain in the right shoulder after a fall, one month ago and landed on her right side. *Id.* Since then she had pain and noted some weakness in the arm with reaching and overhead lifting, stating that her motion was good and she was able to move her arm around. *Id.* Petitioner denied any other complaints. Dr. Milos' impression was a right shoulder injury status post massive rotator cuff repair. *Id.* He believed that Petitioner likely re-tore her rotator cuff and he ordered an MRI with arthrogram of the right shoulder. *Id.*

On December 1, 2010, Petitioner underwent the recommended MRI and arthrogram. PX5 at 29. The interpreting radiologist noted an extensive full thickness rotator cuff tendon tear and partial longitudinal tear involving the long head of the biceps tendon which was displaced medially from the bicipital groove. *Id.* Additionally, he noted a questionable limited superior labral tear. *Id.*

Petitioner's Addendum to Accident Report

On January 21, 2011, Petitioner completed a handwritten amendment to the accident report providing additional details. RX1 at 2. She noted that Ms. Bernardin and Ms. Schneider heard her fall, but did not witness the fall. *Id.* Petitioner also noted the following:

> Hallway to my office is dark until you get almost to my door then motion activated light comes on. I was searching + getting my key ready in the dark hallway, and stubbed my toe. The two people I mentioned who witnessed my fall, only heard the sound when I hit the floor and they came running.

Id.

Continued Medical Treatment

On January 24, 2011, Dr. Milos noted that conservative treatment over the prior month had failed and Petitioner symptoms were getting worse. PX5 at 16. He also noted that Petitioner's MRI "revealed a re-tear of her rotator cuff involving the infraspinitus, supraspinatus, and subscapularis. She denies any other injuries." *Id.* Dr. Milos offer continued conservative treatment versus a right shoulder revision rotator cuff repair with possible patch augmentation surgery. *Id.* Petitioner elected to proceed with surgery. *Id.*

Additional Written Reports of Accident

On February 7, 2011, Ms. Bernardin completed a "Worker's Compensation Witness Report" addressing Petitioner's fall on September 16, 2010. PX9. Ms. Bernardin noted that she did not witness the incident. *Id.* She also noted the following:

> Carolyn came in from a meeting and was carrying items she had used at the meeting. About a minute later I heard a really hard on it and immediat[e]ly got up and went to the direction of the noise. Carolyn was laying on the floor, with items all around her. She was laying on her right side, trying to get up. She could not get up the way she was because her right side was hurting her. A co worker and I carefully helped her up and she said her right arm and shoulder hurt. We asked her to sit down and she did, but it

> was obvious she was in some pain.. She went back to work, but as she left, you could see she was clearly favoring one side.... Her right side. I will say it was a very hard fall, because I was amazed that it was a person who had fallen and made that kind of noise.

Id. Ms. Bernardin noted that the location of the accident was "[o]utside of Carolyn's office[....]" *Id.*

On February 8, 2011, Ms. Schneider completed a "Worker's Compensation Witness Report" addressing Petitioner's fall on September 16, 2010. PX9. Ms. Schneider noted that she did not witness the incident. *Id.* She also noted the following:

> I was sitting at my desk in CLB 240J around lunch time when I heard a very loud noise- a thud or a crash and the office shook some. I was on the phone so it took me some seconds to tell the caller I had to go, hang up, get around my desk and go see what happened. My office is around the corner and about 25 feet from Carolyn's office. What I remember is that Carolyn was already on her feet, standing by her door, holding on to the door handle. Mary Bernardin was standing next to Carolyn. I asked Carolyn what happened in the she was okay. She was shaken, but thought she was okay. She said she had tripped on the carpet as she was approaching her door to unlock it and had fallen flat. Later that day Mary Myers told me to find the paperwork necessary for a Worker's Compensation claim because Carolyn had e-mailed Mary about her fall and said that she was starting to have some pain.

Id. Ms. Schneider noted that the location of the accident was "...hallway outside of 240D[.]" *Id.*

Continued Medical Treatment

On May 10, 2011, Dr. Milos performed the recommended surgery. PX5 at 32-33. Specifically, he performed a right shoulder rotator cuff repair and biceps tenotomy. *Id.* Dr. Milos noted Petitioner's history of a rotator cuff repair followed by "a fall and sustained a massive repair of the rotator cuff." *Id.*

Petitioner returned to Dr. Milos for follow up care reporting continuing symptoms for which physical therapy and prescription medications were ordered. PX5 at 17-23. Petitioner testified that she was released to return to work with restrictions on August 15, 2011. *See* PX8. She testified that she provided her work restrictions to Respondent.

As of October 31, 2011, Dr. Milos noted Petitioner's report that her right shoulder was popping and there was crepitus with overhead reaching. PX5 at 24. He noted that Petitioner had significant crepitus with overhead range of motion and weakness with scaption testing. *Id.* Dr. Milos indicated that Petitioner most likely had a re-tear of her supraspinatus with healing of her infraspinitus and subscapularis. *Id.* he recommended waiting for further surgical intervention noting that if she started to develop worsening pain and dysfunction he would proceed with a reverse total shoulder prosthesis. *Id.*

Petitioner underwent some additional conservative care including cortisone injections for her right shoulder on December 19, 2011 and April 16, 2012. PX5 at 26, 44-46. Petitioner testified that the injections provided only short-term relief.

Petitioner testified she had no new accidents or injuries to her right shoulder after the September 16, 2010 accident. On cross examination, Petitioner testified that she fell on her hand and knee in 2012 in the parking lot

at work. Petitioner did not report any injury at work. Dr. Flynn examined Petitioner on August 23, 2012 and noted no new right shoulder injury. RX4 at 75.

On October 30, 2012, Petitioner underwent the recommended reverse total shoulder replacement. PX6 (Dep. Ex. 3); PX7. Petitioner testified that she was placed off work from October 30, 2012 through January 30, 2013. As of January 31, 2013 to February 10, 2013, Petitioner testified that Dr. Milos recommended that she should only work half days for the next two weeks. PX2. Petitioner testified that she provided this note to her employer and she only worked four hours per day in her regular job at NIU through February 10, 2013. Petitioner testified that she was not paid workers' compensation benefits for the days that she missed.

Petitioner testified that she discussed her job duties with Dr. Milos that did not require her lifting over 10 pounds at the end of 2012. On February 11, 2013, Petitioner was released to full duty work and he continued the work restrictions.

Narrative Report & Deposition Testimony – Dr. Milos

On October 11, 2016, Dr. Milos authored a narrative report regarding Petitioner and the relatedness, if any, of her right shoulder condition to her fall at work. PX6 (Dep. Ex. 4).

Dr. Milos stated that "[t]he fall at work on September 16, 2010, aggravated and worsened the condition of the right shoulder. The patient had seen me on April 27, 2009, right shoulder pain. At that time, she was diagnosed with a rotator cuff tear. At that time, she had an MRI scan, which revealed a rotator cuff tear involving the supraspinatus and infraspinatus with biceps subluxation. The MRI scan that was performed on December 1, 2010, following the fall demonstrated again the infraspinatus and supraspinatus tear as well as the biceps station, but also included the subscapularis, which was torn following the fall. This was not torn on the previous MRI in 2009. Therefore, the fall worsened the previous rotator cuff tear." *Id.* He further opined that the two surgeries that he performed after Petitioner's fall at work were causally related to the fall. *Id.*

On February 1, 2017, Petitioner called Dr. Milos as a witness and he gave testimony at an evidence deposition. PX6. Dr. Milos testified that he is a board-certified orthopedic surgeon specializing in the knee and shoulder. PX6 at 4-7; PX6 (Dep. Ex. 1).

Dr. Milos testified that he previously performed a right shoulder surgery on Petitioner in May of 2009 and she had completed care and treatment for that before November of 2010. PX6 at 8-9. At the time of her visit in November of 2010, Dr. Milos testified that he recommended surgery to repair Petitioner's right shoulder. *Id.*, at 9-10. Regarding Petitioner's biceps tendon, Dr. Milos testified that her previous MRI did show a biceps tendon issue, but when he performed Petitioner's initial surgery (in 2009) he did not come across a biceps issue. *Id.*, at 11, 35.

After her fall at work, Dr. Milos testified that Petitioner sustained a right shoulder rotator cuff tear with biceps subluxation. PX6 at 21, 35. He opined that the large tear he saw intraoperatively (at the time of Petitioner's May of 2010 surgery) as well as the biceps subluxation would be consistent with Petitioner's fall and her MRI. PX6 at 12. He also testified that at the time of Petitioner's visit on October 31, 2011, he was concerned that she had re-torn her rotator cuff. *Id.*, at 13. Dr. Milos opined that the rotator cuff repair was causally related to the fall noting that it did not heal, which was a risk with massive tears and a revision. *Id.*, at 13-14, 30. Dr. Milos further opined that Petitioner's reverse total shoulder replacement as well as the revision surgery after

Petitioner's fall at work were causally related to the accident. *Id.*, at 23-24, 39-40.

Additional Information

Regarding her current condition, Petitioner testified that when it is cold, her shoulder hurts more. This began occurring only after her second surgery. Petitioner testified that if her grandchildren are sitting next to her and lean on her right arm, it is painful. She is also considerably limited in her range of motion to the back. Petitioner testified that her right shoulder condition does not affect her sleep. She testified that she does not have the strength in her right arm that she had previously.

Petitioner testified that her medical bills reflected in Petitioner's Exhibit 3 remain unpaid. She also made co-payments, for which she has not yet been reimbursed. Petitioner acknowledged that the bills from April 23, 2012 do not involve her right shoulder.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issue (C), whether Petitioner sustained an accident that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (LEXIS 2011). The "in the course of employment" element refers to "[i]njuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work...." *Metropolitan Water Reclamation District of Greater Chicago v. IWCC*, 407 Ill. App. 3d 1010, 1013-14 (1st Dist. 2011). Additionally, Petitioner must establish the "'arising out of' component [which] refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1013-14 (*citing Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989)). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of her employment) to establish that her injury is compensable. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006). Where an employee has a pre-existing condition that renders her more vulnerable to an injury, "recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *See Sisbro*, 207 Ill. 2d at 205 (*citing Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d at 36; *Williams v. Industrial Commission*, 85 Ill. 2d 117, 122 (1981); *County of Cook v. Industrial Commission*, 69 Ill. 2d 10, 18 (1977)).

Considering the record as a whole, the Arbitrator finds that Petitioner has established that she sustained a compensable accident at work as claimed. In so concluding, several facts are significant. Petitioner had a prior rotator cuff tear and surgery performed by Dr. Milos on May 5, 2009. She completed treatment after this surgery and was able to work her full duty job for Respondent through September 16, 2010.

Then, on September 16, 2010, Petitioner was walking from her assigned post at the front desk back to her office when she fell in the hallway near her office door. Petitioner was holding a notebook at that time and her fall was so significant that, although the instance itself was not witnessed, her co-workers noted the noisiness or force with which it occurred. Petitioner's fall was noted by Ms. Bernardin and Ms. Schneider. They documented their knowledge of the incident five months later on February 7 and 8, 2011, respectively. Both women corroborated Petitioner's version about the circumstances of the fall. Specifically, Ms. Bernardin corroborated that Petitioner was carrying work items at the time of her fall and that she fell on her right side. Both Ms. Bernardin and Ms. Schneider corroborated that Petitioner's fall was significantly forceful. Ms. Bernardin noted that she heard a loud noise and that Petitioner fell really hard. Ms. Schneider corroborated that Petitioner's fall was forceful such that she heard a very loud noise and a thud or crash that shook her office somewhat.

The day after the fall, Petitioner documented the circumstances of her accident. The report reflects that she "stubbed [her] toe of shoe on floor. Stumbled forward but could not catch [her] balance." RX1. At the hearing, Petitioner testified that she stubbed her toe on a seam in the carpet. She explained that the carpeting was comprised of large squares with a lot of seams and that she went back to look at the carpet the day after the fall at which time she saw a seam. Petitioner provided a photograph of the carpeting and identified the seam on which she caught her shoe. She testified that she was certain that the place where she stubbed her toe is at the location of the seam in the carpet. Petitioner also testified that the hallway was dimly lit. Notably, no contrary witness testimony or controverting evidence was submitted at the hearing.

Given the foregoing, the Arbitrator finds that Petitioner's accident occurred in the course, and arose out, of her employment. Petitioner traversed a hallway with work notes from the front desk back to her office as assigned by Respondent. There was a defective or dangerous condition in the flooring (i.e., a seam in the carpeting) on which she caught the toe of her shoe causing her to fall. Petitioner's accident report from September 17, 2010 corroborates her testimony to this effect and the written statements of the two women that saw Petitioner immediately after her fall further corroborate Petitioner's version of events. Thus, the Arbitrator finds that Petitioner has established that she sustained a compensable accident at work as claimed.

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator also finds that Petitioner's claimed current condition of ill-being is related to the injury sustained at work. In so finding, the Arbitrator again notes the consistency of Petitioner's testimony with the reports of Ms. Bernardina and Ms. Schneider as well as her reports noted in the medical records.

There is evidence in this case that Petitioner had a pre-existing right shoulder condition at the time of her accident at work. However, a claimant need only establish a causal connection between her 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)).

Petitioner testified that she was able to work without any problems after her release from care following the May 5, 2009 right shoulder rotator cuff repair. Petitioner's treating physician, Dr. Milos, confirmed that

Petitioner did not require care for many months before her fall at work. Dr. Milos also provided the only medical opinion in this case regarding the relatedness, if any, of Petitioner's post-fall right shoulder condition and the fall at work. Notwithstanding, the Arbitrator finds that Dr. Milos' opinions are persuasive. He opined that Petitioner's right shoulder condition was aggravated and worsened by her fall at work. In so concluding, Dr. Milos noted his review of Petitioner's MRI films comparing the results. He also testified in detail about his intraoperative findings during the May 5, 2009 surgery compared to the subsequent surgeries.

Moreover, given Petitioner's uncontroverted testimony at the hearing regarding her post-accident symptoms, her immediate need for medical care, and absent evidence of a solely non-occupational source of right shoulder pain and limitations, the evidence establishes that Petitioner sustained a re-tear of the right shoulder rotator cuff as diagnosed by Dr. Milos that was caused by her fall at work and necessitated two additional surgeries.

Thus, the Arbitrator finds that Petitioner has established a continued causal connection between her current condition of ill-being and accident at work on September 16, 2010.

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

Petitioner claims entitlement to payment of reasonable and necessary medical bills from medical providers that administered care after her accident at work. In consideration of the treatment records and medical bills, the Arbitrator finds that the treatment rendered to Petitioner is reflective of reasonable and necessary medical treatment to alleviate her of the effects of the injury she sustained to the right shoulder as a result of her accident at work. Therefore, the Arbitrator awards payment of the medical bills submitted in Petitioner's Exhibits from Swedish American Lundholm Orthopedics ($7,861.50) and out-of-pocket expenses ($450.00) pursuant to Sections 8(a) and 8.2 of the Act as those are reasonable, necessary, or related to medical treatment necessitated after Petitioner's accident at work. Respondent shall receive a credit as agreed, if any, for any payments made by the group insurance carrier.

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

In light of the causal connection analysis explained above, the Arbitrator addresses Petitioner's claim that she is entitled to temporary total disability benefits from May 10, 2011 through August 9, 2011 and October 30, 2012 through January 30, 2013.

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that he was unable to work*. *Gallentine*, 201 Ill. App. 3d at 887 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

Petitioner's testimony and the medical records reflect that she underwent active medical treatment and was incapacitated in whole or in part due to the effects of her accident. Dr. Milos either placed Petitioner off work or on light duty restrictions[3]. Thus, based on the record as a whole, the Arbitrator finds that Petitioner was temporarily totally disabled from May 10, 2011 through August 9, 2011 and October 30, 2012 through January 30, 2013 as claimed. Respondent shall receive a credit for temporary total disability benefit, as well as temporary partial disability payments, if any, as agreed by the parties. *See* AX1.

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

Based on the record as a whole—which reflects that Petitioner sustained a massive tear of the right rotator cuff with biceps tendon subluxation in the dominant arm ultimately requiring two surgeries including a total shoulder replacement resulting in a full duty release to work that took Petitioner's permanent restrictions of no lifting over 10 pounds into consideration, but with ongoing symptoms including pain, decreased range of motion, weakness, and weather sensitivity—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 20% loss of use of the person as a whole (right shoulder) pursuant to Section 8(d)2 of the Act.

[3] The parties stipulated that Petitioner is entitled to temporary partial disability benefits for the period beginning January 31, 2013 through February 10, 2013. AX1.

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

Paul Gentry,
Petitioner,

vs.

Fermilab,
Respondent.

19IWCC0076

NO: 12 WC 34720

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of nature and extent, causal connection, 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 September 13,m 2017, is hereby affirmed and adopted.

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

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

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

DATED: FEB 6 - 2019
o12/20/19
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

David L. Gore

David L. Gore

Stephen J. Mathis

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0076

GENTRY, PAUL
Employee/Petitioner

Case# **12WC034720**

FERMILAB
Employer/Respondent

On 9/13/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.14% 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:

1505 SLAVIN & SLAVIN LLC
BRIAN DRISCOLL
20 S CLARK ST SUITE 2500
CHICAGO, IL 60603

0445 RODDY LAW LTD
CHRISTOPHER TOMCZYK
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

19IWCC0076

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

Paul Gentry
Employee/Petitioner

v.

FermiLab
Employer/Respondent

Case # 12 WC 34720

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 J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **August 8, 2017**. After reviewing all of 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 _____

19IWCC0076

FINDINGS

On **August 15, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$40,858.09**; the average weekly wage was **$851.21**.

On the date of accident, Petitioner was **57** 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 **$567.47** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$567.47**.

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 $567.47/week for 5/7 weeks, commencing August 21, 2012 through August 28, 2012, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $567.47 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $510.73/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.

Petitioner's claim for additional medical bills after September 24, 2012 is denied.

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

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

Signature of Arbitrator

September 13, 2017
Date

ICArbDec p. 2

SEP 13 2017

Statement of Facts

This matter proceeded to trial in Wheaton on August 8, 2017. At the commencement of trial, Petitioner made an oral motion to amend the Application for Adjustment of Claim to change the date of accident from August 6, 2011 to August 15, 2012. Respondent raised no objection and the motion was granted. The Application for Adjustment of Claim was modified on its face to reflect the amendment (Arb Ex 2).

Petitioner Paul Gentry testified that he had been employed Respondent Fermilab for 36 years as a "Tech II". His job was to install and maintain large magnets and other mechanical duties. He described the job as physical. He retired from Respondent on May 26, 2017.

Petitioner testified that on August 15, 2012, while he was moving a table weighing in excess of 1,000 pounds with a fellow employee, he injured his lower back. The table became wedged in a corner and he had to pull on the table with a crowbar to attempt to move it. He immediately felt pain in his lower back.

Petitioner testified that he injured his back at work previously in 2011 while pulling a 380 ft. cable through a pipe. Petitioner received conservative treatment for that injury and was released to return to full duty work on March 7, 2012. The records of Dr. Brian Svazas at Fermilab (PX 12) reflect a long history of back problems. Petitioner reported a lifting incident in April, 1989. He missed a few days of work and was on restricted duty thereafter before being released for full duty in May, 1989. In April, 1998 he reported back problems for years. He was placed on a 50 pound lifting restriction and was reclassified as a "B" back. Petitioner reported an episode of non-occupational back pain in February, 2009. On November 4, 2011, Dr. Svazas recorded a history of low back pain 7/10 getting worse for the last 3 weeks since pulling cable (PX 12). X-rays taken at Tyler Medical Services showed degenerative facet findings predominantly at L4-5 and a low grade listhesis L5 over S1 (PX 1). Dr. Long at Tyler Medical Services noted the history of previous back strains which have resolved with conservative treatment. Petitioner reported seeing a chiropractor on an as needed basis. He continued follow up with Dr. Svazas for the back pain (PX 12). Petitioner had physical therapy at Accelerated Rehabilitation Center from November 30, 2011 through December 23, 2011 (PX 2).

Petitioner was seen at the Delnor Hospital emergency department on January 28, 2012 with an acute onset of spasm in the low back (PX 4). On February 1, 2012, Petitioner reported a reinjury to Dr. Abrams at Rush Medical Center. He stated he was picking up a relatively light object. Dr. Abrams noted a long standing problem with several acute exacerbations. He diagnosed musculoskeletal back pain (PX 7A). Petitioner saw Dr. Andreshak at OAD Orthopedics on February 8, 2012. He reported the prior injury and resolution of symptoms with therapy until a reaggravation two weeks prior. He was diagnosed with low back pain, acquired spondylolisthesis and a lumbar sprain/strain. He was prescribed a Medrol Dosepak. On March 7, 2012, He reported complete resolution of his pain. Dr. Andreshak released him to full duty. He notes that if Petitioner's symptoms return, he will need an MRI (PX 5). Dr. Svazas placed Petitioner on a 30 pound lifting limit on May 4, 2012. He notes that this is a permanent limit (PX 12). Petitioner testified that he did not miss any time from work during this period. He testified he returned to full duty work in March, 2012 and worked pain free until August.

Following the August 15, 2012 incident, Petitioner sought treatment with Dr. Matthew at OAD Orthopaedics on the same day. Petitioner noted the earlier injury and treatment. He reported being pain free as of March 7, 2012. He reported that Dr. Abrams put him on permanent restrictions and he had been working without significant symptoms until this morning. The assessment was low back pain, acquired spondylolisthesis and a

lumbar sprain/strain. Petitioner was prescribed a Medrol Dosepak and Flexeril and authorized completely off work (PX 5). On August 20, 2012, Petitioner denied improvement. Dr. Matthew recommended initiating physical therapy and noted that if Petitioner's back pain did not improve, he would recommend an MRI (PX 5). The Petitioner began a course of physical therapy at Accelerated Rehab Centers on August 23, 2012 (PX 2). On September 10, 2012, Petitioner reported 65% improvement with physical therapy. Dr. Matthews recommended that he return to full duty work on a trial basis and complete physical therapy (PX 5). Dr. Svazas notes a return to work on September 11, 2012 (PX 12). The Functional Discharge Summary on September 14, 2012 found Petitioner able to perform 100% of the physical demands of his job (PX 2). On September 24, 2012, Petitioner reported very minimal pain. Dr. Matthew noted that Petitioner was pain free and released him to work within the guidelines of the Functional Capacity Evaluation. He noted that Petitioner is pain free with regards to the injury but continues to have mild chronic pain from a prior injury. He is at maximum medical improvement for the injury on August 15, 2012 and was released from care (PX 5).

The Fermilab notes on September 26, 2012 state that Petitioner will remain on a 30 pound lifting restriction until a note is received from his "Rush Doctor" (PX 12). Petitioner testified that he worked light duty through September, 2012. The Fermilab Evaluation Forms continue this restriction through a February 6, 2013 scheduled reevaluation. Petitioner reported on December 4, 2012 that he felt great with no back pain. Petitioner was to check with his personal doctor and update (PX 12).

Petitioner testified that he suffered a seizure at home on December 31, 2012. Petitioner was taken to West Suburban Medical Center. The history given was that he was watching television and he fell down and began shaking. His wife reported she heard a loud noise and found him. Petitioner's history included hypertension and coronary artery disease with a stent placement. He was diagnosed with a seizure and discharged (PX 3).

Petitioner saw Dr. Abrams on March 20, 2013. There is no mention of back pain in the office note and the records do not reflect an examination of the back. Dr. Abrams authored a letter stating that Petitioner had a back injury two years ago and had a recent reinjury. He noted his prior 30 pound restriction and requested Petitioner be returned to that restriction (PX 7B).

Petitioner began additional treatment with Chicago Neck & Back Institute on August 26, 2013 on referral from the company doctor (PX 6). Petitioner provided a history of the 2011 and 2012 work incidents. He stated the pain persisted. Dr. Cicero's assessment was an acute episode of chronic pain. Petitioner was to begin therapy and remain on light duty (PX 6). Petitioner saw Dr. Wilson, a neurologist on September 3, 2013. Petitioner gave a history of back pain since August, 2011, with pain thereafter off and on. He recommended continued therapy with Dr. Cicero (PX 6). On September 6, 2013, Dr. Cicero ordered an MRI. The MRI performed September 13, 2013 noted a bulging disc at L4-5 (PX 6, PX 9). An EMG/NCV performed on September 26, 2013 was suspicious of L5 radiculopathy, but was not definite and noted to be a limited study. No neuropathy was found in the lower extremities (PX 8). Dr. Cicero saw Petitioner on September 27, 2013 and recommended epidural injections to address the nerve injury suggested on the EMG. He advised Petitioner that he needed to be off work. Dr. Wilson concurred on October 9, 2013 (PX 6).

Petitioner had his first injections on November 19, 2013 (PX 10). Dr. Cicero noted improvement on November 27, 2013. He prescribed a TLSO brace to stabilize the spine (PX 6). Petitioner underwent a second set of injections on January 21, 2014 (PX 10). Petitioner continued therapy through March, 2014. He was released to restricted work on March 11, 2014. He was scheduled for a Functional Capacity Evaluation for March 17, 2014 (PX 6).

Petitioner suffered from additional non-work related seizure on March 26, 2014. He also treated for an unrelated heart condition on April 8, 2014 (PX 4). At Petitioner's April 8, 2014 visit with Dr. Snell at Rush for follow up on his cardiac condition, he reported his back felt much improved. On June 9, 2014, he reported his back has been better. He was hoping to retire soon. On August 27, 2014, he reported intermittent back pain (PX 7C).

Petitioner was seen at Rush on December 26, 2014 complaining of an acute exacerbation of his low back pain starting 5 days ago. He denied any trauma, heavy lifting or unusual activity. He was given medication. On December 30, 2014, he continued to complain of left sided back pain and radiating pain into the left leg. He was advised get an MRI and pain management referral for an additional epidural injection (PX 7C). Petitioner was disabled from work by Dr. Abrams on January 7, 2015 (PX 7D). An additional MRI of the lumbar spine on January 9, 2015 showed lumbar stenosis. The Petitioner underwent two additional epidural steroid injections on January 21, 2015 and February 4, 2015. Petitioner called the clinic on March 3, 2015 to discuss options for disability or retirement. On September 21, 2015, Petitioner reported an additional flare up of back pain. He noted he has been back to work with a 20 pound lifting restriction and was driving a forklift. He was taken off work through September 23, 2015 (PX 7D).

Petitioner testified that Dr. Abrams released him to return to full duty work as of August 1, 2016. On January 25, 2017, Petitioner saw Dr. Nestor at Rush for right hip and leg pain. He advised the doctor that his initial pain was on the left, but now has traveled to his right leg as well. Dr. Nestor noted the 2015 MRI showed a bulging disc. Dr. Nestor notes Petitioner does not want surgery. He set up a trial of physical therapy and referral to pain management. He placed a lifting restriction of up to 30 pounds (PX 7D). Petitioner saw Dr. Abrams on May 17, 2017 noting that he is thinking of stopping work. He is feeling OK after a round of epidural injections, but is concerned that his sciatica would worsen with work. Dr. Abrams commented that it might be best for the Petitioner to retire (PX 7D).

Petitioner testified to continued low back pain which hampers his ability to perform daily tasks. He admitted he is weaning off narcotic pain medication and only taking Tylenol for his pain as needed. He is scheduled to see Dr. Abrams again in November. Petitioner testified that Respondent denied medical bills after September 24, 2012. These were paid by his group benefit carrier.

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing Rosenbaum v. Industrial Com. (1982), 93 Ill.2d 381, 386, 67 Ill.Dec. 83, 444 N.E.2d 122. If the claimant had health problems prior to a work-related injury, he bears the burden of showing that the preexisting condition was aggravated by the employment and that the aggravation occurred as a result of an accident which arose out of and in the course of his employment. *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 476, 510 N.E.2d 502, 505, 109 Ill. Dec. 634 (1987). Cases involving aggravation of a preexisting condition concern primarily medical questions and not legal ones. *Schroeder v. The Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC (4th Dist., 2017).

Petitioner had an undisputed pre-existing low back condition. Petitioner reported a lifting incident in April, 1989. He missed a few days of work and was on restricted duty thereafter before being released for full duty in May, 1989. In April, 1998 he reported back problems for years. He was placed on a 50 pound lifting restriction and was reclassified as a "B" back. Petitioner reported an episode of non-occupational back pain in February, 2009. On November 4, 2011, Dr. Svazas recorded a history of low back pain 7/10 getting worse for the last 3 weeks since pulling cable. X-rays showed degenerative facet findings predominantly at L4-5 and a low grade listhesis L5 over S1. Petitioner reported seeing a chiropractor on an as needed basis. He had physical therapy at Accelerated Rehabilitation Center through December 23, 2011. Petitioner was seen at the Delnor Hospital emergency department on January 28, 2012 with an acute onset of spasm in the low back. Petitioner reported a reinjury when he was picking up a relatively light object. On February 8, 2012, Dr. Andreshak diagnosed low back pain, acquired spondylolisthesis and a lumbar sprain/strain. On March 7, 2012, Dr. Andreshak released him to full duty but notes that if Petitioner's symptoms return, he will need an MRI. Dr. Svazas placed Petitioner on a 30 pound lifting limit on May 4, 2012. He notes that this is a permanent limit.

Following the August 15, 2012 accident, Petitioner sought treatment with Dr. Matthew at OAD Orthopaedics. The assessment was low back pain, acquired spondylolisthesis and a lumbar sprain/strain. Petitioner was prescribed a Medrol Dosepak and Flexeril. He began a course of physical therapy at Accelerated Rehab Centers on August 23, 2012. On September 10, 2012, Dr. Matthew recommended that he return to full duty work on a trial basis and complete physical therapy. The Functional Discharge Summary on September 14, 2012 found Petitioner able to perform 100% of the physical demands of his job. On September 24, 2012, Dr. Matthew noted that Petitioner was pain free and released him to work within the guidelines of the Functional Capacity Evaluation. He noted that Petitioner is pain free with regards to the injury but continues to have mild chronic pain from a prior injury. He is at maximum medical improvement for the injury on August 15, 2012 and was released from care. The Fermilab medical notes on September 26, 2012 state that Petitioner will remain on a 30 pound lifting restriction until a note is received from his "Rush Doctor." Petitioner reported on December 4, 2012 that he felt great with no back pain.

Thereafter, Petitioner did not have any further treatment for his low back until he began additional treatment with Chicago Neck & Back Institute on August 26, 2013. While Dr. Abrams authored a letter on March 20, 2013 stating that Petitioner had a back injury two years ago and had a recent reinjury and requested Petitioner be returned to a 30 pound lifting restriction, there is no mention of back pain in the office note and the records do not reflect an examination of the back on that date. The Arbitrator notes that this letter does not specifically refer to the August, 2012 work accident and that Petitioner also had suffered the December, 2012 seizure with a fall before this visit.

The Commission has considered a gap in treatment in its evaluation of causal connection. See: *Richard Olcikas v. Dominick's Finer Foods, Inc.*, 2009 Ill. Wrk. Comp. LEXIS 1098, affirmed *Olcikas v. IWCC*, 2012 Ill. App. Unpub. LEXIS 26; 2011 IL App (1st) 103274WC-U; 2012 WL 6951575; *Jacob Haltom v. Center for Sleep Medicine*, 2013 Ill. Wrk. Comp. LEXIS 509; 13 IWCC 563, affirmed *Haltom v. IWCC*, 2015 IL App (1st) 133954WC-U; 2015 Ill. App. Unpub. LEXIS 1568; *Jose Ruben Meraz vs. Minute Men Staffing*, 2015 Ill. Wrk. Comp. LEXIS 30; 15 IWCC 30.

Petitioner treatment since August, 2013 includes multiple histories of the pre-existing back condition and multiple new aggravations. In August, 2013, Petitioner provided a history of the 2011 and 2012 work incidents, but Dr. Cicero diagnosed an acute episode of chronic pain with no reference to the 2012 work accident. On

December 26, 2014, Petitioner complained of an acute exacerbation of his low back pain starting 5 days ago without any trauma, heavy lifting or unusual activity. On September 21, 2015, Petitioner reported an additional flare up on back pain.

Given this extensive history of a pre-existing condition and multiple subsequent events, the Arbitrator looks to the medical causation opinions. The Arbitrator notes that Petitioner was already on a lifting restriction, but often did heavier duties. The earlier diagnostics noted degenerative conditions in the lumbar spine. X-rays showed degenerative facet findings predominantly at L4-5 and a low grade listhesis L5 over S1. Dr. Andreshak at OAD Orthopedics diagnosed low back pain, acquired spondylolisthesis and a lumbar sprain/strain on February 8, 2012. He notes that if Petitioner's symptoms return, he will need an MRI. After the August 15, 2012 accident, the assessment was low back pain, acquired spondylolisthesis and a lumbar sprain/strain, unchanged from the prior assessment. No further diagnostics were performed during this course of care. Petitioner was released to return to his full duty. The subsequent request to reinstate the 30 pound lifting restriction did not reflect any real change from his prior condition. All of Petitioner's subsequent treatment and diagnostics reflect the chronic condition of an L4-5 bulging disc and stenosis.

In evaluating the medical, the Arbitrator notes that Petitioner's testimony as to his job status and complaints does not always correspond to the medical records. Petitioner testified to return to full duty after March, 2012, but the Fermilab medical records reflect an ongoing restriction. Petitioner testified he had ongoing complaints after September, 2012, but told the doctor he felt great in December, 2012. His testimony of the subsequent incidents is far less clear that the histories of aggravations provided in the records. The Arbitrator also notes that the medical histories provided after August, 2013 do not include the extensive prior problems noted in the Fermilab medical records dating back to 1989. The Arbitrator also notes that the medical records disclose serious other medical conditions including Petitioner's history of seizures and cardiac issues. The records document Petitioner raised the options of retirement to the doctors on multiple occasions dating back to 2014.

The only clear causation opinion contained in the medical evidence is the September 24, 2012 opinion of Dr. Matthew who noted that Petitioner is pain free with regards to the injury but continues to have mild chronic pain from a prior injury. He is at maximum medical improvement for the injury on August 15, 2012 and was released from care. Based upon the medical evidence presented, the Arbitrator finds this opinion persuasive.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that, as a result of the accidental on August 15, 2012, he sustained an aggravation of his pre-existing degenerative lumbar condition of low back pain, acquired spondylolisthesis and a lumbar sprain/strain. The Arbitrator finds that this condition reached maximum medical improvement as of his release by Dr. Matthew on September 24, 2012. Petitioner's condition of ill being in the lumbar spine thereafter is not causally related to the accident on August 15, 2012.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Based upon the Arbitrator's finding with respect to Causal Connection, Petitioner is entitled to reasonable and necessary medical treatment for his condition of ill being in the low back from the date of accident through reaching maximum medical improvement on September 24, 2012.

Petitioner admitted unpaid medical bills as PX 13. Respondent admitted its medical payment log as RX 1. The Arbitrator has reviewed these exhibits as well as the medical evidence and finds that the unpaid bills submitted are for treatment after September 24, 2012 and therefore not causally related to the accident. Based on the record as a whole and the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he is entitled to any further medical payments. Petitioner's claim for further medical payment is denied.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter. Based upon the Arbitrator's finding with respect to Causal Connection, the Arbitrator will consider only the condition of ill being causally connected to the accident, being the condition of Petitioner's low back through his date of maximum medical improvement on September 24, 2012.

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 Tech II at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that Petitioner had a previous 30 pound lifting restriction but had been able to remain in his regular job. Petitioner continued to perform his Tech II position after his return to work in September, 2012 until his retirement in May, 2017. Because of these facts, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 57 years old at the time of the accident. He was released to his regular job as of September 24, 2012 and continued to work as a Tech II through his retirement on May 17, 2017. Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that was released to his regular job as of September 24, 2014 and continued to work as a Tech II through his retirement on May 17, 2017. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner was diagnosed with low back pain, acquired spondylolisthesis and a lumbar sprain/strain. Petitioner underwent physical therapy. The Functional Discharge Summary on September 14, 2012 found Petitioner able to perform 100% of the physical demands of his job. On September 24, 2012, Dr. Matthew noted that Petitioner was pain free and released him to work within the guidelines of the Functional Capacity Evaluation. He noted that Petitioner is pain free with regards to the injury but continues to have mild chronic pain from a prior injury. He is at maximum medical improvement for the injury on August 15, 2012 and was released from care. Because of these facts, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 4% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

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

Samed Dzombic,

Petitioner,

vs.

NO: 17WC 33291

Weld-Seam,

19IWCC0077

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 issue(s) of accident, temporary total 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 May 10, 2018 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.

19IWCC0077

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 6 - 2019
SJM/sj
o-1/24/2019
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

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

DZOMBIC, SAMED
Employee/Petitioner

Case# **17WC033291**

19IWCC0077

WELD-SEAM INC
Employer/Respondent

On 5/10/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.00% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2559 BOWMAN & CORDAY
LANE ALLAN CORDAY
134 N LASALLE ST SUITE 1440
CHICAGO, IL 60602

2837 LAW OFFICES JOSEPH MARCINIAK
BRENT W HALBLEIB
200 W MADISON ST SUITE 501
CHICAGO, IL 60606

STATE OF ILLINOIS 19IWCC0077
) SS.
COUNTY OF DU PAGE)

☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Samed Dzombic
Employee/Petitioner

Case # 17 WC 33291

Consolidated cases: _____

v.

Weld-Seam, 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 **Wheaton**, on **March 7, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 11, 2017**, Respondent was operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$37,080.00**; the average weekly wage was **$713.08**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **0** children under 18.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services **$197,009.10**, as set forth in Petitioner's Exhibits 7-14 and18, as provided in Sections 8(a) and 8.2 of the Act. The respondent shall pay for reasonable and necessary prospective medical care as prescribed by Dr. Ackerman. Respondent shall hold Petitioner harmless from claims for any payments made by another insurance carrier, or health plan.

Respondent shall pay Petitioner temporary total disability benefits of $475.39/week for 16-2/7 weeks, commencing November 14, 2017 through March 7, 2018, as provided in Section 8(b) of the Act.

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

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

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

KSSteffen

Signature of Arbitrator Ketki Steffen

5/8/18

Date

ICArbDec19(b)

FACTUAL HISTORY

Petitioner, a 51-year-old Bosnian born man and testified at Arbitration through a Serbian interpreter. The Petitioner was employed by Respondent Weld-Seam, Inc., a metal fabrication and welding shop, for the past eleven years. His duties involved shaping material, welding, planing weld seams, also known as planishing.

Petitioner testified that on October 11, 2017 while in the process of planishing a cylinder, he sustained injury to his neck with tingling pain into the left arm. He continued working that day and noticed continuing pain while at home that night. He returned to work the next day, October 12, 2017, and worked for a few hours until he could no longer tolerate the pain. He told his boss, Marty Bruner, that he had pain down his arm and that he needed to see his doctor. Petitioner acknowledged that he did not notify Mr. Bruner that he was injured during work.

Petitioner testified that he left work and immediately went to his family doctor, Dr. Milenko Lazarevic. He told the doctor he had pain in his neck and tingling in his left arm, and that he was hurt on the job.

Dr. Lazarevic notes of October 11, 2017 indicate that Petitioner complained of neck pain and tingling. (Pet.Ex.No. 15) The handwritten notes are difficult to read but indicate that Petitioner was planishing. There are no doctor's notes from October 12 but there are medical notes "planishing cylinder and developed strong pain at this job in the neck". (Pet.Ex.No. 15) Petitioner underwent a cervical MRI, which was performed at Presence St. Joseph Hospital on October 13, 2017. The is a note from Dr. Lazarevic that Petitioner was under his care on October 13th there there is no medical documentation similar to October 12th visit. The radiologist's impression was C6-7 left paracentral focal disc osteophyte, likely accounting for the patient's left upper extremity radiculopathy (Pet.Ex.No.16).

Petitioner had follow-up visits with Dr. Lazarevic on October 21 and 26, 2017. Petitioner testified that he chose to work for the Respondent through his pain.

Petitioner was seen in surgical consultation by Dr. Paul Ackerman on November 7, 2017, at which time cervical fusion surgery was recommended. . On that date he noted that the petitioner developed the insidious onset of neck pain and LUE discomfort that worsened into sharp electric shocks down the left arm from the C6 and C7 distribution. There is no mention of a lifting incident of 10/11/17 in Dr. Ackerman's notes but the intake form from Dr. Ackerman's office shows that Petitioner answered yes to the question of whether his injury was work or auto accident related.

Petitioner testified that he continued working until he could no longer tolerate the pain, and on November 14, 2017, Dr. Lazarevic took him off work (Pet.Ex.No.2).

After pre-op clearance by Dr. Lazarevic on November 20, 2017, Petitioner underwent cervical fusion surgery by Dr. Ackerman at Presence Resurrection Medical Center on November 29, 2017: vertebral corpectomy at C6, anterior approach with decompression of the spinal cord; anterior cervical arthrodesis from C5-7, anterior interbody technique with PEEK (NuVasive Monolith) interbody cage filled with local autograft and allograft and placement of anterior cervical plate (Pet.Ex.No.17, page 12).

Petitioner has remained off work under Dr. Ackerman's care through date of Arbitration. He commenced a prescribed course of post-operative physical therapy on March 2, 2018 (Pet.Ex.No.25). When last seen by Dr. Ackerman on February 26, 2017, a cervical CT scan was requested, with a return visit to Dr. Ackerman on April 12, 2018 (Pet.Ex.No.24).

Petitioner testified that the surgery was successful in relieving the tingling in his arm, but he still continued to have pain in his neck. He had difficulty sleeping due to pain.

Petitioner testified that he had sustained no prior injury to his neck or left arm, or any injury subsequent to October 11, 2017. He has filed no prior claims for work related injuries.

Marty Bruner, the President of Weld-Seam, Inc. testified on behalf of Respondent. He described the nature of the business, specialty welding, and described the jobs performed and number of employees. He testified on the safety meetings, attended by Petitioner and other employees, and as to reporting procedures. He confirmed that Petitioner requested to see his doctor on October 12, 2017, but that Petitioner did not advise him of a work-related accidental injury. Mr. Bruner testified that the petitioner did approach him on 10/12/17 and advised he wanted to go the doctor. However, Mr. Bruner advised that the petitioner told him at that time that he had tried to go to the doctor the previous Saturday but could not go because the doctor did not have hours on Saturday.

Mr. Bruner testified that the petitioner returned to work on 10/16/17. He testified that the petitioner gave him the work notes from the doctor's visit from 10/12/17 that day and said he was going for an MRI. He testified that the petitioner did not tell him it involved a work accident.

Mr. Bruner testified that on 10/19/17, he had another conversation with petitioner regarding his physical condition. On that date, the petitioner asked about short term disability benefits. He again did not tell Mr. Bruner that he had a work accident causing his symptoms.

Both the petitioner and Mr. Bruner indicated that the petitioner worked his regular job through 11/14/17. According to Mr. Bruner, at no time during that period did the petitioner indicate that he had sustained a work accident on 10/11/17.

Mr. Bruner confirmed that Petitioner brought him notes from Dr. Lazarevic subsequent to the injury. He confirmed that Petitioner's step-daughter contacted him (Marty) to advise of the work-related injury. Prior to the conversation with the step-

daughter, Marty was unaware that Petitioner was injured at work. He testified as to the nature of work performed by Petitioner on October 11, 2017.

Petitioner was cross-examined and acknowledged that he did not ever communicate about the work accident directly to the insured, but had his step-daughter call in 2 ½ weeks later to advise that it was a work accident. At trial, petitioner stated that he did not always know what was going on whenever things were explained to him in English.

Mr. Bruner testified that the petitioner was a long-time employee of the respondent and he had never had a problem communicating with the petitioner.

The intake forms from Dr. Lazarevic's office are in the English language and are filled out and signed by the Petitioner in English.

FINDINGS/ANALYSIS

(C) DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT.

Petitioner is a Bosnian interpreter who testified through an interpreter. He was a long term (10 years) employee of the Respondent and appeared to have a good working relation with his employer. The testimony and the supporting document indicate that Petitioner's job often involved heavy lifting of cylinders weighing up to 60 lbs. The work descriptions logs, introduced into evidence clearing support that on October 11, 2017, Petitioner was performing (partly) heavy lifting and planishing of cylinders.

Petitioner testified that on October 11, 2017 while planishing cylinders, he sustained injury to his neck and left arm, when lifting one of the cylinders. He continued working that day and left the job early the next day to see his family physician, Dr. Milenko Lazarevic.

Dr. Lazarevic's office notes of October 12, 2017 state that "Patient complains of neck pain and tingling in left upper extremity; Patient was planishing cylinders and developed strong pain at his job in the neck." (Pet.Ex.No.15). Dr. Lazarevic ordered a cervical MRI which was performed on October 13, 207. Dr. Lazarevic's office notes of October 21, 2017 state "Patient complains of strong pain in his neck, 10/11/2017 while working at his job." (Pet.Ex.No.15)

Petitioner testified that he did not initially tell his boss, Marty Bruner, that he was injured at work because he did not know how to express himself. Furthermore, he did not know the exact nature of his injury, but merely that he had pain in his neck and tingling down his left arm.

Marty Bruner testified that Petitioner did not advise him about the work accident, and that he was unaware of same until Petitioner's step-daughter called him (Marty) to report the injury and explain the situation. Notice of the accident was stipulated to by the Respondent.

Petitioner testified that he thought the cylinder weighed 65 pounds. Marty Bruner testified that referring to the Time Audit (Pet.Ex.No.1), the various materials worked on by Petitioner on October 11, 2017, weighed 20-40-60 pounds. There is no dispute that Petitioner did, in fact, planish cylinders on October 11, 2017 weighting 20-40-60 pounds.

The pertinent issue is whether Petitioner's injury is work related. Questions arise because Petitioner failed to notify his employer of a work accident for over two weeks. Notice is not in issue because the Respondent's witness, Mr. Bruner testified and agreed Petitioner's step-daughter called to notify the Respondent that the Petitioner had suffered a work accident on October 11, 2017. The call came approximately 2 to 2 and ½ weeks after the accident of October 11, 2017.

Therefore, the case rests on the credibility of the Petitioner as to whether his injury is work related. The Arbitrator has patiently and repeatedly examined the medical notes and witness testimony with this issue in mind and finds that the Petitioner has met his burden of proving that he suffered an injury that arose out of and in the course of his employment.

In support of her finding the Arbitrator notes that Petitioner is a long-term employee of Respondent. The nature of the heavy-duty work is supported by Petitioner's testimony (corroborated by Respondent/owner Mr. Bruner) the photographic evidence and the work logs. The nature of work and the description of how the accident occurred, i.e. mechanism of the injury, is consistent with the complaints and nature of the injury. The injury is consistently reported to the physician and noted in the medical records. It is re-noted and reported by Petitioner in Dr. Lazarevic's intake form.

Specifically, on his initial visit to Dr. Lazarevic, on October 12, 2017, the day after the alleged accidental injury, Petitioner told Dr. Lazarevic that he felt pain in the neck and tingling down the left arm while planishing cylinders on his job. On October 21, 2017, subsequent history indicates injury at work on October 11, 2017. The Arbitrator finds Dr. Lazarevic's documentation of medical history to be corroborative of Petitioner's testimony regarding the work-related accident. Although, Petitioner failure to tell his employer that he suffered a work accident plants seeds of doubt, the medical corroboration is sufficient to overcome this reservation. The Arbitrator notes that Petitioner is an immigrant and although the Arbitrator finds that he has some command of the English language, the Arbitrator is convinced that Petitioner is credible in his testimony that he was injured due to work activities. His demeanor in court along with the absence of other evidence that would negate the work-accident, support Petitioner's claim. The Arbitrator also notes that

Petitioner was truthful in testifying that he did not initially notify his boss about the work accident. He did not embellish his testimony. Although the Arbitrator does find it questionable that Petitioner who regularly communicated with his boss had difficulty communicated the nature of his injury due to communication difficulty, the Arbitrator notes that the Petitioner did tell his medical provider that he was injured at work. Perhaps he did not understand the legal implications of why he needed to tell his employer. Perhaps he was afraid to report a work accident. Rather than speculate, the Arbitrator chooses to look at other objective evidence that supports Petitioner's claim of a work accident.

The Arbitrator finds such evidence to be ample and therefore finds that Petitioner sustained a work-related accidental injury on October 11, 2017.

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

As a result of his work-related accident, Petitioner sustained injury to his neck and left arm which resulted in C5-7 cervical fusion surgery.

Dr. Lazarevic's medical records corroborate Petitioner's complaints of neck pain and radiation into the left arm (Pet.Ex.No.15). MRI findings demonstrate C6-7 left paracentral focal disc osteophyte, flattening the adjacent ventral margin of the cervical spinal cord likely impinging the left exiting C-7 nerve root, accounting for patient's left upper extremity radiculopathy (Pet.Ex.No.16). Petitioner underwent C5-7 cervical fusion with instrumentation which relieved the symptoms of tingling in his left arm.

Petitioner credibly testified that he had sustained no injury to his neck or left arm prior to October 11, 2017, nor subsequent thereto. No medical record of treatment to the

neck or left arm has been presented to indicate prior injury. Petitioner did testify to back pain in 2014, for which he had treatment, and x-rays were taken of both lumbar and cervical spine. However, no evidence of cervical spine injury or treatment has been presented. Petitioner's payroll records for the year prior to the October 11, 2017 accident, indicate that he worked full-time 40 hours nearly every week, and particularly that he worked overtime hours for 14 of the 52 weeks (Pet.Ex.No.27). This demonstrates no significant lost time for any prior injuries, and that he was able to perform his physically demanding job for that period of time. This corroborates his testimony of no prior injuries.

This Commission, and the Courts above, have adhered to the long standing "chain of events" analysis when determining the issue of causal relationship. "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *Shafer v. IWCC*, 2011 IL App (4th) 100505WC, quoting *International Harvester v. Ind. Comm.*, 93 Ill.2d 59, 63-64 (1982). In the recent case of *Schroeder v. IWCC*, 2017 IL App (4th) 160192WC, May 31, 2017, the Appellate Court agreed with the Commission's utilization of the chain of events analysis, having extended the common-sense factual inference of "relative good health" with reference to preexisting conditions.

It is well established that an accident need not be the sole or primary cause – as long as employment is a cause – of a claimant's condition. *Sisbro Inc. V. Industrial Commission*, 207 Ill. 2d 193 (2003). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill.2d 30, 36 (1982).

Based upon a "chain of events" analysis, and a common sense factual inference, the records of Dr. Lazarevic and Dr. Ackerman, and the credible testimony of the Petitioner, supported by all of the medical evidence presented, the Arbitrator finds a causal relationship exists between the Petitioner's work-related accident and physical condition requiring surgical intervention. No other medically supported explanation for the injury has been presented.

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

The Petitioner's claim for medical services is being challenged based on whether the accident was work-related. There is no evidence to overcome or contest Dr. Lazarevic and Dr. Ackerman's medical opinion that the medical services provided to Petitioner were reasonable and necessary. Therefore, based on the above analysis the Arbitrator finds that the medical treatment prescribed, and the accompanying charges, are appropriate, reasonable, necessary and related to Petitioner's work-related accident. As such, Respondent shall pay to the Petitioner for medical expenses pursuant to Section 8(a) and 8.2 of the Act:

- Dr. Lazarevic (reimbursement) $60.00 (Pet.Ex.No.7)
- Cervical collar (reimbursement) $31.97 (Pet.Ex.No.8)
- CVS Pharmacy (reimbursement) $66.39 (Pet.Ex.Nos.9, 10, 11)
- NCH (reimbursement) $150.00 (Pet.Ex.No.12)
- N.W. Neurosurgical (reimbursement) $50.00 (Pet.Ex.No.13)
- Northwestern Neurosurgical Associates $51,283.00 (Pet.Ex.No.14)
- Presence Resurrection Medical Center $145,367.24 (Pet.Ex.No.18)

(The stipulation sheet does not specifically request prospective care and there is little to no testimony of what care is still needed and why. There is a request for Respondent to pay for going care including PT, MRIs etc. so the Arbitrator feels compelled to address this issue. Based on the factors that Petitioner has undergone surgery, the Arbitrator finds that additional care in the form of physical therapy as well post-op visit would be appropriate. The Arbitrator awards the same as long as they are appropriate, reasonable and related to his prior medical care and within-bounds of the findings in this case. This decision and findings are not meant to grant or deny open-ended prospective care.)

(L) WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

For all of the above stated reasons, the Petitioner has met his burden of proof, through testimony and documentary medical evidence, that he has been authorized off work, initially by Dr. Lazarevic on November 14, 2017 (Pet.Ex.No.2), and from date of surgery through the present, per Dr. Ackerman off work statements (Pet.Ex.Nos.4,24)

Therefore, Respondent shall pay to the Petitioner TTD benefits for the period of November 14, 2017 through date of Arbitration hearing, March 7, 2018, a period of 16-2/7 weeks.

The Arbitrator did not find any detailed or explanatory medical evidence to show whether Petitioner can or cannot return to work. There is lacking any evidence of normal or expected recovery time. By all indications the surgery is a success. There is only a blanket and 'cursory' 'cannot return to work' note. The Arbitrator notes however that Petitioner testified that the surgery was successful in relieving the tingling in his arm, but he still continued to have pain in

his neck. Whether this pain is sufficient to allow for full or part time restricted work remains an open question.

The Arbitrator recommends that a more detailed medical opinion on this issue be obtained by one or both sides.

(M) SHOULD PENALTIES BE IMPOSED ON RESPONDENT?

Though the Arbitrator has found in favor or Petitioner, the Respondent has presented a defense to the claim and, accordingly, no penalties or attorneys' fees are awarded. Petitioner's failure to tell his employer that he suffered a work accident for 'some time' was sufficient for the Respondent to challenge Petitioner's claim.

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

Kevin Lacey,

Petitioner,

vs. NO: 14 WC 30632

Rise Electric, LLC.

Respondent.

19IWCC0078

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue(s) of accident, causal connection, medical expenses, any and all issues raised during the hearing, permanent disability, temporary disability, penalties and fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 26, 2018 is hereby affirmed and adopted.

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

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

DATED: FEB 6 - 2019

Stephen J. Mathis

Deborah L. Simpson

David L. Gore

SJM/sj
o-1/24/2019
44

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LACY, KEVIN
Employee/Petitioner

Case# 14WC030632

19IWCC0078

RISE ELECTRIC LLC
Employer/Respondent

On 2/26/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.82% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1922 STEVEN B SALK & ASSOCIATES LTD
FRANK GAUGHAN
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

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

19IWCC0078

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

Kevin Lacey
Employee/Petitioner

v.

Rise Electric LLC.
Employer/Respondent

Case # 14 WC 030632

An *Application for Adjustment 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 **October 10, 2017**. After reviewing all of 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. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **September 3, 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 $3,674.00; the average weekly wage was $1,683.00

On the date of accident, Petitioner was **48** years of age, *single* with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$2,000.00** for other benefits (**advance**), for a total credit of **$2,000.00**.

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

ORDER

Claim for compensation denied. Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent on September 3, 2014 and he failed to prove a causal connection between any such accidental injuries and his current condition of ill-being.

Petitioner's claim for penalties and attorney's fees is denied.

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

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

Signature of Arbitrator

February 24, 2018
Date

FEB 26 2018

STATEMENT OF FACTS

On September 3, 2014, Petitioner was employed by Respondent as a journeyman electrician, working on a job at the new Nieman Marcus store in Chicago. He began working for Respondent on August 18, 2014. Petitioner has been a member of Local 134 of the International Brotherhood of Electrical Workers since August 24, 1992. (RX 10)

Petitioner testified that he was injured at work on September 3, 2014. Petitioner was working in in an electrical closet, pulling wire. Petitioner testified that he was standing on a six-foot ladder on about the second step (2 feet off the floor), pulling wire overhead from left to right and he fell off the ladder. He fell into the wall, slid down the wall onto the ground, onto his head and was "crumpled up." The right side of his body hit the wall. After the fall, he noticed that he was dizzy. He had landed on his head. He was in pain. He had pain in his forehead, as he landed on his forehead and he had a knot on his forehead above the right eyebrow. Petitioner testified that he also had pain in his arm or shoulder.

Petitioner testified that he gathered himself up and reported the incident to his foreman/supervisor, Travis. According to Petitioner, Travis heard the fall. Petitioner saw Travis running toward him to see what happened. Petitioner said that he told Travis that he fell and he wanted to fill out an accident report. Petitioner said that Travis told him that they didn't have any accident reports. Petitioner testified that he attempted to fill out a makeshift accident report in the general contractor's office with a piece of paper and an ink pen. He said that he was successful in this attempt and that he requested a drug test and a trip to the hospital. According to Petitioner, he was given a lay-off notice and a severance check shortly thereafter. Petitioner testified that he then asked Travis about the hospital and Travis said that if Petitioner was still feeling not well on September 4, they would go to the hospital then. Petitioner testified that he gathered his tools and went home.

Petitioner testified that he returned to the job site on September 4, 2014. He still felt light headed and dizzy. He had pain throughout his body. He asked Travis about getting medical attention. Petitioner said that Travis told him that Respondent declined to take him to the hospital. Petitioner was questioned about PX 43, an accident report. He said that he did not fill out an accident report on September 4, 2014. When asked if he signed an accident report, Petitioner responded: "Not to my knowledge." He was then shown PX 43 and identified his signature on the document. Someone else filled out PX 43. He was not sure who filled out PX 43. PX 43 states that the accident occurred on 9/3/2014. The body parts affected were the right shoulder, right elbow and right hand. "Installing electrical boxes on IDF rack. Fell off bucket he was standing on. Fell into IDF rack. Impacted right side into IDF rack and hit floor. Working in tight space." (PX 43)

Petitioner testified that after he spoke with Travis on September 4, he went home. This was the last contact that Petitioner had with Travis or Respondent.

Travis Jorgensen testified at the request of Respondent. He was not present for Petitioner's testimony. He is an electrical foreman, working out of Local 134. He currently works for Titan Electric. He worked for Respondent for about 3 years. He was familiar with Petitioner and recalled the incidents of September 3 and September 4, 2014. On September 3, 2014, Jorgensen assigned Petitioner to work in the IDF room, mounting boxes and piping. Around 10:30 or 11:00, Jorgensen heard something in the room and went to check on Petitioner. He asked Petitioner if everything was ok and Petitioner told him that he fell off a bucket and he was fine. Jorgensen asked Petitioner if he was hurt and Petitioner said "No, no big deal, I'm all right." Jorgensen asked Petitioner if he wanted to fill out an accident report Petitioner said: "No, nothing is wrong, I'm fine." Petitioner was laid off

later that day. As is customary, Petitioner was given a layoff notice and his last paycheck. Petitioner said that someone was picking him up from work, so he asked if he could leave his tools on the job site. Jorgensen said that this was the last that he saw on Petitioner on September 3. Jorgensen denied refusing Petitioner a drug test on September 3. There was no talk of a drug test on September 3 because Petitioner was not hurt. Petitioner did not request a drug test from Jorgensen. The next day, September 4, 2014, Petitioner called Jorgensen and advised that his shoulder was sore from the fall and he wanted to fill out an accident report when he came to get his tools. Jorgensen testified that he filled out PX 43 with Petitioner. Jorgensen sat across a desk from Petitioner and wrote down what Petitioner told him. Petitioner complained of: sore shoulder, right side, elbow and hand. According to Jorgensen, Petitioner did not mention falling off a ladder. Jorgensen filled out the report and then he and Petitioner signed it. When the report was completed, Jorgensen told Petitioner he had to go for a drug test. Petitioner said that he was running late, he was in a hurry and couldn't do it. Because Petitioner was no longer an employee of Respondent, they couldn't make him take the test. Jorgensen did not notice that Petitioner had any injury on September 3. Petitioner worked for 3 hours after the incident on September 3. Petitioner seemed fine on September 4, although he said that he had a problem with his right shoulder and elbow and hand. Jorgensen did not notice any bump on Petitioner's forehead, either on September 3 or September 4.

On cross-examination, Jorgensen testified that he heard the fall. There was no ladder in the room.

Respondent also presented the testimony of Jason Gilles, Principal of Respondent. Gilles testified that Respondent intended to lay Petitioner off on September 3, 2014. Gilles gave Jorgensen Petitioner's last check. Jorgensen did not mention any work accident. The next day, Jorgensen called Gilles and advised that Petitioner wanted to fill out an accident report. He was coming back to the job site to pick up his tools. Gilles offered to take Petitioner for a drug test and Petitioner said nope, he didn't want to do it. Gilles suggested that Petitioner take the test because he was filling out the accident report. Petitioner declined. Petitioner looked fine. There were no facial injuries and no broken teeth. He had no lumps on his head. Gilles testified that when Petitioner started to tell about the accident, he said that he was standing on a bucket and fell. Travis asked Petitioner to explain the accident to him and Petitioner said that he fell off a ladder. Gilles and Travis said "you told us you fell off a bucket." Petitioner responded: "I did fall off a bucket." Petitioner was asked which one is it? And he said "No, it was definitely a bucket." Petitioner and Travis looked at the document that Travis wrote up and they both signed it.

On cross-examination, Gilles confirmed that he was in the hearing room when Jorgensen testified. Both Travis and Gilles offered to take Petitioner for a drug test.

Petitioner did not submit any rebuttal to the testimony of Jorgensen and Gilles.

Petitioner first sought medical treatment for his injuries at St. James Hospital/Olympia Fields, where he was seen in the ER on September 5, 2014 at 8:31pm. He presented with right shoulder pain, pain in the right humerus and right elbow pain as a result of a work related injury. The chief complaint was right arm and shoulder pain, status post work injury on September 3 where he fell 8 feet off a ladder. The patient has a pinched nerve in his right elbow and his hand is numb. Physician notes indicate right shoulder pain secondary to traumatic injury. "Patient states that while at work 2 days ago he was working in a tight space and lost his balance falling off the ladder and hitting his right shoulder and right arm against a piece of furniture on the way down. Denies LOC, head trauma or neck trauma. Currently complains of loss of range of motion at the right shoulder, secondary to pain. The pain radiates down the right arm to the elbow and forearm with palpation or movement. The shoulder had tenderness to palpation and limited range of motion. Sensation was intact. The physical exam did not reveal any injuries consistent with an 8 foot fall (there was no bruising, redness or

swelling). There was no documentation of a head injury, bump on the forehead, back injury, neck pain, broken teeth or a burn on the left medial thigh. X-rays of the right humerus, forearm and shoulder were normal. Norco was prescribed and Petitioner was instructed to follow up with occupational health. The diagnosis was: 1.) right shoulder pain; 2.) pain in the humerus, right; 3.) right elbow pain; 4.) work related injury. (PX 1)

On September 5, 2014, Petitioner underwent a lumbar MRI and a brain MRI (with and without contrast) that had been previously ordered by Dr. Mark Chang of Midwest Spine Care. The MRI of the brain was a limited study because Petitioner could not remain still. It appears to have been unremarkable. The lumbar scan showed some pathology (minimal bulging disc at L4-L5 and minimal bulging disc at L5-S1 with a central annular tear that appeared new). (PX 2)

Petitioner testified that he followed up with his PCP, Dr. Mohammed Shamshuddin, on September 9, 2014. Petitioner testified that his symptoms on that day were light headed, dizziness and pain from the accident. Petitioner testified that the pain was located in the right arm, inner left thigh, forehead and mouth. The chart reveals that he had complaints of headache, right shoulder pain and arm pain. Dr. Shamshuddin noted the history of a fall off a ladder at work on 9/3/14 and complaints at urgent care of headache, right shoulder pain, right arm pain and back pain. There was no history of LOC and head injury. Petitioner had elevated blood sugar and elevated blood pressure. Petitioner was advised to get an MRI of the brain and shoulder. Petitioner testified that he requested a referral to a specialist. The chart note does not support this testimony. Dr. Shamshuddin released Petitioner back to work, effective September 12, 2014. (PX 3, RX 7)

Petitioner testified that he then saw an orthopedist, Dr. Steven Sclamberg, on September 16, 2014. Petitioner had previously treated with Dr. Sclamberg for a work injury to his right elbow. Dr. Sclamberg's chart of 9/16/14 shows that Petitioner was self referred, although he did identify Dr. Shamshuddin as his PCP. He injured his right arm when he fell off a ladder at work. The complaints were of pain in the right shoulder, pain traveling down the deltoid, with diminished range of motion, lots of pain at the elbow. The physical exam revealed diminished range of motion of the shoulder with very positive impingement signs. The elbow showed full range of motion with mild tenderness at the epicondyles and positive elbow hyperflexion testing. The diagnosis was: 1.) Right shoulder pain, contusion; 2.) Right elbow pain, contusion, consistent with ulnar neuritis. Dr. Sclamberg causally related these conditions to the fall as the patient described. Dr. Sclamberg ordered MRI's of the elbow and shoulder. Petitioner was taken off work by Dr. Sclamberg. When Petitioner was seen again by Dr. Sclamberg on October 3, 2014 it was noted that the MRI demonstrates impingement syndrome with partial-thickness rotator cuff tearing. Dr. Sclamberg recommended PT, provided a shoulder injection and recommended that Petitioner see his PCP for other medical issues. Surgery would be considered if therapy was not successful. At the November 17, 2014 visit, Dr. Sclamberg offered surgery. Petitioner was cautioned that post surgery PT was important and post surgery complications could arise because of Petitioner's diabetes condition. (PX 4)

Petitioner saw Dr. Shamshuddin on September 25, 2014 to go over the MRI results. The brain and lumbar MRI's were said to show no acute findings and mild DDD of the lumbosacral spine. Petitioner was complaining of dizziness and high blood sugar symptoms. (PX 3)

Petitioner was seen at the ER at Ingalls Hospital on September 25, 2014 for low blood pressure. He also complained of right shoulder pain, and pain in the knees and back, after a MVA on 9/3/2014. (PX 6)

Petitioner saw Dr. Mark Chang on September 30, 2014. The brain and lumbar MRI's were discussed. Petitioner gave a history of falling 6 feet off a ladder at work on 9/3/14, landing on his side and face. He complained of increased back pain since the fall. The impression was acute aggravation of chronic lower back

pain, no significant MRI change, no obvious radiculopathy, no obvious nerve impingement. The slight bulge and annular tear on the lumbar study might be related to the fall, or not. It is something that does not require surgery. He would benefit from PT. The patient should follow up with rehabilitation management due to the long standing nature of the pain. Petitioner was advised to follow up, PRN. (PX 7)

A right shoulder MRI was performed on September 30, 2014. The impression was: 1.) Mild interstitial tearing of the supraspinatus tendon; 2.) Trace biceps tenosynovitis; and 3.) Degenerative changes that should be correlated regarding impingement. These findings were said to be new and increased from the prior shoulder MRI of April 26, 2010. (PX 2)

Petitioner was seen at St. James Hospital for a left leg ulcer condition. This was thought to be related to his diabetes condition. Petitioner also saw Dr. Grevious for a plastic surgery consult on November 4, 2014. The history was of a fall while working, with a traumatic injury to the brow and a burn abrasion injury to the medial thigh. Petitioner claimed that the facial mass and the left thigh mass were not present prior to "his injury." The forehead lesion was not only not present before the injury, it has gotten significantly worse with more discomfort. Petitioner wished to go ahead with a scar revision of the thigh mass. Dr. Grevious thought that the forehead lesion was a lipoma. (PX 10)

Petitioner began PT recommended by Dr. Sclamberg at Flexeon Rehabilitation on October 15, 2014. Therapy continued through January 25, 2015. The initial visit documents that the patient is seen for right shoulder pain after he fell off a ladder. He also had an injury to his head (visible bump noted), low back, mouth (lower front teeth removed), and to the right elbow and forearm. (PX 9)

A further right shoulder MRI was done on November 25, 2014. The pathology was similar to the September 30, 2014 study. (PX 4)

Dr. Sclamberg performed shoulder surgery on December 12, 2014. The post operative diagnosis was: Right shoulder impingement syndrome with partial rotator cuff tear plus hypertrophic synovitis and labral tearing. The procedure was: Arthroscopy, right shoulder with synovectomy; subacromial decompression; and debridement of labral tearing anteriorly. (PX 4, 12)

Petitioner had follow-up care by Dr. Sclamberg through August 6, 2015. CPM, ice machine and PT were ordered. Dr. Sclamberg kept Petitioner off work during this time. Dr. Sclamberg charted several incidences of Petitioner seeking narcotic pain medication and made referrals to pain management doctors. At some point, Petitioner's physicians agreed that pain medication orders would be done through Petitioner's new PCP, Dr. Patel. Petitioner still tried to contact Dr. Sclamberg for narcotics and he was then appropriately referred to Dr. Patel or the ER. The last visit with Dr. Sclamberg was on May 26, 2016 when Petitioner received a steroid injection for his ulnar neuritis condition. Petitioner was discharged, PRN. (PX 4, 14)

Petitioner had PT at ATI from February 16, 2015 through March 9, 2015. The discharge note documents non-compliance and that the patient was falling asleep during exercises. (PX 13)

After the surgery, starting December 28, 2014, Petitioner sought treatment at the ER at St. James Hospital for uncontrolled pain in the right shoulder. He reported running out of medication (January 3, 2015). He was punched in the shoulder and had problems with his doctors, security called-impression of drug seeking behavior (February 28, 2015). Headache and melena, seeking refills of Oxycodone and Norco, combative with staff, security called, left AMA (March 1, 2015). Chronic right shoulder pain (March 5, 2015). Altered mental status, opiate and benzodiazepine overdoses, patient said CVS is pharmacy, mom say Walgreen's, called Walgreen's

and they advised that they are very familiar with patient (April 22, 2015). Right shoulder, elbow and back pain, out of Norco and Xanax, altercation exacerbating previous injuries, ED Dr. Note-prolonged elucidation, prior drug induced stupor, drug seeking behavior, discharged with Toradol, Tylenol and a sling, University Park FD, transported Petitioner from his house for high blood sugar, back pain and right shoulder pain (June 27, 2015). (PX 1)

The first pain management doctor that Dr. Sclamberg referred Petitioner to was Dr. Andrei, Rakic, MD. Petitioner was seen on March 26, 2015 for analgesics. The patient interview was compromised by manicky affect. The patient complained of 10/10 pain and inability to use his right arm. He also complained of low back pain. Dr. Rakic noted pressured speech with frequent tangentialities and difficulty redirecting. The patient used extensive medical terminology. The impression was that the patient needs to be managed psychiatrically, A script for meds was given. On April 24, 2015, Dr. Sclamberg noted the overdose admit to St. James and the decision to have Dr. Patel manage Petitioner's medications. Petitioner called Dr. Sclamberg on May 7, 2015 and requested pain meds. He was refused. Petitioner called again on May 14, 2015 and said that he had fallen on his operative shoulder and has pain. He was referred to the ER. On May 14, 2015, Dr. Sclamberg charted his comments on the January 26, 2015 IME by Dr. Kenneth Schiffman. The 2010 MRI showed no rotator cuff tear. The patient fell 6 feet from a ladder on 9/3/2014. Causation is established by the 6 foot fall from a ladder onto the patient's right arm. Petitioner called Dr. Sclamberg on June 5, 2015, saying that he was in the ER because his house collapsed on him. He wanted to leave the ER and have Dr. Sclamberg prescribe various medications, including Tramadol, Oxycodone, Norco and antidepressants. Dr. Sclamberg recommended that Petitioner be evaluated at the ER and call his PCP, who is directing his medications. Dr. Sclamberg spoke with Petitioner on June 12, 2015. Petitioner sought medication after being injured by a microwave explosion at a hotel where he was staying because his house fell on him. Apparently, racquetballs (?) struck Petitioner from the exploding microwave. His left eye was taken out and he had second degree burns on his face and throat. He fell over a table and injured his shoulder again. Petitioner requested medication because Dr. Patel said that it was ok. Dr. Sclamberg spoke with Dr. Patel and he said no meds. Dr. Sclamberg recommended that Petitioner go to the ER to rule out a fracture. Dr. Sclamberg declined to authorize meds. (PX 4)

Petitioner presented to the Ingalls ER on June 12, 2015. He complained of a sore throat and right shoulder pain after an accident on Sunday (June 7 ?). Eggs exploded in the microwave on Monday, right shoulder pain, throat and bilateral eye pain and back pain due to this incident. The patient began rambling about his life story and had no complaints and walked out AMA. He would not answer staff and would not tell them what they could do for him. (PX 6)

Petitioner was seen by Midwest Anesthesia and Pain Specialists (Billy Hayduk, PA-C-ND) in August of 2015. The complaints were of a fall on 9/3/2015 at work. On an 8 foot ladder. Fell. Hit his head and knocked out his dentures. Injured his right shoulder, neck and low back. EMG showed ulnar nerve entrapment at the elbow. The lumbar MRI showed a torn disc. They have never done physical therapy, but he has a note to begin. The diagnosis was cervicalgia; pain in limb; arthropathy, unspecified; lumbago; pain in joint involving shoulder; lumbosacral spondylosis. Hayduk charted that the patient's "injuries" were related to the work injury of 9/3/2015 and not from a preexisting condition. Percocet, Flexeril and Tramadol were recommended. An L4-L5 sided medial nerve block should be done. If there was 80% improvement, an RFA should be done. Chart notes after the August 25, 2015 visit reference the 9/3/2014 date of injury. Medications were refilled monthly through April 13, 2016. (PX 15)

Petitioner testified that Dr. Patel referred him to Dr. James Diesfeld, MD for pain management treatment. He was first seen on January 10, 2017 for evaluation and management of work-related shoulder pain. He had arthroscopic surgery by Dr. Klingenberg (Sclamberg?). "Scar neuralgias present in the port scars and this refers

into the 4th and 5th digits. TENS therapy, nerve injections and medications were recommended. Petitioner was seen in follow up on April 6, 2017, August 22, 2017 and August 28, 2017. Petitioner testified that he had an appointment scheduled for October 10, 2017 at 3:30pm (this was the date of hearing). (PX 16)

Petitioner returned to work, sporadically, beginning October 1, 2015. He works one to two weeks a month. He submitted claimed medical bills in the amount of $124,396.86. He seeks TTD from September 4, 2014 through September 30, 2015, a period of 56 weeks. Petitioner currently misses time from work due to the stress and the pain. He has to climb up and down. It is hard for him to stand for long periods of time. He has difficulty lifting. He can't hold his arms over his head. He gets a shooting pain in his shoulder. He has pain in his tail bone. He has pain in his elbow. It feels like it was hit with a tuning fork. He has numbness in the pinky and ring finger on the right. He can work ground jobs. Last year he worked a 5 month period, averaging 24 to 40 hours a week. Petitioner currently takes the following medications: Tramadol; Norco; Panzerine; Trimectin; Ferrous Sulfate; Insulin; Folic Acid; and Metformin. Petitioner's stomach is upset by his medications.

Prior to the accident, Petitioner had problems with his right elbow. He filed 2 Workers' Compensation cases (Nos. 09 WC 51370 and 11 WC 3091) for which he received a $275,000.00 settlement. (RX 11) At first, Petitioner denied prior problems with his right shoulder. He denied prior pain in his right shoulder. He was then reminded that he had a right shoulder MRI in 2010, which he said was for stiffness and joint discomfort in his right shoulder. He had minor back problems before 9/3/2014. He received a $2,000.00 advance so that Respondent could obtain an IME in this case.

Petitioner submitted the Evidence Deposition of Dr.Steven Sclamberg as PX 42. The deposition took place on June 29, 2015. Dr. Sclamberg is a board certified orthopedic surgeon. He had treated Petitioner in the past for a right cubital tunnel condition. The last visit for that condition was May 13, 2013. He described his treatment of Petitioner as is set forth above, including the surgery of December 12, 2014. Petitioner was authorized off work through April 24, 2015. Dr. Sclamberg had no opinion on Petitioner's current work status. He thought that the fall off a ladder as described by the patient was a competent mechanism of Petitioner's injuries. The degenerative conditions in the shoulder could be aggravated or accelerated by the fall. The labral tear that was noted at surgery was probably caused by the fall. The history and surgical findings support his opinion. The opinions given at the deposition were regarding Petitioner's shoulder and not his elbow. If there was no fall, then his opinion would change secondary to there being no great mechanism of injury at that point. (PX 42)

Respondent submitted the Evidence Deposition of Dr. Kenneth Schiffman as RX 1. The deposition took place on July 17, 2015. Dr. Schiffman is a board certified orthopedic surgeon. Petitioner first appeared for an IME on November 6, 2014. He appeared with his attorney and the examination did not take place. Petitioner was examined on January 26, 2015. The history was that the patient fell from a ladder, 6 to 8 feet. The diagnosis was right shoulder subacromial impingement and right elbow ulnar neuritis. These conditions were not related to the fall. The elbow condition was preexisting. The shoulder condition was degenerative and not related to trauma. Petitioner should be restricted to work activities at the chest level or below. This restriction is not related to his work. No more treatment is necessary. On cross-examination, Dr. Schiffman agreed that it is harder to see a labral tear on a plain MRI, as opposed to an MR/Arthrogram. An acute labral tear could be consistent with a fall off a ladder. A rotator cuff tear could be related as well. Interestingly, Dr. Schiffman was not aware of a degenerative condition being aggravated by trauma, such that surgery was needed. The alleged injury did not accelerate the degenerative condition. (RX 1)

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the 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. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

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

The Arbitrator finds that Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of her employment by Respondent on September 3, 2014. Petitioner's story does not add up.

First, Petitioner's testimony is found to be not credible. Having observed the demeanor of all of the witnesses and considering all of the evidence, the Arbitrator finds that Petitioner did not fall off a ladder working for Respondent on September 3, 2014, as he testified at trial under oath that he did. The Arbitrator believes that Petitioner may have fallen off a bucket in the IDF room, as he told Jorgensen and as supported by the testimony of Jorgensen and Gilles and as is set forth on PX 43. According to Petitioner, after he was laid off, he gathered his tools and went home. Jorgensen said that Petitioner asked to leave his tools at the job site after he was laid off, as someone was picking him up. The Arbitrator notes that Jorgensen testified that Petitioner did not mention falling off a ladder when PX 43 was being filled out and that Gilles testified that Petitioner first said he fell off a bucket, then said he fell off a ladder and then said he fell off a ladder in response to questions from Jorgensen. While this is an inconsistency, it does not require the Arbitrator to disregard the testimony of Gilles and Jorgensen, especially where there are so many inconsistencies in Petitioner's testimony. Neither Jorgensen nor Gilles noticed that Petitioner had any injury. Specifically, they did not notice the knot that Petitioner said was on his forehead. Petitioner did not rebut the testimony of Gilles and Jorgensen. There was no ladder in the room where Petitioner fell. Falsus in uno, falsus in omnibus. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968)

Petitioner's testimony on direct examination about PX 43 was evasive. He said that he did not fill out an accident report on 9/4/2014 (Jorgensen did, asking Petitioner what his answers to the questions were). Then Petitioner answered "not to my knowledge" when asked if he signed an accident report. He then identified his signature as being on PX 43. Someone else filled out PX 43, Petitioner did not know who filled out PX 43, although he was in the room with Jorgensen when PX 43 was filled out.

The Arbitrator believes that Petitioner did not suffer an injury as a result of the fall. On September 3, 2014, Petitioner told Jorgensen that he was not hurt and Petitioner declined to fill out an accident report. Petitioner's testimony that he asked Jorgensen to send him for medical treatment and a drug test on September 3, 2014 on more than one occasion is not believed. If Jorgensen was told on September 3, 2014 that Petitioner was injured, he would have filled out an accident report and sent Petitioner for treatment and a drug test on that day. Petitioner, being an experienced tradesman, should have sought medical treatment on the day of accident if he was hurt as bad as he claims he was (lightheaded, dizzy and pain throughout his body), even if Respondent refused to send him to its clinic. He did not seek treatment on September 3, 2014. Petitioner did not seek treatment on September 4, 2014 and refused to comply with Respondent's request for a drug test. If Petitioner was hurt bad enough to go back to the job site on September 4 to fill out an accident report, he should have gone for treatment on that day. He did not. Indeed, Petitioner did not seek treatment until 8:30 pm on September 5, 2014, more than 36 hours after the alleged injury occurred. In this case, the gap in time between the alleged injury and Petitioner's first medical care persuades the Arbitrator that no injury occurred on September 3, 2014.

Additionally, Petitioner failed to provide a credible and consistent history of accident. PX 43 documents: fell off a bucket installing electrical boxes on IDF rack, injured right shoulder, right elbow and right hand. When Petitioner was seen for the first treatment at the St. James ER on September 5, 2014, the history was of an 8 foot fall off a ladder, with injuries to the right shoulder, right humerus and right elbow. Petitioner testified that he had pain in the right arm, inner left thigh, forehead and mouth when he saw his PCP for treatment on September 9, 2014. The chart documents complaints of right shoulder pain, headache and right arm pain. There was no history of LOC and head injury. The history to Dr. Sclamberg was of a fall off a ladder at work, with complaints of right shoulder pain, pain traveling down the deltoid, diminished range of motion and lots of apin at the elbow. The history to Dr. Chang on September 30, 2014 was of falling 6 feet off a ladder at work on 9/3/14, landing on his left side and face. Petitioner complained of increased back pain since the fall. Petitioner saw Dr. Grevious on November 4, 2014 and related a left leg ulcer and a forehead lipoma lesion to the fall while working. The varied histories to different providers and the many conditions that Petitioner related to the alleged accident lead the Arbitrator to conclude that no injury occurred on September 3, 2014.

Finally, the Arbitrator incorporates the findings below on the issue of causation in support of this finding of a failure of proof on the issue of accident.

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

This is an issue that should not have been disputed by Respondent.

Petitioner gave timely notice of the alleged accident, based upon the testimony of Jorgensen and Gilles and exhibits PX 43 and RX 2.

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

The Arbitrator finds that Petitioner failed to prove a causal connection regarding his present condition of ill-being and any injury of September 3, 2014, based upon the Arbitrator's finding above on the issue of accident. Additionally, Petitioner's failure to get medical care on the day of accident and his refusal of the medical care

offered by Respondent on the next day and his finally seeking ER treatment at 8:30pm on the second day after the accident persuades the Arbitrator that no injury occurred on September 3, 2014, in addition to a complete review of the treating medical records with their inconsistent histories.

While the Arbitrator is troubled by Dr. Schiffman's testimony that he was not aware of a degenerative condition being aggravated by trauma such that it leads to surgery (never?), his no causal connection opinion comports with the Arbitrator's finding of no accident/no injury, above. If there was no accident and no injury, there is no causal connection.

Dr. Sclamberg's opinion is not persuasive, because it is based on Petitioner falling off a ladder as the mechanism of injury and the Arbitrator has found that no such event occurred.

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

Petitioner's Average Weekly Wage was $1,683.00.

Petitioner was hired out of the Local 134 Union Hall and began working for Respondent on August 18, 2014. In the two full weeks that Petitioner worked for Respondent before the claimed date of accident, he worked 79 hours and was paid $3,366.00. Dividing that figure by the 2 weeks yields an AWW of $1,6783.00. (RX 5)

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

As the Arbitrator has found that Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent on September 3, 2014 and failed to prove a causal connection between any said injuries and his current condition of ill being, the Arbitrator needs not decide these issues.

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

Based upon the Arbitrator's findings on the issues of accident and causation, above, Petitioner's claim for Penalties and Attorney's Fees is denied.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

Respondent is entitled to a credit of $2,000.00 for the advance that it 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

Tony C. Perkins,

Petitioner,

vs.

NO: 15 WC 20762

19IWCC0079

State of Illinois Warren G. Murray Developmental Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 2, 2018, 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 7 - 2019
TJT:yl
o 1/29/19
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PERKINS, TONY C
Employee/Petitioner

Case# **15WC020762**

WARREN G MURRAY DEVELOPMENTAL CTR
Employer/Respondent

19IWCC0079

On 7/2/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1580 BECKER SCHROADER & CHAPMAN PC
MATTHEW R CHAPMAN
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUL 2 - 2018

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

19IWCC0079

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

TONY C. PERKINS
Employee/Petitioner

v.

WARREN G. MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

Case # 15 WC 020762

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon** on **May 3, 2018**. By stipulation, the parties agree:

On the date of accident, **2/6/15**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$43,669.08**, and the average weekly wage was **$839.79**.

At the time of injury, Petitioner was **53** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent and Respondent shall pay, or has paid, all of the medical bills found in PX 19 subject to the medical fee schedule. Respondent shall also receive credit for any medical bills paid by its group medical plan for which credit may be allowed under Section 8(j) of the Act. Said bills may be paid directly to the providers.

Respondent shall be given a credit of $0 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $0. The parties stipulated that all TTD has been paid.

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

ORDER

Respondent shall pay Petitioner the sum of **$503.87/week** for a further period of **150 weeks**, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused **30% loss of a man as a whole.**

Respondent shall pay Petitioner compensation that has accrued between **February 6, 2015** and **May 3, 2018**, and shall pay the remainder of the award, if any, in weekly installments.

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

June 27, 2018
Date

ICArbDecN&E p.2

JUL 2 - 2018

19IWCC0079

FINDINGS OF FACT and CONCLUSIONS OF LAW REGARDING THE NATURE AND EXTENT OF PETITIONER'S INJURY

THE ARBITRATOR FINDS:

The parties stipulated that the only issue in dispute at the time of arbitration was the nature and extent of Petitioner's injury.

On February 6, 2015, Petitioner was employed by Respondent in the dietary department. On that date, Petitioner injured his low back lifting a crate of milk. Petitioner filed an incident report (RX1) and followed up with Dr. Rajendra Shroff, his family physician. (PX1)

On February 9, 2015, Dr. Shroff noted Petitioner's history of injury and diagnosed Petitioner with a low back and right hip sprain. Dr. Shroff prescribed pain medication and muscle relaxers. Dr. Shroff also restricted Petitioner from work for one week. X-rays of the lumbar spine and right hip were taken. (PX2, PX3)

On February 20, 2015, Dr. Shroff noted Petitioner's back pain had not improved. Dr. Shroff noted that Petitioner had low back pain with right leg radiculopathy. Accordingly, Dr. Shroff recommended that Petitioner see a specialist. (PX1, 6)

On March 17, 2015, Petitioner saw Dr. Chi-Tsai Tang, a physical medicine and rehabilitation physician at Washington University in St. Louis. (PX4) Dr. Tang recommended physical therapy and an MRI of the lumbar spine. Dr. Tang diagnosed Petitioner has having right lumbar radiculitis, spondylolisthesis and a disc extrusion. According to testimony at arbitration, Petitioner underwent three epidural steroid injections.

Petitioner signed his Application for Adjustment of Claim herein on June 22, 2015. (AX 2)

On July 30, 2015, Petitioner returned to Dr. Shroff, as his condition had not improved. Dr. Shroff referred Petitioner to Dr. Matthew Gornet for a surgical consultation. (PX1, 8)

On October 1, 2015, Dr. Gornet noted that Petitioner was experiencing low back pain to the left side and particularly the right buttock, right hip and pain down his right leg to his lateral foot with numbness, tingling and weakness. (PX5) Dr. Gornet's opinion was that Petitioner aggravated his underlying condition of spondylolisthesis. Dr. Gornet opined that Petitioner's current symptoms were casually connected to the work injury. Dr. Gornet recommended six weeks of physical therapy and a new MRI. Dr. Gornet also continued the light duty work restrictions. (PX5, 2-3)

Petitioner performed his physical therapy at SSM Health St. Mary's Centralia. (PX6)

On October 22, 2015, Petitioner saw Dr. David Robson for an independent medical examination. (PX7, RX2) Dr. Robson opined as follows, "I believe the February 6, 2015 injury is the aggravating factor in the development of his lower back pain and left radiating pain and numbness." Dr. Robson also noted, "I believe there is a causal relationship in the patient's current condition and the reported date of injury of February 6, 2015." Dr. Robson opined that all the medical treatment incurred to date has been reasonable and necessary. Dr. Robson recommended that Petitioner continue with physical therapy and follow up after therapy for

additional evaluation and potential planning for a surgical procedure. Dr. Robson recommended that Petitioner continue working a light duty sedentary job.

On December 7, 2015, Dr. Gornet reviewed Petitioner's new MRI. (PX8) Dr. Gornet noted that it revealed isthmic spondylolisthesis at L5-S1 with some foraminal stenosis. In addition, the film showed an annular tear at the right side of L5-S1. The MRI also showed a central disc herniation at L3-4, disc degeneration at L3-4, L4-5, and L5-S1 and facet arthropathy bilaterally at L4-5. Dr. Gornet believed that Petitioner's best option was an L3 to S1 fusion. Dr. Gornet wanted Petitioner to reduce his weight and be cleared by Dr. Charles with respect to anterior mesh in Petitioner's abdomen. Dr. Gornet noted that Petitioner had exhausted conservative care including injections as well as physical therapy. Dr. Gornet continued Petitioner's light duty restrictions. (PX5, 7)

On January 14, 2016, Dr. Gornet noted that Petitioner had done a remarkable job losing weight. (PX5, 9) Dr. Gornet recommended a fusion surgery from L3 to S1. Dr. Gornet reviewed a CT of Petitioner's abdomen to evaluate his hernia mesh and a myelogram and post myelogram of his CT spine. (PX9, PX10, PX11) Dr. Gornet recommended that Petitioner see Dr. Thomas Charles because the abdominal CT showed rectus diastasis and hernia. This referral was required to obtain medical clearance for the fusion procedure.

On January 28, 2106, Petitioner saw Dr. Thomas Charles, who cleared Petitioner for Dr. Gornet's surgery. (PX12)

On February 1, 2016, Dr. Gornet noted that Dr. Robson's IME was consistent with his opinions and surgery was scheduled for February 24, 2016. (PX5, 15)

On February 24, 2016, Dr. Gornet performed an anterior decompression at L3-4, L4-5 and L5-S1, an anterior lumbar fusion at L5-S1 with 14mm x 23mm LT cages, a large kit of BMP and crushed cancellous allograf, and an anterior lumbar fusion at L3-4 and L4-5. (PX13) Dr. Charles assisted in the procedure.

On February 26, 2016, Dr. Gornet completed the 2-stage procedure by performing a L5-S1 laminotomy and posterior fusion at L3-S1 with local autograft and Medtronic fixation. (PX14)

On March 8, 2016, Dr. Gornet re-examined Petitioner noting that he had already experienced a dramatic improvement in his pain. Dr. Gornet recommended that Petitioner wean out of his brace and continue with his bone stimulator. Dr. Gornet also renewed his prescription for Hydrocodone. (PX5, 23)

On April 11, 2016, Dr. Gornet noted that Petitioner continued to improve but was still having difficulty with bending and putting on his socks. His hips were also painful. Dr. Gornet recommended that Petitioner begin stretching, abdominal stretching and walking. (PX5, 26)

On June 6, 2016, Dr. Gornet noted that Petitioner still had pain in his left side and left groin pain. CT scans taken that day showed the fusion at L5-S1 healing slowly. Dr. Gornet decided to recommend a delay in physical therapy to allow for more bone consolidation. (PX5, 29)

On September 1, 2016, Dr. Gornet noted that Petitioner was continuing to slowly improve, but was still having achiness in his back, buttock and hips. Dr. Gornet recommended physical therapy. (PX5, 33) Petitioner again performed his physical therapy at SSM St. Mary's in Centralia. (PX16)

On November 7, 2016, Dr. Gornet noted that Petitioner was still in daily pain. (PX5, 36) Dr. Gornet discussed with Petitioner a trial return to work. Dr. Gornet noted that there was a distinct possibility that Petitioner may require permanent restrictions, but a trial return to work would allow an evaluation of whether he

could do his job on a regular basis, although Dr. Gornet expected that Petitioner's pain would increase on the short term. Dr. Gornet also recommended that Petitioner continue physical therapy and work conditioning up until his release back to work on December 1, 2016.

On February 6, 2017, Dr. Gornet noted that Petitioner had been back to work full duty. The first month Petitioner did fairly well, but he had experienced increased pain after working voluntary over time, causing him to stop exercising. Dr. Gornet asked him to limit his hours to 8 hours a day and 40 hours a week or just "selective doubles". They talked about exercise. The possibility of permanent restrictions was noted but it was hoped he would gradually improve and regain his quality of life. (PX5, 41)

On April 10, 2017, Dr. Gornet noted that CT scans taken that day showed solid healing from L3 to S1. Dr. Gornet recommended that Petitioner continue to work full duty with no restrictions and placed him at maximum medical improvement. Petitioner was very pleased with his progress and Dr. Gornet described Petitioner as doing well. Dr. Gornet noted that Petitioner might require further treatment in the future at the adjacent levels. (PX5, 43-44)

On July 20, 2017, Petitioner underwent an examination with Dr. Richard Katz for purposes of establishing an AMA rating. (RX3) Dr. Katz noted the following issues regarding Petitioner's condition: stiffness and difficulty bending; pain every day between a three and 10 on a scale of 10; pain when bending forward, bending backwards, and lying down; pain is worse in the morning; difficult standing for more than one hour; difficulty sleeping; and impaired sex life. Petitioner completed a questionnaire indicating he could no longer run at all. He could manage lifting light to medium weights they were conveniently positioned; however, pain restricted him from lifting heavy weights. Dr. Katz gave Petitioner an AMA impairment rating of 15% of the whole person. Dr. Katz noted that a three-level fusion is rated at 15 -23 % with 19% the default value.

On February 15, 2018, Dr. Gornet re-examined Petitioner noting that he still had some permanent numbness in his right foot. Dr. Gornet did not believe that this would ever resolve. Petitioner also had some numbness in his thigh on the right side and occasional symptoms in his abdomen from the incision. Imaging studies revealed excellent position of all hardware with no significant lucencies. Dr. Gornet cautioned Petitioner about increasing activities or doing other things that could lead to further problems. Dr. Gornet stated Petitioner was at maximum medical improvement, but if he desires further long term follow up, Petitioner should return at year five. (PX5, 47-48)

Petitioner testified that he did not limit himself to a 40-hour work week, as Dr. Gornet suggested, because he had been off work for two years and needed to earn additional money due to financial obligations at home. He still works overtime, estimating it is about twenty hours a week. When asked if that was how much overtime he did before the accident, he replied in the affirmative noting he worked 20 to 30. Petitioner testified that he returned to his original position, but still has pain and stiffness every day. He has pain medication prescribed by Dr. Gornet but tries not to take it. Petitioner testified that the limitations identified by Dr. Katz remain today. Petitioner is a high school graduate and has worked with Respondent for 13 years. Petitioner testified that he plans to retire in another eight years. Petitioner testified that he cannot perform his usual tasks at home, such as maintenance of his vehicles, due to his back condition as he can't bend over "that good" or get down on the ground. Petitioner described his pain as worse in the mornings and that he has difficulty standing for more than hour before he needs to sit down. Petitioner also testified that he has difficulty sleeping as he can do so for three to four hours and then he's up. Petitioner further testified that he still has the numbness in his right thigh and a numbness/tingling sensation in his right foot as he mentioned to Dr. Gornet. His abdominal incision also remains sore, especially if he coughs.

THE ARBITRATOR CONCLUDES:

Issue (L): **What is the nature and extent of the injury?** 19IWCC0079

As an initial matter, the Arbitrator concludes that Petitioner testified regarding his current disability credibly and consistent with the medical records in this case. Petitioner underwent a three-level, two-stage lumbar spine surgery. Petitioner's testimony and Dr. Katz's report adequately summarize his limitations.

The Arbitrator notes that 820 ILCS 305/8.1b governs determination of permanent partial disability. In particular, the Arbitrator is to consider the following factors:

(i) The reported level of impairment pursuant to the AMA evaluation under the Sixth Edition;
(ii) The occupation of the injured employee;
(iii)The age of the employee at the time of injury;
(iv) Evidence of disability corroborated by the treating medical records. No one single factor shall be the sole determinant of disability.

With regard to Petitioner's case herein and each of the foregoing factors, the Arbitrator notes the following:

(i) Reported level of impairment.Dr. Katz assigned a 15% whole person impairment in this case. Dr. Katz did not testify regarding how he reached his impairment rating, but his report notes the modifiers that he applied to the 19% default value. Impairment, however, does not equal disability. *Fiene v. City of Zion Police Dept.*, 14 IWCC 0445, 2014 WL 3689224 (June 6, 2014). The Arbitrator gives some weight to this factor.

(ii) The occupation of the injured employee. Petitioner was employed in the dietary department at Respondent's facility. He returned to this position full duty with no work restrictions. Very little is known about Petitioner's job as he did not testify to what the position entailed. His Supervisor's Report of Injury indicates he was to provide meal portions to the people they served in the proper consistency and properly rotate and date supplies on the cottage kitchen area. He was also to provide proper cleanliness and sanitation in the cottage kitchen and dining area. Petitioner provided no direct testimony as to any difficulties performing any tasks associated with his job requirements and duties. (RX 1) The Arbitrator gives some weight to this factor.

(iii) Petitioner's age at the time of his injury. Petitioner was 53 at the time of his injury. No evidence was presented as to how Petitioner's age impacts/affects any disability. However, Petitioner has at least eight years before he will be eligible for retirement. The Arbitrator notes that he can reasonably be expected to live and work with the effects of his injury for a reasonable period of time and he is now an older member of the work force. Petitioner's age is given some weight.

(iv) Petitioner's future earning capacity. Although Dr. Gornet suggested that Petitioner should limit the amount over overtime worked, Petitioner has not done so. Thus, there was no direct evidence presented showing how Petitioner's injury has affected his earning capacity. Therefore, this factor is given little, if any, weight.

(v) Evidence of disability corroborated by the treating medical records. Although Petitioner has returned to work in the dietary department, he testified to working every day in pain. Dr. Gornet cautioned Petitioner to limit his overtime and avoid "increasing activities or doing other things that could lead to further problems." Petitioner has not returned to his pre-accident condition. The Arbitrator has also reviewed the operative reports, which detail the extensive surgeries in

this case and the fusion of three levels of Petitioner's lumbar spine. These reports and the medical records corroborate Petitioner's testimony regarding pain, lack of range of motion, and right foot numbness/tingling. Petitioner's testimony regarding ongoing issues with numbness in his right fourth and fifth toes, the area of his abdominal incision, and his right thigh were corroborated by the doctor's records. While not a treating medical record, Dr. Katz's report also corroborates Petitioner's ongoing complaints. The Arbitrator gives substantial weight to this factor.

Having considered all of the factors as required by statute, the Arbitrator concludes that Petitioner has been permanently partially disabled to the extent of 30% person as a whole, as provided in Section 8(d)(2) of the Act.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Fabian Florencio,

Petitioner,

vs.

NO: 16WC 27107

ABM Janitorial Midwest,

19IWCC0080

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, 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 3, 2018, 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 $71,500.00. 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 7 - 2019
o012919
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

FLORENCIO, FABIAN
Employee/Petitioner

Case# **16WC027107**

ABM JANITORIAL MIDWEST
Employer/Respondent

19IWCC0080

On 5/3/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.99% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4564 ARGIONIS & ASSOCIATES LLC
ALL KORITSARIS
180 N LASALLE ST SUITE 1925
CHICAGO, IL 60601

2999 LITCHFIELD CAVO LLP
ANITA JOHNSON
303 W MADISON ST SUITE 300
CHICAGO, IL 60606

19IWCC0080

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) & 8(A)

FABIAN FLORENCIO
Employee/Petitioner

v.

ABM JANITORIAL MIDWEST
Employer/Respondent

Case # **16** WC **27107**

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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **February 16, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0080

FINDINGS

On the date of accident, **06-14-16**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$30,160.00**; the average weekly wage was **$580.00**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **2** dependent children.

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

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

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $386.66/week for 83 weeks, commencing July 15, 2016 through February 16, 2018, as provided in Section 8(b) of the Act.

Medical benefits
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2,009.00 to Suburban Pain, $3,355.41 to ATI, $3,925.56 to Metro Anesthesia, $1,142.00 to Chicago Ridge Imaging, $13,771.25 to Midwest Specialty Pharmacy, $1,076.83 to Injured Workers Pharmacy and $14,121.35 to Illinois Orthopedic Network, as provided in Sections 8(a) and 8.2 of the Act.

Prospective medical treatment
Respondent shall pay for all medical services associated with said treatment prescribed by Dr. Geoffrey Dixon (two level microdiscectomy of the lumbar spine (L4-5) (L5-S1), pursuant to the medical fee schedule as provided in Sections 8(a) of the Act.

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

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

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

Signature of Arbitrator

5/02/18
Date

ICArbDec19(b)

MAY 3 - 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

FABIAN FLORENCIO, Employee/Petitioner, v. ABM JANITORIAL MIDWEST, Employer/Respondent.	)	16 WC 27107 Chicago

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator makes the following Findings of Facts:

It is undisputed that on June 14, 2016, Petitioner Fabian Florencio suffered a lower back injury that arose out of and in the course of his employment with ABM Janitorial Midwest. Petitioner testified that on June 14, 2016, he was injured when he attempted to pull out a cleaning robot from a pool. (Transcript 14-16, hereinafter "T 14-16"). Petitioner testified that he works maintenance for the Respondent and is responsible for cleaning a gym and all of its amenities. (T 12). Petitioner described his typical work day which primarily included cleaning various areas of the gym both manually and with equipment. (T 13). He testified that the job is labor intensive and that he is required to perform lifting to accomplish his tasks. Petitioner testified that he worked in that position since 2007. (T 11) Petitioner testified regarding the mechanism of injury when he testified that he was lifting the cleaning robot out of the pool when he slipped on water while holding the machine in his hands. (T 16). He testified that the machine weighs approximately 40 pounds dry. (T 41). Further he estimated that when full of water the machine weighs approximately 80 pounds. (T 14). He testified that the filters were filled with water when he slipped and twisted his back while removing the equipment. (T 16). Petitioner

testified that he felt immediate pain in his lower back which traveled down his left leg. *Id.* Further, he testified that he finished his shift which was approximately another two and a half hours and then sought medical attention. (T 16-17). Petitioner testified that he treated at a place called Union Health, which is a medical clinic. (T 17). He testified that he would treat at that clinic for injuries as well as illnesses in essence making that his primary care physician group. (T 18).

The Petitioner testified that prior to the date of injury he was working full duty with no restrictions. (T 15). The Petitioner testified that he complained of lower back pain in the past. (T 18-19). He testified that the first time he complained of lower back pain was approximately seven (7) years before the incident following a car collision. (T 19). He testified that he went to Union Health at the time. (T 19). On November 18, 2009, the Union Health medical chart reflects this visit with complaints of low back pain after a prior auto collision. (Respondent Ex. 1, p. 76 of 106, hereinafter "Res. Ex. 1, p. 76 of 106"). Physical examination revealed a normal spine and normal neuro examination. *Id.* He was prescribed Motrin for his pain but no treatment was recommended. (Res. Ex. 1, p. 77 of 106). On November 24, 2009, six days later, he returned to the clinic and did not complain of low back pain. (Res. Ex. 1, p. 1 of 2). Further, the physical exam and neurological exam performed were normal. *Id.* Following that day, he treated at the clinic multiple times over the next fifteen (15) months for various ailments and did not complain of any low back pain. (Res. Ex. 1, p. 53-80 of 106).

On March 11, 2013, he treated at Union Health Clinic for abdominal pain, diarrhea, and vomiting. (Res. Ex. 1, p. 7 of 63). The record mentions low back pain as well but mentions it appears to be muscular and did not recommend any treatment. *Id.* He returned to the clinic on April 4, 2013 complaining of fever and sore throat. (Res. Ex. 1, p. 54 of 114). He did not

complain of any back pain during this visit. *Id.* He returned to the clinic several times over the next eight months for various ailments and did not complain of back pain at any of the visits. (Res. Ex. 1). On August 14, 2014, sixteen months later, he returned to Union Health Clinic and complained of low back pain after a fall he had six months prior. (Res. Ex. 1, p. 1 of 2). On that day, an x-ray was performed, and he was given Ibuprofen. (Res. Ex. 1, p. 2 of 2). No treatment was recommended for his lower back pain. Beginning on October 17, 2014 through May 24, 2016 he returned to the clinic nine (9) times for various ailments and did not complain of lower back pain at any of the visits. (Pet. Ex. 2, p. 20-38). The Petitioner testified that that he was completely pain free with respect to his lower back for approximately two years prior to the June 14, 2016 injury. (T 22).

On June 15, 2016, Mr. Florencio testified that he was treated at Union Health clinic following his shift. *Id.* The record shows that Mr. Florencio was complaining of low back pain that radiated into his left thigh after picking up a heavy machine at work. (Pet. Ex. 1, P. 1). On physical examination, it is noted that there is a positive straight leg raise test on the left. (Pet. Ex. 1, p. 3). He was prescribed flexeril and naprosyn and was allowed to return to work, per his wishes. *Id.* Petitioner testified that he returned to work and attempted to work for a period of time. (T 23). He testified that the pain became unbearable and decided to return to the clinic. *Id.* On July 15, 2016, he returned to the clinic complaining of lower back pain down his left buttocks and thigh with numbness in the left leg. (Pet. Ex. 1, p. 5). The records note that an x-ray was performed of the lower back and he was provided an off work slip due to the pain. (Pet. Ex. 1, p. 6). Further, the record indicates that he was given a referral to a pain center. *Id.*

In August 3, 2016, he returned to Union Health clinic complaining of the same symptoms with no improvement. (Pet. Ex. 1, p. 8). The record notes that he attempted to make an

appointment with the pain clinic that Union Health recommended but that there was no approval. *Id.* The record notes that he was kept off work at this time due to his symptoms. *Id.* Five (5) days later he returned with the same symptoms with lower back pain radiating into the left leg. (Pet. Ex. 1, p. 10). An MRI of his lower back was ordered and he was kept off work. (Pet. Ex. 1, p. 11). The Petitioner testified that he never had an MRI prior to June 14, 2016 nor was one ever recommended. (T 73-74), Further, the note diagnoses him with lower back pain with left sided radiculopathy. (Pet. Ex. 1, p. 11).

On August 11, 2016, Mr. Florencio underwent a lumbar MRI at Chicago Ridge Medical Imaging. (Pet. Ex. 3, p. 1 of 3). The MRI results show a L4-5 broad based disc bulge with moderate right and left neural foramen stenosis causing impingement of exiting nerve roots. (Pet. Ex. 3, p. 2 of 3). The MRI also showed a L5-S1 central disc bulge with moderate right and left neural foramen stenosis causing impingement of exiting nerve roots. *Id.* Further the report notes disc desiccation seen at L4-5 and L5-S1 levels. *Id.* The Petitioner testified that he went to see a pain specialist following the MRI. (T 26-27).

On August 22, 2016, Mr. Florencio reported to Krishna Chunduri, M.D., complaining of pain in his lower back radiating down his left calf and leg. (Pet. Ex. 3). The record notes that he works pool maintenance and states that the injury occurred while pulling a cleaning robot out in the bent position. *Id.* The Petitioner testified consistently with this history regarding the injury and the way it took place. On examination, it notes positive straight leg raise test on the left at 60 degrees. *Id.* His reading of the MRI showed L4-5 disc protrusion with moderate stenosis and L5-S1 diffuse broad based disk protrusion with impingement on the exiting nerve roots with bilateral stenosis. *Id.* He was diagnosed with lumbar disk herniation with left radiculitis and referred him for physical therapy followed by epidural injection of the therapy does not provide

significant improvement. *Id.*

On August 30, 2016, he presented at ATI physical therapy complaining of lower back pain radiating into the left leg. (Pet. Ex. 5, p. 40 of 65). The Petitioner testified that he underwent five (5) sessions of physical therapy over the next two (2) weeks, which is corroborated by the chart. (Pet. Ex. 5). He testified that the therapy not only did not help his symptoms but made them worse and therefore he stopped going due to unbearable pain. (T 51).

On September 22, 2016, he returned to see Dr. Chunduri complaining that his symptoms worsened. (Pet. Ex. 3). The record notes that his lower back pain continues to radiate down his left leg and that now his right leg is being affected. *Id.* At this time, Dr. Chunduri kept Mr. Florencio off work, instructed that he continue taking the prescribed medication and decided to proceed with the injection. *Id.* On that day, a left L4 & L5 transforaminal epidural steroid injection was performed under fluoroscopic guidance. He returned on October 13, 2016 following the injection and the record notes improvement of pain in the left leg following the injection at about 50% with some mild radiating pain into the right leg. *Id.* The record indicates that a repeat injection was recommended, he should continue the therapy and medication and was kept off work. *Id.* Petitioner testified that he returned to physical therapy to attempt again but that the pain returned to the point where he was unable to continue with the therapy. (T 51). The records from ATI show that he had an additional three (3) therapy visits in October. (Pet. Ex. 5, p. 10 of 65).

On October 20, 2016 he underwent a second left L4 & L5 transforaminal epidural steroid injection was performed under fluoroscopic guidance, performed by Dr. Krishna. (Pet. Ex. 3). The Petitioner testified that the second injection did not provide any further relief. (T 30). On November 3, 2016, he returned for follow-up with Dr. Chunduri. *Id.* The record corroborates

his testimony and notes that the second injection has not given him any further relief. *Id.* Dr. Chunduri referred Mr. Florencio for a spine surgery consultation at this time and notes the reason being that the second injection did not give him further improvement. *Id.* He was instructed to continue taking medication at this time. *Id.*

On November 14, 2016, the Petitioner presented to neurosurgeon Geoffrey Dixon, M.D., for a consultation. (Pet. Ex. 3). The record indicates that he was injured trying to take a large robot out of the water while working and slipped while doing so, resulting in injury to his low back. *Id.* Physical examination revealed positive straight leg raise on the left. *Id.* His review of the MRI revealed a broad-based disk herniation at L4-5 with foraminal stenosis and nerve root compression worse on the left then the right and a central disk herniation at L5-S1 with increased T2 signal in the central area suggestive of annular tear. *Id.* The record notes that he was informed of Petitioner's prior medical treatment, including therapy, anti-inflammatory medication, and two steroid epidural injections. *Id.* At this time, he recommended an EMG study in order to "better delineate the pathology." *Id.*

On November 23, 2016, Mr. Florencio underwent an EMG study at Suburban Pain Care Center. (Pet. Ex. 3). Physical examination performed revealed a positive straight leg raise test on the left at 60 degrees. *Id.* Further, the report notes decreased sensation on exam in the L5 distribution. *Id.* The electrodiagnostic impression was an abnormal EMG and nerve conduction study of the left lower extremity. *Id.* Further, the reported an objective left L5-S1 radiculopathy. *Id.* On December 12, 2016, Mr. Florencio returned to Dr. Dixon with the results of the EMG test. *Id.* Based on the results, Dr. Dixon recommended a microlumbar decompression of the L4-5 and L5-S1 nerve. *Id.* Dr. Dixon also kept Mr. Florencio off work at this time pending the surgical authorization. *Id.* The Petitioner testified that he remained off work and did not receive

benefits. (T 33). Further he testified that he did not have the surgery because it was not approved by the insurance. *Id.* The record notes that he followed up with Dr. Dixon in February and March of 2017 and that his opinion remained the same and also the Petitioner was kept off work pending surgery. (Pet. Ex. 3).

The Petitioner testified that following the surgical recommendation, he was sent for an examination to another doctor at the request of the insurance company. (T 34). The examination took place on April 17, 2017. (Res. Ex. 2, Ex. 1 of evidence deposition). He testified that he met face to face with the doctor for about five minutes. (T 34). He testified that the time was spent mostly with the doctor asking him questions. (T 34-35). He testified that the doctor also had him bend and also lift his leg and that was the extent of the examination. (T 35). Further, he stated that he provided the doctor with the disc containing his MRI for review. (T 34).

On June 5, 2017, following the examination with the Section 12 examiner, he returned to Dr. Dixon yet again. (Pet. Ex. 3). Dr. Dixon's report notes that he reviewed the Section 12 report by Dr. Ghanayem and states his reasons for why he disagrees with Dr. Ghanayem's opinion and assessment of the patient. *Id.* He relates the Petitioners current symptoms to the June 14, 2016 fall and continues to recommend surgical intervention. *Id.* Further, he kept the Petitioner off work at this time. *Id.* The Petitioner returned again on September 13, 2017 to see Dr. Dixon. (Pet. Ex. 13, p. 3). The record notes no improvement of pain during the visit with bilateral lower extremity radiation. *Id.* Examination revealed positive straight leg raise test bilaterally. *Id.* Dr. Dixon recommended surgical intervention and kept the Petitioner off work pending surgery. The Petitioner testified that he has not had the procedure to date since it is not approved by the insurance. (T 33). He testified that the continues to remain symptomatic and that his symptoms have not improved. (T 37).

On January 22, 2011, the Petitioner was videotaped without his consent by a private investigator named Dan Stum, employed by Digistream. (Res. Ex. 4). On January 22, 2018, the video showed the Petitioner in jeans and a hooded sweatshirt outside of his garage. *Id.* The video showed the Petitioner bend over to place a lid on a pale and then place the pale into the trunk of his vehicle. *Id.* Dan Stum testified that he did not see inside the pale to see what was in there and that he does not know if the pale was empty. (T 91). He also testified that the did not lift the pale or have any opinion of what it weighed. *Id.* On February 11, 2018, Mr. Stum testified that he again videotaped the Petitioner. (T 87). The video showed the Petitioner holding a small container which contained what appeared to be salt. (Res. Ex. 4). The video also showed the Petitioner tossing the salt onto the ground with his right hand onto the ground outside his garage. *Id.* Dan Stum testified that he took video on other occasions besides those two dates. (T 89-90). None of those videos were presented into evidence.

The Arbitrator makes the following Conclusions of Law:

In support of the Arbitrator's decision relating to (F), whether the petitioner's present condition of ill-being is causally related to the injury, the Arbitrator finds the following facts:

The Arbitrator finds Petitioner's current condition of ill-being is causally related to his work injury of June 14, 2016. Accordingly, based on the credible testimony of the petitioner as well as the medical records and opinions of pain management Dr. Chunduri, neurosurgeon Dr. Geoffrey Dixon, radiologist Dr Safvi, and pain management Dr. Elton Dixon, which includes the MRI results of the lumbar spine and EMG study, the Arbitrator finds that the petitioner has affirmatively demonstrated a causal relationship between her work related injury on June 14, 2016 and her current condition of ill-being. Immediately prior to his injury, Petitioner did not have any issues with his lower back. Records presented showed approximately 20 months where

the Petitioner did not complain of any back pain. Further, the prior back problems were strictly mechanical and muscular in nature. The Petitioner never had radicular complaints prior to the June 14, 2016 injury. At a minimum, the Petitioner's pre-existing low back issues became asymptomatic and then were exacerbated by the injury. The mechanism of injury described is a competent cause for a herniated disc. The injury caused an immediate disability to Petitioner's lower back. The Petitioner complained of lower back pain with numbness down his left leg consistently from the very first visit.

The Arbitrator places great weight on the diagnostic studies that were taken of the Petitioner's lower back. The MRI clearly shows herniated discs at L4-5 and L5-S1 with bilateral foraminal stenosis as well as impingement on the exiting nerve roots. This reading was also consistent by each of the various treating doctors from different providers and in different sub-specialties. The EMG test showed abnormalities as well with L5-S1 radiculopathy consistent with the pathology shown on MRI. No evidence was presented by Respondent that Petitioner suffered herniated discs with nerve root impingement prior work injury she suffered on June 14, 2016. Further, the Petitioner never had an MRI prior to the occurrence which shows that the pathology at the levels described above pre-existed the work injury of June 14, 2016.

The Arbitrator also places great weight on the opinion of neurosurgeon Geoffrey Dixon, M.D. After review of the evidence deposition transcript as well as his credentials with having attended Wake Forest University Medical School with an internship and residency at Mayo Clinic in Rochester Minnesota, the Arbitrator finds the opinions credible. Dr. Dixon explains pathology of a broad-based disc protrusion in that it could cause symptoms in more than one anatomical space. (Pet. Ex. 14, p. 52, ln. 19-24, p. 53, ln. 1). He explains that type of pathology causes symptoms within the lateral recess, within the foramen and the central spinal canal. (Pet.

Ex. 14, p. 53, ln. 2-7). Further, he explains that the nerve roots traverse all of those spaces and are therefore impinged. (Pet. Ex. 14, p. 53, ln. 8-11). The Arbitrator finds this opinion credible since it is consistent with objective evidence of nerve root impingement on the MRI, as well as the Petitioner's symptoms being consistent with objective pathology in those dermatomes.

The Arbitrator also agrees with Dr. Dixon, that the low back pain that Mr. Florencio had prior to the June 14, 2016 related injury is not related and irrelevant since it was a different characteristic of pain. Dr. Dixon's opinion regarding causation was not affected by his knowledge that Mr. Florencio had pre-existing back pain. (Pet. Ex. 14, p. 35, ln. 7-22). The Arbitrator does not find this opinion to lack credibility since the Petitioner was pain free for approximately two years prior to the occurrence and working full function. Further, the Petitioner never complained of radicular symptoms prior to the injury so any pre-existing back issues were exacerbated and worsened by the June 14, 2016 work injury and thus compensable.

On April 17, 2017, Mr. Florencio was sent for a Section 12 Examination with Dr. Alexander Ghanayem regarding his back injury. Mr. Florencio testified that the examination only lasted five minutes and that the doctor barely examined him. (T 34). Dr. Ghanayem opined that the Petitioner sustained minor injuries and that any current pain he was having was completely unrelated to the work accident and was non-organic in nature. (Res. Ex. 2, Ghanayem Ex. 2, p.3). It is important to note that Dr. Ghanayem disagrees with the radiologist who interpreted the lumbar MRI and stated in his report that there is no evidence of a herniated disc or disc protrusion at L5-S1. *Id.* Further, his report states that the Union Health records he reviewed indicate that he had back pain for 4 months prior to the incident. (Res. Ex. 2, Ghanayem Ex. 2, p.2). The Arbitrator finds this report to be credible, in that Petitioner exaggerated his symptoms during the exam, but also finds that record supports a compensable

claim requiring surgery.

On October 27, 2015 the Respondent took the evidence deposition of Dr. Ghanayem. Dr. Ghanayem testified that Mr. Florencio suffered a lower back sprain. (Res. Ex. 2, p.23, ln. 14-24). He testified that regarding the mechanism of injury and agreed that it was a competent cause to sustain a lower back injury. (Res. Ex. 2, p.40-41, ln. 20-24, p.41, ln. 1). Further, on cross examination, he conceded that the mechanism of injury in this case is one that could produce a disc herniation. (Res. Ex. 2, p. 43, ln. 4-10, p. 44, ln. 3-10). He further testified that the MRI of the lumbar spine showed a L4-5 disc herniation but disagreed with the neurologist that there was nerve root impingement. (Res. Ex. 2, p. 51-53, ln. 7-24, p. 52, ln. 1-24, p. 53, ln. 1-24).

Also, Dr. Ghanayem disagreed the results of the EMG, which seemed to corroborate the positive MRI pathology. The weight of the evidence favors the Petitioner in this case. The accident was well established. The initial accident history was clean, and the MRI and EMG were in synch. It may be true that Petitioner was non-complaint in physical therapy and there was some surveillance suggesting he was involved in his son's painting business, the overall evidence still favors the Petitioner. The essential elements of a compensable were not damaged by cross-examination, the surveillance or Dr. Ghanayem's opinion.

It is well settled that employers take their employees as they find them. Therefore, even though an employee may have a pre-existing condition which may make him more susceptible to an injury, compensation for the injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co., v. Industrial Comm'n*, 92 Ill. 2d 30, 36, 440 N.E.2d 861 (1982). Furthermore, an 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. Industrial Comm'n*, 37 Ill. 2d

123, 127, 227 N.E.2d 65 (1967). Although this is well settled law in the state of Illinois, the petitioner's work related injury was the primary causative factor in the resulting condition of ill-being. If a pre-existing condition was asymptomatic prior to the injury and then became symptomatic as a result of the injury, aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Id* at 67-68.

Upon close examination of the medical records and review of the evidence deposition transcripts, this Arbitrator finds no inconsistent history, nor any evidence of any intervening cause for the petitioner's current condition. Respondent's Section 12 examiner did not dispute that Petitioner suffered an injury. (Res. Ex. 2). Additionally, Dr. Ghanayem's opinion is less credible due to the factors described above. Therefore, the Arbitrator concludes that the Petitioner's current condition of ill-being is causally related to the work injury of June 14, 2016.

In support of the Arbitrator's decision relating to (J), were the medical services that were provided to petitioner reasonable and necessary, the Arbitrator finds the following facts:

On September 8, 2016 the Petitioner began treating at Illinois Orthopedic Network with Dr. Chunduri and Dr. Dixon and treated there for roughly one year through September of 2017. At the time of the hearing on February 16, 2018, the petitioner presented medical bills from the provider. (Pet. Ex. 7, 13). The Arbitrator finds that the treatment rendered by the medical staff and doctors was reasonable and necessary to treat the Petitioner for the work-related injury he sustained. The Arbitrator also finds that since the Petitioner's condition of ill-being was causally related to his injury on June 14, 2016, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that the related bills on Petitioner's Exhibit's 7 & 13, totaling $14,121.35 are to be paid by Respondent

according to the medical fee schedule.

On November 23, 2016 the Petitioner had an EMG performed at Suburban Pain Care Center. At the time of the hearing on February 16, 2018, the petitioner presented medical bills from the provider. (Pet. Ex. 8). The Arbitrator finds that the treatment rendered by the medical staff and doctor was reasonable and necessary to treat the Petitioner for the work-related injury he sustained. The Arbitrator also finds that since the Petitioner's condition of ill-being was causally related to his injury on June 14, 2016, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that the related bills on Petitioner's Exhibit 8, totaling $2,009.00 are to be paid by Respondent according to the medical fee schedule.

On August 30, 2016 the Petitioner began treating at ATI physical therapy and treated there for roughly two months through October of 2016. At the time of the hearing on February 16, 2018, the petitioner presented medical bills from the provider. (Pet. Ex. 9). The Arbitrator finds that the treatment rendered by the medical staff and therapists was reasonable and necessary to treat the Petitioner for the work-related injury he sustained. The Arbitrator also finds that since the Petitioner's condition of ill-being was causally related to his injury on June 14, 2016, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that the related bills on Petitioner's Exhibit 9, totaling $3,355.41 are to be paid by Respondent according to the medical fee schedule.

On September 22, 2016 & October 20, 2016, the Petitioner underwent anesthesia for his lumbar injection. At the time of the hearing on February 16, 2018, the petitioner presented

medical bills from the Metro Anesthesia (Pet. Ex. 10). The Arbitrator finds that the treatment rendered by the medical staff and doctors was reasonable and necessary to treat the Petitioner for the work-related injury he sustained. The Arbitrator also finds that since the Petitioner's condition of ill-being was causally related to his injury on June 14, 2016, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that the related bills on Petitioner's Exhibit 10, totaling $3,925.56 are to be paid by Respondent according to the medical fee schedule.

On September 11, 2016 the Petitioner had a MRI performed at Chicago Ridge Medical Imaging. At the time of the hearing on February 16, 2018, the petitioner presented medical bills from the provider. (Pet. Ex. 11). The Arbitrator finds that the treatment rendered by the medical staff and doctor was reasonable and necessary to treat the Petitioner for the work-related injury he sustained. The Arbitrator also finds that since the Petitioner's condition of ill-being was causally related to his injury on June 14, 2016, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that the related bill on Petitioner's Exhibit 11, totaling $1,142.00 is to be paid by Respondent according to the medical fee schedule.

As a result of the injuries sustained the Petitioner required prescription medication for pain as prescribed by his treating doctors. At the time of the hearing on February 16, 2018, the petitioner presented medical bills from Injured Workers Pharmacy and Midwest Pharmacy. (Pet. Ex. 12, 15). The Arbitrator finds that the medication was reasonable and necessary to treat the Petitioner for the work-related injury he sustained. The Arbitrator also finds that since the

Petitioner's condition of ill-being was causally related to his injury on June 14, 2016, the respondent is responsible for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary as well as usual and customary. The Arbitrator finds that the related bill on Petitioner's Exhibit 12, totaling $1,076.83 and Petitioner's Exhibit 15 totaling $13,771.25 is to be paid by Respondent according to the medical fee schedule.

In support of the Arbitrator's decision relating to (K), is the Petitioner entitled to any prospective medical treatment, the Arbitrator finds the following facts:

The Arbitrator finds that the Petitioner requires additional medical treatment and is entitled to prospective medical treatment. The Arbitrator finds that the respondent is responsible for the surgery recommended by Dr. Dixon. The MRI taken of the Petitioner's lower back clearly shows herniated discs at two levels with nerve root impingement and foraminal stenosis. (Pet. Ex. 3, p. 2 of 3). Further, the records show that Mr. Florencio has already exhausted conservative treatment of physical therapy and injections. Further, the records from Dr. Chunduri and Dr. Dixon as well as the Petitioner's credible testimony show that the injuries were causally related, and that additional treatment is needed. (Pet Ex. 1, 3, 4 and 5). The Arbitrator finds that the respondent must authorize the remaining treatment, including the discectomy and follow-up appointments with Dr. Dixon. The Arbitrator finds that payment for the treatment is also the responsibility of the respondent. Once the current recommended treatment regimen decided by the Petitioner's treating physician is rendered and complete, the petitioner's condition will be re-evaluated to ascertain whether additional treatment is necessary.

In support of the Arbitrator's decision relating to (L), is the Petitioner entitled to any TTD benefits, the Arbitrator finds the following facts:

Having found an accident that arose out of an in the course of Petitioner's employment,

and that Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator awards temporary total disability benefits to the Petitioner. The medical records show that Mr. Florencio was kept off work since he saw the doctor at Union Health Clinic on July 15, 2016. (Pet. Ex. 1, p. 5-6). Mr. Florencio testified that he has been kept on an off-work restriction by Union Health physicians, Dr. Chunduri and Dr. Dixon and the same is confirmed by the submitted records. The arbitrator finds that Mr. Florencio is owed temporary total disability benefits from July 15, 2016 through February 16, 2018, for a total of 83 weeks. Further the Arbitrator awards that TTD should continue until Mr. Florencio is released to return to work by his treating physicians or until work status becomes validly disputed in the future.

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 Trevino,
Petitioner,

vs.

NO: 14WC 22446

City of Chicago, Department of Fleets & Facilities Mgmt.,
Respondent.

19IWCC0081

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 April 12, 2018, is hereby affirmed and adopted.

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

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

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

DATED: FEB 7 - 2019
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MJB/jrc
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TREVINO, ROBERT
Employee/Petitioner

Case# **14WC022446**

CITY OF CHICAGO DEPT OF FLEETS & FACILITIES MGMT
Employer/Respondent

19IWCC0081

On 4/12/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.88% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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 60603

0113 CITY OF CHICAGO
STEPHANIE LIPMAN
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CHICAGO, IL 60602

19IWCC0081

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Robert Trevino
Employee/Petitioner

v.

City of Chicago, Dept. of Fleets & Facilities Mgmt.
Employer/Respondent

Case # **14 WC 22446**

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian T. Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **December 1, 2017**. After reviewing all of 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 present condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ____

FINDINGS

On **6/5/2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$88,872.99**; the average weekly wage was **$1,709.10**.

On the date of accident, Petitioner was **66** 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 **$53,551.80** for TTD, **$0.00** for TPD, **$56,970.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$110,521.80**.

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

ORDER

- Respondent shall pay Petitioner temporary total disability benefits at a rate of $**1,139.40**/week for **47** weeks, for the period of **6/7/2014** through **5/1/2015**, which is the period of temporary total disability for which compensation is due, in accordance with Section 8(b) of the Act. (Ax. 1)

- Respondent shall pay the Petitioner maintenance benefits of $**1,139.40**/week for **50** weeks, from **5/2/2015** through **4/15/2016**, which is the period for which compensation is payable, pursuant to Section 8(a) of the Act. (Ax. 1)

- Respondent shall pay Petitioner the sum of $**721.66**/week for a further period of **187.5** weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained to his right leg caused a **37.5%** loss of use of his person as a whole.

- Respondent shall pay Petitioner compensation that has accrued from **11/1/2016** through **12/1/2017** and shall pay the remainder of the award, if any in weekly payments.

- The Arbitrator adopts the Rider to the Arbitration Decision attached hereto.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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

4-12-2018
Date

APR 12 2018

Robert Trevino v. City of Chicago, Department of Fleets & Facilities Management
Case Number: 14 WC 22446
Date of Accident: 6/5/2014

RIDER TO THE ARBITRATION DECISION

I. FINDINGS OF FACT

Petitioner testified before the Arbitrator on December 1, 2017. The Arbitrator finds that Petitioner's testimony was credible. The Arbitrator also finds that Petitioner's testimony was consistent with the histories, treatment and objective findings documented in the medical records, which were offered into evidence at the time of the hearing. Specifically, the histories regarding the accident were consistent throughout Petitioner's medical treatment.

A. Background and Work History

Petitioner testified that on June 5, 2014, he was employed by Respondent as an ornamental ironworker. He was a member of the Ironworkers Union Local 63. Petitioner was hired by Respondent in 1997. He had been employed as an ironworker for 35 years.

Petitioner attended high school. He attended Midtown from 1986 through 1970. Petitioner served in the army. He was honorably discharged. At the time of the hearing Petitioner was 69. He is 5'6" tall and weighs 150 pounds.

Petitioner described his job duties for Respondent as an ironworker. Petitioner performed commercial work and worked on public buildings. He worked on bridges, fire departments, police departments and medical centers. Petitioner performed work on stairs, doors, hardware, thresholds, railings and window frames. He lifted and carried up to 100 pounds. Petitioner climbed ladders and scaffolding up to fifty feet. Petitioner used welding tanks and torches to cut. He also fabricated, installed and repaired windows. Petitioner walked up and down stairs. He performed climbing, kneeling, squatting, twisting, bending and jumping. Petitioner used hand tools, power tools and other equipment. The tools could weight up to 100 pounds. Petitioner carried steel for fabrication which could weigh 100 pounds. Petitioner also

walked across beams and welded and cut while standing on the beams. The steel beams were 15 feet long and weighed 120 pounds.

A list of job requirements from Local 63 was admitted into evidence. (PX 12). Petitioner agreed that he performed the job duties listed in the Ironworkers Job Requirements. The Ironworkers Job Requirements sets forth that an ironworker must walk up and down a minimum of 5 flights of stairs, walk on rough surfaces, climb ladders and scaffolding, kneel, squat, lean, reach, twist, bend, climb over objects, jump up and down getting into and out of trucks, carry heavy/awkward objects, use both arms and legs, walk, climb and descend beams, use power and hand tolls, use a welder and cutter torch, lift up to 100 pounds and lift 50 pounds overhead. (PX 12). The Ironworker Job Requirements set forth that light duty is not a consideration in the ironworker industry. (PX 12).

B. Prior Medical Treatment

Petitioner testified that prior to June 5, 2014, he had not sustained any injuries to his right knee. Further, he had not sustained any accidents or injuries involving his right knee. Petitioner testified that the instant case was his only workers' compensation claim. Prior to June 5, 2014, Petitioner was able to perform his full job duties as described without problem.

C. Work-Related Accident of June 5, 2014

On June 5, 2014, Petitioner was performing his job duties for Respondent. Petitioner was installing an L-shaped beam made of steel. The beam was 12 to 15 feet long and weighed 100 pounds. Petitioner was standing on a scaffold when the weight of the beam shifted towards Petitioner. He pushed off with his right leg and felt the right knee twist, pushing his right knee at an angel into an opening. Petitioner felt a sharp pain and pop in his right knee. Following the work-related accident of June 5, 2014 Petitioner noticed pain in his right knee.

D. Medical Treatment

Following the work-related accident of June 5, 2014 Petitioner sought medical treatment. Petitioner was initially examined at MercyWorks on June 6, 2014. (PX 1). Dr. Diadula found that Petitioner had a

sprain of the right knee. (PX 1). He recommended Ibuprofen, a knee brace, an ice pack and elevation. (PX 1). He stated that Petitioner was unable to return to work due to a work-related accident. (PX 1).

On June 10, 2014, Dr. Diadula recommended an MRI of the right knee. (PX 1). Petitioner underwent the recommended MRI study on June 20, 2014 at Open MRI Mercy. (PX 2). The MRI study revealed moderate osteoarthritic changes of the patellofemoral joint, a large complex tear of the lateral meniscal body extending into the anterior and posterior horns, an extrusion of the degenerated chronically torn medial meniscal body resulting in a bowing of the MCL, and prepatellar bursitis. (PX 2).

Petitioner had a follow-up examination with Dr. Diadula on June 24, 2014. (PX 1). Dr. Diadula set forth a diagnosis of lateral and medial meniscal tears of the right knee. (PX 1). He referred Petitioner to Dr. Wolin. (PX 1).

Petitioner was examined by Dr. Wolin on June 27, 2014. (PX 3). Dr. Wolin assessed Petitioner with a lateral meniscal tear of the right knee that was post-traumatic and evidence of osteoarthritis. (PX 3). Dr. Wolin recommended a steroid injection, which was performed in the office. (PX 3). Dr. Wolin stated that if Petitioner's right knee condition did not improve, he would recommend a right knee arthroscopy. (PX 3). He stated that Petitioner should remain off work. (PX 3).

Petitioner underwent the recommended arthroscopic surgery on October 13, 2014 at Weiss Memorial Hospital. (PX 4). Dr. Wolin performed such surgery. (PX 4). The post-operative diagnosis was medial and lateral meniscal tears, partial medial and lateral meniscectomies, complex, due to the multiple portals required. (PX 4).

Petitioner remained under the post-operative care of Dr. Wolin. (PX 3). Post-operative care included follow up office visits, physical therapy and activity modification. (PX 3). Petitioner participated in physical therapy at Athletico from October 14, 2014 through February 5, 2015. (PX 5).

On November 21, 2014, Dr. Wolin performed an aspiration and injection of the right knee. (PX 3). Petitioner had limited range of motion of the knee due to effusion. (PX 3). He opined that Petitioner should remain off work. (PX 3). Petitioner continued to have follow-up examinations with Dr. Wolin. (PX 3).

On January 6, 2015, Dr. Wolin recommended that Petitioner participate in work conditioning for a month and then undergo an FCE. (PX 3). Petitioner underwent the recommended FCE on February 26, 2015 at ATI Physical Therapy. (PX 6). The FCE was valid. (PX 6). It stated that Petitioner demonstrated functional capabilities at a medium physical demand level. (PX 6). Petitioner's capabilities fell below the job duties of an ironworker. (PX 6). Petitioner reported right knee pain throughout the duration of the FCE. (PX 6). Petitioner experienced difficulty with balance when walking on uneven surfaces, climbing stairs, prolonged repetitive squatting when holding objects, squatting and prolonged standing during the FCE. (PX 6).

Petitioner was last examined by Dr. Wolin on March 6, 2015. (PX 3). Dr. Wolin documented that Petitioner experienced "pinching" medially in his right knee. (PX 3). On physical examination, Petitioner had tenderness to palpation and tenderness at the medial joint line. (PX 3). Dr. Wolin stated that Petitioner had reached maximum medical improvement. (PX 3). He recommended that Petitioner return to work within the restrictions of the FCE. (PX 3).

E. Post-Accident Employment

After Petitioner was released by Dr. Wolin to return to work with restrictions, he had a meeting at City Hall. Initially, he was not offered work within his restrictions. Petitioner began a self-directed job search. (PX 7). Petitioner's job search logs were admitted into evidence. (PX 7). Petitioner received temporary total disability benefits and maintenance benefits from Respondent while he conducted a job search. (RX 1).

On February 19, 2016, Petitioner received correspondence from Kurt Peterson, the Deputy Commissioner of Human Resources for Respondent. (PX 10). The correspondence set forth that Petitioner had permanent restrictions that conflicted with his ability to perform the essential functions of his position. (PX 10). It requested that Petitioner apply for a reasonable accommodation. (PX 10).

Petitioner applied for a reasonable accommodation, which was granted. (PX 11). The Letter of Determination from Respondent indicates that Petitioner's request for accommodation was granted. (PX 11). The correspondence stated that Petitioner would be provided assignments as an ironworker that did

not require him to lift more than 36 pounds over shoulders occasionally and 10 pounds frequently, 65 pounds from floor to waist occasionally, push and pull 106 pounds, carry 52 pounds, climb stairs occasionally, balance occasionally, and crouch occasionally. (PX 11).

On April 16, 2016, Petitioner returned to work for Respondent within his restrictions. Petitioner worked for Respondent within his restrictions from April 16, 2016 through October 31, 2016. When Petitioner returned to work, he acted as a supervisor. He did not perform heavy work. Petitioner testified that he did not perform his full duties as an ironworker. Petitioner did not perform heavy lifting, climbing, balancing or work on a scaffold.

Petitioner retired after October 31, 2016. He testified that if not for the accident, he would have worked until he was 70. However, due to the accident, he retired.

F. Vocational Opinions of Thomas Grzesik

Thomas Grzesik, a certified vocational counselor, prepared a vocational report dated July 12, 2016. (PX 8). Mr. Grzesik interviewed Petitioner on July 11, 2016. (PX 8). He prepared an addendum report dated July 18, 2016. (PX 8). Mr. Grzesik opined that Petitioner was not able to perform many essential components of his pre-injury employment as an ornamental ironworker due to the work restrictions. (PX 8). He noted that Petitioner was currently employed in a light-duty assignment, which the employer arranged. (PX 8). Mr. Grzesik set forth that no light-duty work is provided by Local 63. (PX 8). Mr. Grzesik documented that the pay scale for Local 63 Ornamental Ironworkers is approximately $45.00 per hour. (PX 8).

Mr. Grzesik opined that Petitioner was not qualified to work as an ironworker due to his restrictions. (PX 6). The restrictions prevented Petitioner from performing essential work duties of an ironworker. (PX 8). The light-duty assignment, with which he was provided by Respondent, constituted "made work" since Petitioner was precluded from performing the majority of his pre-accident job duties. (PX 8). He stated that it is highly unlikely that Petitioner would secure employment of a similar nature at the same rate of pay as an ironworker with another employer. (PX 8). Mr. Grzesik stated that outside of the "made work" assignment from Respondent, Petitioner would be limited in his post-accident employment. (PX 8).

Petitioner could earn between $8.75 and $16.00 per hour for work within his restrictions. (PX 8). Mr. Grzesik set forth that the pay scale of $45.00 per hour was inflated for the work that Petitioner was performing for Respondent. (PX 8).

In his addendum report dated July 18, 2016, Mr. Grzesik reviewed the Architectural and Ornamental Ironworkers' Union - Local 63 - Ironworkers Job Requirements. (PX 8). Mr. Grzesik stated that the job requirements were consistent with his understanding of the job duties for an ornamental ironworker. (PX 8). Further, it confirmed that Local 63 does not provide light duty work. (PX 8). Accordingly, Mr. Grzesik concluded that the light duty job assignment from Respondent was "made work" and Respondent paid Petitioner a significantly inflated wage for the work that he was performing. (PX 8).

The evidence deposition of Mr. Grzesik was completed on March 7, 2017. (PX 9). Mr. Grzesik found that Petitioner was 68 years old, obtained a GED and served in the military. (PX 9 at 21). Mr. Grzesik testified that the physical demand level of an ornamental ironworker is heavy. (PX 9 at 30). The position of an ornamental ironworker is skilled. (PX 9 at 31). Mr. Grzesik reviewed the FCE and opined that Petitioner was capable of performing job duties at the medium physical demand level. (PX 9 at 37).

Mr. Grzesik testified that Petitioner did not meet the physical demand criteria for the occupation of an ornamental ironworker. (PX 9 at 40). Mr. Grzesik noted that Petitioner was provided a reasonable accommodation by Respondent to return to work. (PX 9 at 42). The reasonable accommodation determination supported Mr. Grzesik's opinion that Petitioner was not able to perform his full job duties as an ironworker for Respondent. (PX 9 at 42). Mr. Grzesik testified that Petitioner's right knee injury affected his future earning capacity because Petitioner could not perform his regular job duties as an ornamental ironworker. (PX 9 at 43). If Petitioner were not provided this job assignment by Respondent, he would not be able to perform work as an ornamental ironworker. (PX 9 at 43).

Mr. Grzesik testified that the potential labor market for Petitioner outside of his job with Respondent would allow him to earn between $8.75 per hour and $16.92 per hour. (PX 9 at 44). As an ironworker, Petitioner would be earning $45.00 per hour. (PX 9 at 45). Accordingly, Petitioner's future earning capacity was diminished significantly. (PX 9 at 45). Mr. Grzesik testified that Petitioner was earning Union

pay scale in his modified job for Respondent. (PX 9 at 45). He explained that the wage was inflated because another contractor outside of Respondent would not pay him that rate given the work restrictions. (PX 9 at 45). Petitioner's work related injury had a negative effect on his future earning capabilities. (PX 9 at 46).

Mr. Grzesik opined that Petitioner's right knee injury partially incapacitated him from performing his pre-injury job duties as an ironworker. (PX 9 at 47). Petitioner could perform partial aspects of his job duties as an ironworker. (PX 9 at 48) He was not capable of performing a majority of his job functions for Respondent. (PX 9 at 48). In Petitioner's modified position, he occasionally performed stick welding, changed door locks, and made minor repairs. (PX 9 at 48). Petitioner was provided with assistance for the physical aspects of his job. Petitioner did not lift anything heavy. (PX 9 at 49). Petitioner performed fewer job duties than he did in his pre-injury employment. (PX 9 at 49). Mr. Grzesik opined that Petitioner would not be able to perform his occupation as a journeyman ornamental ironworker. (PX 9 at 50). Without a reasonable accommodation, Petitioner would not be employable as an ironworker and he would not be able to obtain employment outside of Respondent as an ironworker. (PX 9 at 51).

G. Current Subjective Complaints

Petitioner testified regarding his current subjective complaints. Petitioner testified that he experiences soreness in his right knee when he walks and stands. His right knee is weaker than his left knee. Petitioner is not able to walk on uneven ground. Petitioner takes over-the-counter medication for the pain. Petitioner has not had any new accidents or injuries involving his right knee since June 5, 2014.

II. CONCLUSIONS OF LAW

In support of his decision in regard to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator makes the following conclusions:

The Arbitrator concludes that Petitioner's current condition of ill-being of his right leg is causally related to the work-related accident of June 5, 2014. The Arbitrator relies on the testimony of Petitioner and the medical records submitted into evidence. Respondent did not submit any evidence to dispute a finding of medical causation.

Immediately following the accident, Dr. Diadula at MercyWorks noted that Petitioner sustained an injury to his right knee at work and that Petitioner should remain off work due to the work-related injury. Dr. Wolin stated that Petitioner sustained a post-traumatic meniscal tear and documented a history of a work-related injury. Accordingly, the Arbitrator finds that the opinions of Dr. Diadula and Dr. Wolin support a finding of medical causation.

The Arbitrator further concludes that Petitioner's current condition as it relates to the right knee was causally connected to the accident through the "chain of events" analysis. Proof of prior good health and change immediately following and continuing after an injury may establish that the impaired condition was due to injury. *Ill. Power Co. v. Indus. Comm'n*, 176 Ill.App.3d 317, 530 N.E.2d 617 (4th Dist. 1988).

In *Corn Belt Energy Corp. v. Illinois Workers' Comp. Comm'n*, 56 N.E.3d 1101, 404 Ill. Dec. 688 (3d Dist. 2016), the court held that the Arbitrator could accord more weight to the chain of events analysis than the opinions of the Section 12 physician. In *Kawa v. Illinois Workers' Comp. Comm'n*, 991 N.E.2d 430, 372 Ill. Dec. 123 (1st Dist. 2013), the Appellate Court reaffirmed the chain of events analysis. The court found that the claimant established a "causal nexus between the accident and his condition of ill-being" based on the evidence that the claimant's condition had begun no sooner than the work-related accident and continued with no intervening cause that broke the chain of events. *Id.*

In the instant case, Petitioner did not have any prior accidents or injuries to his right knee. Furthermore, he had not received any medical treatment for his right knee prior to June 5, 2014. However, immediately following the accident, Petitioner experienced ongoing and continuous pain in his right knee

and required medical treatment, including office visits, diagnostic tests, physical therapy and surgery. Accordingly, the Arbitrator finds that the work-related accident of June 5, 2014 caused Petitioner's current condition of ill-being as it relates to his right knee based on the chain of events analysis.

In support of his decision in regard to issue (L) "What is the nature and extent of the injury?", the Arbitrator makes the following conclusions:

Although Petitioner presented evidence of a wage loss, he has waived his right to recover under Section 8(d)1. Petitioner is seeking an award not under Section 8(e)12, but under Section 8(d)2 of the Act.

Section 8(d)2 states, in pertinent part, the following: "If, as a result of the accident, the employee sustains serious and permanent injuries ... [that] partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, or having resulted in an impairment of earning capacity, the employee elects to waive his right to recover under the foregoing subparagraph 1 of paragraph (d) of this Section," then he shall be entitled to 8(d)2 benefits.

Section 19(e) of the Act states, in pertinent part, the following:

> "Decisions rendered by the Commission and dissents, if any, shall be published together by the Commission. The conclusions of law set out in such decisions shall be regarded as precedents by arbitrators for the purpose of achieving a more uniform administration of the Act."

The following Commission decisions have dates of accident that are after September 1, 2011:

In *Robert Gregory v. Caterpillar, Inc.*, 16 IWCC 0561 (15 WC 15332), claimant was a 64-year-old welder who sustained repetitive trauma injuries to his left shoulder on August 20, 2013, and repetitive trauma injuries to his right shoulder on September 29, 2013. No impairment rating was offered into evidence; therefore, the Commission gave no weight to this factor. With regard to claimant's age, he was 64 years old on the date of accident, and worked for respondent for 39 years as a welder. Claimant was returned to work in May 2015 with significant restrictions of no pushing or pulling over five pounds with either arm. The Commission concluded that claimant could not return to his welding job. However,

respondent accommodated these restrictions with the safety champion job at the same rate of pay. The record reveals that claimant testified that he spoke to respondent about retirement prior to his injuries, but postponed the retirement, with respondent's agreement, until after his treatment was completed. Claimant testified that he was able to perform the accommodated job of safety champion but in fact chose to retire after briefly working at this position and upon completion of his treatment. Therefore, claimant's retirement was for reasons unrelated to his disability, and little weight was placed on claimant's age, occupation, and future earnings capacity in deciding permanent disability. Significant weight was placed on the evidence of disability corroborated by the treating medical records. Claimant underwent surgery on his right shoulder for a massive rotator cuff tear followed by a reverse right shoulder replacement. Among other complaints, claimant indicated that he has trouble sleeping, primarily due to right shoulder pain. For this accidental injury to the right shoulder, the Commission awarded claimant 25% loss of use of his person as a whole, which they found to be a percentage loss more in line with prior Commission findings for the same or similar disabilities. Case # 15 WC 15331, in which claimant sustained repetitive trauma injuries to his left shoulder on August 20, 2013, was decided separately. Arbitrator Doherty awarded this 64-year-old welder, Robert Gregory, 10% loss of use of his person as a whole. Claimant underwent arthroscopic surgery to his left shoulder for a partial rotator cuff tear, impingement, and AC arthritis. No review was taken of Arbitrator Doherty's decision.

In *Tom Auth v. University of Illinois*, 16 IWCC 0268, the Commission affirmed and adopted the decision of the arbitrator. The Commission found that claimant was a 53-year-old construction laborer who sustained an injury to his right shoulder. The Commission concluded that as a result of the February 13, 2013 accident, claimant suffered a massive rotator cuff tear that required surgery. Neither claimant nor respondent tendered an AMA impairment rating into evidence, and thus, the arbitrator gave this factor no weight. The Commission further found that the position of construction laborer was an extremely physically demanding position, and that because of this right shoulder injury, claimant was no longer able to work in this position. The Commission concluded that the doctor imposed very stringent permanent restrictions on claimant's use of his right shoulder. Claimant returned to work for respondent as a building

maintenance coordinator and earned the same rate of pay he earned as a construction laborer. In the year preceding the February 13, 2013 accident, claimant earned $17,195.16 in overtime pay. Petitioner testified that he has not received overtime pay as a building maintenance coordinator, but has not inquired about whether overtime hours were available or not. The Commission was unable to determine whether or not overtime hours would be offered to him in the future, and therefore gave minimal weight to this factor. The Commission gave significant weight to the evidence of disability as corroborated by the treating medical records, his occupation, and his age, given the fact that he will have to live with significant permanent restrictions for the remainder of his working and natural life. For this accidental injury, the Commission awarded claimant 35% loss of use of his person as a whole.

In *DeLawrence Dillard v. DS Waters of America, Inc.*, 18 IWCC 0049, claimant was 47-year-old sales consultant who injured his cervical spine after lifting a 5-gallon jug of water on January 28, 2013. No impairment rating was offered into evidence; therefore, the Commission gave no weight to this factor. With regard to claimant's age, the record reveals he was 47 years old; the Commission found this factor to be relevant and gave it minor weight. With regard to claimant's occupation, the record reveals he was a sales consultant, which required him to lift and load water into a truck. He was required to lift 5-gallon jugs of water that weighed 43 pounds each. The Commission found this factor to be relevant and gave it major weight. No evidence was presented regarding claimant's future earnings capacity. Therefore, the Commission gave no weight to this factor. With regard to evidence of disability as corroborated by the treating medical records, the record reveals that claimant sustained a C4-C5 disc herniation that caused radiculopathy and spondylosis, as well as a bulging disc at C3-C4. Claimant underwent a C4-C5 cervical fusion, after which he was given permanent that prevented him from returning to his pre-accident job with respondent. For these accidental injuries, the Commission awarded claimant 40% loss of use of his person as a whole.

In *Jonathan Malley v. Menard Correctional Center*, 16 IWCC 0117, claimant was a 41-year-old correctional officer, who, on June 3, 2012, sustained an accidental injury when he was assaulted by two inmates. Such accidental injury resulted in a vitreous detachment, a herniated cervical disc that required

surgery, including a two-level fusion, post-concussion syndrome, and post-traumatic stress disorder. No impairment rating was offered into evidence; therefore, the Commission gave no weight to this factor. Claimant was 41 years old on the date of accident. With regard to claimant's occupation, the record reveals that claimant was a correctional officer; the Commission gave significant weight to this factor given (1) claimant's accidental injuries, and (2) the physically demanding nature of the job. With regard to claimant's future earnings capacity, the Commission gave no weight to this factor since Petitioner was given a full-duty release but voluntarily changed jobs. With regard to evidence of disability corroborated by the treating medical records, the Commission gave great weight to this factor due to claimant's complaints of disability coupled with "the treatment of cervical fusions." For these accidental injuries, the Commission awarded claimant 45% loss of use of his person as a whole.

Pursuant to Section 8.1b of the Act, for accidental injuries that occur on or after September 1, 2011, the following criteria are to be used in the determination of permanent partial disability:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator gives no weight to this factor. Pursuant to the Appellate Court's holding in *Corn Belt Energy v. Illinois Workers' Comp. Comm'n*, 56 N.E.3d 1101, 404 Ill. Dec. 688, (3d Dist. 2016), the Arbitrator finds that the absence of a permanent partial disability impairment report and/or opinion does not preclude him from making a determination on permanent partial disability.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that at the time of the accident, Petitioner was employed as a Local 63 ornamental ironworker. Petitioner was required to walk up and down a minimum of 5 flights of stairs, walk on rough surfaces, climb ladders and scaffolding, kneel, squat, lean, reach, twist, bend, climb over objects, jump up and down getting into and out of trucks, carry heavy/awkward objects, use both arms and legs, walk, climb and descend beams, use power and hand tolls, use a welder and cutter torch, lift up to one hundred pounds and lift 50 pounds overhead. In his pre-injury employment as an ironworker, Petitioner was required to work at a heavy physical demand level. The finding that the job was at a heavy physical demand level was supported by the testimony of Mr. Grzesik, a vocational rehabilitation counselor, and the job description. Yet, Petitioner returned to work for Respondent in an accommodated position for 6 months after which he voluntarily retired. The Arbitrator gives moderate weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 66 years old at the time of the accident. Mr. Grzesik testified that it was his understanding that Respondent does not have a mandatory retirement age. However, Petitioner testified that he wanted to work for Respondent as an ornamental ironworker until he was 70 years old. Petitioner returned to work for Respondent on April 16, 2016 within his restrictions. Petitioner worked for Respondent within his restrictions, as a supervisor, from April 16, 2016 through October 31, 2016, after which he voluntarily retired. The Arbitrator takes judicial notice that, *ceteris paribus*, a 66-year-old worker has shorter life and work-life expectancies than those of a 26, 36, 46, or 56-year-old worker. Please see *Flexible Staffing Services v. Illinois Workers'*

Comp. Comm'n, 68 N.E.3d 846, 409 Ill. Dec. 688 (1st Dist. 2016) and *People v. Greene*, 50 Ill. App. 3d 872, 875, 365 N.E.2d 1181, 8 Ill. Dec. 795 (1977). The Arbitrator gives major weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that when Petitioner returned to work for Respondent in the accommodated position, he worked full time and earned the same or higher Union wages that he did pre-accident. There is no evidence that Petitioner filed a grievance with the Union for the work he was performing or the wages he was earning.

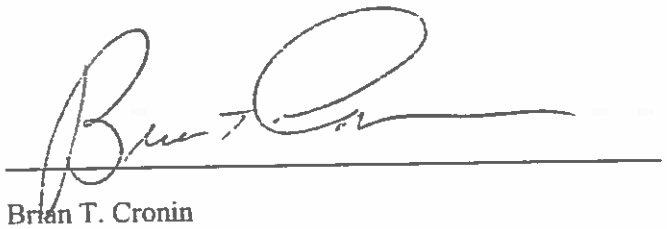
Yet, the work restrictions imposed by Dr. Wolin have prevented Petitioner from returning to his pre-injury employment. Specifically, Petitioner's testimony, the Union job requirements, and the opinions of Mr. Grzesik establish that the job duties of an ornamental ironworker exceed Petitioner's physical capabilities. Further, the Union job requirements document that the Union does not provide light-duty work. Petitioner's work restrictions, the job requirements of an ironworker, the correspondence with Respondent regarding the accommodated position, and the opinions of Mr. Grzesik stand unrebutted.

Respondent provided Petitioner with work within his restrictions and accommodated his restrictions to allow him to return to work for Respondent. Petitioner testified that he was not performing his full job as an ironworker for Respondent when he returned to work. Petitioner did not perform heavy lifting, climbing, balancing or work on a scaffold. Based on the job description and Petitioner's testimony, he was not performing his pre-injury employment as an ironworker. Mr. Grzesik opined that Petitioner was not performing his full-duty job for Respondent. Consequently, as a result of the accident, Petitioner became partially incapacitated from performing his usual and customary line of employment. Although Petitioner presented evidence of a wage loss, he has waived his right to recover under Section 8(d)1. The Arbitrator gives major weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the following: The medical records of Dr. Wolin establish that Petitioner sustained a medial and lateral meniscal tear of his right knee that required surgery. This

diagnosis is corroborated by the diagnostic studies and the operative report. On March 6, 2015, which was the last time Petitioner saw Dr. Wolin, he told the doctor that his right knee is getting better all the time but that he still feels "pinching" medially. On physical examination, Petitioner exhibited tenderness to palpation and tenderness at the medial joint line. Dr. Wolin declared that Petitioner had reached maximum medical improvement, and released him to return to work within the restrictions of the valid FCE. The Arbitrator gives major weight to this factor.

Determination of permanent partial disability ("PPD") is not simply a calculation, but is an evaluation of the five factors. The Arbitrator has carefully considered all five factors. By applying §8.1b and by considering the relevance and weight of all five factors, the Arbitrator finds that as a result of the June 5, 2014, accident, Petitioner has sustained a permanent loss of use of his person as a whole to the extent of 37.5%, pursuant to Section 8(d)2 of the Act.



4-12-2018

Brian T. Cronin

Arbitrator

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 Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL FLETCHER,

Petitioner,

vs.

NO: 17 WC 31222

NEXUS STAFFING,

19IWCC0082

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Petitioner sustained an accident that arose out of and in the course of his employment with Respondent on October 12, 2017. The Commission also finds that Petitioner's left shoulder, neck, and upper back conditions were causally related to the October 12, 2017 accident. The Commission further finds that Petitioner is entitled to all reasonable and necessary medical expenses related to the October 12, 2017 accident, as well as TTD benefits from October 13, 2017 through March 8, 2018. As to PPD benefits, the Commission awards five-percent (5%) loss of use of the person as a whole.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1) Petitioner, a 33-year-old man, began working with Respondent, a staffing agency, in August 2017. (T.11-12). Respondent sent Petitioner to work with MAT Holdings as a forklift operator. (T.12). Petitioner also drove a stand-up reach truck. Petitioner's duties included replenishing products that had been picked throughout the shift, and putting away products that would be delivered on the trucks. (T.12-13). The products that Petitioner worked with comprised of ladders, step stools, and scaffolding; these products would weigh between five pounds to 150 pounds; these items were in cases. (T.13). When Petitioner was replenishing products, he would have to physically move items from one pallet to another pallet. (T.14).

2) Petitioner described how he was injured on October 12, 2017:

> I lifted up two cases, maybe 50 pounds, I'm not exactly sure. But it's not normal practice. I try to be quick and efficient about what I'm doing. So when I picked the cases up, the item in the bottom case fell through the bottom of the case. And I wasn't exactly sure on what was going on. I thought maybe I was dropping the case. So I tried to reassure my grip, which I did a lifting motion, and I felt a lot of pain in my back at that time. (T.16-17).

3) Petitioner testified that he was not sure what type of product was inside the cases, but he described them as two metal poles that were several feet long in each case. (T.17).

4) Petitioner stated that after the accident, he immediately felt a pop below his neck and between his shoulders blades. He also felt tightness, "like I was being stabbed in the middle of my back." Petitioner had trouble lifting his arms. (T.18-19). Petitioner testified that he had never felt a pain like that. Petitioner explained that he left the aisle where the accident occurred and saw another employee. "I asked him if he knew where the supervisor was because I needed to – I felt like I needed to go to the hospital then and there. I was in a lot of pain." (T.20). Petitioner eventually located a supervisor named Juan, and notified him of his injury, and that he wanted to go to the emergency room. (T.20-21). Petitioner had also telephoned Respondent's "temp rep," Angelica. (T.20). Petitioner testified that Angelica arrived and took him from the warehouse to the office of the temp service; Petitioner spoke with Robert Kennedy at the office. (T.22-23).

5) Petitioner stated that he had never experienced similar pain in his neck, back, or shoulder prior to October 12, 2017. (T.23).

6) Petitioner presented to the emergency department of Saint Joseph Medical Center on October 12, 2017. The history recorded was: "Patient states he picked up a heavy box and contents fell out. Patient [proceeded] to pick up box that was empty and using the same strength as if box was full and pulled his should[er] up too hard." Petitioner had complaints to his left shoulder, the left side of his neck, and he felt a sharp pain to his left breast with deep breaths. Physical examination indicated no obvious deformity of the left shoulder, range of motion was full, there was tenderness on palpation of the left sternocleidomastoid muscle in the neck (SCM), AC joint, and left trapezius; the remainder of the left upper

extremity was normal. Petitioner was diagnosed with a left shoulder strain/sprain and given Ibuprofen, Norco, and a sling. Chest and left shoulder x-rays were normal. (PX1).

7) During cross-examination, Petitioner testified that he was not aware that the emergency department at St. Joseph's had only diagnosed him with a shoulder strain. Petitioner disagreed that that was his only complaint. (T.32-33).

8) On October 16, 2017, Petitioner commenced physical therapy and chiropractic treatment for the cervical and thoracic spine with Dr. Mark Cohen, D.C., of Physicians Plus, Ltd. The history recorded was, "He states he was moving boxes from one pallet to another when some of the contents of one of the boxes began to fall out of the bottom, he tried to grab onto the box and felt the sudden onset of pain." Petitioner reported neck pain without radiation to the upper extremity. Petitioner also had pain on the left side of the upper back. Dr. Cohen examined Petitioner and noted painful and limited cervical range of motion, Soto Hall test and Kemps test were positive, Petitioner exhibited spasms in the paracervical muscles, active trigger points were noted in the suboccipital muscles. There was also pain with superficial palpation of C2 through C6 and T2 through T6. Dr. Cohen diagnosed Petitioner with neck and mid-back pain. (PX2).

9) Dr. Cohen had ordered the physical therapy, and he also ordered an MRI. Dr. Cohen's medical records run through March 8, 2018 and are repetitive in nature. The records stated that Petitioner's symptoms either increased or decreased since the last visit, and that Petitioner should continue with therapy as planned. (PX2).

10) On October 31, 2017 and December 5, 2017, Petitioner consulted with Dr. Nitin Malhotra, of Expert Pain Physicians. The history of injury recorded was that on October 12, 2017, while at work, Petitioner lifted a pallet of nearly 70 pounds when the contents suddenly fell from the bottom. Prior to this injury, he denied any neck pain or having any treatment for any condition in his neck. On December 5, 2017, Dr. Malhotra noted that Petitioner was undergoing physical therapy, which he was benefiting from. Petitioner reported no longer experiencing "pains on the right or paresthesias down the left arm. Pain is no longer constant, but intermittent, between 0-7/10 in severity." Previously, on October 31, 2017, Petitioner had reported a pain level of 7-10/10. (PX2).

11) On December 5, 2017, Dr. Malhotra indicated that Petitioner had pain in his left neck, trap, and left rhomboid. Petitioner also had pain with lifting and cervical range of motion. Dr. Malhotra had reviewed MRIs of the cervical and thoracic spine completed on October 20, 2017. The cervical spine images demonstrated a disc protrusion at C5-6 with mild canal stenosis and biforaminal narrowing. There was also a minimal disc bulge at C6-7 with facet joint hypertrophy. The thoracic spine was unremarkable. Dr. Malhotra diagnosed Petitioner with cervicalgia, cervical radiculopathy, and cervical spondylosis without myelopathy or radiculopathy. Dr. Malhotra ordered additional therapy and medication. (PX2).

12) At arbitration, Petitioner testified that he did not need any additional treatment from Dr. Cohen, and that he believed he would be returning to work. (T.24). When asked by his attorney about his present condition, Petitioner stated, "I'm not feeling pain, but I'm just

not where I was at before." (T.25). Petitioner had difficulty playing with his children. (T.26).

13) Petitioner also testified that he had been off work since the accident through the date of arbitration. (T.24). Dr. Cohen provided Petitioner with off work slips from October 16, 2017 through March 2018. (PX2).

14) Respondent called Jose Servin as its witness. Mr. Servin was a forklift driver for MAT Holdings; he had worked with Petitioner. (T.43). Mr. Servin testified that on October 12, 2017, he had a conversation with Petitioner who indicated that his shoulder was bothering him, and that it was his last day of work because he had found a better job with better pay. (T.44-45). Petitioner testified that he had considered becoming a direct employee of MAT Holdings:

> There was no guarantee on me becoming a full time member with MAT Holdings. It was really just – I had only been there for about two months. Normally you have to be on for 90 days before you're eligible to become full time with MAT Holdings. So it was just the beginning stages of me discussing full time employment with the management of MAT Holdings. (T.38-39).

15) Mr. Servin completed a handwritten statement on October 12, 2017. (T.47; T.51-52; RX1). On re-cross, he could not remember the date he gave the statement, but he recalled giving his statement to Angelica, the staffing agent representative. (T.53). Mr. Servin did not see Angelica speak to any other employee. (T.54).

16) Mr. Servin also confirmed that he did not see Petitioner after they started working on October 12, 2017, and Mr. Servin did not witness the accident. (T.45-46). Mr. Servin further testified that on October 12, 2017, his bosses ordered him to finish Petitioner's work since Petitioner was no longer there; Mr. Servin was required to put away pallets. (T.46).

17) Angelica Leal also testified on behalf of Respondent; she was Respondent's area support/on-site manager. (T.57). Ms. Leal testified that Petitioner had sent her a text on October 12, 2017 regarding his accident. (T.59-60). Ms. Leal then drove to the facility where Petitioner was working, which was about 10 minutes away. (T.60). When Ms. Leal arrived at the facility, Petitioner had informed her that he had hurt his shoulder moving product, and he had trouble breathing. (T.60-61; T.78). Ms. Leal had offered to take Petitioner to the company clinic for evaluation, but first they had to drive back to Ms. Leal's office to retrieve paperwork. (T.61). While at the office Petitioner spoke to his attorney by phone. After that conversation, Petitioner decided to go to the emergency room instead. (T.61-62).

18) During cross-examination, Ms. Leal testified that her job following an accident was to speak to the managers, co-workers, and anyone that was around the department. (T.68). She had received e-mails from "the manager" and the warehouse manager, Juan Mitchell. (T.65-66; T.68). Ms. Leal testified that after receiving Petitioner's text, Mr. Mitchell had

called her and told her that Petitioner had informed him he had been hurt. Mr. Mitchell did not provide any further details to Ms. Leal. (T.66-67). Mr. Mitchell later emailed Ms. Leal and asked how Petitioner was feeling. (T.65-67). During further cross-examination, Ms. Leal could not recall speaking to any other people at MAT Holdings on October 12, 2017, or if she took other statements other than that of Mr. Servin. (T.69; T.73). When asked several times who told her to speak with Mr. Servin, Ms. Leal kept answering, "It's a protocol." (T.70).

19) Robert Kennedy testified on behalf of Respondent; he was Respondent's on-site manager and risk manager. (T.79). Mr. Kennedy testified that he had received a call from Ms. Leal regarding Petitioner's injury. "I said okay, I will meet you at the clinic. I advised her to take him to Physicians Immediate Care." (T.81). Mr. Kennedy stopped at Respondent's office to gather his "stuff" and then he was going to head to the clinic. (T.82). At that time, Ms. Leal was also at the office with Petitioner. (T.82). Mr. Kennedy stated that Petitioner had him speak to his attorney over speakerphone. (T.82-83). Petitioner's attorney had advised Mr. Kennedy to send Petitioner to the emergency room and not Physicians Immediate Care. (T.84).

20) During cross examination, Mr. Kennedy could not recall the exact mechanism of injury, but stated that Petitioner told him that his shoulder was hurting. (T.85). Mr. Kennedy identified Petitioner's Exhibit 5, which was the statement Petitioner recorded on Respondent's investigation form. (T.86). The statement read:

> I was consolidating an item so I could do the required replen. I lifted the case to move it, the contents broke through the bottom of the case. When this happened I tried to correct my hold of the case so I did not drop it. During that motion I felt pain through my back/shoulder/neck. (PX5).

21) Mr. Kennedy stated that two other employees had provided statements to Respondent, but they could not state how he had been injured because they did not witness the accident. (T.88).

> Well, we all know what Jose said. Then we had an employee Bernard Fox who you've been referring to as Bernard Junior. His name is Bernard Fox Jr. He was in another aisle when he saw Mr. Fletcher come out and say he was injured. So I'm guessing that's who he told who told him to go see and tell the supervisor. (T.88).

22) Mr. Kennedy testified that no one had investigated whether there had been a box with contents that had fallen out. "Not at that time. I didn't know exactly what happened because again we were more worried about getting him treatment. He filled out the statement the next day." (T.89).

The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts

in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n,* 291 Ill. App. 3d 734, 740 (4th Dist. 1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Indus. Comm'n,* 51 Ill. 2d 533, 536-37 (1972).

The Commission disagrees with the Arbitrator's finding that Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment with Respondent on October 12, 2017. The Arbitrator had explained that even though Petitioner's testimony about the accident was consistent with the medical records, and consistent with his report to Respondent the date after the accident, the Arbitrator indicated that there was no corroborating evidence that the accident occurred. The Arbitrator did not find Petitioner credible because his testimony was contradicted by Respondent's witnesses. (Arbitrator's Decision, pg. 5). The Arbitrator found persuasive the testimony of Respondent's witness, Mr. Servin. Mr. Servin testified that Petitioner already had shoulder pain when he came into work on October 12, 2017; Petitioner had also told Mr. Servin that Friday [October 13] was going to be his last day because he had found a better job with better pay. The Arbitrator also found suspect that Petitioner's alleged injury occurred after he had been working for Respondent for only two months. (Arbitrator's Decision, pgs. 5-6). The parties did not file Briefs in this claim.

The Commission reverses the Arbitrator's Decision in its entirety. The Commission finds that Petitioner's testimony as to his injury is sufficiently supported by the record. To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. *Sisbro, Inc. v. Indus. Comm'n,* 207 Ill. 2d 193, 203 (2003). "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Id.* 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. *Id.* The "arising out of" component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Id.*

Here, Petitioner's accident was not witnessed, but that is no bar to recovery. Petitioner testified that on October 12, 2017, he was at work moving products; he had lifted two cases of product that weighed approximately 50 pounds. The bottom case opened, and the items in that case fell out. In attempting to secure his grip on the cases, he maneuvered and made a "lifting motion." In that instant, Petitioner testified that he felt a pop below his neck and between his shoulder blades; he also felt tightness and a lot of pain in the middle of his back. (T.16-19). As noted by the Arbitrator, the medical records, especially the emergency room records dated October 12, 2017, and Petitioner's written statement to Respondent (PX5), dated October 13, 2017, were sufficiently consistent with Petitioner's testimony.

Although the Arbitrator found Respondent's evidence to rebut Petitioner's claim of accident persuasive, Respondent's evidence by way of witness testimony actually lends support and credibility to Petitioner's position. The first witness was Jose Servin; he was a forklift driver for MAT Holdings and he worked with Petitioner on October 12, 2017. Mr. Servin testified that

Petitioner's shoulder had already been bothering him prior to starting his shift, and that Petitioner had told him his last day of work was October 12, 2017. Petitioner had testified that he had no prior complaints, injury, or treatment to his shoulder; this is also indicated in his medical records. Petitioner also testified that he was considering working directly for MAT Holdings, but that in order to become a direct employee, he had to be employed for 90 days – Petitioner had only been working for MAT Holdings for two months. (T.23; T.38-39; T.43-45).

Respondent's other witnesses, Angelica Leal and Robert Kennedy, both on-site managers, testified to being notified by Petitioner on October 12, 2017, that he had been injured at work; they directly responded to Petitioner on this date. Ms. Leal testified that Petitioner had informed her that he had hurt his shoulder moving product, and he had trouble breathing. (T.60-61; T.78). Ms. Leal's testimony corroborated Petitioner's earlier testimony that after the accident, he had called Angelica, who picked him up from the warehouse and took him to the office of the temp service wherein Petitioner next spoke with Mr. Kennedy. (T.20; T.22-23). Ms. Leal had also offered to take Petitioner to the company clinic for evaluation. (T.61).

Mr. Kennedy's testimony picked-up the sequence of events following the accident, and as was previously testified to by Petitioner and Ms. Leal. Mr. Kennedy testified that Ms. Leal had informed him of Petitioner's injury on October 12, 2017, and Petitioner had told him that he had hurt his shoulder. (T.81; T.85). Mr. Kennedy also admitted during cross-examination that no one had investigated whether there had been a box with contents that had fallen out. "Not at that time. I didn't know exactly what happened because again we were more worried about getting him treatment." (T.89).

Ms. Leal's testimony regarding her on-site investigation was negligible. Ms. Leal testified that her job following an accident was to speak to the managers, co-workers, and anyone that was around the department. (T.68). She had received e-mails from "the manager" and the warehouse manager, Juan Mitchell. (T.65-66; T.68). Ms. Leal testified that after receiving Petitioner's text, Mr. Mitchell had called her and told her that Petitioner had informed him he had been hurt. This is consistent with Petitioner's testimony. (T.20-21; T.66-67). Mr. Mitchell did not provide any further details to Ms. Leal. (T.66-67). During further cross-examination, Ms. Leal could not recall speaking to any other people at MAT Holdings on October 12, 2017, or if she took other statements other than that of Mr. Servin. (T.69; T.73). When asked several times who told her to speak with Mr. Servin, Ms. Leal kept answering, "It's a protocol." (T.70).

Based on the record in its entirety, the Commission finds that the credible evidence demonstrates that Petitioner met his burden of proving, by a preponderance of the evidence, that he suffered a disabling injury which arose out of and in the course of his employment with Respondent on October 12, 2017.

As to the issue of causal connection, the Arbitrator rendered this issue moot as the Arbitrator had determined that Petitioner failed to prove accident. A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. *Int'l Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64 (1982). Here, Petitioner testified to no history of complaints, injury, or treatment to his left shoulder, neck or

back prior to October 12, 2017. (T.23). Respondent offered no evidence to rebut Petitioner's testimony in this regard. Immediately following the October 12, 2017 accident, Petitioner had complaints to his neck, upper back, and left shoulder area. (T.16-19). He sought treatment that same date at the emergency department of Saint Joseph Medical Center wherein he was diagnosed with a left shoulder strain/sprain. (PX1). Four days later, Petitioner consulted with Dr. Mark Cohen, D.C., who evaluated his cervical and thoracic spine. (PX2).

Dr. Cohen examined Petitioner and noted painful and limited cervical range of motion, Soto Hall test and Kemps test were positive, Petitioner exhibited spasms in the paracervical muscles, active trigger points were noted in the suboccipital muscles. There was also pain with superficial palpation of C2 through C6 and T2 through T6. MRIs for the cervical and thoracic spine revealed a disc protrusion at C5-6 with mild canal stenosis and biforaminal narrowing. There was also a minimal disc bulge at C6-7 with facet joint hypertrophy. The thoracic spine was unremarkable. (PX2).

Petitioner was taken off work, provided with medication and a sling for his shoulder, and underwent physical therapy and chiropractic treatment for his back for nearly five months. (PX1; PX2).

Thus, the consistent and credible evidence herein, establishes that prior to October 12, 2017, Petitioner had no complaints to his left shoulder, neck, or upper back. Thereafter, following the October 12, 2017 work-related accident, he sustained injury to his left shoulder, cervical and thoracic spine, which necessitated time off work and treatment by way of medication and therapy. Therefore, the Commission finds that Petitioner's left shoulder, neck, and upper back conditions were causally related to the October 12, 2017 accident.

As such, the Commission awards all reasonable and necessary medical expenses as evidenced by the billing records contained in Petitioner's Exhibit 2 and Petitioner's Exhibit 3. Petitioner's Exhibit 2 contains the billing statement for Dr. Mark Cohen, dated October 16, 2017 through March 8, 2018, in the amount of $11,358.00. Petitioner's Exhibit 3 is the billing statement for the October 20, 2017 MRIs of the thoracic and cervical spine, in the amount of $4,871.00. (PX2; PX3). Petitioner provided the corresponding medical records to support the outstanding charges, and Respondent offered no evidence to rebut the reasonableness and necessity of the bills. Respondent indicated on the Request for Hearing Form that it disputed liability for the medical bills due to "no causal connection." (Arbitrator's Exhibit 1). The Commission having found accident and causal connection in this claim, awards said medical expenses.

The Commission further awards TTD benefits to Petitioner from October 13, 2017 through March 8, 2018. Petitioner testified that he had been off work since the accident date through the date of arbitration. (T.24). The medical evidence demonstrates that Dr. Cohen provided Petitioner with off work slips through March 8, 2018. (PX2). Respondent offered no evidence to rebut the claimed TTD period, and indicated on the Request for Hearing Form that it disputed liability for TTD due to "no causal connection." (Arbitrator's Exhibit 1). The Commission having found accident and causal connection in this claim, awards said TTD benefits.

As to the nature and extent of Petitioner's injury, the Arbitrator did not consider the five factors under Section 8.1(b) of the Act as she considered the issue of nature and extent moot; again, the parties did not file Briefs in this claim. The Commission having found accident and causal connection in this claim, and taking into consideration the following five factors listed under Section 8.1(b) of the Act, awards Petitioner five-percent (5%) loss of use of the person as a whole:

(i) Impairment Rating: The Commission gives no weight to this factor as neither party offered any evidence or opinion relative to impairment.

(ii) Occupation of Injured Employee: The Commission gives this factor little weight. The record lacks any formal discharge note from Dr. Cohen; however, the last time Petitioner had any type of therapy with Dr. Cohen was on March 8, 2018. As of the April 13, 2018 arbitration, Petitioner testified that he did not need any additional treatment from Dr. Cohen, and that he believed he would be returning to work. (T.24). As of the date of arbitration, Petitioner was not working.

(iii) Petitioner's Age: Petitioner was 33 years old on the accident date; the Commission gives no weight to this factor as there is no evidence in the record that Petitioner's age had any effect on the level of permanent partial disability.

(iv) Petitioner's Future Earning Capacity: There is no evidence in the record as to reduced earning capacity. Therefore, the Commission gives no weight to this factor.

(v) Evidence of Disability: The Commission gives this factor significant weight as evidence of disability was corroborated by the medical records. During Petitioner's emergency room visit on the date of accident, October 12, 2017, Petitioner had complaints to his left shoulder and left side of his neck. He was initially diagnosed with a left shoulder strain/sprain, which was treated with Ibuprofen, Norco, and a sling. Left shoulder x-rays were normal. (PX1).

On October 16, 2017, Petitioner commenced physical therapy with Dr. Mark Cohen for his cervical and thoracic spine. Dr. Cohen examined Petitioner and noted painful and limited cervical range of motion, Soto Hall test and Kemps test were positive, Petitioner exhibited spasms in the paracervical muscles, active trigger points were noted in the suboccipital muscles. There was also pain with superficial palpation of C2 through C6 and T2 through T6. Dr. Cohen diagnosed Petitioner with neck and mid-back pain. (PX2).

MRIs of the cervical and thoracic spine completed on October 20, 2017, demonstrated a disc protrusion at C5-6 with mild canal stenosis and biforaminal narrowing. There was also a minimal disc bulge at C6-7 with facet joint hypertrophy. The thoracic spine was unremarkable. Dr. Nitin Malhotra, of Expert Pain Physicians, had diagnosed Petitioner with cervicalgia, cervical radiculopathy, and cervical spondylosis without myelopathy or radiculopathy. (PX2).

19IWCC0082

At arbitration, Petitioner testified that he was no longer in pain, but, "I'm just not where I was at before." (T.25). Petitioner had difficulty playing with his children. (T.26). Although Dr. Cohen's March 8, 2018 office visit note does not formally discharge Petitioner, Petitioner testified that he did not need any additional treatment from Dr. Cohen, and that he believed he would be returning to work. (T.24).

In light of the foregoing factors, with no single enumerated factor being the sole determinant of disability, the Commission awards five-percent (5%) loss of use of the person as a whole for Petitioner's left shoulder and cervical/thoracic spine conditions.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 14, 2018, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $320.00 per week for a period of 21 weeks, from October 13, 2017 through March 8, 2018, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses as detailed in Petitioner's Exhibit 2 and Petitioner's Exhibit 3, totaling $16,229.00, pursuant to Sections 8(a) & 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $319.00 per week for a period of 25 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused five-percent (5%) loss of use of the person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $31,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: FEB 7 - 2019
MJB/pm
D: 1-29-19
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FLETCHER, MICHAEL
Employee/Petitioner

Case# **17WC031222**

NEXUS STAFFING
Employer/Respondent

19IWCC0082

On 5/14/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.00% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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
PATRICK SHIFLEY
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

4234 RIPES NELSON BAGGOT KALOBRATSO
MICHAEL POWALISZ
650 E DEVON AVE SUITE 110
ITASCA, IL 60143

19IWCC0082

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

Michael Fletcher
Employee/Petitioner

v.

Nexus Staffing
Employer/Respondent

Case # **17** WC **31222**

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 **April 13, 2018**. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 12, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was*** given to Respondent as explained *infra*.

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

In the year preceding the injury, Petitioner earned **$24,960.00**; the average weekly wage was **$480.00**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **3** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services as explained *infra*.

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

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

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

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has failed to establish that he sustained a compensable accident at work. By extension, all other issues are rendered moot and all requested compensation and benefits including temporary total disability benefits, payment of medical bills, and permanent partial disability benefits are denied.

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

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

Signature of Arbitrator

May 7, 2018
Date

MAY 14 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Michael Fletcher
Employee/Petitioner

v.

Nexus Staffing
Employer/Respondent

Case # **17** WC **31222**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute at this hearing include accident, causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to a period of temporary total disability benefits commencing on commencing October 12, 2017 through March 8, 2018, and the nature and extent of the injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Michael Fletcher (Petitioner) testified that he began working for Nexus Staffing (Respondent) in approximately August of 2017. He was assigned to work as a Forklift Operator at MAT Holdings. Petitioner explained that he was the stand-up reach truck operator. In this role, he would replenish products that had been "picked" and stock shelves working on ladders, step stools, and scaffolding. Petitioner testified that the items he handled weighed anywhere from 5-150 pounds per case and he had to personally lift items from the new pallet to the old pallet within the warehouse.

Petitioner testified that he had plans to leave Respondent's employment to work full time with MAT Holdings, and explained that there was usually a 90-day probation period. He had only worked for Respondent at MAT Holdings for approximately two months at the time of his alleged accident.

October 12, 2017

On October 12, 2017, Petitioner explained that he arrived at work and logged in on a computer, performed the "replens" left over from the prior shift and went to the dock where products were located to retrieve and put away a load or two. He testified that he got back on the computer system and then went to a location that needed replenishment. Petitioner explained that he got off the machine and moved cases from a new pallet to an existing pallet. He described a rack with a horizontal beam that had been knocked off and not yet replaced, so the product in that area was stacked high on one pallet. Petitioner testified that he lifted two cases weighing about 50 pounds when an item in the bottom case fell through bottom of the box. He tried to reassure his motion and felt a pop below his neck between his shoulders. Petitioner he then felt tightness and a stabbing feeling in his back. Petitioner felt a lot of pain in his back and in his arms. Petitioner testified that he was unsure whether it was his shoulder or back area that hurt, but the pain was between his shoulder blades in the upper part of his back. Petitioner testified that no one else was present at the time of his accident.

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

Petitioner testified that he came out of the aisle and saw another employee whom he asked about the supervisor. Petitioner testified that he then went to the front desk and reported the injury and his pain to his supervisor's supervisor who instructed him to go into the breakroom.

Petitioner testified that he also called Angelica from Respondent and reported the injury stating that he was waiting to go to the emergency room. On cross examination, Petitioner testified that MAT Holdings was located approximately 20 minutes from Respondent's office. He first called Angelica and then called his attorneys.

Petitioner testified that he drove himself to the emergency room after Angelica took him from the warehouse to Respondent's office. He explained that he spoke with Mr. Kennedy on the phone and declined the care facility offered to him by Mr. Kennedy. Petitioner testified that he went to the emergency room because it was located closer to his home.

Petitioner testified that he did not return to work for either Respondent or MAT Holdings. He also explained that he has not received any benefits after his injury.

Medical Treatment

The medical records reflect that Petitioner presented at Saint Joseph Medical Center in Joliet on October 12, 2017. PX1. Petitioner complained of left shoulder and neck pain. *Id.* He gave a history of having picked up a heavy box and having the contents fall out. *Id.* He reported having pulled up with his shoulder, and complained of pain in his left shoulder, left neck, and sharp pain in his left breast with deep breath. *Id.* He was diagnosed with a left shoulder sprain, placed in a sling, and referred out for further care. *Id.*

Incident Report

On October 13, 2017, Petitioner completed an Employee Incident/Injury Statement. PX5. At that time, he reported a history of injuring his left shoulder and neck when the contents of a case broke through the bottom when he was doing a "replen". *Id.*

Continued Medical Treatment

On October 16, 2017, Petitioner presented to Mark Cohen, D.C. (Dr. Cohen) at Physicians Plus in Joliet. PX2. Petitioner reported an injury when he was moving boxes from one pallet to another when the contents fell out of the bottom. *Id.* He reported trauma care at St. Joseph Hospital, and to have pain in the neck and upper back. *Id.* He reported no history of upper back pain, and no prior work injuries. *Id.* He was placed off work for 30 days. *Id.*

The following day, on October 20, 2017, Petitioner underwent cervical and thoracic spine MRIs. PX2. The interpreting radiologist noted a 1 to 2 mm diffuse protrusion at C5-C6, and a 1mm protrusion at C6-C7. *Id.* The MRI of the thoracic spine was unremarkable. *Id.*

On October 31, 2017, the Petitioner was examined by Dr. Nitin Malhotra MD. PX2. A history was noted of an onset of pain on October 12, 2017 while at work. *Id.* The mechanism of injury reported was lifting pallets of 70lb material when the contents fell out of the bottom. *Id.* Petitioner specifically denied any history of neck

pain, neck injection/surgery or physical therapy. *Id.* He was diagnosed with cervicalgia and cervical radiculopathy, and continued therapy was recommended. *Id.*

Petitioner received care from Physicians Plus which included physical therapy and electrical stimulation. PX2. As of November 18, 2017, Petitioner remained off work for an additional 30 days. *Id.*

On December 5, 2017, Petitioner was examined by Nitin Malhotra, M.D. (Dr. Malhotra). PX2. A history was noted of an onset of pain on October 12, 2017 while at work. *Id.* The mechanism of injury reported was lifting pallets of 70lb material when the contents fell out of the bottom. *Id.* Petitioner specifically denied any history of neck pain, neck injection/surgery or physical therapy. *Id.* He was noted to have improved by the reduction of pain in his left arm, but to continue to have residual pain in his neck. *Id.* He was diagnosed with cervicalgia and cervical radiculopathy, and continued therapy was recommended. *Id.*

As of December 18, 2017, Petitioner remained off work for an additional 30 days. PX2. As of January 16, 2018, Petitioner remained off work per Dr. Cohen for 30 days. *Id.* As of February 15, 2018, Petitioner remained off work per Dr. Cohen for 30 additional days. *Id.*

Angelica Leal

Respondent called Angelica Leal (Ms. Leal) as a witness. She testified that she is employed as Respondent's Area Support Onsight Manager. In her position, she is in charge of candidates and associates working at MAT Holdings. Ms. Leal explained that she oversees the staffing people, walks the floor, and manages the employees. She testified that half of her time is spent on site at MAT Holdings and the other half is spent at Respondent's office.

Petitioner testified that she was working at Respondent's office when she received a text from Petitioner that he was hurt. Ms. Leal responded that she would be there shortly. Ms. Leal then drove to the MAT Holdings facility in less than 10 minutes. Ms. Leal explained that she was going into the building and Petitioner was going out. Petitioner said he hurt his shoulder and he had trouble breathing. Ms. Leal told Petitioner that she could drive him to the Immediate Care Center located in Romeoville less than five minutes from the MAT Holdings facility. Ms. Leal testified that Petitioner got into the truck. They went to the office to get the injury paperwork. Petitioner then told Ms. Leal that his lawyer told him that he needed to go to the emergency room. Ms. Leal explained that she had to get accident investigation forms. She then went to the office.

Ms. Leal testified that Petitioner asked her to take him back to his car so that he could go to the Immediate Care Center. Later, Petitioner called Ms. Leal and told her that he was not going to go to the clinic and that he was going to St. Joseph's in Joliet. Ms. Leal went back to MAT Holdings and conducted an investigation where she spoke with Mr. Servin and obtained a statement from him. RX1. Ms. Leal testified that she spoke with one manager, Juan Mitchell (Mr. Mitchell), who only told her that Petitioner reported that he was hurt. He did not witness the accident.

Robert Kennedy

Respondent called Robert Kennedy (Mr. Kennedy) as a witness. He testified that he is employed by Respondent as the Onsite and Risk Manager. Mr. Kennedy explained that he trained Ms. Leal and others on safety and investigation protocols. He testified that Ms. Leal obtained statements and he also spoke with certain individuals that Ms. Leal could not interview without MAT Holdings' approval.

Mr. Kennedy testified that Ms. Leal called him and reported that she was headed to the MAT Holdings facility. He advised Ms. Leal to take Petitioner to Immediate Care. Mr. Kennedy expected that he would then meet Petitioner and Ms. Leal at the clinic. He testified that he went to Respondent's office to then head to the clinic when Ms. Leal came into the office and reported that Petitioner was speaking with an attorney. Ms. Leal asked what should she do.

Mr. Kennedy explained that he then spoke with someone at Petitioner's lawyer's office while on speakerphone with Petitioner. The attorney told him and Petitioner that Petitioner needed to go to an emergency room. Mr. Kennedy testified that he said that was fine and said that they would take Petitioner to Adventis Hospital. A doctor then called stating that he received a call from Petitioner's lawyer. Mr. Kennedy testified that all of these conversations occurred on speakerphone in Petitioner's presence.

On cross examination, Mr. Kennedy testified that Petitioner told him that his shoulder was hurting. He acknowledged that on the following day on October 13, 2017 Petitioner ultimately filled out Respondent's paperwork reporting that he injured his shoulder. PX5.

Mr. Kennedy testified that two other witnesses were interviewed in the investigation, but they did not report seeing the injury. He testified that Bernard Fox, Jr. (Mr. Fox) was in another aisle when he saw Petitioner come out of his (Petitioner's) aisle and told Mr. Fox that he was injured.

Jose Servin

Respondent called Jose Servin (Mr. Servin) as a witness. He testified that he works for Midwest Air Technologies (MAT) Holdings as a Forklift Driver. Mr. Servin testified that he and Petitioner worked in the receiving area on the alleged date of accident. Only one other person working in the area at the time of the alleged accident, and that employee was working with Mr. Servin. Mr. Servin also testified that Petitioner told him that his shoulder was bugging him a bit, but he did not say why, and that Petitioner was moving it around. Mr. Servin testified that Petitioner told him that it was going to be his last day of work soon because he found a better job with better pay.

In a handwritten note dated October 12, 2017, Mr. Servin documented his knowledge of what occurred at Respondent's request. RX1. Therein, Mr. Servin stated as follows:

> 10/12/2017
>
> Mike came in to work in the morning and was complaining that his shoulder was hurting. He didn't state why it was hurting he just said it hurt but very little. He also mentioned today that Friday will be his last day because he found another job with better pay.
>
> Jose L. Servin
> [phone number]

Id.

Additional Information

Regarding his current condition of ill-being, Petitioner testified that he is not feeling pain, but he does not feel the same as he did before the accident at work. He cannot play with his children the same way that he did before the accident.

Petitioner testified that after his last visit with Dr. Cohen, he has been ready to return to work. Prior to his accident at work, Petitioner testified that he did not have any medical treatment or pain in his body other than general body soreness.

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 Issues (C) and (D), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent and the date of the accident, the Arbitrator finds the following:

In light of the record as a whole, the Arbitrator finds that Petitioner has failed to establish that he sustained a compensable injury while working for Respondent on October 12, 2017 as claimed. In so concluding, the Arbitrator notes that Petitioner's testimony about the accident is consistent with the medical records and his report to Respondent the day after the alleged injury. However, there is no corroborating evidence that the accident occurred. Indeed, Petitioner's testimony about the occurrence of the accident is contradicted by Respondent's witnesses. Thus, the Arbitrator does not find it to be credible.

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (LEXIS 2003). The "in the course of employment" element refers to "[i]njuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work...." *Metropolitan Water Reclamation District of Greater Chicago v. IWCC*, 407 Ill. App. 3d 1010, 1013-14 (1st Dist. 2011). The "'arising out of' component refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1013-14 (*citing Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989)). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of his employment) to establish that his injury is compensable. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006).

It is undisputed that Petitioner was at work on October 12, 2017. He reported an injury to one of Respondent's representatives, Ms. Leal. According to Petitioner, he lifted two cases weighing about 50 pounds when an item in the bottom case fell through bottom of the box. The alleged injury was unwitnessed.

Respondent called Mr. Servin as a witness. He testified that Petitioner told him that his shoulder was bugging him a bit, but he did not say why, and that Petitioner was moving it around. According to Mr. Servin, Petitioner

came in to work that day complaining of shoulder pain, and he also stated that Friday was going to be his last day of work because he found a better job with better pay. Petitioner admitted that he had plans to leave Respondent's employment, and had only worked at MAT Holdings for about two months at the time of the accident.

Respondent also called Ms. Leal as a witness. She testified that Petitioner sent her a text that he had been injured at work. She responded and told Petitioner that she could drive him to an immediate care facility located nearby. Ms. Leal testified that Petitioner got into the vehicle with her to stop at Respondent's facility to get paperwork, where Petitioner told her that he was not going to the medical facility she recommended, rather he was going to the emergency room as advised by his attorney. Ms. Leal reported this to Mr. Kennedy.

Mr. Kennedy was called as a witness by Respondent. He testified that after Ms. Leal called him, he spoke with Petitioner who was speaking with his attorney. While Petitioner's attorney was on Petitioner's speakerphone, Mr. Kennedy testified that the attorney told him and Petitioner that Petitioner needed to go to an emergency room. Mr. Kennedy testified that he said that was fine and said that they would take Petitioner to Adventis Hospital. However, Mr. Kennedy then testified that a doctor called on Petitioner's phone stating that he received a call from Petitioner's lawyer. All of these conversations occurred on speakerphone in Petitioner's presence.

The circumstances of Petitioner's alleged injury are suspect at best. Petitioner had only worked for Respondent at MAT Holdings for two months at the time of the alleged injury. He admittedly had plans to leave Respondent's employment for another job. The accident itself was unwitnessed. Petitioner's reported mechanism of injury is consistent when comparing Petitioner's testimony at the hearing to the medical records of his carefully selected medical providers. However, Mr. Servin noted on October 12, 2017 that "[Petitioner] *came in to work in the morning* and was *complaining that his shoulder was hurting*." RX1 (*emphasis* added). He also noted Petitioner's, unsolicited, report that "… Friday will be his last day because he found another job with better pay." *Id.* Mr. Servin's contemporaneously recorded recollection of when Petitioner reported that his shoulder hurt contradicts Petitioner's testimony that he came to work without any shoulder condition before allegedly sustaining an unwitnessed injury at work.

Based on a thorough review of the totality of the evidence, the Arbitrator finds that Petitioner has failed to establish by a preponderance of credible evidence that he sustained a compensable accident at work on October 12, 2017 as claimed. By extension, all other issues are rendered moot and all requested compensation and benefits including temporary total disability benefits, payment of medical bills, and permanent partial disability benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JERRY LOHMAN,

Petitioner,

vs.

NO: 15 WC 32110
19IWCC0083

DYNEGY MIDWEST GENERATION,

Respondent.

DECISION AND OPINION ON REVIEW

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

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

While the Commission agrees with the Arbitrator's well-reasoned analysis of Section 8.1b, and the weight assigned to each subsection, the Commission disagrees with the PPD award relative to the thumbs. The Arbitrator awarded Petitioner 25% loss of use of the right thumb and 25% loss of use of the left thumb. However, the Commission finds that a greater permanency award is warranted for the left and right thumb. The Petitioner underwent right and left thumb carpometacarpal joint fusion. As a result of the surgeries, Petitioner has limited range of motion of his thumbs and has difficulty picking up smaller objects. Accordingly, the Commission awards Petitioner 45% loss of use the right thumb, and 45% loss of use of the left thumb. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2018, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 34.2 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 45% of the left thumb.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 34.2 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 45% of the right thumb.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 20.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 10% of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 20.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 10% of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 18.975 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 7.5% of the left arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 18.975 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 7.5% of the right arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses contained in Petitioner's exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

IT IS FURTHRE ORDERED BY THE COMMISSION that Respondent shall be given a credit of $24,193.19 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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.

19IWCC0083

DATED: FEB 7 - 2019

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

MJB/tdm
O: 1/14/19
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LOHMAN, JERRY D
Employee/Petitioner

Case# **15WC032110**

DYNEGY MIDWEST GENERATION LLC
Employer/Respondent

19IWCC0083

On 4/2/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1679 MATHIS MARIFIAN RICHTER ET AL
MARK S SCHUVER
23 PUBLIC SQUARE SUITE 300
BELLEVILLE, IL 62222

0299 KEEFE & DePAULI PC
NEIL A GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

19IWCC0083

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

JERRY D. LOHMAN
Employee/Petitioner

v.

DYNEGY MIDWEST GENERATION, LLC
Employer/Respondent

Case # **15** WC **32110**

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Collinsville**, on **July 27, 2017.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 16, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$83,200.00**; the average weekly wage was **$1,600.00**.

On the date of accident, Petitioner was **56** years of age, ***married*** with 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.

The parties have stipulated that the Petitioner was paid salary continuation benefits by the Respondent with no overpayment or underpayment, and thus that temporary total disability benefits are not at issue in this hearing.

Respondent is entitled to a credit of **$24,193.19** for medical expenses previously paid by Respondent prior to hearing pursuant to both Section 8(a) and Section 8(j). Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

ORDER

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of his employment with the Respondent on June 16, 2015. The Arbitrator further finds that the conditions of ill-being identified by both Dr. Goldfarb and Dr. Katz are causally related to the June 16, 2015 accident/manifestation date.

Respondent shall pay the reasonable and necessary medical expenses contained in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of **$24,193.19** for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$735.37 per week**, the maximum allowable statutory rate, for 19 weeks, because the injuries sustained caused the loss of use of **25% of the left thumb**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$735.37 per week**, the maximum allowable statutory rate, for 19 weeks, because the injuries sustained caused the loss of use of **25% of the right thumb**, as provided in Section 8(e) of the Act.

19IWCC0083

Respondent shall pay Petitioner permanent partial disability benefits of **$735.37 per week**, the maximum allowable statutory rate, for 20.5 weeks, because the injuries sustained caused the loss of use of **10% of the left hand**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$735.37 per week**, the maximum allowable statutory rate, for 20.5 weeks, because the injuries sustained caused the loss of use of **10% of the right hand**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$735.37 per week**, the maximum allowable statutory rate, for weeks, because the injuries sustained caused the loss of use of **7.5% of the left arm**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$735.37 per week**, the maximum allowable statutory rate, for weeks, because the injuries sustained caused the loss of use of **7.5% of the right arm**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from **June 6, 2016** through **July 27, 2017**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

March 28, 2018
Date

APR 2 - 2018

STATEMENT OF FACTS

At the time of the injury, the Petitioner, a 56-year-old, was working for the Respondent at its coal-fueled power plant in Ballwin, Illinois. Petitioner testified that from 2002 to 2008 he was in training to become a Heavy Equipment Operator, and that since 2008 he has continuously been employed by the Respondent in that position on a full-time basis. He testified that in this job, he operated various pieces of machinery, in particular bulldozer and scraper machines.

The Petitioner's job essentially involved moving coal from one place to another all day. He testified that over each two-week schedule, he worked 2 days and was off 5 days the first week, then worked 5 days and was off 2 days the following week. With the exception of one 8-hour shift per two-week pay period, Petitioner worked 12-hour shifts from 6:00 a.m. to 6:00 p.m., working a total of 80 hours per two-week pay period (one work day every two weeks was an 8-hour shift). He testified he also worked a lot of overtime on his scheduled off days in the 2 to 3 years prior to the onset of his symptoms in 2015. During a typical 12-hour shift, Petitioner testified he would take a half hour meal break and two 15-minute breaks. Otherwise, he typically spent 10 to 10 ½ hours per 12-hour shift operating one of the various pieces of heavy equipment (see Px12). Petitioner testified that the Respondent's three heavy equipment operators, including himself, would rotate the machines they would operate each day. He wouldn't operate the same machine every day.

At trial, Petitioner provided detailed and extensive testimony regarding his upper extremity activities while operating each piece of equipment (Tr. 50 to 113). Petitioner described in detail the motions he used to operate the various levers, joysticks, thumb switches and buttons on each piece of heavy equipment, including a description of the gripping motion he used with each hand. His testimony focused specifically on the movements of his bilateral elbows, wrists, hands and thumbs. On cross exam, the Petitioner was asked for further detail relative to the distances he would move his upper extremities on various machines. (Tr. 126 to 131). Petitioner also admitted into evidence photographs obtained from the internet depicting several pieces of the equipment, including interior cab photos showing the various levers, joysticks, thumb switches and buttons (see Px7, 8, 9, 10 and 11). While they do not depict the actual machines the Petitioner used, he testified that the photos showed machinery he used and cockpits that were identical or comparative to what he used with Respondent. The Petitioner established a sufficient foundation for the photos to be used for demonstrative purposes.

Petitioner's testimony indicated that he was required to flex and extend his elbows, wrists and thumbs back and forth "constantly" while operating the various machines. He testified: "If you're pushing coal out you're back and forth, if you're pushing it in you're back and forth. I mean, you're constantly moving." (Tr. 61). Petitioner also described constantly gripping the various levers, joysticks, steering wheels and other devices with his thumbs and hands. The Arbitrator notes that the Petitioner indicated a number of the arm movements involved a palm-down or pronated position. Petitioner also described being exposed to constant vibration while he was operating heavy equipment. Petitioner testified that he was also required to occasionally perform scheduled maintenance service on the heavy equipment, which involved flexion/extension and gripping of various tools. Petitioner has been performing these same duties on a full-time basis since at least 2008.

Petitioner alleges that, as a result of these activities, he sustained repetitive trauma injuries to the bilateral elbows, wrists and thumbs, with a manifestation date of 6/16/15. Petitioner acknowledged that prior to 2015 he had experienced some tingling in the hands and elbows when he was required to work 3 or 4 consecutive days, but that prior to 2015 these symptoms would always clear up and go away on his off days. He did testify that he initially attributed these temporary or intermittent symptoms to overuse.

Petitioner testified that in 1991 he went to see his family doctor, Dr. Preuss, for tingling in his right elbow, which at the time was only intermittent. He testified that Dr. Preuss prescribed anti-inflammatories and the problem cleared up. He believed at the time that he had just overused his elbow for a little while and it got better with the anti-inflammatories. He testified that he didn't have any further problems with either upper extremity until he returned to see Dr. Preuss in April of 2012 with tingling in his right elbow and left thumb. Petitioner testified that he had no significant problems with

either of his upper extremities between 1991 and April 2012. Dr. Preuss again prescribed a short course of anti-inflammatory medication, and the symptoms again resolved. Petitioner testified that Dr. Preuss never recommended surgery, never referred him to a specialist, and never took him off work for anything regarding either upper extremity. He testified he continued to work full-duty, full-time without any significant problems related to his upper extremities until June of 2015. Petitioner testified that he did not make the connection that work was a cause of these temporary symptoms at the time he saw Dr. Preuss.

Dr. Preuss' records support the Petitioner's testimony. On 7/12/91, the Petitioner was seen by Dr. Preuss for complaints limited to his right elbow. His right elbow was noted to be "very tender", while at a 7/22/91 follow-up he was noted to be only "mildly tender" in the elbow. The records contain no indication of further upper extremity problems until April 2012. On 4/25/12, the Petitioner returned to Dr. Preuss complaining of a three-week history of right arm pain. He also noted some left thumb numbness "but states that's been present for years." Petitioner indicated he was working quite a bit running a dozer and had to push and pull the shifter back and forth with his right arm while holding it up and not resting on the armrest.". No other upper extremity symptoms were reported. Dr. Preuss noted no pain or paresthesia in the hands, and that Petitioner had full range of motion with 5/5 strength in both upper extremities. Dr. Preuss diagnosed tendonitis of the right arm and again prescribed Relafen. Petitioner returned to see Dr. Preuss for unrelated medical issues on 8/7/12, at which time the Petitioner indicated: "His left thumb does bother him some, a little bit right elbow, but he does repetitive work." Dr. Preuss noted that Petitioner did not wish to pursue any of the ongoing issues with his right elbow or left thumb. The diagnoses included right lateral epicondylitis and neuropathic left thumb pain. A 6/24/13 note makes no mention of the Petitioner's upper extremities. Petitioner had an 8/10/14 follow-up for gastroesophageal reflux and high cholesterol, but also noted bilateral hand wrist pain and "?CTS." A 7/6/15 review of systems indicates neurologic findings of numbness and paresthesias, but does not reflect any specific upper extremity complaints or abnormal exam findings. The visit was based on complaints of irritability and memory issues. The records of Dr. Preuss do not reflect any referral to a specialist or a surgical recommendation, and there is no indication that the Petitioner sustained any related lost time from work until after the claimed manifestation date. (Rx4).

Petitioner acknowledged having some tingling in his upper extremities in the two or three years prior to 2015, but testified that the symptoms would always subside. This started to change in early 2015, when both hands, both thumbs and both elbows started tingling, which would wake him up at night, and the tingling would last longer. This differed from before when it was just his right elbow and left thumb. As a result, sometime in January or February of 2015, Petitioner said he reported these symptoms to his shift foreman, Mike Weaver, and that Weaver told him to wait and see if the symptoms got worse and "we'll ride it out." Petitioner testified that he followed Mr. Weaver's instructions, but his symptoms got worse, and his thumbs, index fingers and middle fingers on both hands started locking up, which he had never experienced before. The tingling in his elbows, hands and thumbs became more severe and stopped getting better on his off days. Petitioner testified that by June of 2015, his symptoms went from being intermittent to being continuous. In early June 2015, Petitioner testified he reported the symptoms to Terry Rehmer, an EMT employed on premises at the Respondent's facility. He testified that Mr. Rehmer sent him to Respondent's Safety Coordinator, Dan Shirley, who sent him back to Rehmer to schedule a visit with Midwest Occupational Medicine. Petitioner testified that Mr. Rehmer drove him to the initial appointment.

On cross exam, the Petitioner agreed that when he initially saw Dr. Preuss, his family doctor, he likely talked about his job duties; "I went because I wanted to know why I had numbness." He testified he did not make the connection of his symptoms to work at that time. While he did not recall seeing his family doctor between 2012 to 2015 for his upper extremities, he indicated he would not disagree if his records indicated this: "I just don't remember it." He

acknowledged that he'd had symptoms for two to three years prior to 2015. As to whether he believed at that time that his symptoms were due to his work duties, Petitioner testified: "I just figured it was from using my extremities" at work, but prior to 2015 the pain would always go away on his days off. He agreed he believed his work was causing the problems at least 6 months prior to reporting his symptoms to the Respondent.

On further cross exam, Petitioner agreed that he was advised by Dr. Goldfarb at his last visit to return as needed, and that he hasn't returned since. Again, while the Petitioner would alternately use various pieces of equipment with Respondent, he testified that between 2014 and 2015 he probably used the scraper the most, then the dozer. He would use different machines each day, noting he would often be the "miscellaneous" operator of the three working for Respondent, and so would run miscellaneous machines. Petitioner agreed that Dr. Katz asked him about his work duties. His questioning of Dr. Katz's report was that the doctor only wanted to focus on three machines, though the Petitioner agreed this included the scraper and dozer.

While Petitioner agreed he did not have to hold his machine controls like he was "trying to choke the life out of it", but that he would have to have a good grip of them. Petitioner agreed that the vibration he was exposed to was a slower, bumpier type of vibration versus what one would be exposed to using a jackhammer. Petitioner agreed that he was performing his regular heavy equipment operator job at the time of the hearing and was earning the same rate of pay as he had before the alleged accident date. He agreed that he had down time between work days, but how much would depend how much overtime was being worked, noting it can be a lot at times.

Petitioner was initially seen at Midwest Occupational Medicine on 6/16/15 with complaints of intermittent bilateral wrist numbness and tingling. Petitioner reported working as a heavy equipment operator, noting symptoms generally only happen when operating equipment, mainly the bulldozer. He was occasionally awakened at night by symptoms. He denied any weakness. Following examination, Physician's Assistant Colon stated: "I believe the patient may have (an) intermittent medial nerve irritation when using vibratory equipment." Jonas and thumb spica splints were issued to be worn "only when he operates the vibratory equipment," along with an NSAID for pain and discomfort. .32). Unlike his previous treatment with Dr. Preuss, Petitioner testified that despite the anti-inflammatories, splints and braces his symptoms got worse instead of better. Petitioner returned on 6/30/15 indicating: "Pain has gotten worse and is moving up into his forearm. Please recall the patient is a heavy equipment operator for Dynegy Industries and has been operating vibratory equipment for a number of years and did treat him for the last couple of weeks conservatively with anti-inflammatory medications and splinting day and night. This conservative regimen apparently has not helped the patient in the sense that he is getting worse." PA Colon referred Petitioner to a hand surgeon, Dr. Brown, for further evaluation. (Px2).

Petitioner initially saw Dr. Brown on 7/13/15 at the Orthopedic Center of St. Louis. He completed a New Patient Questionnaire, indicating he was right-handed, had symptoms in both wrists and the right elbow, and pain from his wrists to the thumb and index and middle fingers with locking. He indicated he first noticed the symptoms two or three years prior. At the visit, Petitioner reported working for Respondent since 2000 as a heavy equipment operator, working 12 hour shifts and totaling 80 hours every two weeks, and would operate dozers, loaders and scrapers. He indicated a two to three-year history of gradually progressive bilateral hand numbness and tingling, primarily involving the thumb, index and middle fingers, along with the right lateral elbow. He noted some improvement in the last month with bracing at night. Following examination, Dr. Brown concluded that Petitioner had symptoms and findings consistent with lateral epicondylitis and bilateral carpal tunnel syndrome. He prescribed bilateral wrist splints, NSAIDs and a home

therapy program, as well as EMG/NCV testing, noting he would seek authorization from the adjuster/case manager. (Px3).

Petitioner underwent EMG/NCV testing with Dr. Phillips on 8/10/15. He indicated a gradual onset of symptoms, noting it was unknown how they occurred, but that the symptoms were aggravated when he would operate a dozer for several days. The doctor reported that the testing reflected significant moderate bilateral sensory motor median neuropathies across the carpal tunnels, as well as moderate predominately demyelinative ulnar motor neuropathies across the elbows, left worse than right, with partial bilateral ulnar sensory axonal loss that made the lesions even more significant. (Px4).

Petitioner testified he was not improved, and on 8/13/15, Dr. Brown issued a narrative report to the Respondent summarizing the EMG/NCV findings, and recommending bilateral carpal tunnel releases, bilateral cubital tunnel braces to be worn at night, Heelbo pads, a home therapy program and NSAIDs. Dr. Brown indicated he would contact Petitioner with his recommendations and to schedule surgery. (Px3).

Petitioner verified that Dr. Brown's office did make this contact, but that he decided to obtain a second opinion with Dr. Goldfarb on 9/28/15. He reported having bilateral hand and wrist pain for several years, right greater than left, worsening over the last 6 to 9 months. An intake questionnaire indicated complaints of the wrists and elbows. Petitioner noted the use of heavy equipment made the symptoms worse, and that they would improve when he's away from the equipment for several days: "Pain is activity related in that capacity but also he has pain at night and can be operative table. [sic]" Petitioner indicated he had been told that this was not work related. He reported using a right-sided joystick with the scraper, and bilateral joysticks with the dozer, with the latter bothering the left side more. His primary complaint was pain, though he also had numbness and tingling. Following examination and hand x-rays, Dr. Goldfarb diagnosed CMC arthritis and carpal tunnel syndrome. The bilateral CMC joints were injected. (Rx3).

At his 10/26/15 follow-up, Petitioner reported the injections helped for about a week. Dr. Goldfarb also noted lateral right elbow pain. Petitioner noted he had worked for Respondent for 15 years, the last 7 as a heavy equipment operator, and that "work is what exacerbates his symptoms, especially the thumb pain." Adding the diagnosis of lateral epicondylitis, Dr. Goldfarb planned for surgery involving lateral epicondyle debridement, carpal tunnel release and CMC joint fusion "based on his age and activity level." (Rx3).

Petitioner underwent surgery with Dr. Goldfarb on 11/11/15 with regard to the right upper extremity. This involved a right thumb CMC fusion, right CTS release and right lateral epicondyle debridement. Petitioner underwent the same surgeries on the left upper extremity on 12/30/15. (Px5, Depx2). Petitioner participated in physical therapy at Apex from 12/23/15 to 1/8/16 following his 11/11/15 right upper extremity surgery, noting he was to undergo surgery on the left side on 12/30/15. (Px6).

The evidence depositions of both Dr. Goldfarb and Respondent's examining surgeon Dr. Katz were obtained by the parties.

Dr. Goldfarb is an orthopedic surgeon specializing in treatment of the hands and upper extremities. He testified that the complained of the hands and wrists, as well as the elbows. Petitioner felt that his operation of heavy equipment made him worse in terms of discomfort in the hands, wrists and elbows. Dr. Goldfarb was aware the Petitioner worked long hours, two days one week and five days the next, and used one of a few different machines "constantly with repetitive use of levers and machine operating kind of tools." He testified the EMG/NCV showed carpal tunnel syndrome and

mild cubital tunnel syndrome, though Petitioner had no clinical signs of the latter. X-rays showed CMC joint arthritis at the base of both thumbs. He diagnosed CTS and CMC joint arthritis, testifying that "learning more about his job duties and the like, and I now believe that its more likely than not that his work contributed to the development of his arthritis and carpal tunnel syndrome." (Px5).

Steroid injections into both CMC joints provided only temporary benefit. On 10/26/15, he added a diagnosis of lateral epicondylitis / tennis elbow. Given the prolonged nature of the symptoms and Petitioner's desire for definitive treatment, Dr. Goldfarb recommended surgery for the bilateral elbows, wrists and thumbs. He performed the surgeries noted above on 11/11/15 (right) and 12/30/15 (left). He testified that the CMC fusion involved fusing the carpal and metacarpal joint at the base of the right thumb using a plate and six screws. While the CMC joint no longer moves, and it takes a while to get used to, people are generally happy with function and pain relief with this surgery. Petitioner was held off work as of 11/10/15, and was later placed in a cast from his right elbow to his hand, and underwent therapy at Apex starting on 12/23/15. Dr. Goldfarb indicated "remarkably similar" findings bilaterally. Petitioner was doing well at his 1/11, 2/8 and 3/14/16 visits with Dr. Goldfarb. He remained on off work status until 3/28/16, when Dr. Goldfarb released him to full duty, stating: "That must have been at (Petitioner's) request." (Px5).

Dr. Goldfarb testified that over the course of his treatment of Petitioner he obtained a more detailed description of his job duties and activities with the Respondent over several conversations with him. The Petitioner showed him pictures of the equipment he worked on and demonstrated how he operated them with his upper extremities. Dr. Goldfarb testified he "just wanted to understand his job activities to the best of my abilities." He reviewed the report of Dr. Katz, and Petitioner indicated the report "did not have things very accurately depicted." Dr. Goldfarb testified that he also relied on a letter from Petitioner's counsel regarding Petitioner's job duties. He acknowledged the Petitioner operated different machines and thus didn't do the exact same activity all day. Based on all of the information he had, Dr. Goldfarb prepared a 3/21/16 narrative report, opining that the Petitioner's work activities contributed to the development of his CTS symptoms, based on the motions the Petitioner performed repetitively on different heavy equipment machines while working long hours. Petitioner had no evidence of other CTS or lateral epicondylitis comorbidities. As to the lateral epicondylitis, Dr. Goldfarb's 3/21/16 report stated that, based on the knowledge he had at the time he prepared the report, it was difficult for him to understand the relationship of the condition to Petitioner's work activities. As to the CMC joints, Dr. Goldfarb opined that the Petitioner's work duties contributed to the development of the arthritis based on his "grasping and pinching" work activities. Petitioner was released as of 6/6/16 to return as needed. (Px5).

On 6/6/16, the Petitioner was doing very well and had been back to work for a few months. He had no pain at rest, but still had some discomfort after heavy work. Physical examination was normal. He had some right medial elbow pain. At that time, the Petitioner showed him photos of the heavy equipment he operated and demonstrated the motions he used to do so: "For the bulldozer, it is shoulder and elbow flexion and extension motion, especially for the right hand, whereas the left hand is more of a thumb and finger motion. For the scraper and other machines there is an abducted posture of the shoulder moving to and fro, and, again, he demonstrated those actions for me." He indicated that while doctors don't know exactly what causes lateral epicondylitis, they know that activities with a constantly pronated, or palm-down, position, especially with the elbows and arms in space where the muscle is firing continuously, seems to be associated with the development of the condition. (Px5). While Dr. Goldfarb provided an opinion in this report with regard to causation, this was objected to by the Respondent based on the 48-hour rule, as noted below, and the Arbitrator has sustained that objection. Dr. Goldfarb agreed that Dr. Katz had opined that Petitioner's lateral epicondylitis was work related. As to Dr. Katz criticizing the performing of ulnar releases, Dr. Goldfarb testified he did

not recommend or perform such surgeries on the elbows – he performed epicondylar debridement, which is a different procedure. Again, while EMG was positive for ulnar compression, the Petitioner had no clinical symptoms. (Px2).

On cross examination, Dr. Goldfarb agreed that he had not reviewed a written job description or the Physical Demands Analysis prepared by Respondent regarding Petitioner's job duties (the Arbitrator notes that Petitioner's counsel indicated that these documents were not provided prior to the deposition despite multiple requests to produce same). He did not have measurements of the specific degrees of flexion and extension Petitioner performed. He agreed that his opinions are based in part on the letter from Petitioner's attorney and, "less so", the information contained in Dr. Katz' report: "The majority of my information, I believe I can quite fairly say, was based on what the patient told me specifically." He agreed the Petitioner only referenced his work activities in the initial questionnaire, not any of his non-work activities. While he is aware that the Petitioner also performs other activities, Dr. Goldfarb agreed it was fair to say that his causation opinions are primarily based on the Petitioner's operation of two or three pieces of heavy equipment, including a dozer and a scraper, which is what he indicated he used the majority of the time in his job. Dr. Goldfarb agreed that the duration of provocative activities is important in determining a causation opinion, and that he was aware Petitioner had days off between shifts and didn't know exactly how long he spent per day in an equipment cab. (Px2).

Dr. Goldfarb agreed he had not reviewed a job video, despite indicating one would assist in formulating his opinions regarding Petitioner's elbow conditions. He also agreed that his causation opinion regarding the elbows is primarily based on information provided by Petitioner on 6/6/16. He agreed Petitioner reported shoulder and elbow flexion and extension was done more on the right than the left, while the left hand was more thumb and fine motion. His causation opinion regarding both elbows is based on "the arms in space", meaning Petitioner is in about 45 degrees of elbow extension while moving to and fro, which he believes fires the extensor musculature and, "based on the description to me of the position of his arms, I think he's at risk for overload." Dr. Goldfarb agreed that any inaccuracies in the Petitioner's or his attorney's description of his duties could impact his causation opinions. (Px2).

Dr. Goldfarb agreed that CTS and CMC joint arthritis can be idiopathic, but this is unlikely with lateral epicondylitis. He agreed that CTS and CMC arthritis tend to occur more frequently when people get older, but again this is not the case with lateral epicondylitis. He agreed that, based on his notes, the Petitioner could have returned to work as of 2/8/16 full duty with the right arm and light duty with the left arm, but that he also has a separate note indicating Petitioner was to remain off work: "I don't remember any conversation, whether that was because the patient said there wasn't light duty or what. I don't know." Dr. Goldfarb released Petitioner to return to full duty as of 3/28/16. However, he agreed that the only note knows he would have provided Petitioner on 2/8/16 was the off work note through 3/14/16. (Px2).

Dr. Goldfarb on 3/3/16 was provided with a long letter from Petitioner's attorney that both presented facts regarding the Petitioner's job duties as well as questions regarding causation of the Petitioner's upper extremity conditions of ill-being. This includes photos of the cockpits of, among other machines, a bulldozer and scraper, and descriptions of how the Petitioner would operate the machines with each hand. (see Px2, Depx3). Dr. Goldfarb was also presented with Dr. Katz's report. In his response, Dr. Goldfarb noted Petitioner operated various machines, but that: "The similarities include repetitive movement of the thumb and wrist using each hand, although each piece of equipment varies in exact specifications." Given a joystick is often involved with the machines, he noted that "the thumb is crucial to the operation of this machinery, as is finger and wrist motion. It is my understanding that both the thumb and wrist motion were performed on a regular, repetitive basis each day at work and therefore would contribute to the development of CMC arthritis and CTS. As to the elbows, he stated that "It is my understanding that his elbows are held in a variety of different positions during the day without prolonged extension or flexion activities", and that Petitioner experienced pain

in the elbows during his daily work activities. He reiterated that Dr. Katz had determined that the lateral epicondylitis was work related. (Px2).

With regard to Dr. Goldfarb's 6/6/16 progress note, the Respondent objected to the doctor's opinion regarding causation of lateral epicondylitis based on the 48-hour rule based on Petitioner's failure to provide this opinion within 48 hours prior to Dr. Goldfarb's deposition. (Px2, Depx5).

Dr. Katz, a non-surgeon board certified in physical medicine and rehabilitation, testified on 8/8/16. He testified that Petitioner reported that 90% of his job was spent operating three pieces of heavy equipment: a dozer, an old scraper/end-loader and a newer scraper/end-loader. He and the Petitioner reviewed internet photos of these machines, and the Petitioner agreed the photos were accurate. Dr. Katz described his understanding of how the Petitioner used his hands and upper extremities to operate these machines on pages 8 to 10 of the deposition. He also relied on a Physical Demands Analysis from the Respondent which reflected some of the weights and forces involved in equipment operation, and agreed that Petitioner's description of the activities was substantially similar to this analysis. Dr. Katz was aware of Petitioner's work days and hours as well. He agreed with the diagnoses indicated by Dr. Goldfarb. Dr. Katz noted that Petitioner had just undergone surgery on the left side when he saw him in January 2016, so he was essentially unable to examine that upper extremity. Dr. Katz reviewed the records and deposition of Dr. Goldfarb, and commented that he "didn't feel that Dr. Goldfarb went into the level of detail that I did" with regard to the Petitioner's work activities. (Rx2).

Dr. Katz opined that Petitioner's carpal tunnel conditions were not related to his work activities because he keeps his wrists in a neutral position, did not have frequent or forceful wrist flexion or extension on a frequent basis, and was not exposed to vibratory power tools. As to the CMC arthritis, Dr. Katz testified: "if we look at the medical literature, there is not scientific information of an adequate basis to say that there is a causal link between work and the development of osteoarthritis of the thumb." He further testified that the best medical evidence suggests this condition is based primarily on a genetic basis. Regarding Petitioner's lateral epicondylitis, Dr. Katz testified that because the Petitioner has hand squeezing activities that were fairly forceful bilaterally, he believed these conditions were related to the Petitioner's job duties. When asked about whether any of the conditions could have been aggravated or exacerbated by the work duties, Dr. Katz testified that medical science does not recognize these terms. Dr. Katz opined that, based on the diagnosed conditions, the treatment performed by Dr. Goldfarb was within the medical standard of care and reasonable and necessary treatment. He did not find any other comorbid factors in the Petitioner that would have potentially caused these conditions. (Rx2).

On cross examination, Dr. Katz testified that Petitioner reported operating heavy equipment since 2000, that his symptoms began about two years prior to seeing Dr. Katz, and that his symptoms were worse during the weeks where he had more work shifts, as well as towards the end of each shift. Asked about the conclusion in the 6/15/15 Midwest Occupational Medicine report that Petitioner had median nerve irritation when using vibratory equipment, Dr. Katz testified he wished he had this history in his report. He indicated he would want to know the amount of vibratory exposure for the Petitioner. However, he also testified that this statement indicates "a little bit of difference" versus what the Petitioner told him. While he agreed that dozers and scrapers cause vibration, he testified that the key is whether it is high frequency vibration, stating: "the mere notation of vibration is not enough." He testified that there is a difference in the type of vibration in a piece of heavy equipment versus that of a power tool, and that the Petitioner specifically denied using high frequency power tools at work. (Rx2).

Dr. Katz agreed that Midwest Occupational and Dr. Brown instituted conservative treatment, and it was only after this failed to provide significant improvement that Brown recommended surgery. Ultimately, Dr. Katz was satisfied that Petitioner had undergone sufficient conservative treatment prior to surgery, despite questioning this in his reports. Dr. Katz agreed he is not a surgeon. He initially questioned why Dr. Goldfarb would have performed a cubital tunnel release based solely on EMG findings, but didn't have Goldfarb's records to review at that time and didn't realize he hadn't performed such surgery. As to his questioning of the performance of lateral epicondylitis surgery, Dr. Katz testified he just felt aggressive conservative treatment should have been attempted first, but he ultimately was not critical of the surgeries performed. (Rx2).

Dr. Katz agreed that, to his knowledge, Petitioner had no other risk factors for CTS. He agreed that the dozer and scraper operation included the use of thumb buttons, thumb switches, levers, steering wheels, joysticks and finger controls. Dr. Katz agreed the Physical Demands Analysis he reviewed was from 11/30/12. He agreed that the Petitioner would perform more of each percentaged activity during a 12-hour day than he would in an 8-hour day. He agreed that the Analysis noted constant wrist extension with scraper operation, but that "it is not frequent flexion and extension of the wrist, and it is not high force." Additionally, the extension that matters, in his opinion, is extension beyond 30 degrees. However, he agreed he could not say whether Petitioner's actual extension while operating was or wasn't beyond this degree. His understanding, from discussing it with the Petitioner, was that his wrists were in a neutral position most of the time on all three machines. When he saw the Petitioner, Dr. Katz agreed that he believed Petitioner was capable of full work duties on the right arm but recommended restrictions as to the left arm, as he was still in surgical dressings. Based on the CMC fusion, the Petitioner would need at least three months to obtain a solid fusion. Dr. Katz agreed that the CMC fusions involve a permanent loss of motion at that joint. As to difficulty performing work post-fusion, Dr. Katz opined that working molding clay with the hands, for example, would be difficult for Petitioner, but operating joysticks would probably not because the forces involved would be considerably less. (Rx2).

The Physical Demands Analysis referenced by Dr. Katz was attached to his deposition (Depx2), and has been reviewed by the Arbitrator. This document analyzes the physical requirements of a heavy equipment operator for Dynegy. The main portions of this report that are applicable to this case are the indications that there is about 4 to 11 pounds of force needed to operate the scraper apron switch, which is performed on an occasional basis. Additionally, there is constant wrist extension and ulnar deviation in using the dozer, while the scraper is indicated to involve only occasional extension, while flexion and radial deviation are occasional. Operating the equipment involves constant vibration.

Petitioner testified that he spent significantly more time discussing his job duties with Dr. Goldfarb than he had with Dr. Katz. He noted that because his left upper extremity was still wrapped up from above the elbow to hand when he saw Dr. Katz, and he was still wearing a plastic brace on his right, he was unable to visually demonstrate his work activities to Dr. Katz the way he had with Dr. Goldfarb.

The Petitioner testified that he currently has weaker right grip strength than he had before, and has difficulty opening screw-tops because of this. Due to the fusion of both thumbs, he testified that he cannot touch the palms of either hand with his thumbs. As a result, he struggles with picking up small things or opening jars. Petitioner testified that these physical limitations impair his ability to perform certain tasks at work, noting he can't change certain filters at work, and has difficulty picking up small things like screws and bolts. He testified that he can't button a shirt or his jeans.

Petitioner's Exhibit 1 shows that Petitioner incurred medical expenses totaling $59,332.95. Respondent's Exhibit 1 shows that medical payments totaling $22,965.53 were paid under Respondent's group health policy, and the parties agree that the Respondent is entitled to Section 8(j) credit for same.

The Arbitrator notes that objections were made during the deposition of Dr. Goldfarb with regard to the 48 hour rule contained in Section 12 of the Act and the causation opinions of Dr. Goldfarb. The Arbitrator sustains the objections to the portions of Dr. Goldfarb's 6/6/16 report which provide an opinion regarding causation of the Petitioner's bilateral lateral epicondylitis opinion. Dr. Goldfarb issued a 3/21/16 narrative report which provided causation opinions on Petitioner's conditions of CTS, CMC arthritis and lateral epicondylitis. This report is admitted as the Respondent had notice of the opinions prior to the deposition and had the opportunity to cross examine Dr. Goldfarb. However, pursuant to *Ghere*, the Arbitrator finds that the doctor's 6/6/16 opinion regarding causation of lateral epicondylitis, which appears to differ from his 3/21/16 opinion based on additional facts presented to him, violates the 48-hour rule and presents surprise based on the findings in *Ghere*. *Ghere v. Industrial Comm'n*, 663 N.E.2d 1046, 278 Ill. App.3d 840, 215 Ill.Dec. 532 (1996). Thus, the causation opinion expressed in Dr. Goldfarb's 6/6/16 report is stricken.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, and WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Petitioner must prove that he sustained accidental injuries arising out of and in the course of his employment with the Respondent. In this case, the activities at issue were performed while the Petitioner was operating heavy equipment during work hours for the Respondent. Thus, there is no real question that the alleged accident, that being repetitive or cumulative trauma, occurred in the course of the employment – the issue is whether the accident arose out of the employment.

For an injury to "arise out of" employment, it must have an origin in some risk connected with or incidental to the employment so that there is a causal connection between the employment and the injury. However, it is important to note that under current Illinois law an occupational accident does not have to be the sole or principal causative factor in the resulting condition of ill-being; a claimant only needs to show that some act or phase of his employment was a causative factor in the resulting injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003); *Land & Lakes Co. v. Industrial Comm'n.*, 359 Ill. App. 3d 582, 834 N.E.2d 583, 296 Ill.Dec. 26 (2005).

The Arbitrator finds that the Petitioner has met his burden and that the preponderance of the presented evidence supports the finding that the Petitioner sustained accidental injuries arising out of and in the course of his employment with the Respondent.

The Petitioner testified in great detail with regard to the types of movements he performed with his upper extremities while operating dozers and scrapers while working for Respondent, as well as assorted other machines. This was

covered in over 75 pages of testimony on direct and cross examination. He also testified that while he did have weeks with a number of days off, that he worked very long hours (12) on his workdays, and that in the year or two prior to his symptoms getting worse, he also worked a large amount of overtime, which took place on his off days. Thus, every other week, at least, he was working 60 hours per week. He testified that in a 12-hour shift, he would spend 10 to 10.5 of those hours operating the heavy equipment machine he was assigned to. in significant detail in terms of the number of hours per day that the activities were performed, and how constant the operation of the machines was. The constant nature of the work tasks, the upper extremity intensive nature of those tasks and the significant number of hours worked per day and every other week are significant factors in the Arbitrator's determination that the Petitioner's work activities performed were repetitive and cumulative in nature, and that these activities constituted an increased risk of injury.

The Arbitrator also would note that the Petitioner was subjected to what appears to have been constant vibration through his upper extremities via gripping of the heavy equipment controls while the machines were running for hours at a time. While the Arbitrator notes the opinions of Dr. Goldfarb and Dr. Katz, below, with regard to the impact of this vibration in terms of causation, in terms of the arising out of aspect of the accident issue, this vibration exposure provides even further evidence of an increased risk of injury to the upper extremities.

The Arbitrator notes that the Petitioner's testimony with regard to how he performed his job, which machines he operated, and the periods of time he worked and spent operating the machines was unrebutted at hearing. In viewing the testimony and reviewing the evidence in conjunction with it, the Arbitrator found the Petitioner's testimony to be credible. While the Respondent presented a Physical Demands Analysis to Dr. Katz, the Arbitrator believes that this document is very general in nature in terms of describing the job activities, and that the Petitioner's description of the job duties carries more weight than the document. The document does provide specifics as to the forces and weights involved in certain activities, but there is no real explanation of how these forces and weights were determined, if they were universal across all machines, if they took into account how an individual operator may perform the tasks versus others, etc. The Respondent's cross examination of Petitioner attempted to elicit information regarding specific distances that the Petitioner moved various body parts in operating the machines. While this is certainly valid information, given Dr. Katz's analysis of risk factors, at some point we begin to split hairs a little too much in terms of whether the Petitioner may have moved his arm 3 inches or 4 inches. Overall, the Arbitrator finds that the best evidence of the Petitioner's work activities and upper extremity motions in this case is the information that came from the Petitioner himself. Both Dr. Goldfarb and Dr. Katz have indicated that they obtained substantial information from the Petitioner directly regarding his work activities, and the Arbitrator believes the doctors were able to fairly rely on this information in providing their opinions.

The Arbitrator finds that the greater weight of the evidence indicates that the Petitioner sustained accidental injuries relative to repetitive and cumulative work activities which arose out of and in the course of his employment with the Respondent on 6/16/15.

With regard to the issue of causation, expert testimony is important in claims involving repetitive trauma. When the Petitioner was initially examined at the Respondent's direction at Midwest Occupational Medicine, the clinician there indicated: "I believe the patient may have a intermittent medial nerve irritation when using vibratory equipment." While Dr. Brown did not specify a causal connection opinion when he diagnosed lateral epicondylitis and CTS, he did specify that he would be seeking approval for treatment with the adjuster/case manager. These are not determinative facts on the issue of causation, but they are relevant and they add weight to the argument that the Petitioner's upper extremity conditions are causally related to the work activities.

Petitioner's treating physician, Dr. Goldfarb, who clearly spent an extensive amount of time reviewing the Petitioner's job duties with him, testified that in his opinion the injuries to the bilateral wrists and thumbs were causally related to Petitioner's work activities. While his current opinion regarding the elbows was objected to, Respondent's Section 12 examining physician, Dr. Katz, agreed that the Petitioner's lateral epicondylitis conditions were causally related to his work activities with the Respondent.

The Arbitrator places greater weight in this case on the opinions of Dr. Goldfarb as to the CTS and CMC joint conditions. While Dr. Katz indicated that the Petitioner reported that his wrists were generally in a neutral position while he operated equipment at work, the Arbitrator finds that the greater weight of the evidence supports that this was not the case. While he argued that the Physical Demands Analysis noted only occasional flexion, he agreed it reflected constant extension. It doesn't make sense to the Arbitrator that constant extension would equate to the wrists being constantly in a neutral position. Based on the Petitioner's testimony and the reports and testimony of Dr. Goldfarb, it would be highly unlikely that the Petitioner's wrists were consistently in a neutral position while operating the heavy equipment at work. Dr. Katz at one point himself conceded that "There are clearly some inconsistencies there" in terms of what was indicated in the Analysis and the Petitioner's description of his work activities. The Arbitrator finds that there was sufficient evidence to show that the Petitioner's work activities were a contributing cause to his bilateral CTS conditions and, in particular, the need for surgery. Whether this causal connection is called a "cause" or "aggravation" is not particularly relevant to the Arbitrator insofar as the Arbitrator finds that the work activities contributed to the conditions in such a way that it led to the need for surgical releases.

With regard to the Petitioner's CMC joint arthritis, the Arbitrator finds that the noted work activities were a causal factor in the condition to become symptomatic to the point that the Petitioner required a fusion surgery. The Arbitrator again relies on the persuasive opinion of Dr. Goldfarb in this regard. The Arbitrator notes that the Petitioner has been performing these activities for seven plus years for the Respondent, preceded by a multi-year history of training for the operator's job. The fact that thumb triggers were used in his operation of the equipment is a key factor weighing in the favor of the Petitioner. Again, it is entirely possible that the predominant cause of the CMC arthritis was not the work activities. However, as noted above, the Petitioner is not required to prove that the work duties were the predominant or primary factor in the development of a condition, but rather that the work activities were a causal factor in the development. Here, the work activities as described by Petitioner, along with the analysis by Dr. Goldfarb, leads the Arbitrator to conclude that it is more likely than not that the work activities were a contributing cause to the symptomatic increase in the Petitioner's CMC joints and the need for surgical fusion.

The Arbitrator found Dr. Katz's testimony to be knowledgeable and logical in this case, but in the Arbitrator's view not as persuasive as Dr. Goldfarb's with regard to the causal relationship of the Petitioner's bilateral CMC joint and carpal tunnel conditions and his employment duties as a heavy equipment operator. It should be noted that Dr. Katz was unable to fully examine the Petitioner's left upper extremity due to his having had surgery just prior to the exam and the Petitioner testified that he was unable to properly demonstrate his upper extremity motions at work to Dr. Katz because of this. Dr. Katz opined that the Petitioner's lateral epicondylitis conditions were related to his work activities. While the Arbitrator sustained the Respondent's objections regarding the more recent opinion of Dr. Goldfarb regarding causation of lateral epicondylitis, his initial opinion did not reject the connection. Overall, the evidence supports the finding that the Petitioner's job duties were a causative factor in his need for lateral epicondylitis treatment and surgery.

Both Dr. Katz and Dr. Goldfarb agreed that they found no evidence to support the existence of any other risk factors which might account for the cause of Petitioner's upper extremity condition.

Additionally, while the opinion of Dr. Katz regarding high frequency vibration is well taken, the Arbitrator notes that, again, the extended constant periods of time the Petitioner would be subjected to vibration while operating the machines matters. As Dr. Katz testified, one can tell a high frequency vibration by recalling how it feels in the hands/wrists to grip a lawnmower, for example, for a period of time. The Petitioner has indicated that he would feel symptoms in his elbow during work activities, and this makes sense to the Arbitrator under the circumstances of this case. Dr. Katz also testified that he would have liked to have considered this issue when he was making his causation determinations. While not dispositive of the issue in and of itself, this vibratory impact adds further weight to the Petitioner's case on the issues of accident and causation.

The Respondent's attempt to defend this claim, in part, appears to be based on the possibilities that the Petitioner's outside activities could have caused these upper extremity conditions, such as riding a motor cycle. However, while it is absolutely possible that the Petitioner had outside activities that contributed to the noted medical conditions, or that the Petitioner may have somehow been biologically or anatomically predisposed to these conditions, under Illinois law the only question for the Arbitrator is whether the work duties were a contributing cause or not. Thus, while the Petitioner, for example, may not have discussed his non-work activities with Dr. Goldfarb, he clearly discussed his job duties in detail, and that is the main thing Dr. Goldfarb indicated he relied on with his causation opinions.

While the Arbitrator understands Dr. Katz's testimony that medicine itself doesn't recognize terms like "aggravation" or "exacerbation", and thus could not provide opinions on this basis, Illinois workers' compensation law clearly uses these terms and determinations extensively in determining issues of causal connection.

The bottom line for the Arbitrator in this case is that the Petitioner appeared to testify credibly as to his job duties, and those job duties involved virtually continuous upper extremity use for upwards of 10.5 hours per shift. While he may have had rest days in between, it doesn't change the fact that this is a significant amount of hand use. The Arbitrator does not see a lot of difference between the work activities in a job like Petitioner's and a factory or assembly line job. A person may be rotated to different machines, but if they are all hand intensive, it is more reasonable to conclude there has been a cumulative amount of repetitive stress over time. Again, the Petitioner's burden is to show that the work activities were a cause of the relevant conditions, and the Arbitrator finds that he has sustained that burden by the preponderance of the evidence.

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

In a repetitive-trauma case, the date of the accidental injury is the date on which the injury "manifests" itself. "The manifestation date is the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." This is a factual determination. *Durand v. Ind. Comm.*, 224 Ill.2d 53, 862 N.E.2d 918, 308 Ill. Dec. 715 (2006). According to case law, the manifestation date is not necessarily the date the employee became aware of the physical condition and its clear relationship to his employment. "A date based purely on discovery would penalize those employees who continue to

work without significant medical complications when the eventual breakdown of the physical structure occurs beyond the statute of limitations period." Where an employee continues to work until the date his body collapses or surgery is required, that can reasonably be considered the date of accident. *Zion–Benton Township High School District 126 v. Industrial Comm'n*, 242 Ill.App.3d 109, 609 N.E.2d 974 (1993). Because repetitive-trauma injuries are progressive, the employee's medical treatment, the severity of the injury, and how the injury affects the employee's performance, are all relevant in determining when a reasonable person would have plainly recognized the injury and its relation to work. The court will not penalize an employee who diligently works through progressive pain until it affects his or her ability to perform their job and requires medical treatment. *Durand* at 73-74, 929-930.

Repetitive trauma injuries, by their very nature, may take years to develop to the point of severity precluding the employee from performing in the workplace. "The date of disablement, be it for reason of medical treatments such as surgery, or actual collapse of the physical structure, is but one aspect of the proof the parties may bring to bear on the issue of manifestation of the injury." *Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill. App.3d 607, 126 Ill.Dec. 41, 531 N.E.2d 174 (1988). Requiring an employee to inform an employer within 45 days of a definite diagnosis of the repetitive trauma condition and its connection to his/her job may prejudice an employee because it cannot be presumed the initial condition will degenerate to a point at which it impairs the employee's ability to perform their job. It may also prejudice an employee who discovers the onset of symptoms and their relationship to their employment, but who continues to work faithfully for a number of years without significant medical complications or lost working time, if the actual breakdown of the physical structure occurs beyond the period of limitation set by statute. *Id.*

The Arbitrator believes that the case law cited above is significantly on point with the case at bar. The Petitioner admitted experiencing isolated incidents of intermittent tingling in his right elbow in 1991 and again in 2012, and in his left thumb in 2012. However, there is no evidence that these were anything more than temporary, intermittent symptoms which were quickly resolved following a short course of anti-inflammatory medications. No surgery or other treatment was recommended or performed based on the Petitioner's testimony and the medical records in evidence. Prior to June of 2015, consistent with his testimony, it appears that the Petitioner was always able to continue performing his job duties full-duty without lost working time and without the need for any additional medical treatment. There is no evidence that the Petitioner's condition had reached a point where his condition was disabling prior to June of 2015.

Petitioner testified that it was not until June of 2015 that his symptoms became so bad that he had to seek medical treatment beyond mere anti-inflammatories. Additionally, he had previously notified Mr. Weaver earlier in 2015, and testified that Weaver specifically advised him to wait and see how his symptoms went. Petitioner continued to work until the conditions would no longer resolve as they had previously, and caused him to seek medical treatment that turned out to involve more significant treatment including surgery given the failure of conservative treatment.

It appears to the Arbitrator that the Petitioner was the quintessential worker who continued to work diligently despite occasional symptoms until his body essentially broke down to the point that the symptoms would not resolve with rest and basic conservative treatment no longer provided relief. Here, it appears that the Petitioner continued to diligently work as his symptoms worsened over time, ultimately to the point where the symptoms would not resolve and which resulted in the need for surgery.

The Arbitrator finds the distinction between Petitioner's temporary or intermittent conditions of ill-being prior to June of 2015 to be distinctly different than the disabling injuries he sustained starting in 2015. The Petitioner's initial treatment date after the worsening of his condition was the 6/16/15 visit to Midwest Occupational, where the clinician indicated a

belief that the work duties were a contributing cause to the Petitioner's condition. Therefore, the Arbitrator believes this date was the initial realization that the upper extremity conditions the Petitioner was suffering from were significant and could be related to the employment.

Based on the above facts, and the cited case law, the Arbitrator finds that the manifestation date of the accident was 6/16/15.

Here, the Petitioner's testimony is unrebutted that he initially reported his symptoms sometime in January or February of 2015 to his shift foreman, Mike Weaver, who advised him to wait and see if the symptoms got worse and "we'll ride it out." Petitioner testified his symptoms did worsen, and when his symptoms degenerated to the point that they were constant and increasing in severity in early June of 2015, he reported his injuries to the Respondent's on-premises EMT, Terry Rehmer, and to the Respondent's Safety Coordinator, Dan Shirley, at which point he was sent to Midwest Occupational. Accordingly, the Arbitrator finds that timely notice was given to the Respondent pursuant to the Act.

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:

Incorporating the Arbitrator's finding, above, regarding accident and causation, the Arbitrator finds that the treatment provided to the Petitioner relative to his upper extremity conditions has been reasonable and necessary pursuant to Section 8(a) of the Act. Both Dr. Goldfarb and Dr. Katz agree that the treatment to date, including surgery, has been reasonable and within the medical standard of care.

The Petitioner submitted his claimed medical expenses as Petitioner's Exhibit 1, totaling $59,332.95. The Arbitrator awards these expenses pursuant to Sections 8(a) and 8.2 of the Act. The parties have stipulated that the Respondent has paid $22,965.53 towards the Petitioner's medical expenses via group health insurance pursuant to Section 8(j) of the Act. (see Rx1). Respondent shall be given a credit for all medical benefits that have been paid, and the 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 (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's (AMA) "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party has submitted a permanent partial impairment rating or opinion into evidence. Therefore, the Arbitrator gives this factor no weight in the permanency determination.

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 heavy equipment operator at the time of the accident, and has returned to that job following his recovery from surgery. While the Petitioner has been able to so return, the Arbitrator notes that in performing the same job, he again has to use the bilateral upper extremities in the same way that he had prior to the accident / manifestation date. The Arbitrator gives this factor medium weight, and notes that it tends to show an average impact on the permanency determination in that the Petitioner is doing the same job, but that job continues to involve upper extremity use.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 56 years old at the time of the accident. Neither party has submitted evidence which supports the impact of the Petitioner's age on his permanent condition. The Arbitrator gives this factor no weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b). Petitioner's future earnings capacity, the Arbitrator notes the Petitioner testified that he has not sustained any loss of future earning in his job with the Respondent. However, if the Petitioner were required to seek employment elsewhere, he could have some level of restriction based on the fact that the thumb CMC joints are fused, making grip more difficult, as indicated by Dr. Katz. The Arbitrator finds that this factor is entitled to some weight, and that the weight tends to currently show a relatively lower than average degree of permanency.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's compensable injuries in this case involve bilateral carpal tunnel syndrome, lateral epicondylitis and CMC joint arthritis. Surgery was performed for all three conditions. The CTS releases appear to have been typical. The lateral epicondylitis treatment, while it did involve surgery, essentially appears to have been a clean-out procedure to remove, in the words of Dr. Katz. "junk" from about the condyle. The CMC joint surgeries were more significant, in that they involved internal fixation of a joint using hardware, and resulting in the removal of movement in those joints. The Petitioner testified to ongoing difficulty with fine manipulation and grip strength, as well as ongoing elbow soreness. He is, however, able to do his job. Dr. Katz testified that Petitioner will be permanently restricted from any employment or activity which involves very vigorous work with his thumbs. Both Dr. Katz and Dr. Goldfarb agreed

that these limitations and restrictions in Petitioner's current condition of ill-being are permanent and are the direct result of the fusions that were performed to the bilateral thumbs. The Arbitrator therefore gives greater weight to this factor, noting it tends to show greater permanent disability in the thumbs than in the wrists or elbows.

Based on the above factors, the record taken as a whole and a review of prior Commission awards with similar injuries similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the following extents:

25% loss of use of the left thumb pursuant to §8(e) of the Act;

25% loss of use of the right thumb pursuant to §8(e) of the Act;

10% loss of use of the left hand pursuant to §8(e) of the Act;

10% loss of use of the right hand pursuant to §8(e) of the Act;

7.5% loss of use of the left arm pursuant to §8(e) of the Act;

7.5% loss of use of the right arm pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT HREBIC,

Petitioner,

vs.

NO: 11 WC 33373

FRANKFORT SCHOOL DISTRICT 157C,

Respondent.

19IWCC0084

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 7, 2017 is hereby affirmed and adopted.

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

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

Section 19(f)(2) of the Act provides school districts against whom the Commission shall have rendered an award of payment of money shall not be required to file a bond with 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.

19IWCC0084

DATED: FEB 7 - 2019
KWL/mav
O: 12/11/18
42

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

In dissenting from the majority opinion, and unlike the majority, I do not find the testimony of Petitioner with respect to his job activities to be credible. Petitioner, who was diagnosed with and treated for carpal tunnel syndrome involving his right hand, is believed to have exaggerated the extent to which he used his hands over the course of his working hours both to treating physicians as well as before the presiding arbitrator.

Multiple examples the exaggerations made by Petitioner are found in the record. Petitioner described to Dr. Jolyne Scholl, his primary care physician, of sweeping and lifting during the day but provided the Commission with a list of twenty-three activities he claimed to do daily with sweeping and lifting among the enumerated activities. Among these activities, Petitioner claimed to have collected and lifted garbage bags weighing sixty (60) pounds every day, claiming the bags had been filled because of school events held the night before. That the school would hold events every evening that would result in sixty pounds of garbage every night is viewed with suspicion. Similarly, Petitioner also listed shampooing carpets and operating a machine to wax the school's floors as activities he engaged in daily. Petitioner testified to the hours he worked as being from 6:00am to 2:30pm. It seems unlikely that he would have performed shampooing and/or waxing during those hours as, for most of his work hours, the school, during the school year, would have been populated with school staff, students, and visitors. Given the nature of shampooing and waxing, it would seem more likely than not that those activities would be performed when the school is closed to visitors. I am not alone in believing Petitioner did not perform the twenty-three enumerated activities daily. Dr. Jeffery Weinzwerg, an examining plastic surgeon retained by Petitioner, testified to it appearing that Petitioner did not perform all the twenty-three activities daily.

It is not disputed Petitioner had carpal tunnel syndrome effecting his right wrist, only that he proved that it arose out of and in the course of his employment and was causally related to his work activities. Nor is it disputed that Petitioner used his right hand to perform his work activities. What is disputed is that those work activities were shown to cause enough trauma to Petitioner's right hand to result in carpal tunnel syndrome. I find that this was not shown and, respectfully, dissent from the opinion of the majority.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HREBIC, ROBERT
Employee/Petitioner

Case# **11WC033373**

FRANKFORT SCHOOL DISTRICT 157C
Employer/Respondent

19IWCC0084

On 6/7/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.07% 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:

1315 DWORKIN AND MACIARIELLO
GERALD F CONNOR
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

0507 RUSIN & MACIOROWSKI LTD
MICHAEL E RUSIN
10 S RIVERSIDE PLZ SUITE 1925
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

Robert Hrebic
Employee/Petitioner
v.
Frankfort School District 157C
Employer/Respondent

Case # 11 WC 33373

19IWCC0084

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine M. Ory**, Arbitrator of the Commission, in the city of **New Lenox**, on **August 12, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. 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. X Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **April 5, 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 **$35,360.00**; the average weekly wage was **$680.00**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **0** dependent children.

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

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

To date, Respondent has paid $ **0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

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

Respondent is entitled to a credit of **$12,553.62 (for medical only)** under Section 8(j) of the Act.

ORDER

Medical Benefits
Respondent shall pay medical benefits of **$48,563.40, of which there is a claimed outstanding balance of $17,422.84,** subject to the fee schedule, pursuant to §8 and §8.2 of the Act and subject to any credit under §8 j for payments made by Blue Cross and Blue Shield.
Furthermore, respondent shall reimburse Blue Cross and Blue Shield, within the limitations set forth in §8 and §8.2 of the Act, for payments made by Blue Cross and Blue Shield.

Temporary Total Disability
Respondent shall pay temporary total disability from **April 5, 2011 to September 11, 2011** and **November 11, 2011 to March 1, 2012,** which is **38-6/7 weeks at the rate of $453.33 per week.**

Permanent Disability
Respondent shall pay petitioner the sum of **$408.00** for a period of **3.8 weeks,** as the injury caused **10% loss of use of petitioner's right middle finger under § 8 (e) 3** and for a period of **30.75 weeks,** as the injury caused **15% loss of use of petitioner's right hand under §8 (e) 9.**

Credit
Respondent's claim for credit in the amount of $6,054.61 is denied.

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Hrebic	)	
Petitioner,	)	
vs.	)	**No. 11 WC 33373**
Frankfort School Dist. 157C	)	
Respondent.	)	**19IWCC0084**
	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in New Lenox on August 11, 2016. The parties agree that on April 5, 2011, petitioner and the respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree petitioner provided notice of the claimed accident within the time limits of the Act. They agree that in the year preceding the injuries, petitioner earned $35,360.00 and her average weekly wage was $680.00.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of her employment;
2. Whether petitioner's current condition of ill-being is causally connected to the claimed injury;
3. Whether respondent is liable for medical bills claimed outstanding totalling $16,913.00;
4. Whether petitioner is entitled to temporary total disability from April 5, 2011 to March 1, 2012;
5. Whether respondent is due credit for the amount paid in the amount of $6,054.61.
6. What is the nature and extent of petitioner's injury?

STATEMENT OF FACTS

Robert Hrebic Testimony

Petitioner was employed by respondent as a custodian since November 1, 2007. He did not notice any problems with his hand before he started working for respondent.

In his job, petitioner mopped floors; opened and closed tables; mowed grass, buffed floors, walking behind an automatic floor scrubber; dusted; used squeegees to clean windows; shoveled snow and removed garbage by rolling the garbage gondolas to the dumpsters, grasping the bags of garbage and putting the garbage bags in the dumpsters. The automatic buffers had a pad holder on the bottom; the buffers vibrated. He used the floor buffer pretty much every day. All the work required a lot of hand grasping. He did this work every day, five days a week, for over five years.

Petitioner testified that Respondent's Exhibit No. 4 did not list all petitioner's job duties; only a handful. He claimed he did not actual do plumbing, electrical or HVAC work. He estimated he performed only about half of the items listed on Respondent's Exhibit No. 4.

Petitioner prepared Respondent's Exhibit No. 5 wherein he listed the 23 duties; all required use of right hand.

Petitioner noticed his hand began going numb around Halloween, 2010 and it slowly got worse. However, his hand became so numb that on April 5, 2011 he went to his primary care doctor, Dr. Jolene Scholl. She sent him to surgeon, Dr. Fakhouri.

Respondent sent petitioner Dr. Phillips for an examination pursuant to §12 of the Act. The exam by Dr. Phillips lasted less than 10 minutes.

On September 8, 2011, Dr. Fakhouri released petitioner to light duty work. He presented the light duty restrictions to respondent and was advised they could not accommodate the restrictions.

Petitioner then saw Dr. Weisman, which was on September 27, 2011. He found Dr. Weisman through a Google search. Dr. Weisman performed revision carpal tunnel surgery on November 11, 2011. Dr. Weisman released petitioner to return to regular work as of March 1, 2012.

Petitioner was off work from April 5, 2011 until March 1, 2012. He received no temporary total disability and was not provided light duty. He was terminated by respondent as of November 11, 2011. He now works from Tinley Park Park District. He is 53 years old and has only a high school education.

Petitioner's attorney sent him to Dr. Weinzweig for evaluation. Peitioner provided Dr. Weinzweig with the job duties list (Respondent's Exhibit 5) that he had prepared. Petitioner admitted he had prepared the list of job duties list for Dr. Phillips.

Petitioner complained of pain off and on in his right hand and numbness around the base of his right thumb.

On cross examination, petitioner agreed he was not under doctor's care, had no scheduled doctor's appointments and had not seen a doctor for the carpal tunnel condition since he saw Dr. Weisman in March, 2012.

Petitioner worked from 6 AM to 2:30 PM with a 30-minute lunch hour and breaks. Petitioner testified he consistently mopped half the floors; the other half of the floors were carpeted. He endlessly cleaned windows. He estimated he buffed floors about an hour each day.

Petitioner agreed he had a meeting with Mr. Saindon and Mr. Spacek. He denied telling both individuals at the meeting it was not due to work and denied he told them he had a problem for years.

Petitioner discussed his claim with Cindy Heath. He took FMLA after the discussion with Cindy Heath.

Petitioner testified he gave notice of his right hand condition to Dan Spacek who warned him not to try and claim workers' compensation as he would fight him on this.

Cynthia Heath Testimony

Cynthia Heath, respondent's coordinator of personnel for 20 years, testified in behalf of respondent. Heath's duties included handling all respondent's employments records which included health insurance claims, worker's compensation claims and teacher contracts.

If Heath receives the report of injury she files it with workers' compensation insurance. She did not file a workers' compensation claim for petitioner.

She received a doctor's release from petitioner for FMLA. She identified Respondent's Exhibit 2, which was the FMLA form filled out for petitioner on April 11, 2011. She also identified Respondent's Exhibit 3, which was the employer's statement of disability for petitioner. She agreed respondent pays [non-work related] disability to the employee if the employee meets the standard for disability.

She was aware petitioner was off for a right hand injury. She identified Respondent's Exhibit 6 as salary payment for petitioner when he was off. This would be directly deposited to petitioner's account.

She did not know petitioner's specific duties.

Dan Spacek Testimony

Dan Spacek, employed by Aramark for twenty years as director of facilities, testified in behalf of respondent. He is assigned to respondent's entire district. He is not a direct employee of respondent. His duties include construction, custodial, maintenance and projects for respondent.

Spacek had been petitioner's supervisor since 2007. Spacek confirmed petitioner was a custodian. Spacek recalled petitioner reported problems with his right hand in 2011. He was not sure of the exact date. Spacek recalled a conversation with petitioner that occurred midafternoon at respondent's school. Petitioner complained his hand was hurting. Spacek testified petitioner told him it must have happened someplace else. Spacek testified he asked if petitioner hurt himself [at work] and petitioner advised him it did not. There was no accident report completed as petitioner never told Spacek that he [petitioner] felt it was work related.

Spacek, Curt Saindon, respondent's assistant superintendent, and petitioner had a meeting in Saindon's office. The purpose of the meeting was to confirm whether petitioner's condition was work related. Spacek's recollection was that petitioner advised it was not work related. He was not involved after that.

Spacek identified Respondent's Exhibit 4 was an accurate description of petitioner's job. Spacek believed Respondent's Exhibit 5 was not entirely accurate. He did not believe petitioner keyed open 30 doors. He did not believe petitioner collected garbage bags left over from the night before activities as the night cleaning services would do that.

Spacek trained petitioner. He testified petitioner did floor buffing only once a month. Spacek described the job of floor buffing as holding on to the handle bars of a bicycle; there was not much vibration. Spacek indicated petitioner's duties vary from day to day. In the lunch room he would stand-by to do clean ups. Petitioner would use buckets of water and sanitizer to do clean ups; parents would help with the cleanup. Spacek denied petitioner used hand squeegees. Petitioner used a cloth and glass cleaner as needed.

On cross examination, Spacek agreed hand sweeping was part of the job. He agreed petitioner had to use his hands to perform his job. Spacek agreed electrical and plumbing work listed on Respondent Exhibit No. 4 was not technically part of petitioner's job.

Curtis Saindon Testimony

Curtis Saindon, who has been respondent's assistant superintendent for financial and operations for ten years, testified in behalf of respondent. Saindon confirmed he requested a meeting with Spacek and petitioner when he became aware of petitioner's condition. The meeting took place in early April, 2011, shortly before petitioner was to see the doctor. When asked if it was work related, petitioner told Saindon and Spacek said it was a condition that had been present for a long time and he needed to get it fixed. Saindon testified that petitioner reiterated it was not work related. It was agreed he needed to submit the claim to Blue Cross/Blue Shield. If petitioner had claimed it was worker's compensation, then the proper claim would have to be completed and petitioner's supervisor would complete an investigation report.

Saindon confirmed Respondent's Exhibit No. 4 was an accurate job description for petitioner as of July, 2010.

Saindon had telephone calls and emails with petitioner over the next several months [after April, 2011] regarding petitioner's medical and return to work status. Saindon did not recall receiving a light duty note from petitioner requesting accommodations.

At first, petitioner was paid sick and vacation time until it ran out. In July, 2011, petitioner received more sick bank time. Petitioner was required to get board approval for leave of absence extension from month to month. Petitioner was terminated in November, 2011 when he ran out of sick and vacation time and failed to obtain board approval for an extension of his leave of absence.

On cross-examination, Saindon agreed he was not aware of "cumulative trauma". Saindon did not know if the vast majority of petitioner's work required use of his hands.

Robert Hrebic Rebuttal Testimony

Petitioner disputed, that in the meeting with Spacek and Saindon, he [petitioner] denied it was work related. He advised that the condition had been happening since the fall. Petitioner also denied that Spacek and he had a conversation in midafternoon at the respondent's location. Petitioner advised it was by phone, on April 5 or 6, when he was going to see the orthopedic surgeon. Spacek told petitioner not to try and claim it as work related.

Petitioner cannot think of one job he performs for respondent that he didn't use his hands.

Advocate Health Center/Dr. Scholl Records (PX.1)

According PCP Primary Care Note, petitioner was first seen by Dr. Jolyne Scholl on April 5, 2011 with complaints off and on for two weeks with right hand pain and numbness that shoots up to shoulder. Specifically, he stated he had pain that started in the right palm of his hand and radiates up to forearm below the elbow; entire arm aches up to bicep. The numbness was in the fingertips thumb and finger; second through fourth. There were no falls or trauma, but he was sweeping during the day and lifting. The diagnosis was wrist joint pain, arthralgia of temporomandibular joint, trigger finger of the right index (sic) finger and carpal tunnel syndrome. He was referred for orthopedic consult.

Petitioner was seen again on April 25, 2011 after surgery was performed on April 15, 2011.

Petitioner was seen again on August 3, 2011 to discuss carpal tunnel syndrome. Petitioner admitted he had tramadol addiction in the past. The diagnosis was anxiety and opioid dependency.

Petitioner was next seen relative to the carpal tunnel syndrome condition was on November 8, 2011 for a pre-operative exam for a carpal tunnel revision. On November 23, 2011, petitioner was see for sinus infection and wound check in right hand. On November 25, 2011 petitioner was seen with right hand would pain that was burning and oozing with pus. Diagnosis was cellulitis in right wrist.

On November 29, 2011 was seen by Olga Mata-Arce R.N. regarding change in pain meds.

These records also include the records of Dr. Anton Fakhouri which were duplicates of Petitioner's Exhibit 3 and 4, with the exception of the visit with Dr. Fakhouri on September 8, 2011. At that visit, Dr. Fakhouri indicated that he saw no reason why petitioner would not be capable of returning to regular work, was to keep his regular scheduled appointment with Dr. Fakhouri.

Chicago Imaging Records and Bill (PX.2)

X-rays of petitioner's right hand and right wrist on April 5, 2011 were reported as unremarkable. The charges were $61.00.

Midwest Orthopaedic Consultants/Dr. Anton Fakhouri Records (PX.3 & PX.4)

Petitioner, right hand dominant individual, appeared at Dr. Anton J. Fakhouri on April 7, 2011 with complaints of tingling, numbness and pain in the right hand, as well as clicking for the last one and a half years that had progressively worse. He also had clicking of right middle finger that sometimes gets stuck and had to manually extend it. He was diagnosed with chronic right carpal tunnel syndrome and severe tenosynovitis, right middle finger. Surgery to release the carpal tunnel and right middle trigger finger was discussed.

Petitioner underwent right carpal tunnel release and right middle finger A1 Trigger release by Dr. Fakhouri on April 15, 20111. Petitioner followed up with Dr. Fakhouri on April 28, 2011, May 19, 2011 and June 2, 2011. On June 16, 2011, petitioner reported sensitivity hypersensitivity over the scar tissue. Dr. Fakhouri injected petitioner's right wrist.

At the July 7, 2011 visit with Dr. Fakhouri, the petitioner advised the doctor of his work activities as a custodian which he believed caused the carpal tunnel condition. Petitioner related his work activities as: unloading heavy milk carts and other items that weight as much as 80 to 100 pounds. He also cut the grass, using a vibrating machine, shoveled, swept, mopped and used the floor scrubber that vibrates. Dr. Fakhouri, based upon the activities petitioner described he performed for three years as a custodian, believed at a minimum aggravated his carpal tunnel syndrome and trigger finger.

The records also show petitioner underwent physical therapy from May 2, 2011 to July 26, 2011, at which time he was released having met all goals.

On August 15, 2011, Dr. Fakhouri petitioner advised Dr. Fakhouri he felt he could return to work on September 12, 2011, but to lift no more than 25 pounds. Dr. Fakhouri noted petitioner's incision was well healed. Dr. Fakhouri believed petitioner would be capable of returning to full duty work within six to eight weeks of August 15, 2011.

Instant Care Medical Group/Dr. Irvin M. Wiesman Records (PX.5)

Petitioner was first seen by Dr. Irvin Wiesman on September 17, 2011 with a one-year history of nocturnal paresthesia, numbness and tingling in his right thumb, index and long finger, as well as locking in the right middle finger. He underwent surgery on April 15, 2011 for carpal tunnel and trigger finger. He had good result from the trigger finger but still had persistent numbness and tingling in the right hand, pillar pain and proximal migration of the symptomology and pain. Diagnosis was right carpal tunnel syndrome and possible neuroma, palmar cutaneous branch of the median nerve.

Petitioner completed an IMRF form on September 17, 2011 relating the condition to his employment; date of accident listed was May 25, 2011. He was put on restrictions by Dr. Wiesman for 30 days of no lifting more than 25 pounds with the right hand.

The EMG/NCV done on October 13, 2011 showed mild-moderate right median neuritis/neuropathy at the wrist; CTS as well as possible neuroma.

On October 22, 2011 Dr. Wiesman recommended surgery after petitioner received relief from the injection of lidocaine.

He followed up with Dr. Wiesman five days' post-surgery on November 16, 2011. On December 10, 2011, petitioner reported he had seen his primary care physician due to an infection he developed. On January 7, 2012 petitioner was making good progress; to return in two months and likely released from care. On March 3, 2012 petitioner was released to return to work without restrictions on March 5, 2012.

North Shore University Health System Records (PX.6)

Petitioner surgery for recurrent right carpal tunnel syndrome and neuroma, palmar cutaneous branch of the median nerve by Dr. Irvin Wiesman on November 11, 2011.

ATI Physical Therapy Records (PX.7)

Petitioner received physical therapy from November 21, 2011 to March 3, 2012. The bill totaled $13,681.99.

Dr. Jeffrey Weinzweig Records/Bill (PX.8)

The $2,457.00 bill was for an examination and deposition of petitioner. (Included is a bill for another patient, Julie Carr.)

Dr. Jeffrey Weinzweig March 17, 2014 Deposition (PX.9)

Dr. Jeffrey Weinzweig, board certified plastic surgeon with fellowship training in hand surgery and craniofacial surgery, testified in behalf of petitioner. Dr. Weinzweig is well published in hand and wrist surgery (6-7). Dr. Weinzweig examined petitioner on November 7, 2012 and authored a report to petitioner's attorney on December 28, 2011 (sic) (9).

Dr. Weinzweig examined petitioner and reviewed medical records. Dr. Weinzweig noted petitioner had undergone carpal tunnel release on the right side in April, 2011 by Dr. [Fakhouri]. Petitioner reported problems with a nerve subsequent to the procedure. (9-10)

Petitioner provided Dr. Weinzweig with a detailed job description he did as a custodian (10-11). Dr. Weinzweig opined that petitioner performed a number of tasks on a regular basis that was of a repetitive nature and, in Dr. Weinzweig's 20 year experience, was the type of activities that causes patients to develop carpal tunnel syndrome as well as trigger finger (11).

Dr. Weinzweig specifically reviewed medical records of the procedures performed by Dr. Fakhouri and Dr. Weisman as well physical therapy records (11-12). Petitioner had undergone the subsequent procedure by Dr. Weisman due to persistent carpal tunnel syndrome and development of a neuroma of the palmar cutaneous branch of the median nerve (12).

Dr. Weinzweig noted thenar atrophy which is associated with chronic carpal tunnel syndrome (19-20). This thenar atrophy would indicate irreversible changes/damage to the median nerve (22). This resulted in weakness or loss of motor strength in the hand (23). Dr. Weinzweig also reviewed EMGs (24-25).

Based upon his examination of petitioner, reviewed of the medical records and diagnostic testing, Dr. Weinzweig diagnosed petitioner's condition as treated carpal tunnel syndrome and injury to the palmar cutaneous nerve (25).

Dr. Weinzweig believed the surgery performed by Dr. Fakhouri was necessitated by the carpal tunnel syndrome which was directly related to petitioner's work activities over a number of years (29-30) Dr. Weinzweig also believed the second surgery, which had been performed by Dr. Weisman to excise the neuroma, was related to the first surgery done by Dr. Fakhouri (30). Dr. Weinzweig believed the injury to the palmar cutaneous branch occurred during the first procedure (30-31). The second surgery was also necessary as the first surgery did not completely release the transverse carpal ligament (32).

On cross-examination Dr. Weinzweig reviewed the 23 activities described by petitioner as work duties and confirmed that many required grasping, pinching and lifting that would lead to carpal tunnel syndrome (46-57).

Dr. Weinzweig believed petitioner was capable of working and needed no further treatment at the time of his examination on November 7, 2012.

Blue Cross/Blue Shield Claim (PX.10)

$12,553.62 Blue Cross and Blue Shield Claim

Petitioner's Bill Exhibit (PX.11)

Petitioner claims these bills are owed:
$568.80 Midwest Orthopaedic Consultants (Original Bills $6,240.00)
$1,021.10 Mid America Therapy (Original Bill $7,633.00)
$1,458.41 Instant Care Medical Group (PX.5)
$13,681.99 ATI Physical Therapy
$432.00 Chicago Center for Plastic & Reconstructive Surgery
$692.54 Irvin M. Wiesman, MD (Original Bill $9,550.00)

Dr. Craig Phillips January 13, 2015 Deposition (RX.1)

Dr. Craig Phillips, board certified orthopedic surgeon, testified via deposition in behalf of respondent (5). At respondent's request, Dr. Phillips examined petitioner on October 24, 2011 (6).

Petitioner related to Dr. Phillips that in the first week of August, 2010 he was doing a lot of floor scrubbing with an electric scrubber. He did this six hour a day for 90 days during the summer. He noticed pain in his forearm and wrist shooting up to his elbow and noticed his fingertips were numb and tingling on the right. He took Advil but his symptoms got progressively worse. (9-10)

In April, 2011 he saw his primary care physicians, who referred him to orthopedist, Dr. Fakhouri. Dr. Fakhouri performed right carpal tunnel and trigger finger release surgery on April 15, 2011. He had eight weeks of physical therapy. Petitioner advised the surgery helped his finger, but did not relieve the pain and numbness. (10)

Petitioner then saw Dr. Wiesman, who gave him a cortisone injection which helped for only six hours. He underwent a nerve study. Petitioner denied left-sided symptoms. (10)

Petitioner's complaints, at the time of Dr. Phillips' exam, was pulling in his wrist, pain around the thenar eminence which started about a month after the surgery which was getting progressively worse and numbness (tingling) in his index, middle and ring finger; his hand was weak and he was dropping things. (12-13)

Petitioner advised Dr. Phillips that he had worked for respondent for one and a half years and his work included sweeping, cleaning, mopping floors, washing windows and taking out garbage. In the winter he shovels snow and puts out salt; sometime he used his hand and sometimes he used machines. (13)

Petitioner had previously worked 17 years form Oak Lawn School District as a night custodian. Before that, he worked for Midway Airlines as a skycap for seven years. (13-14)

Dr. Phillip's exam of petitioner was normal except for complaints of numbness in his index and middle finger (14-18). Dr. Phillips diagnosis at the time of his exam was status post trigger finger release, for which petitioner was doing well (18). He was also status post carpal tunnel release with some residual numbness in the middle finger and pain around the thenar eminence (18). Dr. Phillips also believe petitioner had symptom magnification based upon the non-organic findings during his examination (19).

Dr. Phillips opined, based upon literature, petitioner's right middle trigger finger was not caused by the work activities (20). Dr. Phillips also opined that petitioner's carpal tunnel condition was not related to his work as that normally if someone does the repetitive work the symptoms come on within days to a couple of weeks rather than the year and a half of gradual onset as petitioner described to Dr. Fakhouri (20-21). Dr. Phillips indicated the literature suggest things such as jackhammering and use of very forceful vibration tools, as well as use of meat cleavers, cause carpal tunnel; repetitive activities, in and of themselves, were not a cause of carpal tunnel or trigger finger (22).

Although Dr. Phillips did not believe petitioner's conditions were work related, he did believe the treatment was reasonable for the condition (29).

At the time of his examination on October 24, 2011, Dr. Phillips believed petitioner could return to work without restrictions and was at maximum medical improvement (31-32).

Dr. Phillips authored an addendum report dated September 22, 2014 after reviewing additional records from ATI and two different job descriptions. Dr. Phillips again opined that petitioner's job, as described in the two job descriptions, was not the cause of his carpal tunnel condition or trigger finger. Dr. Phillips added that smoking contributed to the cause of petitioner's carpal tunnel condition. (33-38)

Dr. Phillips did not review the actual records or operative report of Dr. Weisman (40-41).

Dr. Phillips was of the opinion that only ten percent of all carpal tunnel condition develops from a specific cause (66).

Petitioner's April 11, 2011 request for Family Medical Leave (RX.2)

Employer Statement Disability Claim (RX.3)

Custodian Building Care Job Description (RX.4)

Petitioner's job description was provided by respondent.

Daily Job Duties list (Prepared by Petitioner) (RX.5)

Petitioner provided the details of his job duties.

Petitioner's Payroll Record January 1, 2011 through December 31, 2011 (RX.6)

Providence Life Services Records (RX.7)

Petitioner's employment records from Providence Life Services where he worked from July 12, 2012 through August 31, 2013 in Environmental Services as a Floor Tech. According to these records, petitioner was terminated because of workman's comp.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

C. With respect to the issue of whether an accident occurred that arose out of and in the course of Petitioner's employment by respondent, the Arbitrator finds the following facts:

Although respondent did not dispute petitioner gave notice of the accidental injuries within the time limitations of the Act, respondent presented three lay witnesses who testified that in April,

2011, petitioner did not relate the right hand condition to his work with respondent, which was confirmed in a meeting held with petitioner, Saindon and Spacek. However, petitioner testified that the discussion in the meeting was only to let petitioner know respondent would fight him if he tried to claim the condition as work related. The Arbitrator does not find any of the witnesses on this issue to be reliable. Regardless, as notice is not at issue, whether petitioner advised respondent in April, 2011 that his right hand condition was or was not work related, is not relevant.

The issue is whether petitioner's work as a custodian for respondent culminated in a repetitive work accident on April 5, 2011 that arose out of and in the course of his employment with respondent. This issue is determined by the medical evidence.

Dr. Scholl, who provided the first treatment of petitioner's right hand condition, reported on April 5, 2011 petitioner had pain in his hand and radiates into his forearm and elbow. There was no falls or trauma, but petitioner did sweeping during the day and lifting.

Dr. Fakhouri who first saw petitioner on April 7, 2011, did not address the causal connection of the condition to petitioner's employment until he was asked by petitioner on July 7, 2011. At that time, Dr. Fakhouri opined that at a minimum petitioner's work as a custodian aggravated petitioner's right hand condition.

Petitioner was next treated by Dr. Wiesman; seeing him for the first time on September 17, 2011. The petitioner reported he was employed as a custodian and had a one-year history of nocturnal paresthesia, numbness, tingling in his right thumb, index, and long finger. Dr. Wiesman related the condition and symptomology to the reported mechanism of injury. However, Dr. Wiesman did not provide specifics as to the mechanism of the injury.

Petitioner offered the expert opinion of Dr. Jeffrey Weinzweig on this issue. Based upon his experience as a plastic surgeon, who had been specially trained in hand and craniofacial surgery, Dr. Weinzweig's believed petitioner's work as a custodian was sufficiently repetitive in nature to cause the carpal tunnel and trigger finger condition involving his right hand.

Respondent offered the expert opinion of Dr. Craig Phillips on this issue. Dr. Phillips is a board certified orthopedic surgeon. Dr. Phillips did not believe petitioner's work as a custodian was sufficiently repetitive to result in the claimed right hand condition. Dr. Phillips relied upon unidentified literature in reaching his conclusion. Dr. Phillips believed only ten percent of carpal tunnel or trigger finger resulted from a specific "cause"; the other ninety percent were idiopathic.

Based upon the foregoing, the Arbitrator finds petitioner proved by a preponderance of the evidence that he sustained injuries, as a result of the cumulative trauma accident, manifesting itself on April 5, 2011, that arose out of and in the course of his employment as a custodian with respondent.

F. With respect to the issue of whether the petitioner's condition of ill-being is related to the injury, the Arbitrator finds the following:

For the same reasons the Arbitrator found petitioner sustained an injury from a repetitive work accident of April 5, 2011, the Arbitrator finds the carpal tunnel and trigger finger condition was caused by the work accident.

J. In support of the Arbitrator's decision with regard to the medical bills incurred, the Arbitrator finds the following:

Although Dr. Phillips did not believe petitioner's condition was the result of petitioner's work as a custodian for respondent, Dr. Phillips did find the treatment petitioner received was appropriate given the diagnosis. The Arbitrator, having found petitioner was injured as a result of

the repetitive work accident of April 5, 2011, awards the following bills in accordance with §8 and §8.2 of the Act, with credit to be given for any payment made pursuant to §8 (j) of the Act:

$6,240.00 Midwest Orthopaedic Consultants, of which $568.80 is outstanding.
$17,633.00 Mid America Orthopaedics, of which $1,021.10 is outstanding.
$1,458.41 Instant Care Medical Group
$13,681.99 ATI Physical therapy
$9,550.00 Dr. Irvin M. Wiesman, of which $692.54 is outstanding.

(Respondent shall reimburse Blue Cross and Blue Shield, to the limit allowable under §8 and §8.2 of the Act, for any portion of the aforementioned bills paid by Blue Cross and Blue Shield)

No award is made for the claimed bill of $432.00 from Chicago Center for Plastic & Reconstructive Surgery as this was for charges by Dr. Weinzweig, who was petitioner's expert witness, and not for actual treatment.

K. In support of the Arbitrator's decision with regard to TTD, the Arbitrator finds the following:

According to Dr. Scholl's disability statement, petitioner was off work as of April 5, 2011. Dr. Fakhouri kept petitioner completely off work until September 12, 2011. There is a conflicting records of Dr. Fakhouri as to whether petitioner was released to full-duty work or restricted work as of September 12, 2011.

According to Dr. Fakhouri's record from September 8, 2011, which was contained in Dr. Scholl's records, petitioner was to be released to return to full duty work as of September 12, 2011; however, petitioner did not feel he was capable of returning to full-duty work (PX.1). Nonetheless, contained in Dr. Fakhouri's records (PX.4) there is a note dated August 15, 2011, that petitioner was released to return to work as of September 12, 2011 with a 25-pound lifting restriction, without further explanation.

Petitioner sought treatment by Dr. Weisman, whom he saw for the first time on September 17, 2011. Dr. Weisman restricted petitioner's work to no lifting greater than 25 pounds with right hand until October 17, 2011. Dr. Weisman kept petitioner on light duty work until the time of petitioner's surgery on November 11, 2011; thereafter petitioner was kept off work completely by Dr. Weisman until March 2, 2012, when he was released to return to work without restrictions.

Respondent denied receiving any light-duty work slips from petitioner and denied petitioner requested light-duty accommodations.

The Arbitrator finds petitioner proved he was temporarily totally disabled from April 5, 2011 to September 11, 2011 and November 11, 2011 to March 1, 2012 and awards TTD benefits for that period, which is 38-6/7 weeks at the rate of $453.33 per week.

L. In support of the Arbitrator's decision with regard to the nature and extent of petitioner's injury, the Arbitrator finds the following:

Petitioner sustained a trigger finger of the right middle finger which petitioner underwent a release with good results and minimal complaints. Petitioner also sustained carpal tunnel syndrome for which he underwent surgical repair. He underwent a subsequent revision surgery

due to a neuroma and incomplete carpal tunnel release. His complaints include pain, on and off, and numbness in his hand and around the base of the thumb.

Accordingly, the Arbitrator finds the aforementioned condition resulted in permanent disability to the extent of 10% loss of use of the right middle finger pursuant to §8 (e) 3, and 15% loss of use of the right hand pursuant to §8 (e) 9

N. In support of the Arbitrator's decision with regard to whether respondent is due any credit, the Arbitrator finds the following:

The Arbitrator finds respondent is not entitled to any credit for payments made to petitioner was the payment was sick and vacation time petitioner had earned.

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

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

Christine M Day

Signature of Arbitrator

June 6, 2017

Date

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14 WC 38815
I

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEROY GRAY,

Petitioner,

19IWCC0085

vs.

NO: 14 WC 38815

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of Petitioner's 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.

Petitioner sustained a work-related accident while carrying a 50-pound box on October 10, 2014, resulting in injury to his lower back. He treated with Respondent's preferred provider, MercyWorks, from October 14, 2014 through January 5, 2015. He was diagnosed with a lumbar strain and was sent for physical therapy. On December 2, 2014, Dr. Diadula at MercyWorks recommended work hardening in prelude to return to work. Petitioner declined work hardening and asked for a complete release to work, which he received. On January 5, 2015, Dr. Diadula released Petitioner from treatment because he was scheduled for a consultation with Dr. Mok.

Petitioner saw Dr. Mok once on January 8, 2015 for "further evaluation of pain that localized in the left side of his lower back and is accompanied by occasional quadriceps weakness with his knee giving way." Dr. Mok read that the MRI showed mild age-appropriate disc degeneration L2-5 with an asymmetric bulge at L4-5 causing mild foraminal stenosis with contact of the exiting L4 nerve on the left. He had improved with the prior physical therapy and Dr. Mok recommended additional physical therapy focusing on core strength. He did not recommend surgery or injections. They discussed his work activities and Petitioner indicated he was able to perform his work activities without too much difficulty. He released Petitioner from treatment prn. Thereafter, Petitioner had an additional 12 physical therapy sessions.

Petitioner testified that currently, he was "always conscious of" his back. Occasionally, he still gets that weakness. He retired in June of 2016. While he was working, his back affected most of his work "because most of the equipment [required] 2 feet, 2 hands" to operate; so, he was twisting and bouncing. When asked about how his injury affected personal activities, Petitioner answered: "It depends on what I'm doing. I mean I like to bowl, I want to play golf. I'm hesitant. I'm slowly moving to it." He testified to continuing intermittent weakness.

The Arbitrator awarded Petitioner seven weeks of temporary total disability benefits and 62.5 weeks of permanent partial disability benefits ("PPD") representing loss of 12.5% of the person-as-a-whole. In arriving at this PPD award, the Arbitrator gave "greater weight" to the factor that Petitioner testified to discomfort while performing his job duties after his return to work. He gave some weight to his age (57) which made it more difficult to completely recover from the injury and thus increased the disability award. Regarding Petitioner's future earning capacity, the Arbitrator wrote that "while he returned in a fully (*sic*) duty capacity, Petitioner testified that he was more cautious in the way he would perform his job duties, especially entering and exiting equipment and traversing stairs in the 18 months before he retired. As a result, moderate weight should be given to this factor." Finally, he noted the pathology found in the MRI and Petitioner's testimony about ongoing impairment, though the Arbitrator did not specifically ascribe the weight he was giving that factor.

In reviewing the record before us in its entirety, the Commission concludes that the PPD award is excessive. Petitioner sustained a lumbar strain which was treated only with medication and physical therapy. He was able to return to work in his physically demanding job in less than two months and actually declined work hardening in lieu of return to full duty. In looking at the statutory factors identified by the Arbitrator, the Commission notes that while the Arbitrator gave moderate weight to his age of 57 as a factor to increase PPD, the Commission concludes that in this instance that factor should tend to reduce his PPD award because his future working life with the impairment was limited, as evidenced by his retirement within 18 months of the accident. In addition, while the Arbitrator noted the pathology found in the MRI as an "aggravating" factor, Dr. Mok, Petitioner's chosen treating doctor, characterized the MRI findings as age-appropriate which warranted only limited physical therapy with no need for any return visit. In looking at the statutory factors, the Commission finds that a PPD award of 25 weeks representing loss of the use of 5% of the person-as-a-whole is appropriate in this claim and modifies the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,264.54 per week for a period of 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 $735.37 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 loss of the use of 5% 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.

19IWCC0085

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 proceeding for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: FEB 7 - 2019

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/dw
O-1/24/19
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0085

GRAY, LEROY
Employee/Petitioner

Case# **14WC038815**

CITY OF CHICAGO
Employer/Respondent

On 7/25/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% 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:

0391 HEALY SCANLON
NEIL KILCOYNE
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

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

19IWCC0085

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

Leroy Gray
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 14 WC 38815

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **5/10/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/10/14**, 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 **$93,708.16**; the average weekly wage was **$1,802.08**.

On the date of accident, Petitioner was **57** 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 **$8,851.79** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$8,851.79**.

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 $1264.54/week for 7 weeks, commencing 10/5/14 through 12/3/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $8,851.79. for temporary total disability benefits that have been paid.

The petitioner is to have and to receive 62.5 weeks at a rate of 735.37, representative of a loss of 12.5% man of a whole.

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

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

Signature of Arbitrator

07-24-18
Date

JUL 25 2018

IN THE WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS
CHICAGO, ILLINOIS

LEROY GRAY,	)	
	)	
Petitioner,	)	
	)	**NO. 14 WC 38815**
	)	
v.	)	
	)	
CITY OF CHICAGO,	)	
	)	
Respondent,	)	

MEMORANDUM OF DECISION OF THE ARBITRATOR

Findings of Fact

Accident

The parties have agreed that Petitioner suffered an injury arising and in the course of his employment on October 10, 2014, while carrying a box of materials and supplies that weighed approximately 50 pounds. Petitioner testified that as he set down the box and straightened himself up he felt a pop in his lower back.

Petitioner's medical treatment

On October 14, 2014 reported to Dr. Homer Diadula at Mercy Works. (PEX#2). At the time of his first visit, Petitioner provided a consistent history of injury. (PEX#2). He reported that his pain in his lower back was a 7/10 and radiated down to the left lower quadrant of his abdomen. (PEX#2). Dr. Diadula allowed Petitioner to return to work and ordered that he return on October 20, 2014. (PEX#2).

Petitioner returned to Dr. Diadula at Mercy Works as instructed on October 20, 2014. Petitioner's pain remained at a 7/10 and he reported tenderness in his left lower back and SI joint. (PEX#2). Dr. Diadula diagnosed Petitioner with a lumbar strain, recommended that he begin a course of physical therapy and remain off of work. (PEX#2 & #3). Petitioner completed

11 sessions of physical therapy at Mercy Works from October 23, 2014 through November 14, 2014. (PEX#2 & #3).

On November 18, 2014, Petitioner returned to Dr. Diadula at Mercy Works. (PEX#2). Petitioner reported that his symptoms had improved, but he was experiencing pain in his left lower back and was favoring his left leg when ambulating. (PEX#2). Dr. Diadula ordered Petitioner to obtain an MRI and return on December 4, 2014 or after he obtained the MRI, whichever was first. (PEX#2). Dr. Diadula ordered Petitioner to remain off of work. (PEX#2).

On November 21, 2014 Petitioner presented to Chicago Ridge Radiology for an MRI of his lumbar spine. (PEX#5). The MRI revealed a disc protrusion with effacement of the thecal sac and the exiting L2 nerve root at the L2-L3 level; a disc protrusion with compression of the thecal sac with bilateral neural foraminal stenosis that encroached on the left and right L3 nerve root at the L3-L4; and a disc protrusion with effacement of the thecal sac and the exiting L4 nerve root at the L4-L5 level. (PEX#5). Petitioner returned to Dr. Diadula on December 2, 2014 to review his MRI results. (PEX#2). At the time of this visit, Petitioner reported weakness in his lower back and in his left leg when ambulating. (PEX#2). Dr. Diadula confirmed the findings of the MRI and recommended that Petitioner undergo work hardening. (PEX#2). Despite Dr. Diadula's recommendation, Petitioner chose to return to work in a full duty capacity at that time. (PEX#2).

Petitioner returned to Dr. Diadula on December 9, 2014. (PEX#2). He reported his pain as a 3/10 with weakness in his left leg. (PEX#2). Petitioner stated that the bouncing around in the equipment he operated caused him to feel discomfort in his lower back. (PEX#2). Petitioner expressed that he would like to seek a second opinion for his lower back at that time. (PEX#2). Petitioner returned to Dr. Diadula two more times on December 23, 2015 and January 5, 2016.

(PEX#2). Dr. Diadula discharged Petitioner from his care following the January 5, 2015 visit. (PEX#2).

On January 6, 2015 Petitioner met with Dr. James Mok at the University of Chicago for a second opinion for his lower back injury. (PEX#4). He reported that he was experiencing pain on the left side of his lower back radiating down into his left quadriceps with his knee occasionally giving way. (PEX#4). Petitioner reported that he has been experiencing mild, throbbing pain in his lower back since the October 10, 2014 injury, and that his symptoms are exacerbated by standing for prolonged periods of time and walking. (PEX#4). Dr. Mok reviewed the MRI and noted an asymmetric bulge at L4-5 that caused foraminal stenosis with contact on the exiting L4 nerve root on the left side. Dr. Mok opined that Petitioner's condition could improve with additional therapy, but Petitioner again chose to return to work in a full duty capacity. (PEX#4). Dr. Mok instructed Petitioner to follow-up on an as needed basis and discharged him from his care. (PEX#4).

After his discharge from care, Petitioner continued to work in a full duty capacity for the Respondent until his retirement in June 2016. Petitioner testified that during the time he worked for Respondent, he was more cautious in the way he would perform his job duties, especially entering and exiting equipment and traversing stairs. He testified that during his continued employment with Respondent he would have good days and bad days and was "more hesitant" than he was before the injury. Since his retired, Petitioner testified that he is always conscious of his low back now and that he still experiences weakness in his lower back and left leg.

F. Whether Petitioner's current condition of ill-being is causally related to the October 10, 2014 work injury?

The Arbitrator finds that the injury to Petitioner's lower back injury is causally related to the October 10, 2014 work injury. The Arbitrator notes that Respondent did not offer any evidence, including medical records, or question Petitioner on cross-examination regarding causal connection, yet still disputes this issue. Petitioner testified that he has been employed as a hoisting engineer with the City of Chicago for over 20 years and was working in a full duty capacity at the time of his October 10, 2014 injury. Petitioner testified, and Respondent did not contest, that he suffered injuries to his lower back while he was moving a box weighing in excess of 50 pounds. The Arbitrator finds that the Petitioner testified credibly regarding the facts surrounding this occurrence, his medical treatment, and current condition of ill-being.

Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury. Dunteman v. Illinois Workers' Comp. Comm'n, 2016 IL App (4th) 150543WC, ¶ 42. A work-related injury "need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." Id. As long as there is a "but-for" relationship between the work-related injury and subsequent condition of ill-being, the employer remains liable. Id.

In this case, the Arbitrator finds that Petitioner's lower back injury is causally related to his October 10, 2014 work accident. Petitioner testified that he working in a full duty capacity without restrictions at the time of the October 10, 2014 occurrence. Petitioner's injury occurred as he was moving a box in the course of his employment with the Respondent. While Petitioner

was able to complete his shift on the date of the occurrence, his condition worsened over the weekend and sought medical attention on October 14, 2014 and provided a consistent history of injury.

Therefore, based upon the evidence provided by Petitioner's medical records and testimony, and Respondent's failure to present any evidence to the contrary, the Arbitrator finds that the injury to Petitioner's lower back is causally related to his October 10, 2014 work injury.

K. What temporary benefits are in dispute?

Based upon the agreement of the parties, Petitioner was temporarily and totally disabled for a period of 7 weeks from October 5, 2014 through December 3, 2014. During that time Respondent paid Petitioner a total of $8,851.79 in temporary total disability benefits. The Arbitrator finds that Respondent is entitled to a credit in the amount of $8,851.79 for past temporary total disability benefits paid, for a net credit of $0.00.

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

The Arbitrator finds that Petitioner suffered an injury of a permanent and lasting nature to his lower back, as a result of his October 10, 2014 work injury. This decision is supported by the Petitioner's medical records, which were corroborated by his trial testimony.

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

1. The reported level of impairment;
2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) states, "No single factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the

level of impairment as reported by a physician must be examined." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. Reported Level of Impairment

An AMA impairment rating was not done in this matter.

2. Petitioner's Occupation

At the time of his injury, Petitioner worked as a hoisting engineer for approximately 30 years, over 20 of which were spent working for Respondent. His position as a hoisting engineer requires him to operate heavy equipment including a boom truck, high lift, roller, and fork truck. Although Petitioner was stationed in the yard at the time of injury, he was required to operate different kinds of heavy equipment, load and unload supplies, and maintain the yard.

After two months of conservative treatment, and despite Dr. Diadula's recommendation for additional treatment, Petitioner returned to work in a full duty capacity as a Local 150 hoisting engineer. In his first visit following a return to work, Petitioner reported that the bouncing around in the equipment he operated caused him to feel discomfort in his lower back. (PEX#2). Additionally, during his January 6, 2015 visit with Dr. Mok, Petitioner reported that he has been experiencing mild, throbbing pain in his lower back since the October 10, 2014 injury, and that his symptoms are exacerbated by standing for prolonged periods of time and walking. (PEX#4). As such, the Arbitrator gives a greater weight to this factor.

3. Petitioner's Age at the Time of Injury

Petitioner was 57 years old at the time of the injury and is currently 61 years old. At his age, Petitioner is not likely to fully recover from his injury as a younger worker in same line of

work. At trial, Petitioner admitted that he was able to perform his job duties before his retirement, but that he was more cautious in the way he would perform his job duties, especially entering and exiting equipment and traversing stairs and curbs. He testified that during his continued employment with Respondent he would have good days and bad days and was "more hesitant" than he was before the injury.

The Arbitrator finds that Petitioner's age and the severity of his injury warrants consideration of more disability for Petitioner's factual situation than a younger Petitioner who is employed in a lighter duty position.

4. Petitioner's Future Earning Capacity

Petitioner returned to work without restrictions upon being released by Drs. Diadula and Mok. While he returned in a fully duty capacity, Petitioner testified that he was more cautious in the way he would perform his job duties, especially entering and exiting equipment and traversing stairs in the 18 months before he retired. As a result, moderate weight should be given to his factor.

5. Evidence of Disability Corroborated by Medical Records

Petitioner's medical records at PEX#2, PEX #3, PEX#4 and PEX #5, establish that Petitioner suffered a work-related injury to his lower back. At the time of his October 10, 2014 work injury, Petitioner was working in a full duty capacity and was not under the care of any doctor for his lower back. The MRI taken on November 21, 2014 revealed protruding discs at L2-3, L3-4, and L4-5, all of which effaced the exiting nerve roots. (PEX#5). The results of this MRI were confirmed by Dr. Diadula of Mercy Works. (PEX#2).

Petitioner was able to return to work without restrictions after a course of conservative treatment. However, both at trial and in his follow-up visits with Dr. Diadula and Dr. Mok he

reported that he still experienced symptoms in his lower back that resulted in left leg weakness. Petitioner further testified that he continues to experience symptoms to this day and that his symptoms are exacerbated by weather changes and overuse.

Therefore, given the objective findings of the November 21, 2014 MRI as well as Petitioner's credible testimony regarding the current nature of his condition, the Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of $735.37/week for 62.5 weeks, because the injuries sustained resulted in a 12.5% loss of the man as a whole.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATRICIA ORTIZ,

Petitioner,

19IWCC0086

vs.

NO: 14 WC 21564

STATE OF ILLINOIS-DEPARTMENT OF HUMAN 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 causal connection, medical expenses, temporary total disability benefits, and the nature and extent of Petitioner's 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.

Petitioner is a business manager for Respondent who sustained a work-related accident on January 14, 2014 when she slipped on a wet tile floor and landed on her left knee. She was sent to Physician's Immediate Care where she was placed on light duty, which Respondent accommodated. She was released to full duty and from treatment from Physicians Immediate Care on January 21, 2014. She did not seek additional treatment until May 20, 2014, when she went to her primary care physician, Dr. Irabagon.

Petitioner testified that she twice tried to jog between her last visit to Physicians Immediate Care and first visit to Dr. Irabagon, but she could not because it was too painful. That was when she decided to see Dr. Irabagon. Nothing happened to her knee between April 1, 2015 and June 16, 2016. Petitioner also testified that currently, she still had problems with her knee. She still cannot kneel, cannot jog, cannot walk for long periods, and it is difficult for her even to cross her legs. She takes over-the-counter medication and still tapes her knee every week or two. She never had any such problems prior to her accident.

Dr. Irabagon diagnosed knee contusion. Petitioner had an open MRI, which appeared to be negative and Dr. Irabagon referred her to Dr. Redondo, an orthopedist. Petitioner saw Dr. Redondo on June 4, 2014. After his examination, Dr. Redondo diagnosed patellofemoral pain secondary to contusion, possible chondromalacia, and lateral tracking patella. He administered a cortisone injection, provided a brace, prescribed physical therapy, and took Petitioner off work.

Petitioner was discharged from physical therapy on August 4, 2014 after 13 sessions. She still reported pain that could reach 5/10. On August 6, she returned to Dr. Redondo and reported only 20% improvement after the injection and physical therapy. Dr. Redondo suggested a closed MRI.

The closed MRI was taken on September 5, 2014 and showed reactive-type meniscal signal with no focal tear, minimal sprain of the medical collateral ligament, mild infrapatellar and distal quadriceps tendinopathy, minimal chondromalacia, small effusion, and edema within the Hoffa's fat, which could be related to post-traumatic impingement syndrome. After the MRI, Dr. Redondo prescribed additional medication and physical therapy, but did not recommend an arthroscopy. On December 9, 2014, Dr. Redondo noted that Petitioner had not improved despite conservative treatment. He prescribed Motrin and recommended a diagnostic arthroscopy. On January 30, 2015, Dr. Redondo performed a diagnostic arthroscopy. The post-surgical diagnosis was patella subluxation; "chondromalacia" was deleted from the pre-surgical diagnosis.

Petitioner had postop physical therapy, injection, and medication. By April 1, 2015, she reported being 85% better and that she wanted to return to work. At that time, Dr. Redondo released her from treatment to a home exercise program. Two and a half months later, Petitioner returned and reported 4/10 pain. Dr. Redondo noted she had arthroscopic surgery which revealed no significant pathology in the joint. Dr. Redondo advised Petitioner that surgery would not help her and prescribed strengthening/stretching physical therapy, taping, and bracing. Petitioner last saw Dr. Redondo on August 24, 2016. He noted that Petitioner finally "started" physical therapy, was wearing her brace, and was being taught how to tape her knee. She reported her knee was 70% improved. Dr. Redondo continued physical therapy and released Petitioner from treatment prn.

Respondent sent Petitioner to a medical examination with Dr. Primus on September 25, 2014. He later testified by deposition that the initial MRI (open) showed no pathology. He did not refer to the second (closed) MRI. He also testified that Petitioner exhibited no deformity, swelling, or bruising. She had full strength, normal range of motion, walked with a normal gait, and had no neurological deficits. The only positive symptom was "heightened pain response to her medial and lateral joint line." Dr. Primus opined that her pain seemed out of proportion to his findings on examination. Dr. Primus opined that Petitioner sustained an acute knee contusion in the accident, but her presentation was not related to that contusion. He concluded that the work-related contusion had resolved.

19IWCC0086

The Arbitrator found that Petitioner proved the stipulated accident on January 14, 2014 caused the current condition of ill-being of her left leg. However, she also found that Petitioner reached maximum medical improvement as of April 1, 2015 and denied benefits thereafter. She awarded Petitioner, 33&6/7 weeks of temporary total disability benefits, medical expenses incurred from January 14, 2014 through April 1, 2015, and 32.25 weeks of permanent partial disability benefits representing loss of 15% of the left leg.

The Commission agrees with the Decision of the Arbitrator regarding the issues of causation, medical expenses, and temporary total disability benefits. Therefore, the Commission affirms and adopts those aspects of the Decision of the Arbitrator. The Arbitrator awarded Petitioner 32.25 weeks of permanent partial disability benefits representing loss of 15% of the left leg. The Arbitrator gave "lesser weight" to Petitioner's occupation. She noted that Petitioner returned to her prior job as business manager. She gave "some weight" to her age (50) and noted that she had a relatively shorter work-life expectancy to live with the impairment. She gave no weight to possible loss of earning potential, because Petitioner returned to the same job. She gave the greatest weight to evidence of disability, including Petitioner's testimony about continuing complaints as well as the records of Dr. Redondo.

In looking at the permanency award, the Commission concludes that the Arbitrator should have given greater weight to the fact that Petitioner had a sedentary job and she was able to return to work in that same job after the accident. The lack of any showing of a potential loss of future earning potential should be used as a factor to reduce a permanency award. The Commission also notes that Dr. Redondo indicated that his arthroscopic surgery revealed no significant pathology in the joint and Dr. Primus found evidence of symptom magnification. Based on these factors, the Commission finds that an award of 26.875 weeks of permanent partial disability benefits representing loss of 12.5% of the left leg is appropriate in this claim and modifies the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $819.94 per week for a period of 33&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 all medical expenses incurred between January 14, 2014, through April 1, 2015, including reimbursement for any out-of-pocket expenses, pursuant to §8a, subject to the applicable fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $721.66 per week for a period of 26.875 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of the use of 12.5% of the left leg.

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

19IWCC0086

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 7 - 2019

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/dw
O-1/24/19
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0086

ORITZ, PATRICIA
Employee/Petitioner

Case# **14WC021564**

ST OF IL DEPT OF HUMAN SERVICES
Employer/Respondent

On 9/14/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.14% 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:

0412 RIDGE & DOWNES
AMYLEE HOGAN SIMONOVICH
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CHICAGO, IL 60606

5875 ASSISTANT ATTORNEY GENERAL
STEPHANIE KEVIL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

SEP 14 2017

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

19IWCC0086

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

PATRICIA ORTIZ
Employee/Petitioner

v.

STATE OF IL DEPARTMENT OF HUMAN SERVICE
Employer/Respondent

Case # 14WC 021564

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 **06/15/2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0086

FINDINGS

On 01/14/2014, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being *is* causally related to the accident *and reached maximum medical improvement on April 1, 2015*.

In the year preceding the injury, Petitioner earned **$63,955.32**; the average weekly wage was **$1,229.91**.

On the date of accident, Petitioner was **50** years of age, *married* with **0** children under 18.

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

By stipulation, Respondent is entitled to a credit of **$4,381.82** in medical benefits and short term disability payments from 3/1/15 – 3/29/15. Further, by stipulation, Respondent is entitled to a credit in the amount of **$TBD** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$819.94/week** for **33-6/7th weeks**, commencing **June 10, 2014** through **October 3, 2014** and from **January 30, 2015** through **April 1, 2015**, as provided in Section 8(b) of the Act. By stipulation, Respondent shall be entitled to a credit for all temporary total disability benefits and short term disability benefits paid.

Respondent shall be liable for and pay for Petitioner's treatment from January 14, 2014 up to and including April 1, 2015, subject to Sections 8(a) and 8.2 of the Act. Respondent shall reimburse Petitioner for any out of pocket expenses incurred as a result of the work injury directly to Petitioner. Respondent shall be entitled to a credit under Section 8(j) for any medical benefits that have been paid during this time.

Respondent shall pay Petitioner permanent partial disability benefits of **$721.66**/week for **32.25** weeks, because the injuries sustained caused the **15%** loss of the left leg, as provided in Section 8€ 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

9-13-2017
Date

SEP 14 2017

19IWCC0086

FINDINGS OF FACT

Petitioner, Patricia Ortiz, is a 53-year-old business manager who has worked for the John J. Madden Mental Health Center for 23 years. On January 14, 2014, when Petitioner was coming out of her office, she slipped and fell onto her left knee.

Petitioner first sought treatment at the company clinic, Physicians Immediate Care, on the date of her accident. Px5. She was diagnosed with a knee contusion and a shoulder contusion. *Id.* Petitioner was prescribed medication and placed on work restrictions. *Id.* When Petitioner returned for a follow-up appointment on January 21, 2014, she stated she had difficulty kneeling. *Id.* At that time, she was released from care and returned to work full duty. *Id.* The doctor told Petitioner that her knee was probably bruised and it would take time to heal.

On May 20, 2014, Petitioner went to see her primary care physician, Dr. Irabagon. (PX1). Dr. Irabagon recommended an open MRI for Petitioner's left knee and referred her to Dr. Redondo at Midwest Orthopaedic Consultants. *Id.* When asked at trial why she waited to return to treatment, Petitioner testified that she believed things would get better but when the weather started getting nicer she began going for walks. She then noticed her left knee was giving her problems

Petitioner first presented to Dr. Redondo on June 4, 2014. Px2. Dr. Redondo administered a left knee cortisone injection and put Petitioner off work starting June 10, 2014. *Id.* In addition, Dr. Redondo gave her a J pad brace and recommended physical therapy. *Id.* When Petitioner returned to Dr. Redondo on June 18, 2014, she was 10% better after the cortisone injection and bracing. Dr. Redondo recommended more physical therapy. *Id.*

On August 6, 2014, Dr. Redondo recommended a closed MRI since her past MRI was in an open scanner. Px1, Px3:9. Dr. Redondo found the resolution of an open MRI scan was not as good as a closed MRI scan. Upon review of the closed MRI, Dr. Redondo diagnosed Petitioner with an inflamed Hoffa fat pad and continued to hold Petitioner off work. Px2, Px3:10.

On September 12, 2014, Petitioner presented to Dr. Gregory Primus for a Section 12 examination at the direction of Respondent. Rx2. Dr. Primus opined Petitioner suffered a knee contusion that had resolved, that she required no further treatment and that she could return to work full duty. Petitioner was sent back to work on October 3, 2014. On September 16, 2014, Petitioner followed up treatment with Dr. Redondo, who recommended a left knee arthroscopy, debridement, and removal of the Hoffa inflamed fat affecting the posterior aspect of the patellofemoral joint. Px2. Dr. Redondo took Petitioner back off work. *Id.* On October 9, 2014, Dr. Redondo continued to recommend surgery. *Id.* Petitioner returned to work on December 9, 2014. On December 9, 2014 and January 14, 2015, Dr. Redondo once again recommended surgery for Petitioner's knee, as she had failed conservative management of her injury. *Id.*

On January 30, 2015, Petitioner underwent a left knee arthroscopy with patella subluxation. Px2. Petitioner was taken off work starting January 30, 2015 to recover from her surgery and prescribed physical therapy. *Id.* On March 19, 2015, she returned to Dr. Redondo and was diagnosed with IT band syndrome along with left greater trochanter bursitis. *Id.* Dr. Redondo administered a left knee cortisone injection the same day. *Id.* On April 1, 2015, Petitioner was released p.r.n. by Dr. Redondo. Petitioner returned to work on April 6, 2015.

On June 16, 2016, Petitioner returned to see Dr. Redondo with complaints of stabbing and burning pain in her knee. Px2. Dr. Redondo diagnosed her with total femoral pain and symptoms, possible chondromalacia

and patella instability. *Id.* He did not think surgery would help her. Dr. Redondo recommended physical therapy, where Petitioner was taught how to tape her patella. *Id.* Petitioner also started wearing a patellofemoral brace. *Id.* Petitioner was released from Dr. Redondo's care on August 24, 2016, after completing her course of physical therapy.

At trial, Petitioner testified she still Petitioner still has problems relative to the left knee and that she cannot cross her legs and cannot sit. At church, she cannot kneel. Petitioner endorsed difficulty climbing stairs and has stopped jogging. She still tapes her patella once a week. Petitioner denied prior problems with the left knee. She denied any intervening injuries or accidents to the left knee between January 21, 2014 and May 20, 2014.

Petitioner testified she was off work from June 10, 2014 to October 3, 2014 and received temporary total disability benefits. When she went back off work after her surgery from January 30, 2015 through April 5, 2015, she received short-term disability benefits from March 1, 2015 through March 29, 2015. She received no temporary total disability benefits during this time.

Regarding medical bills, Petitioner testified that her group health insurance paid her medical bills. At the time of the hearing, Petitioner had $1,289.00 in outstanding bills due to Midwest Orthopaedic Consultants. Px6. Her medical bills before January 21, 2014 were paid by Respondent. Her medical bills after January 21, 2014 were paid by her group health insurance through the State of Illinois. Rx1. In addition, she made $250.00 in co-payments to Midwest Orthopaedic Consultants. Px6.

Under cross exam, Petitioner testified she could not recall whether she saw any doctor for her left knee between April 1, 2015 and June 16, 2016.

Deposition of Dr. Gregory Primus

Dr. Primus presented Dr. Primus for his evidence deposition on January 26, 2016. Dr. Primus opined that Petitioner's symptoms were not related to her accident on January 14, 2014. Rx2. Dr. Primus believed Ms. Ortiz's condition from her injury on January 14, 2014 had resolved within four to six weeks of the date of injury. Dr. Primus further believed Petitioner now had pain of unknown etiology involving her medial and lateral compartments and some anterior knee pain as well.

Dr. Primus reviewed Petitioner's January 14, 2014 visit at Physicians Immediate Care and her subsequent medical treatment with Dr. Irabagon and Dr. Redondo through August 6, 2014. He did not review Petitioner's January 21, 2014 visit at Physicians Immediate Care, nor did he review the closed MRI scan results on Petitioner's left knee. Dr. Primus concluded Petitioner failed to follow-up after her initial urgent care visit. Dr. Primus did not have review the medical records and findings surrounding Petitioner's arthroscopic surgery on January 30, 2015.

Deposition of Dr. Luis J. Redondo

On October 27, 2015, Dr. Redondo testified on behalf of Petitioner. Px3. Dr. Redondo stated that after treating Petitioner conservatively, Petitioner was only 20% better. By August 6, 2014, Petitioner had undergone a cortisone injection, bracing and physical therapy. Dr. Redondo concluded that a repeat MRI showed an inflamed Hoffa fat pad. Dr. Redondo stated the Hoffa fat pad can be inflamed through trauma and that the trauma Petitioner experienced on January 14, 2014 was the sort that would inflame the Hoffa fat pad.

Dr. Redondo believed to a reasonable degree of medical and surgical certainty that Petitioner falling directly onto her knee caused anterior knee pain consistent with those Petitioner was having. Dr. Redondo

recommended surgery, as at that point Petitioner had been in pain for approximately 10 months since her accident. Upon performing a diagnostic arthroscopy on January 30, 2015, Dr. Redondo found Petitioner had a subluxating patella and chondromalacia. Dr. Redondo testified that the findings were consistent with Petitioner's mechanism of injury and reported symptoms.

CONCLUSIONS OF LAW

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

The Arbitrator finds Petitioner's current condition of ill-being as it relates to the left foot, left shoulder and left knee to be causally related to the injury. the Arbitrator finds that Petitioner's left knee condition resolved and reached maximum medical improvement on April 1, 2015, when Dr. Redondo released Petitioner from his care. The Arbitrator notes the significant and unexplained gap in complaints, symptoms or treatment between April 1, 2015 and June 16, 2016. Petitioner failed to meet her burden in persuasively explaining how her condition of ill-being after April 1, 2015 is or was related to her undisputed work injury.

As to the period between Petitioner's undisputed work accident and the April 1, 2015 MMI date, the Arbitrator finds that Petitioner suffered a left knee contusion and patellar subluxation as a result of the work accident. Petitioner's mechanism of injuring the anterior portion of her left knee is consistent with the stated diagnosis by Dr. Redondo, with the positive patellar compression testing, with the positive patellar instability noted, which includes the Hoffa fat pad and with the MRI imaging showing inflammation of the Hoffa fat pad. The Arbitrator does not find Petitioner's lack in treatment between January 2014 and May 2014 fatal to her claim as Petitioner reasonably and credibly explained that she believed she would get better and that when she noticed difficulty in the left knee with walking and jogging, she promptly returned for treatment. Dr. Primus suggested during his deposition that perhaps an intervening event had occurred but Respondent could produce no evidence to support Dr. Primus' suggestion. Moreover, Petitioner's symptoms upon her return into treatment in May 2014 were consistent with her prior complaints in January 2014. Eventually, new imaging was suspect for edema within Hoffa's fat thought to be related to post-traumatic impingement syndrome. As a result of this injury, the Arbitrator finds that Dr. Redondo reasonably recommended an arthroscopy, which confirmed patellar subluxation.

The Arbitrator is persuaded by the credible testimony of Dr. Redondo. He was privy to additional medical information when rendering his opinions, including both Physicians Immediate Care visit notes and the findings of the arthroscopic surgery. A closed MRI enabled Dr. Redondo to correctly diagnose Petitioner's injury and perform surgery to resolve her injury. Dr. Redondo testified to a reasonable degree of medical and surgical certainty that Petitioner falling directly onto her knee on January 14, 2014 created the type of trauma that would inflame the Hoffa fat pad. Dr. Redondo testified that his findings at the time of surgery on January 30, 2015 were consistent with both a trauma such as the one Petitioner experienced on January 14, 2014 and the symptoms Petitioner was experiencing. Of note, while the Arbitrator places greater weight on the opinions of Dr. Redondo, the Arbitrator notes the doctor also failed, as did Petitioner, in explaining how her condition of ill-being after April 1, 2015 would be related to her work accident.

Based on the foregoing and under a chain of events theory, the evidence demonstrates that Petitioner's undisputed work accident was a causative factor in the condition of ill-being relative to her left knee. Thus, Petitioner has proven by a preponderance of the evidence that her condition of ill-being is causally related to her work accident and reached MMI on April 1, 2015.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found that Petitioner's current condition of ill-being for her left knee is causally related to her accident on January 14, 2014 and reached MMI on April 1, 2015, the further Arbitrator finds Respondent liable for paying all appropriate charges for all reasonable and necessary medical services and reimbursement of Petitioner's out-of-pocket expenses.

The Arbitrator finds Petitioner's medical treatment from January 14, 2014 to April 1, 2015 was reasonable and necessary to relieve her of her injury. Respondent shall be liable for and pay for Petitioner's treatment from January 14, 2014 up to and including April 1, 2015, subject to Sections 8(a) and 8.2 of the Act. Respondent shall reimburse Petitioner for any out of pocket expenses incurred as a result of the work injury directly to Petitioner. Respondent shall be entitled to a credit under Section 8(j) for any medical benefits that have been paid during this time.

ISSUE (J) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner as set forth above, the Arbitrator finds Petitioner entitled to temporary total disability benefits from June 10, 2014 through October 3, 2014, and from January 30, 2015 through April 1, 2015 or 33-6/7th weeks. This period reflects the time in which Petitioner was under active related medical treatment. The Arbitrator uses April 1, 2015 as the last date Petitioner is entitled to TTD based upon Dr. Redondo's release to full duty work and release from care and based upon the Arbitrator's prior conclusion and finding that Petitioner's condition after this date is not related to her work accident.

The Arbitrator notes that as to the second period of TTD, Petitioner was paid short-term disability benefits only from May 1, 2015 through May 29, 2015. In summary, Respondent shall pay Petitioner temporary total disability benefits of **$819.94/week** for **33-6/7th weeks**, commencing **June 10, 2014** through **October 3, 2014** and from **January 30, 2015** through **April 1, 2015**, as provided in Section 8(b) of the Act. By stipulation, Respondent shall be entitled to a credit for all temporary total disability benefits and short term disability benefits paid.

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

The Arbitrator incorporates for foregoing findings of fact and conclusions of law as though fully set forth herein. The Arbitrator notes that Petitioner did not treat for her left foot or shoulder beyond her time with PIC nor did she endorse any continuing problems, symptoms or treatment for the left foot and left shoulder beyond that time. The Arbitrator finds no permanency shall be awarded as to the left foot and left shoulder. The record shows Petitioner primarily if not only treated for the left knee, which the Arbitrator finds resolved as of April 1, 2015. Thus, Petitioner's left knee injury claim is ripe for adjudication.

The Arbitrator considered the enumerated factors of Section 8.1(b) for guidance in determining whether Petitioner established permanent partial disability. 820 ILCS 305/8.1(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 . . ."

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 business manager. Petitioner was released to her pre-injury job on April 1, 2015 on a full time basis. Petitioner's job has been described as sedentary. She continues to work in that capacity as of the date of trial. Because of the foregoing, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 50 years old at the time of the accident. The Arbitrator acknowledges that Petitioner has a shorter work life expectancy when and superimposed on her injuries, she may suffer the effects of those injuries for a shorter period of time as compared to a worker with a longer work life expectancy remaining. However, Petitioner's age also suggests Petitioner will work with the effects of her injury to a greater degree during this shorter work life expectancy. Because of foregoing, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no evidence in the record demonstrating that Petitioner has suffered any impairment of any future earnings capacity as a result of this work injury. 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 adopts the treatment records of Dr. Redondo. The Arbitrator notes that some of Petitoner's ongoing complaints made during trial, such as kneeling, were noted in her treatment record. The Arbitrator finds Petitioner's complaints are corroborated by her treatment record. Petitioner made little mention of any difficulty with the left knee relative to her work. Based on the foregoing, the Arbitrator therefore gives the greatest weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **15%** loss of use of the **left leg** pursuant to §8(e) of the Act.

Signature of Arbitrator

9-13-2017
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LA TONYA REED,

Petitioner,

19IWCC0087

vs.

NO: 13 WC 30670

MT. SINAI HOSPITAL,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact & Conclusions of Law

1. Petitioner testified that on August 7, 2013 she worked for Respondent as a Certified Nurses' Assistant ("CNA"). On that date, she and a co-worker, Marie Garcia, were lifting a 400-lb+ patient from his wheelchair to his bed using a Hoyer lift. As she was turning to the left, Petitioner had a "pop" and felt burning in her lower back. She demonstrated where she had the pop and pointed to an area in her back about three inches above her jean line. The lawyers agreed that where she pointed was not the sacrum.

2. Petitioner went to the computer room to do charting. But she still felt the burning and sharp pain, so she reported the accident, filled out an incident report, and went home. The next morning, she called in at six reporting that she could not move. She was told to stay in bed and call later. She called back and reported she was still in pain and was told to come in and see a doctor at the hospital. Petitioner was directed to the Emergency Department ("ED"). She also testified that a doctor from the ED sent her to Dr. Kranzler, a neurosurgeon at Schwab, which is part of Respondent's facility.

3. Dr. Kranzler sent her for physical therapy, first at Schwab and then at ATI. The therapy was causing her more pain. On January 17, 2014, Dr. Kranzler performed surgery on her lower back. Postop, Petitioner had some complication with healing of the surgical site. Her pain continued after surgery. She informed Dr. Kranzler, but "he just didn't do anything." She went to Dr. Siemionow for a second opinion. He ordered an MRI and recommended injections thereafter. Relief from the injection only lasted until the numbness wore off. She then had a discogram and Dr. Siemionow recommended fusion surgery, which he performed on November 28, 2014.

4. In early 2015, Petitioner moved to Louisiana to live with her daughter because she had no income and lost her place. Her last temporary total disability payment was around January 7, 2014. She has not received any benefits since. She saw Dr. Siemionow again on June 2, 2015 for her six-month postop follow up. He sent her for an Functional Capacity Evaluation ("FCE"). Subsequently, Petitioner moved from Louisiana to Indiana to live with her brother. Currently, she treats with her primary care physician in Indiana.

5. Petitioner testified that currently her back hurts if she stands too long, sits too long, and she gets "shots" of pain. Her doctor in Indiana prescribes pain medication. She looked for employment within the restrictions of her FCE, basically in retail. She knew that she could not return to work at the hospital. On August 27, 2016, she became employed at Walmart as a greeter/cashier. They let her take breaks every hour and a half to two hours. She can't do what she did prior to the injury. She has to sit frequently to rest her back, and she does not lift anything heavy because she is afraid to. She never had any treatment for her back previously. She had no problem performing her job duties prior to the accident.

6. On cross examination, Petitioner agreed that it is important for patients to provide a good explanation of their symptoms. She again demonstrated that her pain emanated from a spot, again the Arbitrator noted was about three inches above her belt line. She agreed that that was above her first surgical scar, which was about at her belt line.

7. Petitioner was shown her accident report. Petitioner testified that she wrote that she was using a Hoyer lift and that she injured the "middle of back." She wrote everything in the report except "Chicago" which she forgot to fill in. She went to employee health as well as the ED. Petitioner agreed that she signed a consent form on August 9, 2013. The form indicated in capital letters that "physicians are not employed by the hospital," but rather independent contractors.

8. She agreed that at the ED she reported that her pain was in the mid-right back. She did not have symptoms down her legs when she first got hurt or when she went to the ED. She disagreed that a doctor at the ED told her she had a mid-back strain. She never heard of or saw Dr. Sturgill at Schwab, even if the ED records indicated she was sent to him. Petitioner saw Dr. Kranzler at Schwab and she did not know if another doctor accompanied him. He asked her where her pain was, and she told him the location in accordance with her testimony/demonstrations.

9. Petitioner agreed that Schwab is in a different building as the hospital and has its own sign. After the FCE, Dr. Siemionow placed restrictions on her. Those restrictions did not include requiring the number of breaks she had to take. Petitioner did not keep a log of her search for jobs. Petitioner finished her shift after the accident, which happened around the end of the shift.

10. On redirect examination, Petitioner testified that her supervisor told her to go to the ED as well as employee health, to fill out papers to be off work. At the ED she was given the referral to Dr. Kranzler. Petitioner did not read the consent form in its entirety before she signed it.

11. On re-cross examination, Petitioner testified she was given the form to sign and she signed it; she did not read it. She did not notice the statement that physicians were not employees of the hospital. She worked at the hospital for two to three years prior to the accident, but never paid attention to what was on the doctors' identification tags or the inscription on their coats. She did not have the paper from the ED referring her to Dr. Kranzler, she lost everything when she moved. The referral to Dr. Kranzler was on a prescription pad.

12. Robert Tarver was called to testify by Respondent, for which he worked as executive director of risk and insurance. He testified Sinai Hospital and Sinai Community Foundation are separate not-for-profit entities. The hospital does not employ the ED doctors; the foundation does. The hospital does not employ any doctors. The hospital does not direct ED doctors which doctors to refer patients to. Neither Dr. Widell (the attending ED doctor), Dr. Sturgill, nor Dr. Kranzler are employees of the hospital, but rather of the foundation, which is also known as Sinai Medical Group.

13. Gina Koenig was called to testify by Respondent. In 2013 she worked as a claims adjuster and handled Petitioner's claim for a mid-upper back injury. She scheduled a Section 12 medical examination with Dr. Phillips because Petitioner's complaints changed from the upper-mid back to her lower back. In addition, Dr. Kranzler ordered a test, a DSSEP test, which she had never heard of. Dr. Phillips noted a positive Waddell sign and she had no pain or radiculopathy that could benefit from physical therapy. He opined that she could return to work at light duty. Light duty work was offered Petitioner on October 16, 2013. The witness did not approve surgery at L5-S1 recommended by Dr. Kranzler because Dr. Phillips concluded it was not indicated and it as for a different part of the body. She never directed Petitioner to go to Dr. Kranzler or to any provider.

14. The medical records show that on August 9, 2013, Petitioner presented to the ED with 8/10 right-sided back pain for three days after trying to lift a patient off a chair. She twisted and heard a pop. Dr. Sturgill was consulted. Thoracic x-rays showed borderline anterior wedging of a mid-thoracic vertebra and mild-to-moderate degenerative osteophytes complex throughout the thoracic spine. Mid-back strain was diagnosed. Petitioner was provided medication, a back brace, and referred to Dr. Sturgill at Schwab.

15. On August 20, 2013, Petitioner presented to Dr. Kranzler for a non-surgical consultation in the Mt. Sinai Neurosurgery Clinic. She complained of mid-back pain without radiation to arms/legs. She was doing well until her accident on August 7th, when she helped lift a patient in a Hoyer lift. She felt a pop in her back. She continued to work but could not get out of bed the next day. She was taking Flexeril and Hydrocodone. Dr. Kranzler advised her to try physical therapy and apparently ordered MRIs.

16. On September 1, 2013, a thoracic MRI showed degenerative disc disease and disc protrusions T3-4 & T4-5 and a lumbar MRI showed desiccation and focal high signal at L5-S1 consistent with annular fissure and small non-stenotic central disc bulge.

17. About a month later, Dr. Kranzler noted that physical therapy had not helped. Petitioner reported her pain was too severe to work. Dr. Kranzler noted that Petitioner might need surgery. He wanted a DSSEP test of the lumbar spine, prescribed a brace and Motrin, and took Petitioner off work. On October 29, 2013, Dr. Kranzler noted that the DSSEP showed a "1.0 delay on the left and 1.3 delay on the right" at L5. Respondent had denied a hemilaminectomy. She still had low back pain radiating into the right groin and numbness/tingling when sitting.

18. On January 17, 2014, Dr. Kranzler performed a right hemilaminectomy and ligamentectomy at L5-S1 for lumbar radiculopathy.

19. On April 28, 2014, Petitioner presented to Dr. Siemionow with a chief complaint of significant back pain radiating to her leg and left elbow pain. All of her symptoms began on August 7, 2013 when she was injured working as a CNA. Her history of the accident was consistent with her testimony. After some conservative treatment, Dr. Kranzler performed a right-sided laminectomy at L5-S1. Postop, Petitioner felt better for three to four weeks but her back pain returned with radiation of pain into the right leg. She was unable to perform all of her activities of daily living and came to Dr. Siemionow for consultation about prospective treatment. Dr. Siemionow examined Petitioner and reviewed an MRI report from September 1, 2013 (he did not have the actual film) and IME reports of Dr. Phillips.

20. D. Siemionow opined that but for the accident, Petitioner would not have had the surgery with Dr. Kranzler. He believed that the conservative treatment Petitioner received up to surgery was reasonable. However, he refused to opine on whether that surgery was indicated because he did not have the actual MRI film.

21. Dr. Siemionow diagnosed low back pain with right-leg radiculopathy. He largely agreed with the opinions of Dr. Phillips that Petitioner should have been provided additional conservative treatment prior to surgery and that a DSSEP test is not a standard for determining radiculopathy. Nevertheless, Petitioner did have surgery and would not have had the surgery if not for the work-related accident/injury. Dr. Siemionow wanted a new MRI to ensure that she did not have pathology that developed after, or during, surgery. He also wanted to see the films from the first MRI. He discussed the possibility of epidural steroid injections for both therapeutic and diagnostic reasons.

22. The new MRI report indicated multilevel degenerative spondylosis and mild right-sided facet joint effacement at L3-4 and L5-S1, which might represent inflammatory arthropathy or degeneration. Dr. Siemionow noted that the MRI showed an annular tear and degenerative disc disease with disc herniation at L5-S1 and mild disc bulging at L3-4 and L4-5. He recommended an ESI at L5-S1 and kept Petitioner off work.

23. On July 28, 2014, Petitioner returned to Dr. Siemionow after two injections, which only provided temporary relief, and after which she returned to baseline back/leg pain. He reiterated that her laminectomy was performed because of her work injury. She had not had the pain relief from conservative treatment that Dr. Siemionow had hoped. He recommended a discogram.

24. The discogram was positive for discogenic pain at L5-S1 with disc morphology consistent with a Dallas grade 5 annular disruption. It also appears that there was discogenic pain at L3-4, but the test was negative at L4-5. A post discogram CT showed a 4-5 millimeter central posterior and right-sided disc herniation with extruded nucleus pulposus indenting the ventral side of the thecal sac with mild stenosis and narrowing. "This is probably Dallas classification type III herniation." No significant pathology was seen at L3-4 and L4-5.

25. On November 24, 2014, Dr. Siemionow performed anterior interbody fusion at L5-S1 with instrumentation and allograft for disc degeneration/herniation/post laminectomy. It was also noted that a modifier had to be used due to a BMI of 50, which prolonged the surgery for an hour, which was performed with "the assistance of vascular surgery."

26. On June 2, 2015, Petitioner returned for her 6-month postop follow up. She reported her low back pain was significantly improved, though she still had some burning sensation and periodic sharp pain irrespective of activities. Strength was 5/5 and sensation was intact. X-rays showed a stable fusion. Dr. Siemionow prescribed pain medication, an FCE, and for a CT to be completed before the next 6-month checkup.

27. Dr. Kranzler testified by deposition on May 1, 2014. He was board-certified, apparently in neurosurgery, since 1974. He first saw Petitioner on August 20, 2013, he thought on referral from the Mt. Sinai Clinic. She reported her accident, she continued working that day, but she could not get up the next day. She stayed home that day, went to the Mt. Sinai ED, and had been off work since. After examination, Dr. Kranzler's clinical impression was thoracic and lumbar pain. He recommended an MRI and physical therapy.

28. The MRI showed an annular fissure, desiccation, and disc bulge at L5-S1. At her next visit he noted that physical therapy had not helped and that the pain was too severe for Petitioner to work. Dr. Kranzler recommended a DSSEP in contemplation of possible surgery. Dr. Kranzler explained that a DSSEP in like an EMG but is more appropriate for a "pinched nerve in the spine." A reading of over 1.0 indicates a lot of pressure and connotes a need for surgery. He recommended a hemilaminectomy/microdiscectomy on

the right at L5-S1. Respondent denied the surgery and Dr. Kranzler would schedule the surgery when a source of funding was found. He decided to remove the ligament after an intraoperative DSSEP showed continued pressure on the nerve after removing only the bone. It was back to normal after surgery.

29. Dr. Kranzler also testified that on February 4, 2014, he "yielded to her insistent requests" to prescribe physical therapy, which he normally does not do soon after surgery, which is often more painful than helpful. Petitioner continued to complain of pain 11 weeks postop. She had stopped physical therapy because of excruciating pain; the pain was her only problem at the time.

30. Dr. Kranzler opined that Petitioner's reported work accident caused her condition of ill-being and necessitated his treatment, including surgery. He had no reason to think otherwise because the symptoms coincided with the injury and her symptoms persisted despite conservative treatment, thereby creating the need for surgery.

31. On cross examination, Dr. Kranzler testified he was employed by Mt Sinai Hospital. He was not employed by Illinois Masonic, but was employed by Northside Neurological, which is his private practice. He agreed that he had an obligation "to do no harm" and would not perform something invasive if the pathology was unclear. He agreed that on examination, he found muscle spasm "high in the back." L5-S1 was in the low back. High-back spasm can occur from L5-S1 pathology, which he believed was the case with Petitioner. He does not have patients do pain diagrams, and he did not see the ED records.

32. Dr. Kranzler's initial examination was normal except for the identification of muscle spasm and reports of subjective pain. He did note a positive straight leg raises and that eliciting pain was all that was necessary for a positive straight leg raise. He did not remember Petitioner's habitus, but he recorded that she was 326 lbs, which was consistent with morbid obesity. Petitioner did not report numbness or tingling in the first visit, but the symptoms developed later. Dr. Kranzler noted that a patient can have lumbar radiculopathy without displaying all the normal symptoms. He did not know how many physical therapy sessions she attended, but as many as she had, did not provide benefit. The MRI did not show stenosis, but it did show a torn annulus. The torn annulus can put pressure on a nerve. It was "not unusual at all" for a 5'7" 300-lb+ woman to have mild degenerative disc disease.

33. Dr. Kranzler agreed that on October 29, 2013, Petitioner reported pain in a different location, in the low back radiating into the right groin. That is not typical of L5-S1 pathology. However, noting the totality of symptoms and test results, Dr. Kranzler was confident that there was L5 nerve compression. He agreed that some of her symptoms could be related to diabetes, but she was never diagnosed with diabetes, according to her history.

34. Dr. Kranzler believed Petitioner first reported low back pain on a phone call to get her DSSEP results. At that time, she indicated she wanted to proceed with surgery, if it were

appropriate. He thought her MRI results were consistent with her symptoms. He did not know whether various factors, such as obesity, or metabolic disorders can affect DSSEP results. He was unaware that some surgeons find DSSEP results unreliable to assess radiculopathy.

35. On redirect examination, Dr. Kranzler agreed that "fat people can get hurt at work." The DSSEP was "certainly was not" the only thing that he used to determine the necessity of surgery. He also relied on the MRI, his examination, Petitioner's symptoms, and the failure of her symptoms to respond to conservative treatment. He only relies on an EMG if there is weakness or atrophy. He did not believe that Petitioner needed steroid injections. They seem only to provide temporary relief of pain and there is no difference in the percentage of patients ultimately having surgery between patients who have and do not have steroid injections.

36. On January 8, 2015 Dr. Siemionow testified by deposition that he is a board-certified orthopedic surgeon. When he first saw Petitioner, she complained of low back and right leg pain. She reported her accident lifting a heavy patient while working as a CNA. She denied any prior back condition that required treatment. She had physical therapy, which did not help, and then she had surgery on January 17, 2014.

37. On examination, Petitioner had an altered gait, exhibited limited lumbar range of motion, and the report from her MRI that noted a problem at L5-S1, but no stenosis. Petitioner also brought a Section 12 medical report from Dr. Phillips. Dr. Siemionow ordered a new MRI to determine whether there was any new pathology after her surgery. The new MRI showed an annular tear with herniated disc at L5-S1. Dr. Siemionow prescribed epidural steroid injections. They only provided temporary relief. Her relief, however brief, indicated that disc was contributing to her symptoms.

38. Dr. Siemionow then ordered a discogram to determine the pain generator. The discogram showed concordant pain and fluid leakage at L5-S1, which was consistent with a disc injury. He recommended fusion, which was performed on November 24, 2014. He saw Petitioner again on December 2nd, at which time she reported complete resolution of leg pain and improvement of back pain. Petitioner was not yet at maximum medical improvement, but her improvement was "very encouraging." Dr. Siemionow opined that the mechanism of injury reported by Petitioner reasonably could cause a disc injury, but he was not in a position to opine that it did. He noted that she had symptoms continuously from the accident to the date of his surgery. However, he also opined that the initial surgery "played a fairly large role in condition of ill-being" and eventually his surgery.

39. On cross examination, Dr. Siemionow testified he did not know who referred Petitioner to him. He did not know whether he actually viewed the original MRI, but he did not see any reference to that in his notes. While the MRI report indicated there was no pressure on the nerve, it noted a disc bulge, desiccation, and an annular fissure at L5-S1. All references to disc bulging or protrusions are all herniations, the difference is only in the extent of the herniation.

40. Dr. Siemionow did not really know the value of the DSSEP, but it did show a problem with the S1 nerve. He did not remember whether he reviewed the original operative report. He did not mention it in his report, so if he did review it, there was nothing in it that concerned him. He did not recall seeing any other records from Dr. Kranzler.

41. If a patient injures a disc, Dr. Siemionow would expect pain in the back or leg within a week. He would more likely expect a lumbar disc injury to produce pain in the lower back than in the mid to upper back. He agreed that if Petitioner injured her L5-S1 disc on August 7th, he would expect low back and/or leg pain by August 20th. Patients with a L5-S1 disc problem can have groin pain. He was not confident to state that Petitioner had lumbar radiculopathy prior to January 17, 2014, the date of the first surgery. A disc herniation can be "position induced" and it can possibly be so induced in surgery. He did not believe a DSSEP was the standard for determining radiculopathy. He would have rather prescribed an EMG. However, he essentially did a DSSEP test of the nerve intraoperatively which showed a decrease in the left leg.

42. Dr. Siemionow could not answer whether the surgery performed by Dr. Kranzler was reasonable or necessary to relieve Petitioner's work injury. Nor could he answer whether the pathology he treated surgically was the direct result of her work accident. He agreed that he did not truly know Petitioner's symptoms prior to his seeing her. Petitioner's pain was both axial and radicular during his treatment of her. He did not see the area of the first surgery, because it was done from the back and his surgery was from the front. He took that approach to avoid the scar tissue. Dr. Siemionow agreed that her complaints to Dr. Kranzler of numbness, coldness, and tingling in both legs "could be" consistent with the beginning signs of diabetes.

43. On redirect examination, Dr. Siemionow explained that pain from one source can mask pain from another source. Degenerative disc disease can be aggravated by a traumatic event. He saw no evidence that Petitioner suffered any injuries to her back other than the one at issue.

44. On re-cross examination, Dr. Siemionow testified that an aggravation of degenerative disc disease does not have to be permanent; it "absolutely" can be a temporary exacerbation.

45. On re-redirect examination, Dr. Siemionow testified that Petitioner would not have had the initial surgery but for her work accident.

46. The FCE was performed on June 3, 2015 and determined to be valid despite her reports and pain behavior. It placed Petitioner at a light physical demand level. She was able to lift 19.2 lbs from chair to floor and desk to chair, and 14.8 lbs over the shoulder. The job title of CNA was rated at medium physical demand level, but a detailed job description had not been provided. The therapist noted that Petitioner had not had physical therapy. She also recommended that Petitioner be limited to minimal bending, stooping kneeling, squatting, climbing, crouching, and balancing.

47. On May 26, 2015, Dr. Phillips testified by deposition he was a board-certified orthopedic surgeon since 1997 with fellowship training in spine surgery, spinal disorders. He was currently a professor of orthopedic surgery at Rush and previously director of the spine center at University of Chicago.

48. He reviewed Petitioner's records and saw her thrice, the first time on October 1, 2013. He also identified four reports he prepared which were submitted into evidence. At the first examination, Petitioner reported the acute onset of low back pain when lifting a patient on August 7, 2013. His notes did not specify the exact location of the pain, but it was in the thoracolumbar region.

49. She had a normal gait, very little focused pain, and positive Waddell signs. She exhibited intense pain reaction to the lightest palpitation and limited range of motion due to subjective low back pain. His neurological exam of her legs was normal and straight leg raises did not produce radicular symptoms. The normal neurological exam indicated there was no nerve compression and the positive Waddell signs indicated symptom magnification. The MRI from September 1, 2013, was "unimpressive" and showed some mild desiccation at L5-S1, normal disc height, and a "tiny disc bulge at L5-S1." Dr. Phillips diagnosed lumbar sprain/strain based only on her subjective complaints. The accident caused no structural damage. He recommended she complete the month of physical therapy that had been recommended. He also opined that the DSSEP test was not indicated because "it's a test that's completely not valid" and in addition, there was no neural compression. Petitioner was not a surgical candidate.

50. Dr. Phillips was provided the results of the DSSEP test and the initial operative report and issued an addendum report dated March 6, 2014. Neither the DSSEP test results nor the operative report changed his opinion that Petitioner was not a surgical candidate. He did not even know what the goal of the surgery was. Normally, to address mainly complaints of back pain, as Petitioner reported, a fusion surgery is indicated not simply extracting some soft, ligamentous tissue.

51. Dr. Phillips saw Petitioner again on August 5, 2014 after reviewing additional medical records from Dr. Kranzler, Dr. Sharma (who administered the injections), and Dr. Siemionow. Petitioner reported no change in her pain since the surgery with pain radiating into her legs. She also had two injections which did not provide relief. His examination was basically the same as before, with tenderness to the slightest palpitation, break-away weakness in both legs, and normal sensation. Straight leg raises again elicited only back pain. The MRI from June 15, 2014 was essentially the same as the previous test, except showing the laminectomy. He again opined that the surgery did not address any injury or pathology from the accident. He also opined that Petitioner did not need any additional treatment from the work-related injury and that injury did not require any work restrictions.

52. Dr. Phillips saw Petitioner again on December 23, 2014. He reviewed additional notes from Dr. Sharma, Dr. Siemionow, and the discogram/CT reports. Petitioner reported that

she had a fusion performed by Dr. Siemionow. However, she still reported 7/10 pain and was not doing much in terms of activity. Dr. Phillips' opinion remained unchanged that Petitioner suffered only a sprain/strain in the work accident, but the current diagnosis was complicated due to the surgeries. He again opined that the treatment Petitioner received was not related to her work accident.

53. On cross examination, Dr. Phillips testified that although he diagnosed a lumbar sprain/strain, there were not any objective findings corroborating a sprain or strain. He did not believe he reviewed the deposition of Dr. Kranzler. He did not offer an opinion on whether Dr. Kranzler's surgery aggravated Petitioner's condition of ill-being, other than surgery necessarily causes some pain. He also would not opine on Dr. Siemionow's surgery to correct issues that arose from Dr. Kranzler's surgery. He did not review the operative report of Dr. Siemionow. It was too soon after the fusion to determine whether it improved Petitioner's condition.

54. While Dr. Phillips opined that there were no objective findings to suggest that Petitioner required restrictions, he would recommend a 20-pound limit based only on her complaint of a lot of back pain. Dr. Phillips agreed that in a report he indicated that the discogram indicated that Petitioner had a component of pain related to the L5-S1 disc injury, which possibly could be related to the initial surgery. Dr. Phillips agreed that in his initial report, he opined that Petitioner had not reached maximum medical improvement from her work injury.

55. On redirect examination, Dr. Phillips testified that he diagnosed sprain/strain based on Petitioner's subjective complaints and history. It was theoretically possible that contraindicated surgery can improve a patient's condition through a placebo effect. Dr. Phillips was the only doctor to see Petitioner prior to the first surgery, between surgeries, and after the second surgery. Petitioner's clinical presentations were very similar in all his examinations, except the last exam was temporally very close to major spine surgery. Dr. Phillips would not have performed the second surgery.

The Arbitrator found that Petitioner's current condition of ill-being was caused by her work accident. She did not find any persuasive evidence that Respondent employed Dr. Kranzler, directed Petitioner to treat with him, or direct his treatment of her. She cited the testimony of Mr. Tarver and the fact that Respondent denied his recommended surgery. Nevertheless, she found that Petitioner did suffer a disc injury at L5-S1 in the accident and the treatment of Dr. Kranzler was reasonable. She based that on the record indicating that he relied on information other than the DSSEP test to perform the surgery. She also found the causation testimony of Dr. Kranzler and Dr. Siemionow more persuasive than that of Dr. Phillips.

The Arbitrator awarded Petitioner all medical bills incurred to date ($201,380.77 which includes a Medicaid reimbursement of $18,120.33), and temporary total disability benefits through June 3, 2015, the date of the FCE. In so doing, the Arbitrator indicated she was not impressed with Petitioner's alleged self-directed job search and that she had not established that she was entitled to maintenance.

The Arbitrator also awarded Petitioner 125 weeks of permanent partial disability benefits representing loss of 25% of the person-as-a-whole. In arriving at that award the Arbitrator gave greater weight to Petitioner's occupation, because she was not able to return to work in her job as a CNA and had to change occupations. She also gave greater weight to her age (43) and noted that she had would live with the impairment for a considerable time. She gave no weight to possible loss of earning potential, because Petitioner did not testify as to any reduction in earning potential. Finally, she gave the greatest weight to evidence of disability, including Petitioner's testimony about continuing complaints even though they were not entirely corroborated by the medical record.

The Commission agrees with the finding of the Arbitrator that Petitioner sustained a work-related injury in her accident on August 7, 2013. However, the Commission concludes that she suffered only a thoracic sprain/strain. We base that conclusion on the facts that Petitioner initially reported an injury to her "middle back," she was initially diagnosed with a mid-back strain at the ED, and apparently there is no documented report of low back pain until October 29, 2013. In addition, Dr. Siemionow testified he would expect pain in the back or leg within a week of a disc injury. He would more likely expect a lumbar disc injury to produce pain in the lower back than in the mid to upper back, and he agreed that if Petitioner injured her L5-S1 disc on August 7th, he would expect low back and/or leg pain by August 20th. Dr. Siemionow also refused to opine that the work accident actually resulted in an injury to her disc. Finally, the Commission notes that during her testimony, Petitioner twice indicated that the pain emanated from an area significantly above the area of the spine that was the subject of her surgeries.

In addition, the Commission agrees with the conclusion of the Arbitrator that there was no evidence that Dr. Kranzler was employed by Respondent or that Petitioner was referred to him by the ED doctors. The Arbitrator correctly noted that medical records from the ED specifically indicate that she was being referred to Dr. Sturgill and that Respondent denied the treatment recommended by Dr. Kranzler. Because there is no evidence that Respondent directed Petitioner to Dr. Kranzler, her treatment with Dr. Kranzler must be considered to have been her choice.

Regarding the treatment rendered by Dr. Kranzler, it is clear that both Dr. Phillips and Dr. Siemionow had serious reservations about such treatment. Neither understood Dr. Kranzler's use of the DSSEP test to determine radiculopathy and whether surgery was indicated, and Dr. Siemionow actually testified he did not know what Dr. Kranzler's surgery was intended to accomplish. While Dr. Siemionow wrote in his notes that he thought she would not have had the surgery absent the work injury, he refused to testify in his deposition that Dr. Kranzler's surgery was related to the condition of ill-being caused by the work accident. In looking at the testimony of both Dr. Phillips and Dr. Siemionow together, it appears likely that the initial surgery was most likely not indicated, and that subsequent treatment was necessitated by that initial surgery.

The Commission concludes that the surgery performed by Dr. Kranzler was neither necessary nor reasonable because he apparently operated on the wrong part of her body. Then after his surgery, subsequent treatment was related to that surgery to the lumbar spine rather than

her work-related injury to the thoracic spine. In addition, the Commission denies expenses associated with the DSSEP test, because both Dr. Siemionow and Dr. Phillips testified that the test was not indicated and therefore Petitioner had not sustained her burden of proving it was reasonable and necessary. Accordingly, the Commission vacates the award of medical expenses, awards medical expenses incurred on or before January 16, 2014, except medical expenses associated with the DSSEP test which are denied, and the Commission denies medical expenses for all treatment incurred subsequent to Dr. Kranzler's surgery.

Regarding temporary total disability, the Commission finds that Petitioner was entitled to benefits for the period she was disabled due to her thoracic sprain/strain. However, as of the date of her initial surgery by Dr. Kranzler on January 17, 2014 she was no longer temporarily totally disabled due to her work-injury but rather because of the surgery itself. Therefore, the Commission awards temporary total disability benefits of 23&1/7 weeks from August 8, 2013 through January 16, 2014.

Regarding permanent partial disability, it is obviously extremely difficult to determine what disability is related to her thoracic sprain/strain and that disability related to the unrelated treatment to her lumbar spine. Nevertheless, we must do so.

Petitioner clearly suffered an injury that required treatment and left her unable to work for a significant period of time. She was likely not able to return to her relatively physically demanding job of CNA because of her thoracic condition, she was relatively young (43) at the time of the accident and would have to deal with her disability for a considerable period of time, while there was no specific evidence about her current and future earning potential, it is unlikely that her job as Walmart greeter/cashier constituted an improvement in Petitioner's financial condition, and the FCE placed her in the light physical activity level. Based on the entire record before us, the Commission concludes that a permanent partial disability award of 50 weeks, representing loss of 10% of the person-as-a-whole is appropriate for the thoracic sprain/strain Petitioner sustained in this claim.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $293.32 per week for a period of 23&1/7weeks, commencing August 8, 2013 through January 16, 2014 that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $263.08 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 loss of the use of 10% of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for medical expenses submitted and incurred on or before January 16, 2013 under §8(a) of the Act, except the expenses associated with the DSSEP test, which are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that all medical expenses incurred after January 16, 2014 are denied.

19IWCC0087

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 $20,000.00. The party commencing the proceeding for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: FEB 7 - 2019

Deborah L. Simpson

Deborah L. Simpson

Stephen J. Mathis

DLS/dw
O-12/20/18
46

Dissent

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

David L Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

19IWCC0087

REED, LaTONYA
Employee/Petitioner

Case# 13WC030670

MOUNT SINAI HOSPITAL
Employer/Respondent

On 8/15/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.11% 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:

4595 WHITESIDE & GOLDBERG LTD
BRENT EAMES
155 N MICHIGAN AVE SUITE 540
CHICAGO, IL 60601

2461 NYHAN BAMBRICK KINZIE & LOWRY
AMY BILTON
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

19IWCC0087

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
CORRECTED ARBITRATION DECISION

LATONYA REED
Employee/Petitioner

v.

MOUNT SINAI HOSPITAL
Employer/Respondent

Case # 13 WC 30670

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 **Maria Bocanegra**, Arbitrator of the Commission, in the city of **Chicago**, on **04/19/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0087

CORRECTED FINDINGS

On **August 7, 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 **$22,800.96**; the average weekly wage was **$438.48**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$6,305.76** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$6,305.76**. Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

CORRECTED ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$292.32/week** for **95 weeks**, commencing **8/8/13** through **6/3/15**, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **8/8/13** through **6/3/15**, and shall pay the remainder of the award, if any, in weekly payments. Respondent shall be given a credit of **$6,305.76** for temporary total disability benefits that have been paid.

Petitioner's request for maintenance benefits are ***denied***.

Respondent shall pay Petitioner the reasonable and necessary medical services in the gross amount of **$183,260.44**, as provided in and subject to Sections 8(a) and 8.2 of the Act. Against this specific award, 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 further pay and reimburse the Illinois Department of Healthcare Family Services (Medicaid) in the amount of **$18,120.33**.

Respondent shall pay Petitioner permanent partial disability benefits of **$263.08/week** for **125 weeks**, because the injuries sustained caused the **25%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

8-15-2017
Date

AUG 15 2017

CORRECTED FINDINGS OF FACT

On and before 8/7/13, LaTonya Reed ("Petitioner") was employed as a certified nursing assistant (CNA) for Mount Sinai Hospital ("Respondent"). Her duties included taking care of patients and helping them in and out of bed. The parties stipulated that on 8/7/13, Petitioner suffered an accident arising out of and in the course of her employment with Respondent. Specifically, Petitioner said she injured her back when attempting to lift a patient using a Hoyer lift and that she felt a pop in her back. The patient was obese and weighed approximately 400 pounds. Px17. When her back pain became worse and did not subside, she sought treatment via Respondent. Petitioner testified she called into work, where Connie Shay-Hadley advised her to come in anyway.

On 8/9/13, Petitioner reported to Mount Sinai Hospital per Connie's request. There, she completed an accident report and Connie instructed Petitioner to go downstairs for emergency treatment. Px17, Px2. There, Petitioner was required to sign consent forms to receive treatment. Rx1. Among other declarations, these consent forms indicated that the physicians are not employed by Mount Sinai Hospital. Petitioner testified that she did not actually read the consent forms before signing them. Petitioner provided a history of accident to the emergency department physician, complaining of back pain rated at 8/10 located in the right-sided lumbar region from a twisting and lifting injury at work while lifting a patient. Px2. She was received by nurse Jones-Moore, for complaints of lower back pain. After x-rays and examination, Petitioner was diagnosed with a back strain. She was provided instructions from the Mount Sinai Hospital emergency department to follow-up with a neurosurgery specialist for a consultation regarding her back pain at the SMG Schwab Surgery Clinic.

Petitioner testified that a female treater in the emergency department instructed her to see Dr. Leonard Kranzler at the SMG Schwab Surgery Clinic. Medical records from the emergency room department show a referral to a Dr. Michael Sturgill at SMG Schwab Surgery Clinic. Petitioner never saw Dr. Sturgill. Eventually, on 8/20/13, Petitioner first presented to the SMG Schwab Surgery Clinic and saw Dr. Leonard Kranzler. The doctor noted Petitioner injured her back while lifting a patient at work. He noted she had pain in the mid back without radiation to the arms or legs. Examination revealed spasm in Petitioner's back. His impression was thoracic and lumbar pain. Dr. Kranzler recommended MRIs of her lumbar spine and her thoracic spine, as well as a course of physical therapy. Petitioner was instructed to follow-up in one month for a recheck after therapy.

Petitioner attended physical therapy at the SMG clinic and at ATI Physical Therapy, but it did not improve her condition. On 9/1/13, MRI of the lumbar spine showed desiccation and focal high signal of the L5-S1 nucleus pulposus consistent with annular fissure and small non-stenotic central disc bulge. On 9/24/13, Petitioner returned to Dr. Kranzler reporting that the therapy was not helpful. Dr. Kranzler reviewed the MRI of the lumbar spine and opined it showed an annular fissure and desiccation of the L5-S1 nucleus pulposus. Dr. Kranzler prescribed a back brace and recommended a Dermatomal Somato Sensory Evoked Potential (DSSEP) of the lumbar areas. She was removed from work. The doctor hand wrote a diagnosis of lumbar radiculopathy.

On 9/30/13, Petitioner underwent initial evaluation with ATI Physical Therapy as ordered by Dr. Kranzler. Px5. The primary diagnosis listed was "lumbar radiculopathy." She denied radiating pain or numbness but endorsed burning pain, mildly antalgic gait, lordosis, limited flexibility, muscle weakness and limitation of function. Upon discharge on 10/14/13, therapists noted that MRI showed Petitioner needed surgery.

On 10/1/13, Petitioner attended a Section 12 examination with Dr. Frank Phillips. Rx3. He reviewed the September 2013 lumbar spine MRI as showing only mild disc desiccation at L5-S1 and a tiny bulge. He found positive Waddell signs. Dr. Phillips diagnosed Petitioner with a lumbar sprain and opined that she did not suffer any structural damage to her spine or disc as a result of the accident. Dr. Phillips conceded that the diagnosed lumbar sprain would be related to Petitioner's work accident. He recommended that she continue physical therapy as prescribed by Dr. Kranzler. The doctor did not think the SSEP testing was necessary, noting that in his opinion, Petitioner did not have radicular complaints, nor did she have any neural compressive pathology. He also felt there were no studies validating such testing as a prelude to surgical intervention, which Petitioner had informed Dr. Phillips was the reason for the test.

On 10/5/13, DSSEP testing demonstrated at S1 a 1.0 delay on left and 1.3 delay on right. Px4. Dr. Kranzler advised Petitioner to discontinue physical therapy given the fact that she was a surgical candidate. Px5. On 10/19/13, Petitioner presented to Trinity Hospital on an emergency basis for low back pain radiating down to both legs. Px8. No specific event or trauma was noted but registration record noted 8/7/13 as a date. On 10/29/13, Petitioner returned to Dr. Kranzler, complaining of continued lower back pain radiating above the right groin area. Px3. She had been denied surgery by workers' comp. Given Petitioner's complaints coupled with the results of the MRI and the DSSEP, Dr. Kranzler recommended a hemilaminectomy and microdiskectomy at the L5-S1 level on the right. Px7:13.

On 10/16/13, Petitioner reported to the emergency room at Advocate Trinity Hospital for back pain. Px8. Petitioner reported that she just found out she had a disc that broke through muscle and tissue. She complained of lower back pain which radiated down into her legs. She was provided with pain medication and was instructed to follow up with her primary physician for further treatment and pain management. On 10/29/13, a handwritten note indicates that workman's comp denied the requested L5-S1 surgery. Px3. In October 2013, there is surveillance of a woman who is observed driving, shopping, walking, operating a vehicle. Rx5.

On 12/3/13, Petitioner returned to Dr. Kranzler. Px3. Petitioner reported continued severe pain, and Dr. Kranzler reiterated that his surgical recommendation was appropriate.

On 1/17/14, Petitioner underwent and Dr. Kranzler performed a lumbar hemilaminectomy and laminectomy, L5-S1 on the right with microsurgical technique and intraoperative neural monitoring. Px3, 6, 7:16. Dr. Kranzler testified that after the incision was made, the muscle on the right side was removed from the lamina of the L5-S1 level. An intra-operative DSSEP test noted improvement in conduction delays following surgery. Dr. Kranzler testified that bone was removed from the area of the involved nerve at which time DSSEP testing demonstrated acceptable readings. No ligaments were required to be removed at that time. On 1/25/14, Petitioner reported to the emergency room at Advocate Trinity Hospital due to bleeding from her surgical wound. Px8. Petitioner was diagnosed with a non-healing surgical wound and was advised to follow up with Dr. Kranzler.

On 3/6/14, Dr. Phillips issued a second report at Respondent's request. Rx3. Dr. Phillips reviewed the results of the DSSEP testing and the January 2014 operative report and again opined that the DSSEP testing was neither medically reasonable nor medically necessary for Petitioner. He reiterated that the 2013 MRI demonstrated no nerve compression. Dr. Phillips testified that the results of the DSSEP testing had no medical meaning and he was not sure what the purpose of the surgery would have been. Dr. Phillips opined that the surgery performed by Dr. Kranzler was not causally connected to the subject work accident.

Petitioner continued to follow-up with Dr. Kranzler post-operatively, complaining of pain. Px7. Dr. Kranzler last saw Petitioner on 4/1/14, at which point Petitioner continued to complain of severe back pain and he continued to restrict her from working.

In May 2014, Dr. Kranzler testified via evidence deposition. Px7. Kranzler testified that he is employed by Mount Sinai Hospital and he receives a check from Mount Sinai Hospital. He first saw Petitioner at Mount Sinai where she complained of back pain. By September 2013, he recommended an L5-S1 hemilaminectomy, which was denied. In October 2013, he ordered DSSEP testing. Dr. Kranzler testified that he ordered DSSEP testing as it is better suited as a sensory test in identifying if there is radiculopathy or pressure or injury to a nerve. Testing revealed a conduction delay at S1 on the right. He noted that during October 2013, Petitioner complained of low back pain with radiating to the right groin along with numbness and tingling down the legs to the toes. Eventually, in January 2014, Petitioner underwent and the doctor performed a L5-S1 hemilaminectomy and laminectomy, whereby removal of bone and ligament was done and during which time the DSSEP is performed again. By March and April 2014, Petitioner was reporting severe back pain. The doctor opined that if her injury occurred as she described and if she had no prior back problems, then the surgery he performed was related. Under cross examination, the doctor testified that spasm from L5-S1 pathology can occur high in the back. He believed that all the symptoms she presented with at initial exam were related to the L5-S1 level. He noted Petitioner underwent physical therapy (2 visits) and it did not help. He felt she failed conservative care. He felt she had symptoms of pain, including limitation of straight leg raising, spasm in the muscles and limitation in bending forward. He testified he reviewed the 2013 MRI images and agreed that she had no lumbar disc herniation, no stenosis but did have annular tear. Id. at 38. The doctor said the tissue from the torn annulus caused the bulge which caused the compression on the nerve. Dr. Kranzler stated that with a torn annulus, the process can progress from the back and develop into the leg. Following review of the MRI, the doctor agreed he did not conduct a new examination of Petitioner. He also admitted he in fact did not know whether surgery had been prescribed as of September 24, 2013. He further agreed that L5-S1 pathology normally does not lead to radiation above the right groin where Petitioner complained of. The doctor stated however that the complaints of pain and numbness in the little toe, abnormal DSSEP testing, abnormal MRI, along with the failure to improve now presented sufficient evidence of S1 nerve compression.

On 4/28/14, Petitioner sought a second opinion with Dr. Krzysztof Siemionow at the Illinois Spine and Scoliosis Center. Px9. Petitioner gave a history of her work accident, initial back surgery and worsening symptoms. His impression was low ack pain and right lower extremity radiculopathy. Although the doctor agreed with Dr. Phillips that Petitioner could have undergone more conservative care and that DSSEP is not the standard for establishing radiculopathy, he nevertheless opined that the reason Petitioner had surgery was because of the work-related injury. Dr. Siemionow recommended a new MRI of the lumbar spine, as well as a referral to a pain specialist for an epidural steroid injection which would serve both diagnostic and therapeutic purposes.

On 6/20/14, Petitioner followed up with Dr. Siemionow, who reviewed the films for the new lumbar MRI. His impression was an L5-S1 disc herniation and annular tear. He removed Petitioner from work and recommended ESI at L5-S1. On 6/24/14, Petitioner saw Dr. Sharma at Dr. Siemionow's referral for pain management. Px10. She underwent the ESI at L5-S1 which provided an approximate 30% improvement in her pain. Dr. Sharma read the MRI as in part showing degenerative disc disease contributing to bilateral neural narrowing and annular disruption at L5-S1. Assessment was lower back pain, arthropathy and post-laminectomy syndrome in the lumbar. She also underwent a lumbar intra-articular facet joint injection of the L3-4, L4-5 and L5-S1 joints which provided no relief.

On 7/28/14, Petitioner returned to Dr. Siemionow, noting temporary improvement from the epidural before return to baseline. Px9. Dr. Siemionow recommended a discogram at L5-S1 to confirm whether Petitioner was a surgical candidate.

On 8/5/14, Petitioner returned to Dr. Phillips for evaluation at Respondent's request. Rx3. The doctor reviewed updated medical records, including a June 2014 MRI, which he felt showed no real changes other than post-operative changes from the hemilaminotomy. He opined the January 2014 surgery performed by Dr. Kranzler was not related to the work accident as the surgery did not address any injury or pathology from the work accident. The doctor opined that Petitioner did not need any further medical treatment or work restrictions as it related to the lumbar sprain she suffered from the work accident.

On 8/19/14, Petitioner returned to the Pain and Spine Institute and underwent the proposed discogram. Px10. On 9/30/14, Petitioner returned to Dr. Siemionow Px11, 13. Given the failure of the injections to relieve her pain and the results of the discogram, Dr. Siemionow recommended proceeding with an anterior lumbar interbody fusion at the L5-S1 level. In September and October 2014, Petitioner followed up with Dr. Sharma for medication management.

On 11/2/14, Dr. Siemionow performed an anterior lumbar interbody fusion at L5-S1. Px11:56-60. In December 2014, Petitioner was re-evaluated by Dr. Phillips at the request of Respondent. He concluded he was unable to relate the two lumbar surgeries to her work-related lumbar sprain. Rx3.

In January 2015, Dr. Siemionow testified as to his treatment of Petitioner. Px13. He summarized his treatment to date and in pertinent part, opined based upon a reasonable degree of medical certainty that the initial surgery played a very large role in her condition of ill-being and his subsequent surgical intervention. Px13:22. He also testified that the mechanism of injury Petitioner described was a competent mechanism of injury capable of causing a low back disc injury. The doctor noted his agreement with Dr. Phillips as to the diagnosis. Under cross-examination, the doctor stated that he would expect Petitioner to have developed or shown low back or leg pain or symptoms by the time of her first visit with Dr. Kranzler on August 20th. He further testified that he was unable to opine within a reasonable degree of medical and surgical certainty whether Petitioner had lumbar radiculopathy before her January 2014 back surgery with Dr. Kranzler. The doctor testified that based on the MRI he reviewed, there was no evidence of any nerve compression before the January 2014 surgery. He agreed that a disc herniation can be iatrogenically induced and that disc herniation can worsen iatrogenically. The doctor stated that in his opinion, DSSEP testing is not the standard for establishing radiculopathy and he would have done an EMG prior to the type of surgery performed by Dr. Kranzler. Dr. Siemionow was unable to state whether the surgery performed by Dr. Kranzler was reasonable or necessary, whether the pathology he noted was caused by the work accident, whether the January 2014 surgery was necessary to relieve the effects of the work accident and he was unsure what caused the need for the fusion surgery he performed.

In early 2015, Petitioner testified she was forced to move to Louisiana with her daughter due to financial reasons.

In May 2015, Dr. Phillips testified on behalf of Respondent. Rx3. The doctor summarized all of his prior reports and opinions. Dr. Phillips testified that he could not offer any opinion as to whether the surgery performed by Dr. Kranzler was a causative or aggravating factor in Petitioner's condition of ill-being necessitating further treatment and surgery by Dr. Siemionow. However, Dr. Phillips testified that based upon his review of the discogram, the surgery performed by Dr. Siemionow was medically reasonable. He could not state whether the fusion surgery performed by Dr. Siemionow was to address or correct issues which arose out

of the initial surgery with Dr. Kranzler. Under cross examination, the doctor clarified that the disc injury referred to in his final report was in light of the discogram, which pre-dated the second surgery

On 6/2/15, Petitioner followed up with Dr. Siemionow. Px12. Her back pain had significantly improved, although she continued to experience occasional sharp pains and burning. X-rays showed a stable fusion. Petitioner was given a prescription for pain medication as well as a functional capacity evaluation. She was instructed to undergo the FCE and then follow-up as needed for a recheck.

On 6/3/15, Petitioner underwent the functional capacity evaluation at ATI Physical Therapy. Px14. The results were deemed valid and demonstrated Petitioner's functionality at the light physical demand level. Petitioner's position as a certified nursing assistant was noted to be medium demand position per the U.S. Department of Occupational Titles. Petitioner last saw Dr. Sharma in June 2015 for medication refill.

Petitioner subsequently relocated again from Louisiana to Indiana. Throughout 2016 and into 2017, Petitioner continued to receive treatment for her back pain at the Immanuel Family Health Center in East Chicago, Indiana. Px15. She receives pain medication to manage her ongoing pain.

Petitioner testified that to date, she continues to experience pain in her back. It hurts if she stands too long and hurts if she sits too long. She is often required to stop physical activity and sit down due to back pain. She does not lift heavy objects due to her condition. Prior to the subject work accident, Petitioner never experienced pain or problems of any kind related to her back and never received treatment of any kind related to her back.

After Petitioner completed the FCE, Petitioner submitted a formal demand for vocational rehabilitation to Respondent in July 2015. Petitioner secured employment at Wal-Mart in Merrillville, Indiana on 8/27/16, where she is employed as a cashier and greeter. Prior to securing employment with Wal-Mart, Petitioner attempted to find work within her restrictions and applied for jobs at other Wal-Marts and City-Train but did not get hired. Petitioner testified that all physicians she saw at the hospital wore jackets which said Mount Sinai in big letters.

Testimony of Robert Tarver

Respondent called Robert Tarver as a witness, who was the Executive Director of Risk and Insurance for Sinai Health System at the time of the subject incident. Tarver testified that the emergency room physicians at Mount Sinai Hospital are not employed by Respondent, but rather are employees of the Sinai Community Foundation. Tarver further testified that Dr. Kranzler is not an employee of Mount Sinai Hospital but is also an employee of the Sinai Community Foundation. Tarver testified that there is no legal relationship between Mount Sinai Hospital and the Sinai Community Foundation. Tarver testified that the Mount Sinai Hospital does not direct patient care and the hospital relies upon physicians of the Sinai Community Foundation to do that. Tarver testified that he authored the informed consent forms contained with assistance from a defense attorney years ago. Rx1.

Upon cross-examination, Tarver testified that the Sinai Health System as its listed is the sole corporate member of Mount Sinai Hospital. There is a legal relationship between the Sinai Health System and Mount Sinai Hospital. Tarver conceded that the informed consent forms signed by Petitioner indicate that Mount Sinai Hospital is a proud member of the Sinai Health System. The bills for Dr. Kranzler in giant bold letters on the top of the statement indicate that the bills are related to care from Sinai Health System.

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Testimony of Gina Koeing

Respondent also called Gina Koeing as a witness. Koeing testified that she formerly worked as a claims adjuster for CCMSI and she handled Petitioner's claim in the instant case. Koeing testified on cross-examination that in anticipation of her testimony, Respondent's counsel provided her with a questionnaire to review prior to hearing which contained instructed answers. When asked whether she recalled anything specifically that she was instructed by Respondent's counsel to say, she replied, "What I answered".

CORRECTED CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact as though fully set forth herein. Based upon a preponderance of the evidence, the Arbitrator finds that Petitioner's condition of ill-being is causally related to the work accident of 8/7/13.

To establish causation under the Act, a claimant must prove that some act or phase of her employment was a causative factor in her ensuing injury. *Land & Lakes Co. v. Indus. Comm'n*, 359 Ill. App. 3d 582, 592 (2d Dist. 2005). In situations involving the allegation of mistreatment of an injury by a claimant's medical provider, claimant's resulting condition has been held to be a natural consequence that flows from the original injury, and thus, arising out of the employment. *See, e.g., Huntoon v. Pritchard*, 371 Ill. 36 (1939); *Lincoln Park Coal & Brick Co. v. Indus. Comm'n*, 317 Ill. 302 (1925). In distinguishing whether the medical provider's treatment constitutes an independent, intervening cause versus a natural consequence that flows from the injury, the Supreme Court has held that the relevant inquiry is whether Petitioner independently chose to treat with the medical provider as opposed to following the treatment instructions of the Respondent. *Zick v Industrial Com.*, 93 Ill.2d 353, 362 (1982) When a claimant voluntarily submits to treatment by a physician of her choice and such treatment results in a disability unrelated to an injury sustained during employment, the employer will not be held liable. *Id.* at 362. Contrarily, when an employee submits to treatment at the request of the employer, the employer is liable for the consequences of said treatment to which the injured employee submits. *Id.* The Commission has held that *Zick* applies only where treatment results in the disability unrelated to an injury sustained during employment. *Hanson v. Francis Cadillac*, 90 WC 42731, 96 IIC 453, 1996 Ill. Wrk. Comp. LEXIS 15 (Apr. 24, 1996).

As an initial matter, the Arbitrator notes that parties dispute whether Petitioner suffered any pathology, disc herniation or annular tear at L5-S1 as a result of the work accident. Respondent maintains that because there was no pathology at that level, the basis for the treatment and surgery ultimately rendered by Dr. Kranzler was unnecessary that contributing to Petitioner requiring a fusion. In support thereof, Respondent relies on the opinions of Drs. Phillip and Siemionow for the proposition that the initial surgery Dr. Kranzler performed was not necessary due to the fact that no pathology existed at that level. When asked whether he had an opinion whether the surgery performed by Dr. Kranzler was causally related to the work accident, Dr. Phillips testified that he did not believe the surgery would address any injury or pathology that occurred in 2013. Dr. Phillips further stated that neither surgery was relatable to the work injury as he believed Petitioner sustained nothing more than a lumbar sprain/strain. Respondent also argues that Petitioner was not directed to Dr. Kranzler by itself or its representatives and that Dr. Kranzler otherwise has no direct relationship with Respondent such that Respondent would be liable for the surgery Dr. Kranzler performed and any related treatment thereto. In support, Respondent introduced the testimony of Robert Tarver.

Petitioner maintains, however, that as a result of her accident, she did in fact suffer disc herniation/bulge resulting in annular tear and disc herniation at L5-S1 for which she underwent surgery with Dr. Kranzler. Petitioner also argues that she undertook the surgery as recommended by Dr. Kranzler in an effort to get better and that she saw Dr. Kranzler after being directed there.

Having carefully reviewed and considered all medical opinions, medical records, testimonial evidence as well as other documentary evidence, the Arbitrator concludes that the preponderance of the evidence shows that Petitioner's current condition of ill-being ***is*** casually related to her work accident.

In addressing whether Petitioner was directed to Dr. Kranzler at Respondent's instruction, the Arbitrator finds that there is no evidence demonstrating Respondent directed or referred or instructed Petitioner to Dr. Kranzler for care. Petitioner presented no evidence that persuasively demonstrated that Petitioner was directed to emergency room treatment following her work accident by the Respondent or that Respondent undertook any role in eventually sending her to Dr. Kranzler for an initial evaluation. In addition, Dr. Kranzler's records and his testimony do not support such a theory. Respondent's witness, Mr. Tarver, explained that the doctors providing emergency room care and subsequent care are not employees and that the hospital does not direct patient care but rather leaves that up to the contracted doctors. Mr. Tarver also explained that there is otherwise no legal relationship between Respondent and Dr. Kranzler. The Arbitrator assigns greater weight to this testimony insofar as it tends to demonstrate that there is no evidence Respondent directed Petitioner to Dr. Kranzler for continued and ongoing managed care. Finally, Dr. Kranzler's medical record and testimony show that Respondent in fact denied the requested surgical intervention at L5-S1 as proposed by Dr. Kranzler, which the Arbitrator sees as further evidence that Respondent did not at any time control, direct or require Petitioner to undergo any modality or treatment with Dr. Kranzler.

Even in finding the above, the Arbitrator notes the issue is moot by the conclusions reached below, which further detail why Petitioner's condition of ill-being ***is*** casually related to her work accident.

In finding a causal relationship between Petitioner's current condition of ill-being and the work accident, the Arbitrator rejects Respondent's contention that Dr. Kranzler performed surgery based primarily on if not only on DSSEP testing. Dr. Phillips testified that DSSEP testing is not the gold standard for assessing radiculopathy but there is no evidence that Dr. Kranzler relied solely on this test in evaluating Petitioner for surgery. Rather, Dr. Kranzler persuasively and credibly explained that, in addition to the DSSEP testing, which was performed pre- and intra-operatively and confirmed S1 delay on the right greater than left, he relied upon the MRI findings, Petitioner's subjective complaints, objective testing and on the fact that she failed to improve with conservative care in prescribing surgical intervention. Thus, his recommendations for treatment and surgery were based on the totality of the information in front of him and not solely on one test. It appears that Dr. Phillips obtained the idea that the DSSEP testing was primarily relied on in determining whether Petitioner was a surgical candidate because that is what Dr. Phillips noted Petitioner told him at the time of the first Section 12 exam. Rx3. However, Dr. Kranzler's records or testimony do not state this. Moreover, neither the testimony of Dr. Phillips or Dr. Siemionow conclusively established that Dr. Kranzler's recommendation for surgery was based solely on a DSSEP testing.

The Arbitrator also rejects the contention that DSSEP testing as used in this case was invalid or not indicated. Dr. Phillips' opinion on the testing was as follows:

> *"I see no indication for the [sic] SSEP testing. Ms. Reed does not have radicular complaints, nor does she have any neural compressive pathology."*

The opinion suggests that such a test could be indicated or used in the context of a back injury where there is radicular complaints and/or compressive pathology. Here, the evidence shows that at least as of 9/24/13, before the DSSEP testing, Dr. Kranzler had already suspected radiculopathy and that Petitioner's surgery was already recommended and denied. Px3. Thus, while Dr. Phillips shared his ultimate disagreement with the testing's overall validity, he gave no further information as to why such a test is invalid. Interestingly, Dr. Siemionow's operative report mentioned use of the very test previously criticized by Dr. Phillips as having "no correlation with underlying pathology or clinical outcome," having noted in the operative report that potentials improved following graft placement compared to Petitioner's baseline obtained prior to the start of surgery. Rx3, Px2. Yet, Dr. Phillips testified that the fusion surgery was appropriate and otherwise necessary. Based on the foregoing, the Arbitrator rejects Respondent's argument that Petitioner had no pathology present at L5-S1 that was caused by the work accident. The Arbitrator adopts Dr. Kranzler's conclusion that Petitioner had L5-S1 pathology requiring treatment and the initial January 2014 surgery.

Further, Dr. Phillips gave no direct opinion on whether he believed Petitioner's current condition of ill-being was causally related to the work accident – he only gave an opinion whether surgery was necessary – an opinion that goes to reasonableness and/or necessity. Specifically, when asked whether the surgery performed by Dr. Kranzler was causally related to the work accident, Dr. Phillips testified that he did not believe the surgery would address any injury or pathology that occurred in 2013. Dr. Phillips further stated that neither surgery was relatable to the work injury as he believed Petitioner sustained nothing more than a lumbar sprain/strain. That opinion is also rejected based upon Dr. Kranzler's findings on MRI, DSSEP testing, clinical exam and on Petitioner's failure to improve with conservative care. Nor did he did offer any opinions as to whether Dr. Kranzler's surgery caused the need for Dr. Siemionow's surgery to be performed. Rx3:26. He also did not have an opinion whether Dr. Kranzler's surgery caused or further aggravated any condition of ill-being relative to the low back. *Id.* at 27. However, Dr. Phillips testified that based upon his review of the discogram, the surgery performed by Dr. Siemionow was medically reasonable. *Id.* at 32. In summary, the Arbitrator finds that Dr. Phillips' opinions do not directly or persuasively address causal connection or whether there was any intervening injury that took place either iatrogenically or otherwise.

In evaluating Dr. Siemionow's opinion on causation, Dr. Siemionow directly testified that Petitioner's first surgery with Dr. Kranzler was due to the work-related injury. Px13:48-49. He further testified that Petitioner's mechanism of injury was a competent cause for a low back injury and that although he thought the mechanism made sense, he was not impressed with the MRI. Id. at 24. While the doctor noted he did not find Petitioner's first MRI particularly impressive, he did note that he believed having the benefit of a discogram at that time would have been better. In the Arbitrator's view, this does not change the doctor's ultimate opinion on causation. Dr. Siemionow also testified that Petitioner's fusion was ultimately related to the first surgery, which was and is consistent with Petitioner's post laminectomy syndrome as diagnosed by Dr. Sharma. Therefore, the Arbitrator elects to adopt the causation opinions of Drs. Kranzler and Siemionow over those of Dr. Phillips as they are consistent with the mechanism of injury, the onset of symptoms and the objective totality of the medical evidence.

Based upon the foregoing, the record as a whole and the preponderance of the evidence, the Arbitrator finds and concludes that Petitioner's current condition of ill-being is causally connected to the work accident of 8/7/13.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the issue of causal connection, the Arbitrator finds that all claimed medical services provided to Petitioner were reasonable and necessary and further finds that Petitioner is entitled to payment of all related medical expenses.

Section 8(a) of the Illinois Workers' Compensation Act mandates that the Respondent shall provide and pay for all the necessary surgical services which are reasonably required to cure or relieve from the effects of the accidental injury. 820 ILCS 305/8(a). Here, the preponderance of the evidence established that Petitioner's work accident resulted in L5-S1 herniation and annular tear necessitating the reasonable medical treatment provided to her by Mount Sinai, its affiliates and Dr. Kranzler, who ultimately performed surgery. When Petitioner failed to improve, Dr. Sharma determined she was suffering from post-laminectomy syndrome and eventually post-surgical evaluations and testing determined she was a candidate for a fusion at L5-S1. Dr. Phillips agreed that such surgery was reasonable, although he ultimately disagreed as to its causal relationship to the work accident. thus, the evidence shows that such treatment was reasonably required to cure or relieve Petitioner from the effects of her accidental injuries.

Petitioner submitted outstanding bills as outlined in Px1 and Px16. Ax1. The providers listed include: Mount Sinai Hospital (ER), Dr. Leonard Kranzler, ATI Physical Therapy, Presence St. Joseph Hospital, Lakeshore Surgery Center, Western Touhy Anesthesia, Injured Workers Pharmacy (IWP), Pain and Spine Institute (Dr. Sharma), University of Illinois Hospital, Illinois Spine and Scoliosis Center (Dr. Siemionow), Metro Anesthesia Consultation, Advocate Trinity Hospital (ER) and the Ill. Dept. Healthcare Fam. Svcs. (Medicaid). The Arbitrator has reviewed these bills and finds that they correspond to treatment related to this claim. The Arbitrator further finds that the Ill. Dept. Healthcare Fam. Svcs. (Medicaid) issued payments to some of the very same providers listed as having potentially outstanding balances in Px1. Px16. The asserted lien is in the amount of $18,120.33. Px16. Respondent submitted its proposed fee schedule findings for which the Arbitrator takes judicial notice of, however, disagrees that the lien amount is subject to further reduction via fee schedule. Rx2

Based upon the preponderance of the evidence, the Arbitrator finds that Respondent shall pay Petitioner the reasonable and necessary medical services in the gross amount of **$183,260.44**, as provided in and subject to Sections 8(a) and 8.2 of the Act. Against this specific award, 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 further pay and reimburse the Illinois Department of Healthcare Family Services (Medicaid) in the amount of **$18,120.33**.

ISSUE (K) ***What temporary benefits are in dispute? TTD & Maintenance***

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues and having adopted the medical opinions of Drs. Kranzler and Siemionow, the Arbitrator finds that the medical records and evidence indicate that the last date Petitioner worked for Respondent was 8/7/13 and she was temporarily disabled from working with no accommodation offered by Respondent from 8/9/13 through the date of her FCE on 6/3/15. Following the FCE, Petitioner testified she began a self-directed job search but produced no records to that effect and could

only recall applying to a few jobs. (T.79). The Arbitrator finds Petitioner proved she was entitled to TTD from 8/8/13 through 6/3/15, the date of her FCE. The Arbitrator finds that Petitioner failed to prove she was entitled to maintenance after 6/3/15 and thus the Arbitrator declines to award maintenance.

Based upon foregoing and the preponderance of the evidence, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability benefits of **$292.32/week** for **95 weeks**, commencing **8/8/13** through **6/3/15**, as provided in Section 8(b) of the Act. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **8/8/13** through **6/3/15**, and shall pay the remainder of the award, if any, in weekly payments. Respondent shall be given a credit of **$6,305.76** for temporary total disability benefits that have been paid.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues and having adopted the medical opinions of Drs. Kranzler and Siemionow, the Arbitrator finds Petitioner was released with permanent light level restrictions pertaining to her back condition and continues to receive treatment to date, including prescription pain medication. Based on the medical record, the Arbitraotr finds Petitioner reached MMI 6/5/15.

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 CNA at the time of the accident and that she was not able to return to work based upon her valid FCE restrictions. However, she obtained employment at Wal-Mart presumably within the restrictions outlined in her FCE. The Arbitrator notes Petitioner's change in job and usual employment. Thus, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 43 years old at the time of the accident. Because of her age, Petitioner is likely to live with the effects of her injury and resultant disability longer than an older worker, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner did not testify that she suffered any impairment of her future earnings capacity. 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 She said she is forced to avoid lifting and take many breaks throughout her work. Additionally, Petitioner continues to struggle with many activities of daily living, such as standing or sitting for prolonged periods. However, the medical records do not entirely corroborate these statements but do note ongoing pain enough to require ongoing medication. Because of the foregoing, the Arbitrator therefore gives the greatest weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **25%** loss of use of woman as a whole pursuant to Section 8(d)(2) of the Act. Respondent shall pay Petitioner permanent partial disability benefits of **$263.08/week** for **125 weeks**,

because the injuries sustained caused the **25%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Signature of Arbitrator

8-15-2017
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

JOLANTA DABEK,

Petitioner,

vs. NO: 15 WC 39604

CARDINAL BUILDING MAINTENANCE, INC.,

19IWCC0088

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 6, 2017, is hereby affirmed and adopted.

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

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

DATED: FEB 7 - 2019

Joshua D. Luskin

L. Elizabeth Coppoletti

SE/
O: 1/16/19
49

DISSENTING OPINION

I must respectfully dissent. The Arbitrator found, and the majority affirms, that Petitioner suffered from an idiopathic fall on November 15, 2015. I would first distinguish between

Petitioner's fall and the *cause* of that fall. Petitioner's fall was not idiopathic. It was caused by a syncopal episode, which she suffered while cleaning a bathroom. The question then is whether the syncopal episode was idiopathic or, instead, if it was more likely than not related to her employment with Respondent.

Petitioner sustained multiple injuries (but primarily to the low back) on November 15, 2015, when she was cleaning a toilet and fell. Petitioner testified, "I don't know what happened. I woke up on the floor. I was hanging over the toilet bowl." *T.21.* Petitioner testified she did feel dizzy while she was cleaning the toilet in this particular ladies' room, which always had a sewer smell. *Id.* She testified that "sometimes before when I was coming in there, those chemicals and the sewer, they made me dizzy." *Id.* On cross-examination, Petitioner testified that she never passed out from the smell before but there were certain chemicals that she would have to turn her head while using because they were very intense. *T.34.* She also testified that twice before while cleaning that same bathroom, her husband who also worked for Respondent had to cover for her "because I have to leave because after a minute I had dizziness." *T.35-36.*

Petitioner testified about various factors that *could* have caused her to faint including the chemicals, lack of ventilation, possible moisture on floor, etc. However, on cross-examination, Petitioner admitted:

Q: And it's true, basically at the end of the day, you don't know why you fell?
A: I don't know. *T.42.*

Furthermore, none of these possible work-related causes were mentioned to Petitioner's treating physicians. At the emergency room, Petitioner was diagnosed with syncope and was admitted to the hospital. At her neurologic consultation on November 16, 2015, Dr. Sherman wrote that Petitioner's son stated that she "works excessively, and is always sleepy, may fall asleep at various times." However, Petitioner testified that she was not sleepy when she fell. *T.23.* Dr. Sherman noted that Petitioner had a history of hypertension and thyroid disease but he found "no clear focal neurologic deficits to explain this, and the most likely explanation may be vasovagal or neurocardiogenic syncope." He ordered a brain MRI and a cardiac workup but he also wrote:

> Furthermore, they do note that she is excessively sleepy which may be work-related because she does work excessively. That may need some further investigations also.

At her heart and vascular evaluation with Dr. Albert, it was noted that Petitioner had a "sudden syncopal episode without warning while at her job cleaning a bathroom." She denied any recent palpitations, dizziness or diaphoresis. Dr. Albert wrote, "She works long hours and often falls asleep while seated but never before while upright. No known heart disease. On Rx for hypertension." His assessment was "sudden syncope while upright and without warning. A cardiac etiology needs to be ruled out. Narcolepsy or seizure also possible."

A cardiology consultation note by Emily Lannon, PA-C, states:

> had a syncopal episode yesterday at work. She works 80 hours a week as a cleaner, including night shifts, and sleeps in 2-3 hour increments between jobs. She was in a bathroom cleaning when she woke up on the floor with wrist, knee and back pain. She denies associated chest pain, palpitations, dizziness or dyspnea.

> In the past, she has experienced some chest heaviness and shortness of breath on exertion, but that has been ongoing intermittently for years. She has no prior history of syncopal events or cardiac structural/conduction abnormalities.

Ms. Lannon diagnosed "questionable syncopal episode does not seem to be related to any cardiac issues." Dr. Farbman wrote that Petitioner's "syncope appears non-neurologic" and Dr. Herbstman wrote that her "[s]yncope may have been secondary to the patient falling asleep. Rhythm has been stable. Echo revealed normal LV systolic function and mild MR. Plan: OK to discharge from cardiac standpoint."

Based on the above medical records, there does not appear to be a clear "personal risk" cause of Petitioner's syncopal episode. She had no prior history of these episodes and there was no neurologic or cardiac etiology found. So, the question is whether Petitioner's other pre-existing health conditions, including hypertension and hypothyroidism, *alone* caused her syncope, or whether there was some work-related factor as well.

Petitioner testified that a week prior to her accident, she was moved to a "cover crew" and worked 80 hours that week. This is supported by her paycheck stub (Px7), which shows:

> Period: 11/8/15 – 11/21/15
> Pay date: 11/27/15
> 45.50 regular hours
> 35.25 overtime hours
> 80.75 total hours

I would point out that, since Petitioner's accident occurred on November 15, 2015, and she was admitted to the hospital that day and did not return to work until February 1, 2016, then those 80.75 hours must have been worked between November 8, 2015 and the time of her accident on November 15, 2015.

Respondent's Section 12 examiner, Dr. Kramer, initially opined in his May 17, 2016 report, that Petitioner's "pre-existing conditions include hypertension and hypothyroidism, and **they were not causal** for the alleged accident on 11/15/15." *Emphasis added.* He also wrote, "The initial diagnosis of the soft tissue injuries including lumbar sprain and temporary **aggravation of a pre-existing condition were caused by the fall due to her syncope and are related to the work incident.**" *Emphasis added.* However, after being asked by Respondent to write a supplemental report, he opined that Petitioner's syncopal episode could have occurred at any place or any time based on her prior medical history, which included chest heaviness, shortness of breath, hypertension, and hypothyroidism.

Dr. Kramer testified that P "had a syncopal episode where she lost consciousness. And whether her blood pressure dropped or whether her pulse dropped, I don't know." *Rx4 at 12.* He stated that anything could have caused it and:

> I mean, she has pre-existing hypertension. Her blood pressure could have fluctuated. She has a thyroid condition which can make the vasomotor system be a little irritable. So my opinion is that this was some cardiogenic event that caused her to faint and then she injured her back, but it could have happened anywhere which is in my notes as well. *Id.*

He testified that he did not believe any aspect of Petitioner's employment may have caused her to pass out. *Id. at 13.*

I agree that the Arbitrator properly found Dr. Kramer's amended causation opinions to be unpersuasive because the doctor had only "changed his [initial] causation opinion after he received a 2-page letter from the Adjuster that appears to be instructional." *Arb. Dec. at 11.* I believe the most significant testimony of Dr. Kramer was given on cross-examination when he testified:

Q: … What about bending over at the waist for an extended period of time, could you have a syncopal event from doing that?
A: Sure.
…
Q: And as you testified earlier, one of the doctors made a note that Ms. Dabek might have fallen asleep, but you don't think that happened, correct?
A: Not according to her history, no. *Rx4 at 25-26.*

Later, Dr. Kramer testified that individuals with hypertension and hypothyroidism are more susceptible to syncopal episodes (*Id. at 34)* and:

Q: So I guess what I'm just trying to ask is someone who works 80 hours a week with hypertension or hypothyroidism that part of their job duties is to clean floors by sweeping, mopping, scrubbing, or vacuuming is more susceptible to a syncopal episode than someone who doesn't have hypertension or hypothyroidism, correct?
A: Yes. *Id. at 37.*

Although Dr. Kramer also testified that "anybody with hypertension and hypothyroidism has an increased susceptibility to fainting no matter what they're doing," *Id.*, I do not find this persuasive as it relates to Petitioner's accident. She had no prior history of syncopal episodes. Petitioner testified that as part of the "cover crew," she would clean two to six buildings a day with 20 to 60 rooms in each one. *Id.* The bathrooms she cleaned ranged from single stall to ones having three to eight stalls. *T.15.* She testified that the toilet bowls had to be "really clean" so she would spend around three minutes cleaning each one by bending over to brush the inside, spraying the whole toilet bowl, seat, and underneath with cleaning chemicals, and cleaning everything with paper. *T.16-17.* Petitioner worked 80+ hours in the week prior to her accident. *T.12, Px7.*

Based on Dr. Kramer's testimony that bending at the waist for an extended period of time could cause a syncope event and his testimony that someone who works 80 hours a week with hypertension or hypothyroidism is more susceptible to a syncopal episode, I would find that Petitioner has proven it is more likely than not that these work factors (excessive hours and body position while cleaning the toilet) were contributing factors in her syncope and fall at work.

Although bending at the waist for short periods of time may be a risk faced by the general public, the number of times and duration of this activity required by Petitioner's job turned this into a distinctly work-related risk, or at the very least, a neutral risk which Petitioner was exposed to a greater degree both quantitatively and qualitatively. In addition, Petitioner's

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excessive work hours in the week prior to her accident was certainly a "work-related risk," which more likely than not was a contributing factor in her syncope.

Therefore, I would find Petitioner has proven she sustained a compensable accident, which arose out of and in the course of her employment, and she is entitled to benefits under the Act.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DABEK, JOLANTA
Employee/Petitioner

Case# **15WC039604**

CARDINAL BUILDING MAINTENANCE INC
Employer/Respondent

19IWCC0088

On 4/6/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.91% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5669 ALEKSY BELCHER
MATTHEW G GORSKI
350 N LASALLE ST SUITE 750
CHICAGO, IL 60654

1596 MEACHUM & STARCK
KYLE P CARLSON
225 W WASHINGTON ST SUITE 1400
CHICAGO, IL 60606

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DABEK, JOLANTA
Employee/Petitioner

v.

CARDINAL BUILDING MAINTENANCE, INC.
Employer/Respondent

Case # 15 WC 39604

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian T. Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **September 22, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
L. [ ] 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 **11/15/2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

ORDER

As the Arbitrator has found that Petitioner did not sustain an accident that arose out of and in the course of his employment by Respondent on 11/15/2015, he denies compensation. All other issues have been rendered 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

4-6-2017
Date

APR 6 - 2017

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOLANTA DABEK,	)	
	)	
v.	)	Case No. 15 WC 39604
	)	
CARDINAL BUILDING MAINTENANCE, INC.	)	

ARBITRATION DECISION

I. FINDINGS OF FACT

On November 11, 2015, Petitioner Jolanta Dabek was a 59-year-old, Polish-speaking, married woman with no dependent children under the age of 18. Tr. 9, AX 1. Petitioner was employed by Respondent Cardinal Building Maintenance, Inc. Tr. 9. Petitioner testified she began working as a Janitor in June 2011. *Id.* Petitioner testified that she worked 40-50 hours per week in this position, Respondent. Petitioner testified that her job duties included cleaning, vacuuming, mopping, collecting garbage, and dusting in medical buildings, office buildings, and banks. Tr. 9; Resp. Ex. 4, Dep. Ex. 3. Petitioner testified that on November 7, 2015, she took on a new position in Respondent's employ as part of the Janitor "Cover Crew." Tr. 10-11. This new position involved performing the same job duties as before, but in place of other employees who could not work for whatever reason. Tr. 11. She used the same or similar cleaning supplies, specifically cleaning chemicals, in both positions. Tr. 34. Petitioner testified she was required to clean 3-4 buildings as a Janitor and 2-6 buildings as a member of the Cover Crew. Tr. 12. The buildings varied in size. Tr. 12-13. Petitioner testified that she worked 80 hours in the week before the alleged November 11, 2015 accident. Tr. 12.

Respondent's Exhibit 3 indicates that each of the last 3 paychecks Petitioner received was for $846.00, which is for a 2-week pay period.

Petitioner testified that the chemicals she used to clean bathrooms emitted odors. Tr. 13-14. She testified that she would smell these chemicals 3-4 hours per day but that it would vary depending on the size and number of bathrooms she was cleaning. Tr. 14-15. Some bathrooms would take 10 minutes to clean, and some would take up to an hour. *Id.* Petitioner testified in detail regarding her routine for cleaning a bathroom. Tr. 16-17. She would first pour cleaning chemicals on the toilet bowl(s) and

then wipe down the sink(s) and mirror(s). *Id.* She then took a toilet brush and cleaned the inside of a toilet bowl. *Id.* Thereafter, she would spray the entire toilet with cleaning spray and wipe it down. *Id.* She testified that she spent 3 minutes at a time bent over when cleaning each toilet. *Id.*

Petitioner testified that on the alleged date of accident, November 15, 2015, she had cleaned one building in Northbrook with her husband, who was her long-time co-worker, and then traveled to the Dayton building. Tr. 19-20. Between buildings, they took their 30-minute lunch break. Tr. 40. Petitioner testified the accident occurred at about 5:00 a.m., which was 5 hours into her shift. Tr. 33. They took out the garbage, and then Petitioner cleaned two big bathrooms on the second floor and the small men's bathroom on the third floor without incident. Tr. 19-20. Then she began to clean the ladies' restroom on the first floor. *Id.* Petitioner testified the bathroom smelled like a sewer. *Id.* Petitioner specifically testified:

> *"... as usual I put some chemicals in the toilet bowl. I cleaned the sink and I cleaned the mirror, and then again brush. I bent over to start cleaning that. I sprayed the disinfection spray, the whole toilet bowl, and then I reached for the paper; and then I don't know what happened. I woke up on the floor. I was hanging over the toilet bowl."* Tr. 21.

She went on to testify:

> *"I think I hit my head on the wall, but the paper - - toilet paper kind of cushioned the hit. They were laying on the floor after that, so I must have hit this with my head. But I didn't have that much pain in my head."* Tr. 22.

Petitioner testified that she felt dizzy, which sometimes occurred from smelling *"those chemicals and the sewer."* Tr. 21. She testified there was no ventilation and that the floor in that bathroom was sometimes wet with condensation. Tr. 21-22. Significantly, Petitioner testified that she had used these same or similar cleaning chemicals since June of 2011, had cleaned this same ladies' restroom in the Dayton building *"a lot of times,"* and had never passed out or fallen before. Tr. 34-35. Petitioner testified that sometimes the smell in that particular ladies' room was very intense, and that twice before her husband had to cover for her because she had to leave after a minute due to dizziness. Tr. 35-36. Petitioner did not specifically recall sweating at the time of the accident, and she did not recall the room being especially warm. Tr. 40. This fall occurred 5 hours into a shift and after a 30-minute lunch break, *supra*. Petitioner testified that she did not know whether she had slipped and fallen on a

wet floor. Tr. 41. Petitioner adamantly and repeatedly testified that she was not tired or sleepy at the time she fell. Tr. 23-24, 38-40.

> *Q: And it's true, basically at the end of the day, you don't know why you fell?*
>
> *A: I don't know.* Tr. 42.

Petitioner testified that immediately after waking up, she had pain in her knee, wrist, and back. Tr. 22. She thought she hit her head, but she did not feel that much pain in her head. Tr. 22.

After reporting the incident, she treated at Northwest Community Hospital from November 15, 2015 – November 17, 2015. Tx. 23; Pet. Ex. 1.

Petitioner arrived at the Northwest Community Hospital Emergency Room on November 15, 2015 at 1508. The first recorded history was taken by Tracy C. Ziberna, PA-C. She wrote:

> "59 y/o F presents after a syncope episode. Pt states early this am she had a syncope in the bathroom. States pain to bilateral knees, lower back and right wrist. Denies CP or SOB. Denies HA or neck pain. States hx of HTN. MSE: tenderness to lower back." PX 1, p. 9.

At 1611, Glenn F. Suacillo, D.O., wrote, in pertinent part, the following:

> "Jolanta K. Dabek is a 59 y.o. female. Patient brought in by son who translates: states patient passed out in bathroom this morning … no chest pain … no shortness of breath … Chief Complaint · Fall · Back Pain … Patient is a 59 y.o. female presenting with syncope … " PX 1, p. 2.

On November 15, 2015, at 1700, Petitioner underwent, *inter alia*, a non-contrast CT scan of the head. The radiologist's impression is as follows: "No evidence of acute intracranial abnormality." PX 1, p. 15.

At 1813, Dr. Suacillo wrote: " …Due to syncopal episode, which is new, will place in observation for further evaluation …" PX 1, p. 8.

On November 16, 2015, at 1016, Nirali Parikh, M.D., assessed Petitioner. He wrote that the patient "was seen by neuro and cards and had an MRI of the brain, which

was normal." For HPI, he wrote: "59 F here after syncopal episode. Works as a house cleaner and was working night shift. Was in bathroom cleaning and next thing remembers is being on the floor." After reviewing the labs and diagnostic tests, and after examining Petitioner, Dr. Parikh and assessed her with the following:

1. Syncopal episode
   ? etiology
   Pt doesn't remember the whole episode

2. HTN
   Controlled

3. Hypothy
   Synthroid

4. Low back pain
   Unable to ambulate
   Check MRI LS spine Pet. Ex. 1, p. 16.

On November 16, 2015, at 1116, neurologist Sanford S. Sherman, M.D. examined. Pet. Ex. 1, p. 17. Petitioner's self-reported history to him was that "was apparently cleaning the bathroom when she passed out. She may have struck her wrist and flank, and complains of some mild back pain. She had no warning. She felt well afterwards . . . It is uncertain what happened at this point, but she was apparently down for just a short period of time and then recovered." *Id.* Dr. Sherman reviewed the diagnostic data, which included a CT of the brain as well as the blood work, and examined Petitioner. Dr. Sherman offered the following impression:

1. The patient with a history of syncopal episode episode. I find no clear, focal neurologic deficits to explain this, and the most likely explanation may be vasovagal or neurocardiogenic syncope. I am going to proceed with workup to get some x-rays of her spine because of her complaints of back pain. Will also obtain MRI scan of brain to make sure we are not missing an abnormality that might explain her syncope. I am also going to suggest that she get a cardiac workup.

2. Furthermore, they do note that she is excessively sleepy, which may be work-related because she does work excessively. That may need some further investigations (sic) also. Pet. Ex. 1, p. 18.

On November 16, 2015, at 1131, Brian H. Albert, M.D. and Emily Lennon, PA-C, of Northwest Heart and Vascular Specialists, assessed Petitioner. They recorded the following:

> "Subjective: Current symptoms: Had a sudden syncopal episode without warning while at her job cleaning a bathroom about 36 hours ago. She awoke with pain in her wrist, knee and back and slight confusion. She denies any recent palpitations, dizziness or diaphoresis. She works long hours and often falls asleep while seated but never before while upright. No known heart disease, on Rx for hypertension." Pet. Ex. 1, p. 119.

Dr. Albert and Ms. Lennon also took the following History of Present Illness:

"Jolanta K. Dabek is a 59 y.o. female who had a syncopal episode yesterday at work. She works 80 hours a week as a cleaner, including night shifts, and sleeps in 2-3 hour increments between jobs. She was in a bathroom cleaning when she woke up on the floor with wrist, knee and back pain. She denies associated chest pain, palpitations, dizziness or dyspnea. In the past she has experienced some chest heaviness and shortness of breath on exertion, but that has been ongoing intermittently for years. She has no prior history of syncopal events or cardiac structural/conduction abnormalities. Patient's cardiac risk factors are positive for: hypertension. Patient concerned about cost of diagnostic tests. History provided by patient through son as interpreter." Pet. Ex. 1, p. 20.

Dr. Albert and Emily Lennon noted that the neurologic exam was normal and the ECG indicated that Petitioner was in normal sinus rhythm. Pet. Ex. 1, p. 26.

Dr. Albert and Emily Lennon wrote that this questionable syncopal episode does not seem to be related to any cardiac issues. It was suggested that that they consider an Echo +/- event monitor on discharge to evaluate rhythm disturbances which could have precipitated syncope. Pet. Ex. 1, p. 23.

On November 16, 2015, at 1419, Petitioner underwent an echocardiogram. Dr. Albert's impression is as follows:

1. Left ventricular ejection fraction, by visual estimation, is 60-65%.
2. Mild mitral regurgitation.
3. Otherwise normal echocardiographic study. Pet. Ex. 1, p. 53.

On November 16, 2015, at 2028, standard, non-contrast MR images of the brain were taken. The radiologist's findings are as follows:

> "There are minimal periventricular white matter abnormalities, these most typical for very early chronic microvascular ischemic disease this patient age. (sic) However, other white matter processes are not entirely excluded. There are no areas of abnormal diffusion signal to suggest a recent ischemic event. No signal changes to indicate acute hemorrhage are identified. No mass lesions, mass-effect or midline shift are seen. There is no hydrocephalus or focal abnormal extra-axial fluid collection. The craniocervical junction appears unremarkable. Normal signal voids are seen within the arteries at the skull base, the temporal bones and the imaged paranasal sinuses."

The radiologist's impression: "Suspected very early chronic microvascular ischemic changes. No definite acute abnormality." Pet. Ex. 1, pp. 54-55.

On November 17, 2015, at 0905, Burton L. Herbstman, M.D., of Northwest Heart and Vascular Specialists, examined Petitioner. His assessment was syncope and collapse. He identified her active problems as hypertension and hypothyroidism. Dr. Herbstman opined that syncope may have been secondary to the patient falling asleep. He found that Petitioner's rhythm has been stable and that the echo revealed normal LV systolic function and mild MR. Dr. Herbstman gave the OK to discharge from a cardiac standpoint. He recommended an office follow up, and consideration of outpatient monitoring if there are further symptoms. Pet. Ex. 1, pp. 28-29.

At Respondent's request, on April 28, 2016, Petitioner underwent a Section 12 examination with Jeffrey Kramer, M.D. Dr. Kramer is a neurologist. He authored an initial report dated May 17, 2016 and a supplemental report. Resp. Ex. 4, Dep. Ex. 5; Resp. Ex. 4, Dep. Ex. 6. He was deposed on August 23, 2016, and his evidence deposition transcript is part of the record. Resp. Ex. 4.

Dr. Kramer recorded the following: "She states she was cleaning the bathroom in a facility, pulled out some paper to wipe up an object and when turning, suddenly passed out. She briefly lost consciousness but was awake within seconds. She got up on her own." Dr. Kramer reviewed the medical records and noted Dr. Sherman's diagnosis of vasovagal or neurocardiogenic syncope. Resp. Ex. 4, Dep. Ex. 5. Dr.

Kramer opined in his first report that the syncopal episode caused the fall and resulted in multiple traumatic injuries, most significantly a lumbar strain. Resp. Ex. 4, Dep. Ex. 5. However, in his first report, Dr. Kramer answered questions 3 and 5 as follows:

Q: Given the claimant has pre-existing conditions, were they the cause for the alleged work accident which occurred on or about 11/15/2015?

A: The examinee's pre-existing conditions include hypertension and hypothyroidism, and they were not causal for the alleged accident on November 15, 2015.

*****

Q: Is the current diagnosis causally related to the alleged workplace accident on or about 11/15/2015?

A: The initial diagnosis of the soft tissue injuries including lumbar sprain and temporary aggravation of a pre-existing condition were caused by the fall due to her syncope and are related to the work incident. She has had resolution of all her symptoms.

Respondent requested an addendum from Dr. Kramer. The Adjuster sent Dr. Kramer a 2-page letter in which she edited the interpretations of the imaging studies, noted Petitioner's past history and put forth Dr. Herbstman's opinion.

In his addendum report dated June 16, 2016, Dr. Kramer opined: "... the syncopal episode occurred at work, but could have occurred at any place or any time based on her prior medical history, which included chest heaviness, shortness of breath, hypertension, and hypothyroidism. The neurologic consultation in Northwest Community documented neurocardiogenic or vasovagal syncope, both of which are not work related." *Id.* He went on to reiterate: "It just so happened that it did occur at work." *Id.*

Upon deposing Dr. Kramer, he testified that Petitioner "had an episode of syncope, vasovagal syncope or cardiogenic syncope, and that she had an aggravation of an underlying degenerative condition of her back because of the fall when she passed out; and that after therapy, she got better." Resp. Ex. 4, p. 11-12. *"Whether her blood pressure dropped or whether her pulse dropped, I don't know. Those are the most common causes for that to happen. And based upon the fact that she briefly lost consciousness but was awake quite quickly, that suggests that there was some lack of*

blood flow or oxygen to the back of the brain which made her collapse." Id. at 12. He was asked: "*Q: Do you have an opinion as to what could have caused that lack of oxygen or blood flow in her case specifically. A: Anything. I mean, she has pre-existing hypertension. Her blood pressure could have fluctuated. She has a thyroid condition which can make the vasomotor system be a little irritable. So my opinion is that this was some cardiogenic event that caused her to faint and then she injured her back, but it could have happened anywhere which is in my notes as well." Id.* He confirmed she injured her back *"at work"* after passing out but also that no aspect of her employment caused her to pass out. *Id.* at 13.

Petitioner questioned Dr. Kramer about the inconsistency of the conclusions in his 2 reports. With regard to his answer to question 3 in the first report, Dr. Kramer explained that he did not think hypertension and the thyroid disease had anything to do with her back pain. However, with regard to her fainting, specifically, he opined that hypertension and hypothyroidism do play a role. With regard to his answer to question 5 in the first report, Dr. Kramer explained that the lumbar sprain and the temporary aggravation of the pre-existing condition were related to the work incident. Resp. Ex. 4, pp. 29-30.

Dr. Kramer testified:

"As I've explained, No. 5 says the initial diagnosis of the soft tissue injuries including lumbar sprain and temporary aggravation of a pre-existing condition were caused by a fall due to her syncope, and those two conditions, the lumbar sprain with a temporary aggravation, were related to the work incident." Resp. Ex. 4, p. 39.

Dr. Kramer testified that patients with hypertension and hypothyroidism who work 80 hours/week are more prone to syncopal episodes than patients who do not have hypertension and hypothyroidism who do the same job. Resp. Ex. 4, pp. 36-37.

Dr. Kramer testified that for heat exposure to cause syncope, a person would usually have to be in temperatures above 90 degrees; it's usually related to dehydration. *Id.* at 44. Petitioner testified there was no ventilation and that the floor in that bathroom was sometimes wet with condensation. Petitioner did not specifically recall sweating at the time of the accident, and she did not recall the room being especially warm.

Dr. Kramer testified syncope could be caused by extended periods of standing, but that would require the individual to maintain a specific position for an extended period. *Id.* at 45. Petitioner was bending, standing, and walking throughout the course of her shift on the date of the alleged accident. *supra.*

The Arbitrator notes that in Dr. Sokolowski's December 8, 2015 chart note, he wrote:

"Ms. Dabek reports that three weeks prior, while mopping at work, she developed some back pain as well. She notified her supervisor at that time, who advised her to take several Ibuprofen and continue working. That work-related back pain began to improve thereafter, but it had not completely abated by the time of her loss of consciousness and subsequent fall. Since the fall, Ms. Dabek reports her prior work-related back pain has been significantly more symptomatic." Pet. Ex. 3.

The History section of the Vital Rehabilitation Physical Therapy Progress Report of January 18, 2016 indicates, in pertinent part, the following:

"ONSET: PATIENT STARTED TO HAVE PAIN IN LOW BACK WHILE AT WORK A FEW MONTHS AGO. PATIENT EXPERIENCED EXACERBATION OF SYMPTOMS AFTER FALL ON NOVEMBER 15th." Pet. Ex. 3.

The records of Northwest Community Hospital do not reflect that Petitioner had complaints of back pain prior to November 15, 2015. PX.1.

The Section 12 report and the Addendum, both authored by Dr. Kramer, do not reflect that Petitioner had complaints of back pain prior to November 15, 2015. RX 4.

I. CONCLUSIONS OF LAW

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

There are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. Employment risks include the obvious kinds of industrial injuries and occupational diseases and are universally compensated. Personal risks include non-occupational diseases, injuries caused by personal infirmities such as a trick knee and injuries caused by personal enemies and are generally non-compensable. Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombing and hurricanes. Compensation for neutral risks depends upon whether claimant was exposed to a risk of injury to an extent greater than that to which the general public is exposed. Illinois Institute of Technology Research Institute v. Indus. Comm'n, 731 N.E.2d 795, 247 Ill. Dec. 22 (1st Dist. 2000)

The question in the case at bar is:

Did Petitioner experience a fall due to (1) risks distinctly associated with the employment (2) risks personal to her (idiopathic fall), or (3) neutral risk (unexplained fall)?

The Arbitrator relies heavily upon the records of Northwest Community Hospital, where Petitioner treated as an in-patient for 3 days, from November 15-17, 2015. PX 1. The hospital staff and physicians thoroughly worked up Petitioner. Petitioner gave many histories and underwent many examinations and diagnostic tests. Within these records, there is no mention of any suspected chemical exposure, sewage smell, dizziness, poor ventilation, exertion, or heat/dehydration as a cause of her syncope. PX.1. Petitioner testified that she took a 30-minute lunch break before she started cleaning the Dayton building.

Petitioner stated under oath that she does not know what caused her to faint.

No one witnessed her faint. Petitioner never testified as to any specific cause for her fainting spell. She identified many factors that could have led to her syncopal episode. She did testify that she was dizzy prior to the fall. There was no testimony that the smell of chemicals, sewage, hot temperature, stale air, wet floor, or increased workload, whether alone or in combination, overcame her. There was nothing unique or new about cleaning the ladies' room in the Dayton building on that specific day that distinguished it from all the times she had cleaned that bathroom since June 2011 without experiencing any episode of syncope.

In First Cash Fin. Services v. Indus. Comm'n, 367 Ill. App. 3d 102, 853 N.E.2d 799 (1st Dist. 2006), the claimant slipped and fell in a bathroom at work but failed to prove the cause of her injury. The Court held that merely because the bathroom floor could have been dirty, that was not enough to draw an inference in the claimant's favor without more evidence. The Court explained that "circumstantial evidence can only support an inference which is reasonable and probable, not merely possible. [Citations omitted]. Where the evidence allows for the inference of the nonexistence of a fact to be just as probable as its existence, the conclusion that the fact exists is a matter of speculation, surmise, and conjecture, and the inference cannot reasonably be drawn." *Id.* at 106. "In this case, the claimant did not present any direct evidence explaining the cause of her fall. She testified that she did not know why she fell and that no one witnessed her fall."

Similarly, in Baldwin v. Illinois Workers' Comp. Comm'n, 409 Ill. App. 3d 472, 479, 949 N.E.2d 1151, 1157 (4th Dist. 2011), the claimant failed to prove her employer was liable for an unexplained slip and fall while ascending a stairwell. "The claimant in

this case did not present any direct evidence explaining the cause of her fall. She testified that she did not know why she fell and that no one witnessed her fall. As noted earlier, the notion that moisture 'might' have built up on her shoes from walking through a freezer is pure conjecture."

The Arbitrator notes that the ECG, echocardiogram, labs, CT of the head and MRI of the brain were negative for more serious problems. Prior to November 15, 2015, Petitioner had not experienced any episodes of syncope.

The Arbitrator finds that the opinions of Dr. Kramer are not persuasive, given that he changed his causation opinion after he received a 2-page letter from the Adjuster that appears to be instructional.

Dr. Parikh noted that Petitioner's hypertension is controlled, and that she takes Synthroid for hypothyroidism. None of the treating physicians at Northwest Community Hospital attributed Petitioner's syncopal episode to her hypertension or hypothyroidism.

Petitioner testified that on November 7, 2015, she chose to work additional hours as a member of the Cover Crew. Accordingly, she testified, she was working additional hours on November 15, 2011, and worked 80 hours in the week before the alleged accident. Yet, RX 3 indicates no change in pay since November 7, 2015.

Petitioner told Dr. Albert, a cardiologist, and Emily Lennon, PA-C, that she works long hours and often falls asleep while seated, but has never done so while upright. She told them that she gets 2-3 hours of sleep between shifts. When he examined Petitioner, Dr. Sherman, a neurologist, considered the possibility that she fell asleep before she fell and thought that further investigation may be needed. Dr. Herbstman, a cardiologist, offered the last opinion from a physician before Petitioner's discharge from Northwest Community Hospital. He opined that the syncope may have been secondary to the patient falling asleep. Yet, Petitioner adamantly denied that she had fallen asleep just before her November 15, 2015 fall.

Dr. Sherman opined that the most likely explanation may be vasovagal or neurocardiogenic syncope.

Based on the foregoing, the Arbitrator finds that Petitioner's November 15, 2015 fall was an idiopathic fall and, as such, is attributable to a risk personal to her and therefore is not an accidental injury.

Larson discusses a well-established rule that injuries resulting from a non-occupational cause, such as an idiopathic fainting spell, are compensable "if the employment places the employee in a position increasing the dangerous effect *** such as on a height, near machinery or sharp corners, or in a moving vehicle." Larson's Workers' Compensation Law, §9.01. Illinois courts have long adhered to this general rule. Please see Ervin v. Indus. Comm'n, 364 Ill. 56 (1936) and Prince v. Indus. Comm'n, 15 Ill.2d 607 (1959).

However, in the case at bar, Petitioner was merely bent over a toilet at the time of her spell and thus was not placed in a position that would increase the dangerous effect of the fall.

Compensation is hereby denied. All other issues have been rendered moot.

Brian T. Cronin, Arbitrator

4-6-17
Date

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Noorjehan Sajan ,

Petitioner,

vs.

NO: 15 WC 20569
19IWCC0089

The Pampered Chef, Ltd.,

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 temporary total disability, and being advised of the facts and law, affirms the Decision of the Arbitrator with changes 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 Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission corrects a clerical error found at p.3 of the "Attachment to Arbitration Decision 19(b)" to show that Petitioner is entitled to temporary total disability from 5/23/15 through 10/6/15, for a period of 19-4/7 weeks. This period was incorrectly noted as commencing on 5/27/15. The Commission notes that the period was correctly set forth in the "Order" section found on p.2 of the form decision.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed 12/22/17, with corrections, is hereby affirmed and adopted.

19IWCC0089

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 Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury pursuant to §8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers for which Respondent is receiving credit under this order.

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 $8,000.00. 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 8 - 2019
o: 12/11/18
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

SAJAN, NOORJEHAN
Employee/Petitioner

Case# **15WC020569**

THE PAMPERED CHEF LTD
Employer/Respondent

19IWCC0089

On 12/22/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
TEN N DEARBORN ST
CHICAGO, IL 60602

2097 GRANT FANNING & OLSEN
DANIEL SWANSON
300 S RIVERSIDE PLZ SUITE 2050
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF DU PAGE)

☐ 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)

19IWCC0089

Noorjehan Sajan.
Employee/Petitioner

v.

The Pampered Chef, Ltd.
Employer/Respondent

Case # 15 WC 20569

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **December 5, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 2, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$31,075.20**; the average weekly wage was **$597.60**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$28,799.63** for medical expenses paid through October 8, 2015, for a total credit of **$28,799.63**.

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

ORDER

Because the Petitioner failed to prove that her current condition of ill-being is causally related to the injury after the October 6, 2015 IME date of Dr. Lewis, no benefits are owed after that date.

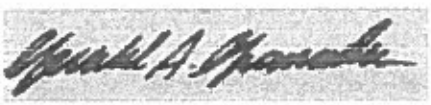
Respondent shall pay Petitioner temporary total disability benefits of $398.40/week for 19-4/7 weeks, commencing 5/23/15 through 10/6/15, as provided in Section 8(b) of the Act.

Respondent shall pay any related, reasonable and necessary medical services through October 6, 2015, as provided in Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule. Respondent shall receive a credit for any medical expenses it has already paid. Any medical expenses beyond October 6, 2015 are denied, including Petitioner's request for 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

12/21/17
Date

FINDINGS OF FACT

This case involves a Petitioner alleging injuries sustained while working for the Respondent on March 2, 2015. Respondent disputes Petitioner's claims and the issues in dispute are: 1) causation, 2) medical expenses, 3) prospective care, and 4) TTD. Petitioner testified via an Urdu translator.

The Petitioner was 57 years old and working as a packer or floor worker for the Respondent on March 2, 2015. On that day, she was carrying an empty pallet with a co-worker, who let go of her end, causing Petitioner to jerk her entire body. Petitioner claimed injuries to her neck, both shoulders, left and right knee, both hands, both elbows, low back, neck, head and feet as a result of this incident with the empty pallet. She testified that she did not fall as a result of the injury but "felt something flowing into her." The Petitioner testified that her whole body was severely injured - from her head to her feet.

Petitioner first sought treatment two and a half months later after the incident on May 15, 2015 at Alexian Brothers Medical Group. She was placed on modified duty of 5 pounds lifting, carrying, pushing and pulling. Petitioner was referred to Dr. O'Keefe at Marian Orthopedic & Rehabilitation. She underwent an EMG on June 29, 2015, which demonstrated mild irritability suggestive of mild bilateral L5-S1 nerve irritation. She underwent an MRI on July 24, 2015, which demonstrated multilevel spondylotic changes with disc bulging and hypertrophy at C3, C4-5, C5-6 and C6-7. On August 11, 2015, Petitioner was referred by Dr. O'Keefe to Dr. Osama Abdellatif Hassan at Pro Clinics. Dr. Osama Abdellatif administered various cervical and lumbar injections and took the Petitioner off work. Petitioner testified that the multiple injections to multiple body parts provided minimal temporary relief. On January 5, 2016, Dr. Osama Abdellatif Hassan recommended a Functional Capacity Evaluation and referred the Petitioner for a surgical spine consult to Dr. Salehi. Dr. Salehi recommended an L4 to S1 spine fusion and decompression on his visit or January 8, 2016. Dr. Salehi did not review any medical records but relied on the Petitioner's history in concluding that Petitioner required a multilevel spine fusion and decompression. Dr. Salehi diagnosed spondylolisthesis, lumbar spondylosis, cervical spondylosis and cervical degenerative disc disease. Based upon the Petitioner's subjective complaints, he indicated that the pre-existing disc disease and spondylolisthesis at L4-5 and L5-S1 were rendered symptomatic by the work injury of March 2, 2015. Petitioner underwent a Functional Capacity Evaluation at Central Dupage Physical Medicine on January 22, 2016 that indicated Petitioner could return to work as a floor worker and assume her former position with a maximum capacity lifting of 10 pounds. Dr. Osama Abdellatif Hassan discharged the Petitioner from his care on a PRN basis on April 11, 2016 and took her off work while awaiting surgical approval.

Petitioner testified that she saw Dr. Michael Lewis for an Independent Medical Evaluation on October 6, 2015 related to her knees, lumbar spine and cervical spine. Dr. Atluri preferred an Independent Medical Evaluation on her hands, elbows, shoulders on October 8, 2016.

Petitioner testified on cross-examination she did not fall down as a result of the accident. She admitted that she did not seek any medical treatment until May 15, 2015, two weeks before her employment was to be terminated as part of the Respondent's economic layoff on May 27, 2015. Petitioner came to the hearing with both a wheelchair and a walker. She admitted that no doctor prescribed either the wheelchair or a walker for her condition.

Dr. Atluri diagnosed right upper extremity pain with numbness and tingling and noted that Ms. Sajan's dramatic right upper extremity complaints including her right shoulder and right wrist are not

substantiated by any objective findings. In his IME report October 9, 2015, Dr. Atluri opined that Petitioner was engaged in symptom magnification in that Petitioner was clearly exaggerating her level of dysfunction. Dr. Atluri noted that "there were gross inconsistencies on her exam and that she demonstrates substantially better function when she did not realize she is being observed as opposed to direct examination. The findings document and the notes from Dr. O'Keefe are substantially better than those she demonstrated at her evaluation." Dr. Atluri found no objective findings indicative of any aggravation of her pre-existing right shoulder condition. Dr. Atluri made no findings at the time of his examination indicative of a need for any specific restrictions with regards to her upper extremity. Furthermore, Dr. Atluri further found that there was no occupational condition related to the incident from March 2, 2015 and there was no permanent partial disability involving the upper extremities attributable to the incident of March 2, 2015. (Respondent's Exhibit No. 3, Dr. Atluri IME Report)

Dr. Sean Salehi, testified via evidence deposition on May 23, 2007. He is Board Certified in neurosurgery and has been practicing in the State of Illinois since 2002. Dr. Salehi first saw the Petitioner on January 8, 2016 on a referral from pain doctor, Dr. Osama Abdellatif Hassan. Dr. Salehi testified that he did not review any prior medical records but relied on the history given to him by the Petitioner. He made a diagnosis of spondylolisthesis, lumbar spondylolysis, cervical spondylosis and cervical degenerative disc disease. Dr. Salehi testified that Petitioner's mechanical back pain is the result of disc disease and spondylolisthesis at L4-5 and L5-S1. Dr. Salehi testified that Petitioner's pre-existing arthritic condition became symptomatic as a result of the work injury on March 2, 2015. He opined that given that she failed conservative management, she would be a candidate for L4-S1 lumbar fusion. Dr. Salehi admitted that he did not review any prior medical records from the past 10 months of treatment and relied on Petitioner's personal history.

Dr. Michael Lewis testified via evidence deposition on July 17, 2017. He is Board Certified by the American Board of Orthopedic Surgery and the American Board of Independent Medical Examiners. He examined the Petitioner on October 6, 2015. His examination revealed an essentially normal cervical spine, lumbar spine and upper and lower extremities. Dr. Lewis reviewed an MRI of her cervical and lumbar spine. Dr. Lewis opined that he detected "non-organic findings that did not fit how the body functions." Specifically, Dr. Lewis gave the example if there was pain with light touch to the posterior cervical spine and to the lumbar spine, which would normally not cause pain. (Respondent's Exhibit No. 1, Deposition of Dr. Michael Lewis, pg. 8) Dr. Lewis' diagnostic conclusion was that he found no objective evidence of orthopedic pathology at the time of his examination related to her cervical spine, lumbar spine or right or left knee. Based on his finding of no objective evidence of orthopedic pathology, he felt there was no need for additional medical treatment. Dr. Lewis further opined that based on his review of the medical records and giving the Petitioner the benefit of the doubt, he would say that the treatment received prior to the examination on October 6, 2015 was reasonable. However, he did not see any need for any additional treatment, as there was no orthopedic pathology. Dr. Lewis returned the Petitioner back to unrestricted work. Her continued multiple subjective complaints were not confirmed by his examination and no physical restrictions were required for the Petitioner to return back to work. Based on Dr. Lewis' finding of no objective evidence of orthopedic pathology, he opined that Petitioner had reached maximum medical improvement at the time of his October 6, 2015 examination.

Moreover, Dr. Lewis performed an AMA impairment rating and determined based on the totality of medical evidence that Petitioner had a net impairment of 1% total body impairment related to the cervical spine and regarding the lumbar spine. Dr. Lewis determined that the impairment for the right and left knee was 0%. Dr. Lewis calculated his impairment ratings for the Petitioner based on the AMA Guides

to the Evaluation of Permanent Impairment, Sixth Edition for cervical spine regional grid, lumbar spine regional grid and knee regional grid. (Respondent's Exhibit No. 2, Dr. Lewis IME Report)

Petitioner testified that she wants the surgery recommended by Dr. Salehi because she wants to feel better. She also testified that she has been receiving social security disability for approximately two years.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has failed to meet her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony, the expert opinions and the medical evidence. Specifically, the Arbitrator finds persuasive the opinions of Dr. Atluri and Dr. Lewis on this issue. The Arbitrator notes that the evidence as a whole casts doubt on the Petitioner's credibility. Both Dr. Atluri and Dr. Lewis noted Petitioner's complaints were not consistent with her objective findings. Dr. Atluri went as far as to say Petitioner was engaged in symptom magnification through the exaggeration of her dysfunction and described her as a malingerer. Both doctors agreed that Petitioner could return to work full duty and did not require any further medical care. On the other hand, Dr. Salehi gave a favorable opinion regarding the causation of Petitioner's condition and is recommending surgery. However, Dr. Salehi's opinions are based primarily on Petitioner's personal history, and not from a review of Petitioner's medical records. As such, the Arbitrator gives more weight to the opinions of Dr. Atluri and Dr. Lewis. Furthermore, the Arbitrator notes the FCE results that show Petitioner could have returned to her previous job.

Petitioner's presentation at trial appeared consistent with the observations of Dr. Atluri and Dr. Lewis. She came to the hearing with both a wheelchair and a walker – both of which were not prescribed by any doctor. The Petitioner testified that Dr. Osama Abdellatif Hassan prescribed a cane; however, the medical records do not corroborate her claim that any cane was prescribed. Petitioner's description of her accident also appeared to be exaggerated as she described lifting an empty pallet with a co-worker, who let go of the pallet. After the co-worker let go of the empty pallet, Petitioner did not fall, but felt a jerking sensation that lead to her feeling something "flowing into her" before she experienced excruciating pain from her head down to her feet. She testified that she still feels the pain to this day, despite the normal objective findings noted by Dr. Atluri and Dr. Lewis. The Arbitrator also finds it telling that Petitioner did not seek medical treatment following the March 2, 2015 incident until over two months later in May, 2015 – around the time Petitioner and a number of her co-workers were to be laid off. These facts all make Petitioner's testimony less than credible.

Based on the above, the Arbitrator concludes that the Petitioner's current condition of ill-being is not causally related to her March 2, 2015 accident. Accordingly, all benefits beyond the date of Dr. Lewis IME on October 6, 2015 are denied.

2. Based on the findings above, the Arbitrator further finds the Petitioner was temporarily totally disabled from May 27, 2015 - the date of her lay-off while she had restrictions - to October 6, 2015 – the date of Dr. Lewis' IME placing Petitioner at MMI. Accordingly, Respondent shall pay Petitioner temporary total disability benefits of $398.40/week for 19-4/7 weeks, commencing 5/23/15 through 10/6/15, as provided in Section 8(b) of the Act.

3. Consistent with the Arbitrator's conclusions regarding the issue of causation, the Petitioner's medical treatment through October 6, 2015 has been reasonable and necessary per Dr. Lewis and the Respondent shall pay any unpaid related medical expenses through that date, subject to the Fee Schedule. Respondent shall receive a credit for any related medical expenses it has already paid. Any medical expenses beyond October 6, 2015 are denied, including the Petitioner's request for prospective medical care.

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

ROSA VALENCIA,

Petitioner,

vs.

NO: 15 WC 37427

SLOAN VALVE CO.,

19IWCC0090

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, 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 18, 2018, is hereby affirmed and adopted.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $42,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 8 - 2019

Joshua D. Luskin

19IWCC0090

SE/
O: 1/16/19
49

Deborah L. Simpson

DISSENTING OPINION

I would increase Petitioner's permanent partial disability award to 45% of the right leg. Under the five factors listed in §8.1b of the Act, I would place more weight on the "evidence of disability corroborated by the treating records" and Petitioner's "occupation."

Dr. Lack's operative report, dated November 6, 2015, shows a diagnosis of right lateral tibial plateau fracture. The surgical procedure was an Open Reduction Internal Fixation (O.R.I.F.) of the right tibial plateau fracture. The importance, which the Arbitrator seems to not comment upon, is the *location* of this fracture, which is the upper part of the tibia where this major bone joins the knee. This is most likely the worst location the tibia can be fractured so greater weight must be given to this factor.

Petitioner was in the hospital for ten days. Four months after surgery, the surgeon recommended sedentary duty and an assistive device for ambulation. X-rays showed decreased bone density at the site of the union, and deformity at the surgical site. Petitioner testified she has stopped running and exercising due to pain near her knee. Daily swelling of the right foot has caused her to wear a larger shoe on the right foot. She cannot walk more than one block. Petitioner is required to stand while doing her machine operator job. She testified that she "practically live[s] on Tylenol" and has to keep moving her leg back and forth at work, which "levels the pain a little bit." Based on what I view as an increased disability, I would raise the award to 45% loss of use of the right leg.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VALENCIA, ROSA
Employee/Petitioner

Case# **15WC037427**

SLOAN VALVE COMPANY
Employer/Respondent

19IWCC0090

On 7/18/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% 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:

1042 OSVALDO RODRIGUEZ LAW OFFICES
7704 W NORTH AVE
ELMWOOD PARK, IL 60707

2461 NYHAN BAMBRICK KINZIE & LOWRY
MARTHA GELY-KRUTO
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

19IWCC0090

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
NATURE AND EXTENT ONLY

ROSA VALENCIA,
Employee/Petitioner

v.

SLOAN VALVE COMPANY,
Employer/Respondent

Case # **15 WC 37427**

Consolidated cases:

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **ROBERT M. HARRIS**, Arbitrator of the Commission, in the city of **CHICAGO**, on **JUNE 28, 2018**. By stipulation, the parties agree:

On the date of accident, **10/30/2015**, 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 **$49,221.64**; the average weekly wage was $ **946.67** .

At the time of injury, Petitioner was **55** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**11,450.14** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **11,450.14**.

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 $568.00 a week for a period of **75.25** weeks as provided in Section 8(e)12 of the Workers' Compensation Act because of injuries sustained caused the permanent partial loss of use of the right leg to the extent of **35%** thereof.

Respondent shall pay Petitioner compensation that has accrued from October 30, 2015 through June 28, 2018, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall receive credit for all amounts paid to or on behalf of this injury, including $11,450.14 for TTD.

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.

Robert M. Harris

Signature of Arbitrator

July 18, 2018
Dated

JUL 18 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

19IWCC0090

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROSA VALENCIA,

Petitioner-Appellee,

vs.

SLOAN VALVE COMPANY,

Respondent- Appellant.

15 WC 37427

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that on October 30, 2015 she was operating her machine when stacking parts in a basket fell off the skid onto her right leg. Petitioner had been a machine operator for 15 years. Petitioner's occupation involves numerous repetitive movements such as pushing, pulling, lifting and use of her upper extremities. Petitioner's duties involve lifting up to 40 pounds. Petitioner testified she felt immediate pain on her right leg and was taken to Gottlieb Memorial Hospital emergency room.

Petitioner began treatment with Dr. William lack and was diagnosed with a closed right lateral tibia plateau fracture.

Petitioner testified she underwent open reduction/internal fixation surgery on November 6, 2015. Dr. Lack performed the surgery and he was satisfied with the reduction with direct visualization through the sub-meniscal arthrotomy. (PX1 P. 2)

After being released from the hospital Petitioner began participating in post-op physical therapy and she followed up with Dr. William Lack at Loyola University (PX2).

Petitioner testified she was evaluated by Respondent's Section 12 physician, Dr. Lawrence Lieber, on February 29, 2016. Dr. Lieber opined Petitioner required an additional 4 weeks of physical therapy. After completing physical therapy Dr. Lieber opined Petitioner could return to her regular duties by March 30, 2016 (RX1). According to Dr. Lieber Petitioner would be at MMI by May 30, 2016.

Petitioner testified she returned to light duty work for Respondent on March 6, 2016. On April 4, 2016 Petitioner began working full duty.

On May 23, 2016 Petitioner saw Eevin Judkins, APN, and stated that she was not doing well, having a lot of pain and swelling. She walks unassisted with pain in the lateral part of her leg. The knee is not swollen. The scar is benign. Right knee ranges from 0 to 120 actively with minimal pain. (PX2 P.35) Her activity is as tolerated with no restrictions. (PX2 P.36)

Petitioner was placed at MMI by her treating physician, Dr. Lack, on May 30, 2016 (PX2, pg.36).

Petitioner testified she still feels pain in the area of the surgical and fracture site. The pain increases with activity. Further, she has a deformity at the surgical site. She also feels pain in her right foot after a heavy day at work and must take over the counter pain medication everyday, sometimes twice a day.

The Petitioner also stopped running and exercising due to the pain near her foot and near her knee. She testified that her foot becomes stiff and hard after activity. Petitioner also testified that the fracture site is tender and sore. She further testified that she has limited her strenuous activities and becomes less active in general due to the pain. She experiences daily swelling and must wear a larger shoe on her right foot due to the swelling. She also stated that it takes her a few minutes to get up from a sitting position because she feels pain when initially putting pressure on her foot and leg. She also complained of cramps in her right leg at the surgical site.

Petitioner testified she still has pain in the right leg. At the end of the day her leg is swollen. Petitioner testifies she wears a size 7 shoe on her left foot and 7½ on the right foot. She testified she takes Tylenol daily and she cannot walk more than a block. While at work she has to move her leg back and forth to "level the pain." However, on cross-examination, Petitioner testified she does not require any type of restriction of accommodation to perform her full duty work. She returned to her pre-injury job in May, 2016 and continues to do that job without any type of restriction. Petitioner also testified she has not seen a doctor since May, 2016.

Petitioner's supervisor, Michael Canlas, testified on Respondent's behalf. Mr. Canlas testified he has worked at Sloan Valve for over 20 years. He has been Petitioner's supervisor for the past 14 years. Mr. Canlas testified Petitioner continues to do her pre-injury job without any type of restriction or accommodation. According to Mr. Canlas' testimony Petitioner has never complained to him about pain or being unable to do her job due to pain. He also testified she has never requested any type of accommodation.

CONCLUSIONS OF LAW

19IWCC0090

Regarding the disputed issue - What is the nature and extent of the injury? The Arbitrator finds and concludes as follows:

To determine Petitioner's partial disability the Arbitrator analyzed the five factors as outlined and required in Section 8.1(b) of the Workers' Compensation Act.

Since no AMA rating was provided, no weight is given to the factor.

At the time of the accident, Petitioner was a 55-year-old full-time machine operator for Respondent. Petitioner's earning capacity was not affected as a result of her work accident. Petitioner was able to return to her pre-injury job without any type of restriction or accommodation. Petitioner testified she continues to do her job without any type of restriction. Petitioner's supervisor testified Petitioner is able to do her job without any type of accommodation. Since Petitioner's future earning capacity was not affected by her work accident the Arbitrator gives this factor significant weight.

Petitioner's age and occupation are not significant in determining Petitioner's partial disability as Petitioner is able to continue to work in her pre-injury job without any restrictions. Therefore, the Arbitrator gives these factors less weight.

Based on Petitioner's own testimony and review of Petitioner's medical records, Petitioner suffered an injury to her right leg, a closed right lateral tibia plateau fracture. Petitioner subsequently underwent surgery, an open reduction/internal fixation surgery on November 6, 2015. Petitioner was eventually released to return to work without any type of restriction by March 30, 2016. Petitioner has not seen a physician for this injury since May of 2016. The Arbitrator finds Petitioner's medical treatment relevant and gives it significant weight.

Based on the above analysis, the Arbitrator finds that as a result of the October 30, 2015 accident, Petitioner sustained the permanent partial loss of use of her right leg to the extent of 35% thereof pursuant to Section 8(e)(12) of the Act.

Robert M. Harris

Robert M. Harris, Arbitrator

Dated July 18, 2018

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tracy Abrusci,
Petitioner,

19IWCC0091

vs.

NO: 15 WC 5159

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 31, 2018, 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 8 - 2019
o1/24/19
DLS/rm
046

Deborah L. Simpson
Deborah L. Simpson

David L. Gore
David L. Gore

Stephen J. Mathis
Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0091

ABRUSCI, TRACY
Employee/Petitioner

Case# **15WC005159**

UNIVERSITY OF ILLIOIS
Employer/Respondent

On 1/31/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5616 STEVEN S SHONDER LAW OFFICE
233 S WACKER DR
SUITE 5210
CHICAGO, IL 60606

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

0075 POWER & CRONIN LTD
JOHN FASSOLA
900 COMMERCE DR SUITE 300
OAK BROOK, IL 60523

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

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

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

JAN 31 2018

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

19IWCC0091

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

Tracy Abrusci Case # **15 WC 05159**
Employee/Petitioner

v.

University of Illinois
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 **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **December 21, 2017 and January 23, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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. [x] Other **Choice of doctors under Section 8(a)**

19IWCC0091

FINDINGS

On 02/23/2012, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, the Petitioner ***did 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* causally related to the accident.

In the year preceding the injury, the Petitioner earned $75,936.00; the average weekly wage was $1,610.00.

On the date of accident, Petitioner was 53 years of age, ***single*** with 0 children under 18.

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

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

Respondent is entitled to a credit of $6,509.00 under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner failed to meet her burden of proving a compensable accident. As a result, no benefits are awarded and all remaining issues are moot. Please see Addendum.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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

January 31, 2018
Date

JAN 31 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TRACY ABRUSCI, Petitioner, v. UNIVERSITY OF ILLINOIS, Respondent.	)	Case Number: 15 WC 05159

FINDINGS OF FACT

Petitioner, Tracy Abrusci, testified that on February 23, 2012, she was employed as a clinical nurse consultant at the University of Illinois. She was working in Infection Prevention and Control. Her office was located at the Ear and Eye Infirmary, which is a separate building from the University Hospital. However, once or twice a day, she would be required to make rounds to units at the hospital, or meet with doctors and nurses at the hospital.

On February 23, 2012, she decided to take her lunch break. Before taking her lunch break, she stopped to check on her son, who was a patient on 7 West of the hospital. Her son was sleeping at the time. She then took some paperwork to a nurse located on 5 East of the hospital. She then returned to her son's room on 7 West. She testified that she used the staff elevator to move between the hospital floors.

When she arrived at her son's hospital room, she told him she was going to get something for lunch and asked him whether he wanted something to eat. He agreed. The Petitioner then left the hospital building, went to a local Pompeii Restaurant on Taylor Street, went across the street

to a 7 Eleven to obtain a beverage, and returned to the hospital. She then used the staff elevator to go back to her son's room to bring back lunch to eat with him.

On cross-examination, Petitioner testified that she would sometimes leave her office location for lunch. She would sometimes eat at Pompeii. On other occasions, she might bring the lunch back to her office building. On other occasions, she might meet with other employees in the cafeteria. It was unusual that she would bring her lunch to a patient care floor, and she was doing it on this occasion only because her son was a patient in the hospital.

Petitioner testified that when she got back up to the 7th Floor, she left the elevator and proceeded to walk down the hallway. When she went to turn left to go towards her son's room, she slipped and fell on what she subsequently determined was water on the floor. The area where she fell was not directly adjacent to the staff elevator. She fell in a hallway that was open to the general public, such as any visitors to the hospital. In fact, the area where she fell was located near an area where visitors are designated to sit.

After she fell, she was assisted to her feet by other employees. She hobbled into her son's room, but was in a lot of pain. She had been hoping to talk to her son's doctor, but she was in so much pain that she told him she could not wait any longer and had to go home. She did not return to her office that day.

When she went home, she did not have any idea as to the extent of her injury. The next day, she called Employee Health to tell them that she had fallen. She testified that Employee Health told her that it was not a workers' compensation injury because had been visiting her son.

She did not go to work the day after she fell. The following Monday and Tuesday she did return to work. However, on Wednesday, she went to the Emergency Room. She was told she had a torn muscle and that she should see an orthopedist.

Petitioner testified that she opted to see Dr. Benjamin Goldberg at the University of Illinois Orthopedics. He recommended an MRI, which revealed a complete avulsion of the left hamstring. She testified that Dr. Goldberg did not recommend surgery, and that he felt it would heal on her own.

She subsequently opted to see a different doctor, Dr. Terry Nicola, in the University of Illinois Sports Medicine department. She was recommended to Dr. Nicola by a trainer at her health club. He referred her to an exercise psychologist who recommended physical therapy.

Petitioner then opted to see Dr. Scott Seymour for a second opinion on September 30, 2013. Dr. Seymour agreed that her condition was inoperable because of the length of time that had elapsed.

Petitioner subsequently moved to New York City. Her condition was pretty much unchanged, but she felt extreme pain on one occasion while trying to get out of her car. She went to see a doctor at Weill Cornell. They referred her for additional physical therapy.

Petitioner testified she then returned to Chicago. When she came back to Chicago, she talked to people who told her that she should see a doctor at Illinois Bone & Joint. She therefore decided to see Dr. Daniel Newman. He prescribed physical therapy. One of her physical therapists then suggested that she see a physician at Midwest Orthopedics at Rush. She therefore decided to treat with Dr. Shane Nho.

Dr. Nho agreed to do surgery. The surgery was performed on April 28, 2016. However, Petitioner testified that the surgery did not significantly improve her functioning, and that her leg is still painful and weak.

She testified that she cannot run, that sitting is a problem, and that she cannot be in a car for more than an hour and a half. She can no longer swim laps because of the unevenness of her leg strength. She testified that walking is difficult after a moderate distance. She testified she has to pace herself while doing her job.

On cross-examination, Petitioner agreed that she last saw Dr. Nho on October 25, 2016. The office note from that date indicates that she did not render any specific complaints at that time. She agreed that she was optimistic at that point that she was doing better. The office note indicates that her only issue was that she had a little bit of weakness in the hamstring. She was released from Dr. Nho's care as of October 25, 2016, and has not seen Dr. Nho or any other physician for her leg or hamstring since that date.

Petitioner has continued to work her regular job duties, full time, since October 25, 2016. She has no specific restrictions that have been placed on her. She testified to certain periods of lost time after her surgery in 2016. The lost time consisted primarily of periodic days off or half days during which she had pain. She totaled the number of days to come up with 13 days of lost time. However, she agreed that the doctors never told her that she was not permitted to work.

On cross-examination, Petitioner admitted that she had accepted a settlement with the University of Illinois for a proposed liability claim arising from her slip and fall injury. She was shown a Release marked as Respondent's Exhibit 1, and confirmed that she signed the Release. After

signing the Release, she received payment from the University of Illinois in the amount of $5,000.00, intended to resolve her claim.

In support of the Arbitrator's Decision relating to (C) did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

The Petitioner bears the burden of proving the issue of Accident. This requires the Petitioner to prove that her injuries arose out of and in the course of her employment with the Respondent. Based on the totality of the evidence, the Arbitrator does not believe the Petitioner can establish that her injuries arose out of her employment, or in the course of her employment.

Petitioner's testimony clearly establishes that she fell while in the process of visiting her son, who happened to be a patient at the hospital, and specifically while obtaining lunch. The personal comfort doctrine does establish that injuries that occur while an employee is engaged in a lunch break, use of the washroom, or other break, may, under certain circumstances, be deemed to occur in the course of employment. However, the Arbitrator does not believe the facts of this case fall within the personal comfort doctrine.

The location of Petitioner's fall was not the result of her simply opting to take her lunch break. Petitioner testified that she would typically eat her lunch off of the University Campus, in her office, or in the cafeteria. She testified that she would not typically eat her lunch on a patient floor. In fact, the sole reason that she was bringing her lunch to 7 West at the hospital building was because she was visiting her son as a patient in the hospital. There appears to be no dispute that Petitioner was present on 7 West of

the hospital as a visitor, rather than an employee, at that time. Her activities in visiting her son therefore cannot be described as an act of personal comfort during the course of her employment.

Petitioner appears to argue that her injury arose in the course of her employment because her son was hospitalized at a location where Petitioner also happened to perform employment activities at other times. Notably, she was not performing any such employment activities at the time she fell. The fact that she was visiting her son at the University of Illinois Hospital, rather than Rush University or some other nearby hospital facility, is an incidental circumstance and does not lead to the conclusion that Petitioner's injuries occurred in the course of her employment.

Even if the Arbitrator could find that Petitioner's injuries occurred in the course of her employment under the "personal comfort" doctrine, the Arbitrator does not find the Petitioner's injuries arose out of her employment. As noted, she was performing no work related activities at the time she fell. She was not carrying anything in her hands related to work. The area where she fell was not specifically limited to employees of the hospital, and Petitioner readily admitted that the hallway in which she fell was open to the general public. There is no evidence that she was required, as a consequence of her employment, to traverse this area of hallway more frequently than a visitor or other member of the general public. Therefore, the Arbitrator cannot find that Petitioner's injuries arose from a risk to which she was exposed to a greater degree than the general public, or that the risk had some specific association with Petitioner's employment with the University.

As a result of the foregoing, the Arbitrator finds that Petitioner has failed to prove that her injuries arose out of and in the course of her

employment with the University. The Arbitrator finds that the Petitioner has not proved compensable injuries under the Workers' Compensation Act.

In support of the Arbitrator's Decision relating to (F) is Petitioner's current condition of ill-being causally related to the injury, (J) were the medical services provided to Petitioner reasonable and necessary, (K) is Petitioner entitled to temporary total disability benefits, and (L) what is the nature and extent of the injury, the Arbitrator finds the following:

Pursuant to the preceding paragraphs, the Arbitrator finds that Petitioner failed to meet her burden of proving that she sustained compensable injuries arising out of and in the course of her employment. As a result of this decision, no compensation is awarded, and all remaining issues are moot.

In support of the Arbitrator's Decision relating to (O) choice of doctors under Section 8(a), the Arbitrator finds the following:

Pursuant to the preceding paragraphs, the Arbitrator finds that Petitioner failed to meet her burden of proving that she sustained compensable injuries arising out of and in the course of her employment. As a result of this decision, all remaining issues are moot.

Notwithstanding the foregoing, the Arbitrator also finds that Petitioner, by her own admission, exceeded the allowed number of choices of medical providers under Section 8(a) of the Act. Petitioner, by her own admission, chose to treat with Dr. Benjamin Goldberg at University of Illinois Orthopedics. She then opted, based on the suggestion of a health club employee, to treat with Dr. Terry Nicola at University of Illinois Sports Medicine. She then opted, on her own, to treat with Dr. Scott Seymour. She then sought medical treatment with a facility in New York City.

Upon her return to Chicago, she obtained a recommendation from friends to treat with Illinois Bone & Joint, and opted to see Dr. Daniel Newman. She then was advised by a physical therapist to consider treatment with Dr. Shane Nho at Rush Orthopedics. There is no evidence of any referrals among these various physicians. Therefore, the Arbitrator finds that all treatment rendered to the Petitioner outside of University of Illinois Orthopedics and University of Illinois Sports Medicine would not be compensable under Section 8(a) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Lindroth,

Petitioner,

vs.

Coastal International,

Respondent.

19IWCC0092

NO: 07 WC 46209

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 credit under Section 5(b) and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 1, 2017, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the petitioner the sum of $585.07/week for life, commencing September 1, 2016, as provided in Section 8(f) of the Act, because the injury caused the permanent and total disability of the petitioner. Commencing on the second July 15th after the entry of this award, the petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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.

19IWCC0092

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 8 - 2019
o12/20/18
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0092

LINDROTH, CHRISTOPHER
Employee/Petitioner

Case# 07WC046209

COASTAL INTERNATIONAL
Employer/Respondent

On 12/1/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

3211 SCHREINER MALLORY & ETZLER PC
STEVEN W ETZLER
9635 SARIC COURT
HIGHLAND, IN 46322

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT HARRINGTON/LINDA ROBERT
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

19IWCC0092

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

CHRISTOPHER LINDROTH
Employee/Petitioner

v.

COASTAL INTERNATIONAL
Employer/Respondent

Case # 07 WC 46209

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert E. Luedke**, Arbitrator of the Commission, in the city of **Chicago**, on **November 15, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [ ] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Respondent's credit under Section 5(b)**

FINDINGS

On **July 10, 2007**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$45,635.20**; the average weekly wage was **$877.60**.

On the date of accident, Petitioner was **35** 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 **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

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

ORDER

Respondent shall pay Petitioner permanent and total disability benefits of $585.07 per week for life commencing September 1, 2016, as provided in Section 8(f) of the Act.

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

Respondent shall continue to pay for reasonable and necessary medical services as provided in Section 8(a) of the Act.

The respondent is ordered to pay the 25% attorneys fee for future medical and permanent total disability benefits to petitioner's counsel as the benefit to the respondent from the third-party recovery is received by respondent. Any such payments for statutory attorney's fees to petitioner's counsel is suspended until such time that the workers' compensation carrier's section 5(b) lien is completely recovered.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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. Luedke

Signature of Arbitrator

11-30-17

Date

DEC 1 - 2017

Findings of Fact

On November 15, 2017, the parties appeared prepared to enter evidence that the Petitioner was permanently and totally disabled under section 8(f). The parties agreed upon the following facts:

On July 10, 2007, Lindroth sustained an accidental injury that arose out of and in the course and scope of his employment with Respondent when he was thrown off the back of a three-wheeled, gas-powered scooter striking his head on the pavement.

Following the incident, Lindroth was transferred to Northwestern Memorial Hospital where he was evaluated and treated for a severe traumatic brain injury, including but not limited to sub-arachnoid hemorrhages of the brain, fractures of the occipital and facial bones for which he underwent bilateral frontal craniotomies.

Since 2007, Lindroth has been hospitalized multiple times for conditions associated with his injuries including but not limited to: pneumonia, staph infections, urinary tract infections and emboli. Subsequent to the accident, he has remained completely dependent for his activities of daily living. This includes receiving nourishment through the use of a G-tube.

For years after the accident, Lindroth resided in either a hospital or dependent care facility. Lindroth currently resides at home where he receives 24-hour care that will be required the remainder of his life. He cannot ambulate or walk by himself and is confined to a wheel chair with no use of his lower extremities. This condition is permanent.

Based on the foregoing, Petitioner and Respondent agreed that Petitioner is wholly and permanently incapable of work. The parties further agreed that Petitioner is medically permanently and totally disabled. (Petitioner's Exhibit 1).

In relation to (L) what is the nature and extent of Petitioner's injury, the Arbitrator finds the following:

The parties agree that the Petitioner is permanently and totally disabled medically and is unable to perform any type of work. Pursuant to section 8(f), the Petitioner is entitled to permanent and total disability benefits of $585.07 per week for life, commencing on August 30,

2016, the last date TTD benefits were paid and the date Respondent claimed a credit under section 5(b).

In relation to (N) is the Respondent due any credit, the Arbitrator finds the following:

It is well established that it is the right of the Illinois Workers' Compensation Commission to determine the credit Respondent is allowed based on the amounts received by the Petitioner from the third-party case if it had not already been determined by the Circuit Court of Illinois. *See Scott v. Industrial Comm'n*, 703 N.E.2d 81 (Ill. 1998). Likewise, the Supreme Court in *Employers Mut. Cos. v. Skilling*, 184 Ill.2d 202 (1998), ruled that a Circuit Court of Illinois had concurrent jurisdiction with the Illinois Workers' Compensation Commission to determine issues of law.

The key in these cases is the fact that the Supreme Court of Illinois found concurrent jurisdiction when addressing matters of the Illinois Workers' Compensation Act with the Circuit Court of Illinois, not a probate court of Indiana applying Illinois law. The Petitioner brought a civil action against MPEA and GES in the Circuit Court of Cook County, Illinois. Petitioner was awarded $22,197,500.00. Respondent's lien was not adjudicated as part of that hearing. *See Respondent's Exhibit 4.* The Petitioner offered a ruling on the payment of attorney's fees and adjudication of the lien entered in Indiana. Based on the cases cited above, the Arbitrator finds that the Lake Circuit Court Probate Division of Crown Point Indiana has no jurisdiction over the issue of adjudicating the Illinois workers' compensation lien. The Arbitrator finds that the order entered on November 15, 2016 by the Lake Circuit Court Probate Division of Crown Point Indiana does not control the decision of the Arbitrator.

The Arbitrator hereby finds that the Respondent's gross lien paid through August 30, 2016 is $5,801.101.17. Less 25% for attorney's fees, the Respondent is entitled to receive $4,350,825.88. To date, the Respondent has received $3,858,881.58. The Respondent is entitled to an additional $491,944.30. (Respondent's Exhibit 6).

In addition, the Respondent is entitled to claim a credit for future benefits owed for ongoing permanent total disability benefits and medical benefits. The Respondent has the right to suspend payment of benefits and take a credit up to the amount of the third party award. *See Freer v. Hyson Corporation, 108 Ill. 2d 421.* In this case, the total amount Respondent is entitled to claim is $22,197,500.00.

The Respondent is still required to pay 25% of any future benefits claimed. Pursuant to *Zuber v. Illinois Power Co.*, 553 N.E.2d 385 (Ill.1990), the attorney's fees for future weekly permanent total disability benefit payments should be issued as the credit is accrued or on a weekly basis. In *Bayer v Panduit*, 63 N.E.3d 890 (Ill. 2016), the court found that attorney's fees should be paid on future credits taken for medical benefits. However, the Court did not address when the payment of attorney's fees should be made.

The only Illinois Supreme Court ruling to address when attorney's fees are due is *Zuber v. Illinois Power Co.*, 553 N.E.2d 385 (Ill.1990). In that case, the Court reasoned that periodic payments, "in this way then, the employer will pay for the benefit it receives from the third-party recovery as that benefit accrues. It is apparent that this approach eliminates the risk that the employer will be required to pay a fee on a benefit it never realizes, should the compensation award terminate early." *See Id* at 419.

Likewise, pursuant to the reasoning utilized by the Court in *Zuber*, attorney's fees on the credit claimed for medical benefits owed pursuant to the fee schedule should also be paid as the bills are presented for payment. There is no guarantee that the Petitioner will need medical treatment that was awarded by the jury. It is inequitable to require the Respondent to pay attorney's fees on a credit for medical treatment that the Petitioner would never need. To require the Respondent to pay attorney's fees before the benefit of the credit is accrued is contrary to the Supreme Court's reasoning in *Zuber* and common sense.

Therefore, the Arbitrator finds that the Respondent is to pay attorney's fees of 25% of the amount the Respondent would have paid under section 8 of the Illinois Workers' Compensation Act for medical bills.

The arbitrator finds the Illinois Supreme Court's decision in *Zuber v Illinois Power Company* 553 N. E. 2nd 385 (ILL. 1990) to be controlling. In Zuber the court held that:

> *"the duration of the employer's weekly payments of fees and costs will correspond to the period during which the plaintiff would have received compensation benefits but for the third-party recovery. In this way than the employer will pay for the benefit it receives from the third-party recovery as that benefit accrues. It is apparent that this approach eliminates the risk that the employer will be required to pay a fee on a benefited never realizes should the compensation award terminate early. "Id at 389.*

Consistent with *Zuber* the arbitrator finds that ordering the employer to immediately pay the 25% attorneys fee in a lump sum for future benefits requires the employer to pay a fee on a benefit it may never realize. The employer's obligation to pay permanent total disability

benefits or medical expenses could conceivably end next week. The petitioner was free to lessen his risk by settling for a lump-sum but chose to receive future benefits of an uncertain duration in the workers' compensation claim. The petitioner has freely chosen to receive a stream of future payments of uncertain duration pursuant to the Illinois Worker's Compensation Act. Pursuant to *Zuber* the respondent is required to pay the 25% attorneys fee to petitioner's counsel as the benefit to the respondent from the third-party recovery comes due.

The future benefits awarded to the petitioner by a jury in the petitioner's civil case has no persuasive weight regarding the amount of future statutory benefits in the petitioner's workers' compensation claim. It is a completely different system meant to address different causes of action. The arbitrator finds that the formula used by the petitioner and presented to the Indiana probate court to determine the specific amount of attorney's fees owed based on the present cash value of future medical and lost wages and payable in a lump-sum immediately is an inappropriate method for the payment of fees in an Illinois workers' compensation claim pursuant to Section 5(b) of the Act and the Illinois Supreme Court's decision in *Zuber*.

The arbitrator finds the order of the Indiana probate court to be entitled to no weight in an Illinois workers' compensation claim. Pursuant to 5(b) of the Act the 25% attorneys fee is to be paid to the petitioner's attorneys. The probate court's fear that compliance with Section 5(b) of the Act regarding payment of a 25% attorneys fee for future medical expenses would "create unnecessary chaos with service providers and other third-party payers" is misplaced. The arbitrator specifically rejects the probate court's finding that the statutory 25% attorney's fee is to be based on the present cash value of uncertain future permanent total disability benefits and unknown future medical expenses. The computation by the Indiana probate court is directly contrary to the Illinois Worker's Compensation Act. The Illinois Worker's Compensation Act requires that permanent total disability benefits are paid on a weekly basis. Medical expenses are paid as they are incurred. The Illinois Worker's Compensation Commission does not make an estimate and then order a lump-sum award like a civil jury.

The arbitrator notes that the Indiana probate court's order of March 16, 2017 found that a net recoverable lien was due to the workers' compensation carrier in the amount of $396,325.76. The Indiana probate court's order did not reimburse the workers compensation carrier for the Section 5(b) lien due and owing to Hartford. The Indiana probate court ordered the amount held in escrow to be distributed directly to the guardians. The arbitrator finds that in the event Hartford is still due and owing any amounts for their lien under Section 5(b) of the Act that any payments for statutory attorney's fees to petitioner's attorneys are suspended until such time that the workers' compensation carrier is repaid for their Section 5(b) lien on past workers' compensation benefits already paid. The trial court has a duty to protect the employer's workers' compensation lien. *Blagg v. FWD Truck & Equipment Co.* 572 N.E.2d 920 (Ill. 1991).

The arbitrator finds that the respondent is ordered to pay the 25% attorneys fee for future medical and permanent total disability benefits to petitioner's counsel as the benefit to the respondent from the third-party recovery is received by respondent. Any such payments for statutory attorney's fees to petitioner's counsel is suspended until such time that the workers' compensation carrier's section 5(b) lien is completely recovered.

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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ELBA MOJICA,

Petitioner,

19IWCC0093

vs.

NO: 16 WC 25465

LABOR NETWORK,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by both the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability benefits, and medical expenses both current and prospective, 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 alleged a work-related accident on July 29, 2015 while she was pushing a very heavy cart with malfunctioning wheels. She claimed an injury to her lumbar spine. Petitioner treated extensively with about 135 physical therapy/chiropractic visits at *La Clinica*, and numerous injections at L2, L3, L4, and L5, including, trigger-point injections, facet blocks, and medical nerve blocks administered by Dr. Glaser of the Chicago Pain Specialists of Greater Chicago. Dr. Glaser also performed radiofrequency ablation on February 27, 2017. After all that conservative treatment failed to resolve Petitioner's pain, Dr. Glaser recommended a percutaneous discectomy L3-4 and L4-5.

An MRI taken on August 15, 2016 was interpreted as showing lumbar spondylosis with disc bulging at L2-S1 and mild bilateral neural foraminal stenosis at L3-4 and L4-5. A discogram taken on June 5, 2017 was interpreted as showing an annular tear, minimal degenerative disc degeneration at L3-4, and greater than 7/10 concordant pain at L5-S1. The post discogram CT showed a 3-4 millimeter broad-based subligamentous disc herniation with an extruded nucleus pulposus with mild stenosis and bilateral neuroforaminal narrowing probably Dallas classification type III at L3-4. An EMG taken on August 27, 2016 showed bilateral radiculopathy at L4-5.

Besides her treatment with *La Clinica* and Dr. Glaser, Petitioner also treated with Dr. Koutsky, an orthopedic surgeon, from March 15, 2017 through March 15, 2018. Dr. Koutsky testified by deposition on October 26, 2017. Dr. Koutsky testified he diagnosed bilateral radiculopathy at L4-5, stenosis, and probable discogenic pain. He was suspicious that her ongoing symptoms were discogenic in nature. They discussed treatment options, but Petitioner had already had most possible conservative treatment. They also discussed lumbar surgery.

Dr. Koutsky wanted a discogram because if her pain were discogenic a simple decompression would probably suffice. The discogram showed concordant pain at L3-4 and L5-S1. However, the EMG showed radiculopathy at L4-5. Therefore, he was considering a fusion from L3-S1. On cross examination, Petitioner testified she understood that Dr. Koutsky recommended surgery on the discs in her lower back, but she was unclear about what exactly he recommended.

Dr. Koutsky also testified he recommended evaluation by Dr. Dixon, neurosurgeon, because it was always better to have a second opinion regarding complicated surgery such as a fusion. Dr. Koutsky did not believe that a single or two-level fusion was sufficient to alleviate her condition, but they were reasonable alternative surgeries. That was a reason why he wanted the second opinion from Dr. Dixon. It appears from Dr. Koutsky's notes that Dr. Dixon agreed that Petitioner was a surgical candidate. However, none of Dr. Dixon's records appear to be in the transcript and Dr. Koutsky did not indicate whether Dr. Dixon recommended any particular surgical procedure.

Dr. Mather, Respondent's Section 12 medical examiner, testified by deposition on February 1, 2018. Dr. Mather diagnosed that Petitioner sustained a lumbar strain with "ongoing psychogenic pain, functional overlay." He based that diagnosis on ill-defined leg pain and diffuse back pain neither of which "was explainable on a scientific basis." He noted Petitioner had extreme complaints of pain with light touching of the skin. Dr. Mather also opined that Petitioner's pain complaints were inconsistent through her treatment and her MRI was "100% normal and pristine." He opined that the EMG results were inconsistent with his examination, the discogram was inaccurate, and discograms are now really useless with high definition MRIs. Dr. Mather did not mention the results of the post-discogram CT. Dr. Mather opined that Petitioner would have been at maximum medical improvement within 6 weeks of the injury and surgery was not indicated because the MRI was "pristine."

The Arbitrator found that Petitioner proved a compensable accident on July 28, 2016 which caused a current condition of ill-being of her lumbar spine. She awarded Petitioner 66&1/7 weeks of temporary total disability benefits, $59,662.65 in medical bills, but she also denied various specific charges which were either not supported by the record or for treatment the Arbitrator deemed excessive. The Arbitrator also denied prospective medical treatment. The Commission agrees with the Arbitrator's analysis regarding his findings of accident, causation, temporary total disability benefits, and her determination of which current medical expenses to award and which medical expenses to deny. Accordingly, the Commission affirms and adopts those aspects of the Decision of the Arbitrator.

In denying prospective medical treatment, the Arbitrator noted equivocal medical opinions on what procedure should be performed. Dr. Glaser recommended two-level discectomy while Dr. Koutsky recommended three-level fusion. She also noted that Petitioner did not have a real understanding of the procedures which were being recommended. The Arbitrator concluded "the conflicting medical opinions as well as Dr. Koutsky's failure to sufficiently and persuasively address why additional levels may or may not be indicated for surgical intervention demonstrate that Petitioner has failed to prove that she is entitled to any particular form of prospective medical care. Based on that failure of proof, the Arbitrator must deny Petitioner's request for prospective medical treatment."

Petitioner argues the Arbitrator erred in denying prospective treatment. She urges that she should not be punished because there was a difference of opinion about the procedure recommended. We agree with Petitioner's general premise, but we also understand the predicament the Arbitrator was in when there were extremely divergent recommendations for treatment. Dr. Mather recommended no prospective treatment, Dr. Glaser recommended a percutaneous discectomy L3-4 and L4-5, and Dr. Koutsky recommended three-level fusion L3-S1, though he also testified that one or two-level fusion were reasonable alternatives.

The Commission faces a conundrum. We do not want to deny Petitioner prospective treatment if such treatment actually is necessary to resolve her condition of ill-being. On the other hand, the Commission does not want to authorize three-level fusion surgery if either no surgery is indicated at all or if a much less invasive procedure would suffice. The Commission does not have sufficient information to make an informed decision on prospective treatment. This matter was initially arbitrated pursuant to §19(b) and because the accident has been deemed to be compensable, the matter will be remanded to the Arbitrator for further proceedings. On remand, the Commission directs the Arbitrator to encourage the parties to agree to an independent orthopedic or neurosurgeon to examine Petitioner, review her medical records, and make a recommendation about whether prospective treatment is indicated, and if so, what prospective treatment should be prescribed. Thereafter, the Arbitrator would reconsider the issue of prospective treatment and either deny it or determine what prospective treatment would be appropriate. Obviously, if either party is recalcitrant in selecting a mutually agreeable surgeon, the Arbitrator can take that into consideration in arriving at her decision.

19IWCC0093

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $332.28 per week for a period of 66&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 the sum of $59,662.65 for medical expenses under §8(a) of the Act, subject to the applicable medical fee schedule in §8.2.

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 denial of prospective medical treatment is vacated and upon remand, the Arbitrator is directed to encourage the parties to mutually agree to an independent surgeon to evaluate Petitioner and make a recommendation about whether prospective treatment is indicated, and if so, what prospective treatment should be prescribed.

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 8 – 2019

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/dw
O-1/24/19
46

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

19IWCC0093

MOJICA, ELBA
Employee/Petitioner

Case# **16WC025465**

LABOR NETWORK
Employer/Respondent

On 6/19/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5177 LAW OFFICE OF LEONARDO MORALES
53 W JACKSON BLVD
SUITE 1750
CHICAGO, IL 60604

5001 GAIDO & FINTZEN
JASON P ALLAIN
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

19IWCC0093

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)

ELBA MOJICA
Employee/Petitioner

v.

LABOR NETWORK
Employer/Respondent

Case # 16 WC 25465

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 BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO**, on **April 12, 2018**. After reviewing all 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. [x] Other **Prospective medical treatment**

FINDINGS

On **7/28/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$25,918.00**; the average weekly wage was **$498.92**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **2** dependent children.

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

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

Respondent shall be given a credit of **$8,971.83** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$8,971.83**. 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 **$332.28/week** for **66-1/7th weeks**, commencing **8/4/16** through **9/19/16** (6-5/7th weeks), from **11/4/16** through **11/25/16** (3-1/7th weeks) and from **3/15/17** to **4/12/18** (56-2/7th weeks), as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$8,971.83** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of **$59,662.65**, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner ***failed*** to prove by a preponderance of the evidence that she is entitled to prospective medical care. Petitioner's request for prospective medical care 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

6-18-18
Date

FINDINGS OF FACT

Elba Mojica ("Petitioner") testified via Spanish interpreter/translator Marco Garcia, that in July 2016 she worked production for Labor Network, Inc. ("Respondent"). Her duties included loading material, trays, pallets, containers of product and moving them from one place to another.

On July 28, 2016, Petitioner worked for Respondent. She testified she had to move pallets from department to another and that the wheels were not functioning. She stated that there was a lot of weight and that at the end of the day, she had to move a container of marmalade and that they were the heaviest. At the end of the day she felt a pain in the low back and right leg. She did not tell anyone and went home and then to the hospital.

On July 28, 2016, Petitioner presented to Mount Sinai emergency room with a chief complaint of hip pain. Px1. Admission time was noted to be 22:27. Triage assessment reported lower back pain since yesterday while at work lifting objects. She was admitted overnight. Impression was low back pain.

On July 29, 2016, Petitioner remained at Mount Sinai's emergency room. Px1. The history noted that Petitioner presented with low back pain and stated that at work yesterday and she carry too many heavy things. She carried heavy boxes of dishes and also carry heavy jars with marmalade [sic], about 25 to 30 pounds. Since last night she had pain. She rated the pain 7 out of 10. Pain was localized to the back, constant, non-radiating, worsening with movement, without numbness or tingling. There was no leg weakness. Diagnosis was low back pain, acute and x-rays were ordered. She was given Tramadol and Valium to treat symptoms. X-rays were within normal limits. Impression was low back pain without sciatica. Petitioner was discharged and ordered to follow up. Other documentation indicated that Petitioner felt an onset of low back pain after lifting boxes at work. Additional documentation noted low back, hip and neck pain.

On August 2, 2016, Dr. Israel Labao of ML Medical gave Petitioner a note indicating that return to work was pending. In the remarks portion of the document, diagnosis was severe backache with radiculopathy on the right. Petitioner testified that she eventually reported her incident and that her employer sent her to a clinic.

On August 4, 2016, Petitioner completed an accident report. Px8. In that report, Petitioner disclosed that on July 28, 2016 between 9 AM and 11 AM, she was pulling trays with the pallet jack when she felt tired due to having done much force in pulling the trays. The last thing carried was honey. Petitioner indicated that the condition of the pallet jacks may have helped prevent the incident. The document is signed by Angel Velasquez. Petitioner testified that she returned to work and they had her standing but that she could not stand very long due to pain.

On August 4, 2016, Petitioner presented to Physicians Immediate Care ("PIC"). Petitioner presented with a chief complaint of constant back pain since Thursday, July 28, 2016. Petitioner rated the pain 9 out of 10. Petitioner reported that this was the result of a work injury that occurred on July 28, 2016. Petitioner reported no radiation of pain. Another noted indicated low back pain stemming from lifting which occurred on July 29, 2016. She was lifting about 100 pounds and felt a pull in her lower back and hip pain radiating down her legs. She currently only reported pain radiating down her right leg not both. Diagnosis was strain of the lower back. Petitioner was prescribed Flexeril and Tylenol Codeine 3. Physical therapy was ordered. She was given light duty.

On August 8, 2016, Petitioner followed up with PIC. Petitioner reported muscle pain and doctors noted spasmodic with radiation down the right leg. She reported the pain was about the same from previous visit. She wore the back brace, but it was uncomfortable. She worked within the restrictions but noted difficulty with bending forward. She had some slight pain radiating down her right leg. Physical therapy approval was pending. Diagnosis was unchanged. She was released to light duty.

On August 10, 2016, Petitioner first presented to La Clinica. The history noted Petitioner was pulling a cart with a pallet with 300 pounds of metal in the morning. She had to pull the cart and push because it was not functioning well. The wheels were not turning properly. Later that day she was carrying buckets of up and down stairs and continue to feel increased pain. By the end of the day, she felt a profound fatigue and back pain and went home. Diagnosis was lumbar sprain/strain, thoracic strain, muscle strain and lumbar radiculopathy. Petitioner was taken off work.

On August 18, 2016 Petitioner first presented to Dr. Scott Glaser. He noted low back pain and right buttock and leg pain from a work accident. The history noted that Petitioner was pulling and pushing metal carts and injured her back. She had not responded to therapy and frequently had right radicular pain and tingling. She rated her pain 5 to 7 out of 10. On exam, the SI joint was nontender bilaterally. Upper facets were nontender bilaterally, mid region facets were mildly tender bilaterally and lower region facets were moderately tender bilaterally. Extension produced pain. Right straight leg raising elicited calf pain. Assessment was facet syndrome without myelopathy and lumbosacral radiculopathy.

On September 6, 2016, Petitioner underwent and Dr. Glaser performed bilateral L3 through S1 intra-articular facet joint injections for a diagnosis of lumbar facet arthropathy with a chief complaint of lower back pain. On September 15, 2016, Petitioner followed up with Dr. Glaser. Diagnosis was unchanged. He noted that her lower back pain and right buttock pain and leg pain had stayed the same since her initial injection earlier that month. She reported 60% pain relief but only 10% long-term relief. Alternative treatment was discussed and recommended for the facets. In September 2016, Petitioner continued chiropractic and physical therapy treatments with La Clinica. Petitioner completed physical therapy and chiropractic treatments on September 5, 2017. During this time there was a prescription for an ultrasound unit issued and a lumbar orthosis and a TENS unit.

On October 10, 2016, Petitioner underwent and Dr. Glaser performed bilateral L2 through L5 medial branch nerve blocks for a diagnosis of lumbar facet arthropathy with a chief complaint of lower back pain. On October 17, 2016, Petitioner followed up with Dr. Glaser. Her low back pain, right buttock and leg pain had decreased since her bilateral medial nerve branch block injection. The frequency and area to the pain had decreased. She described 20% relief long-term relief.

On November 17, 2016, Petitioner followed up with Dr. Glaser. Her back pain, right buttock and leg pain and decreased since her prior visit. Overall, pain decreased by 10%. She rated her pain 4 to 6 out of 10. She had difficulty sleeping. Lumbar spine examination was unchanged. The doctor recommended bilateral radiofrequency ablation at L2 through L5.

On January 11, 2017, Petitioner follow up with Dr. Glaser. Diagnosis was unchanged. Pain, frequency and location was unchanged. She rated her pain from 4 to 6 out of 10. She had sleep interference. She reported she was sit or lie down several times per day to control the pain. Lumbar spine examination was unchanged. The doctor continued to recommend bilateral radiofrequency ablation from L2 through L5.

On February 22, 2017, Petitioner followed up with Dr. Glaser. Her lower back pain, right buttock pain and leg pain has decreased since her prior visit. The frequency of the pain had decreased. The area of the pain stayed the same. Overall, pain decreased by 10%. She continued with sleep disturbances. She rated her pain 2 to 5 out of 10. Lumbar spine examination was essentially unchanged. The doctor continued to recommend bilateral radiofrequency ablation from L2 to L5.

On February 27, 2017, Petitioner underwent and Dr. Glaser performed bilateral L2 through L5 medial branch nerve blocks for a diagnosis of lumbar facet arthropathy for a chief complaint of lower back pain.

On March 7, 2017, Petitioner was re-examined by La Clinica. Her back pain became worse following the third injection back on February 27, 2017. She said the pain was greater on the left and the right it was experiencing right-sided numbness and tingling into the right leg. Exercise, standing, sitting and walking greater than 30 minutes increased the numbness and tingling. She had difficulty sleeping and bending repeatedly. On exam, there was tenderness upon palpation, left greater than right, L1 through L5 and the bilateral SI joints. Kemp's testing was positive bilaterally, straight leg raising was positive on the right at 15° with reproduction of pain into the right calf. Left sided straight leg raising was positive a 22° with pain migrating into the left glut. Braggard's sign was positive on the right. The doctor concluded Petitioner remained unchanged or slightly worse. Therefore, she was to continue with physical therapy. The doctor recommended a neurosurgical consult. Petitioner was to remain off work. The doctor causally related all recommended treatment to the work accident and determined that it was reasonable and necessary.

On March 15, 2017, Petitioner presented to Dr. Kevin Koutsky of Elmhurst Orthopaedics for evaluation of right lower back pain radiating down both lower extremities, right greater than left. She admitted to some numbness and tingling with occasional weakness. The doctor noted that the low back pain was a result of an onset occurring in July 2016 after pushing pallets of pots and pans. The pallets weighed up to 400 pounds. The pallets did have wheels on them but as she was pushing, some of the wheels became stuck and she felt a sharp pain in her back radiating into her legs. He summarized her treatment to date. He read an MRI to show desiccation at multiple levels, generalized protrusion and possible annular tear at L4-5 contributing to some central foraminal stenosis, generalized protrusion noted at L5-S1. He noted EMG testing of the lower extremities revealed bilateral L4-5 radiculopathy. Assessment was bilateral L4-5 radiculopathy, stenosis and probable discogenic pain. He was suspicious that her ongoing symptoms were discogenic in origin. He noted she had some stenosis at L4-5 and radiculopathy which had been refractory to conservative management, including medications, therapy and multiple injections. Surgical options including decompression only versus decompression and stabilization. The doctor prescribed discogram, Tramadol, refilled medications, a home exercise kit and a TENS unit. Trigger point injections were administered at the visit.

On March 22, 2017, Petitioner followed up with Dr. Glaser. Overall, her lower back pain, right buttock and leg pain has decreased since her radiofrequency ablation. Overall her pain and decreased by 10%. She rated her pain 4 to 5 out of 10. Lumbar spine examination with essentially unchanged. Treatment for discogenic pain was discussed if her lower back pain was refractory to the radiofrequency ablation.

On April 3, 2017, Petitioner was re-examined by her chiropractor. Lower back pain was unchanged at 5 out 10. She was still having right lower extremity numbness. On exam, she was ambulating with no obvious antalgia, she was able to transfer from seated to a standing position without much difficulty she was able to turn on the examination table without much difficulty. There was tenderness with AP palpation to L5-S1. Active range of motion was limited secondary to pain. Straight leg raise was positive on the right with 45° of hip flexion. Straight leg raise was negative on the left with 58° of hip flexion. Dermatomal sensation of the lower extremities to light revealed intact sensation bilaterally. The doctor concluded that Petitioner demonstrated no change in her condition. Diagnosis was facet syndrome with lumbar radiculopathy. The doctor recommended that she continue with physical therapy, that she remain off work as recommended by Dr. Koutsky and follow up.

On April 12, 2017, Petitioner followed up with Dr. Glaser. Diagnosis was unchanged. The radiofrequency ablation procedure reduced her symptoms by 40% but she had daily pain affecting quality of life. She rated her pain 5 to 6 out of 10. She reported sleep disturbance. Lumbar spine examination was unchanged. Discography was ordered from L2 through S1.

On April 25, 2017, Petitioner was re-examined by her chiropractor. She reported her low back pain had slightly decreased since her last exam. Her pain was 4 out of 10. Pain was greater on the right and she continued to experience numbness and tingling into the right lower extremity worse with walking. The doctor recommended ongoing physical therapy, that she remain off work and re-examination.

On May 10, 2017, Petitioner followed up with Dr. Koutsky for her bilateral L4-5 radiculopathy, stenosis and probable discogenic pain. The doctor noted she failed conservative treatment and was interested in pursuing more definitive treatment plans. Surgery was discussed. The doctor noted EMG/NCV results were consistent with MRI findings. The doctor noted that assessment was low back pain with bilateral L4-5 radiculopathy with possible discogenic pain. He continued to recommend discogram but also noted a possible 4th injection. He noted that if that injection failed, a second opinion with Dr. Dixon would be considered.

On May 24, 2017, Petitioner followed up with Dr. Glaser. Diagnosis is unchanged. Lower back pain, right buttock and leg pain was the same since prior visit. She was reporting 50% relief. She was using Tramadol and a back brace. She rated her pain anywhere from 3 to 6 out of 10. She reported sleep disturbance. Lumbar spine examination was unchanged. Lumbar discography continued to be recommended.

On June 5, 2017, Petitioner underwent an L2 through S1 lumbar discogram for a diagnosis of lumbar discogenic pain with a chief complaint of lower back pain with Dr. Glaser at APM Surgical Group. Px4:24. At L3-4, there was a posterior annular tear with 7/10 concordant pain; at L5-S1, there was evidence of posterior and anterior annular tear and greater than 7/10 concordant pain.

On June 7, 2017, Petitioner followed up with Dr. Koutsky. She remained unchanged. The doctor noted that while there was a discogram that have been performed, if there was evidence of concordant pain, she would be a reasonable candidate for decompression but also stabilization with instrumentation. She remained off work. Medications, including Tramadol, were refilled. Trigger point injections were administered. On June 9, 2017, a note from Dr. Koutsky's office indicated that discogram revealed concordant pain noted after injection at L3-4 and L5-S1. There was no pain after injection at L2-3 or L4-5.

In June 2017, Petitioner underwent a Section 12 exam with Dr. Stephen Mather at the request of Respondent. Rx1. Petitioner provided history that she was moving a 600-pound pallet jack and had to drag it around and developed back pain. She continued to work and finish the day but by the end of the day her lower back was so sore she went to the emergency room. The doctor noted that after the injury she began having both numbness and pain down the right leg. The numbness appeared to be ill-defined and that it was the whole leg with numbness of the entire circumference of the right thigh and right leg below the knee. She reported pain in the back and the side of the right leg all the way down to the foot. The symptoms came and went. She denied any previous history. She attempted to return to work one day but the pain was too much and had not worked since then.

On exam, she was tender on the right side down to the sacral area. There was no spasm present. She had pain with light palpation appearing to be non-physiologic. There is no spasm in the lumbar spine. There were no complaints of radiating pain. She reported pain with simulated axial rotation and pain with axial compression of the spine. Seated SLR showed no pain complaints. Supine SLR revealed severe complaints of lower back pain with raising and with the hip and knee flexed.

X-rays were normal without evidence of arthritic changes. Pain diagram indicated bilateral lumbosacral pain complaints traveling down the back of the right tire in the back of the right calf. The doctor performed a records review. He noted that the Illinois state prescription monitoring website indicated Petitioner had not filled any pain medication between August 4, 2016 and March 15, 2017, a period of seven months. The doctor reviewed chiropractic records and noted there was no focal findings or objective findings. Further, the notes did not

demonstrate any radicular complaints down the right leg, no numbness down the right leg and no objective findings on exam. He noted pain diagram in October 2016 showed lower back pain without radicular complaints. In January 2017, she had no radicular complaints only right greater than left lower back pain. Also, in January 2017, the doctor noted that Petitioner indicated to Dr. Glaser her back and leg pain stayed the same but when she saw her chiropractor the same day, she did not complain of any leg pain and there were no findings on exam to indicate leg pain.

On June 28, 2017, Petitioner followed up with Dr. Glaser. Diagnosis was unchanged. The location, frequency and area of pain remained unchanged. Petitioner rated her pain 4 to 6 out of 10. She reported sleep disturbance. Fusion surgery versus minimally invasive treatment was discussed. The recommended procedure was L3-4 and L5-S1 percutaneous discectomy with Elliquence device.

On July 12, 2017, Petitioner followed up with Dr. Koutsky. Decompression with stabilization was discussed once again. The doctor recommended that she see Dr. Dixon for a neurosurgical evaluation. In the interim, she remained off work and was to continue physical therapy. She was given Tramadol.

On July 14, 2017, Petitioner followed up with her chiropractor. She rated her pain 4 out of 10 with medication and 6 out of 10 without medication. Pain patches were helpful. She continued with dysfunction and pain noted with ADLs including her household chores, walking, standing, repetitive motions involving bending in the use of stairs. On July 26, 2017, Petitioner followed up Dr. Glaser and was unchanged.

On August 28, 2017, Petitioner was re-examined by her chiropractor. Her back pain was between 3 to 4 out of 10 while taking medications in the morning and evening. Pain traveled from the lower back to the right knee. On August 31, 2017, October 5, 2017 and December 7, 2017, Petitioner followed up with Dr. Koutsky. She continued with a significant amount of pain in her back into her lower extremities. Assessment was unchanged. Recommendations were unchanged. She remained off work.

On October 26, 2017, Dr. Koutsky testified on behalf of Petitioner. Px6. The doctor testified that he is board-certified orthopedic surgery and spine surgery. He noted the Petitioner's cheap complaint at initial evaluation was lower back pain radiating down both lower extremities right greater than left. She had numbness and tingling and occasional weakness. He noted a history of injury and initial complaints. She previously had an MRI the lumbar spine performed at Western Open MRI on August 15, 2016 which showed degenerative changes. She also had disc protrusion and annular tear at L4-5 contributing to some stenosis and protrusion at L5-S1. EMG testing showed evidence of changes consistent with L4-5 radiculopathy. His assessment at that time was L4-5 radiculopathy, stenosis and probable discogenic pain because she complained of a lot of back pain as well. He recommended a lumbar discogram and further work up to see whether her symptoms or discogenic in origin and in order to determine whether she was a candidate for a fusion versus decompression. The doctor opined that the accident correlated with the pain Petitioner was experiencing. He further opined that previous treatment including therapy, injections and chiropractic care was a reasonable course of treatment. The doctor also referred her to Dr. Dixon, in order to obtain a second opinion regarding fusion and decompression versus decompression. The doctor testified that the contemplated level was L4-5 but that eventually, discogram showed pain after an injection at the L3-4 and L5-S1 levels and EMG showed the radicular component was at L4-5. Therefore, the doctor testified, it was his recommendation that L3 through S1 would be decompressed and fused. He testified that continued to recommend that she see Dr. Dixon for another opinion.

When asked whether a one level or two-level fusion would be appropriate for Petitioner, the doctor testified that he did not believe it would suffice completely but that it was not unreasonable. He explained that a one level fusion at L5-S1 with decompression at L5 may be a reasonable alternative. Hence, this is why the doctor wanted her to get a second opinion with Dr. Dixon. The doctor agreed that the recommended three level fusion was not a firm decision and she may just require one or two levels. The doctor opined that Petitioner had some

pre-existing degenerative asymptomatic changes in her back which were rendered symptomatic. He concluded that the condition of the lumbar radiculopathy at L4-5 and discogenic mechanical axial back pain and L3-4 and L5-S1 was causally and directly related to her work-related injury. Likewise, the need for the surgery was causally and directly related to the work injury because that is when her symptoms which were refractory to conservative management started.

Under cross-examination, the doctor testified that while he noted she had undergone 6 to 7 months of therapy at the time that she at first seen him in March 2017, he did not know the frequency or how many sessions she attended total. Likewise, in October 2017, the doctor still did not know the frequency of physical therapy sessions she was undergoing, yet he continued to prescribed therapy. On redirect, the doctor explained that it was necessary for her to continue physical therapy while awaiting the recommended surgery but also stated that physical therapy obviously was not improving her symptoms. He testified that more likely than not, if she were to stop all formal treatment, she would likely deteriorate.

On January 4, 2018, Petitioner followed up with Dr. Koutsky. She did see Dr. Dixon for a neurosurgical evaluation who also felt she would be a reasonable candidate for surgery. Assessment was L3 through S1 radiculopathy and discogenic pain. Tramadol was refilled. She remained off work.

On February 1, 2018, Dr. Stephen Mather testified on behalf of Respondent. Rx1. The doctor, board-certified in orthopedic spinal surgery, testified that he performed a Section 12 examination on Petitioner on June 8, 2017 at the request of Respondent. He took a history and an exam. He testified that she had other pain complaints that he could not explain, meaning pain with simulated axial rotation and pain with axial compression of the spine. Simulated axial rotation meant the pelvis is held and the spine is rotated around the hips, which should not give any spinal pain. Regarding axial compression of the spine, the doctor testified that pressure is placed on the shoulders downward and it should not cause any significant pain. If it does, it is a sign that there is some non-organic source of symptoms.

He noted Petitioner completed a pain diagram indicating bilateral lower back pain, pain traveling down the back of her right leg and back of her right calf. She indicated that during the exam she had pain on the side of her thigh, side of her calf and that the pain in her leg moved around. He also reviewed medical records from La Clinica and reviewed pain diagrams from the clinic dated August 15, 2016, which indicated widespread spinal pain from the shoulder blades down to the lower back and no radicular complaints. Other records, in his opinion, showed a lack of any localized or focal findings and tingling without objective findings on exam. Regarding Dr. Glaser's records, the doctor noted multiple injections and according to that the doctor a normal EMG. He said there were no MRI images on a disk from Western Open MRI.

The doctor concluded that she had suffered from a lumbar strain and psychogenic pain, functional overlay. In support thereof, the doctor testified that the basis of the findings was that her complaints were fairly diffuse and non-explainable; the EMG's raw data showed one plus findings correlating to L2-3 and L3-4, which were normal on MRI and questionable straight leg raise on exam and non-specific SLR in medical records. The doctor also criticized the type of injections, number of injections and length of chiropractic care in this case. He did not believe fusion was indicated and that Petitioner was not in need of further care. The doctor considered Petitioner to be at maximum medical improvement at the time of his examination.

Under cross-examination, the doctor agreed that Petitioner reported having pain her whole leg and the back of her leg. The doctor also agreed that the diagram showed pain traveling down the back of her right thigh to the back of the right calf but testified that it was still part of the whole leg. The doctor identified this as multi dermatomal distribution meaning that it did not follow specific dermatome and was all over the place. The doctor testified that MRI was unremarkable without nerve root compression. He reiterated the EMG one plus findings were non-specific, not significant and did not correlate to any radiculopathy.

On February 8, 2018, Petitioner followed up with Dr. Koutsky. Back and leg symptoms were the same. She had exhausted all conservative care. Assessment was unchanged. The recommendation for surgery was unchanged. She was to transition to home exercises while awaiting authorization. She remained unable to work and Tramadol was refilled.

On March 15, 2018, Petitioner followed up with Dr. Koutsky. She remained unchanged. Assessment was unchanged. The doctor continued to recommend decompression with stabilization, noting Petitioner met the criteria for the procedure according to the official disability guidelines including spondylolisthesis and/or segmental instability with symptomatic radiculopathy and/or symptomatic spinal stenosis and/or symptomatic radiculopathy undergoing previous decompression. The doctor found Petitioner had failed all universally excepted mode of conservative management including medications, therapy and injections and continued to have symptoms interfering with activities of daily living in their ability to function. She remained off work and Tramadol was refilled.

Today, Petitioner testified that she still feels she is in pain, that she cannot sit or stand for very long. She cannot lie down for very long and is unable to sleep. She still feels pain from her lower back to her right leg. She said her leg is in pain and feels numb.

Under cross, Petitioner was asked as to the different weights of the product or items allegedly carried or lifted. At PIC, they noted 100 pounds, at La Clinica, they noted 300 pounds, Dr. Koutsky noted 400 pounds and the Section 12 doctor noted 600 pounds. Petitioner agreed there were different numbers because she did not know. She said these were estimates but that there was a lot of weight.

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact. At trial, the issue of accident was in dispute, primarily being of credibility the mechanism of injury. There appears to be various descriptions given as to the mechanism of injury and the source or type of product involved. For example, Petitioner agreed that she described carrying boxes and buckets of product. She also agreed she was pushing or pulling pallets full of trays. However, she believes she was injured pushing the pallets. The Arbitrator finds that Petitioner's description of her injury to be credible in that she maintained she was performing various tasks related to the pallets and the product that was on them. For example, she stated that she was pulling the pallets, which were loaded of product weighing a lot, and that the wheels were not functioning properly. She also recalled that the last thing she carried was marmalade, also described as honey in the accident report. Petitioner also candidly disclosed that she did not know the exact weight of the product, having estimated. Based on the totality of the evidence and in reading the histories in each medical record, the Arbitrator finds that Petitioner's accident was the result of pushing and pulling wheeled pallets full of product as well as lifting and carrying other product through-out the day. This is in line with Petitioner's testimony that by the end of the work day, her back and right leg hurt. She did not identify one particular act as causing her low back pain or right leg pain but rather that at the end of the day, her back hurt.

The Arbitrator also notes that some of the medical records have different mechanisms and even different dates noted within each medical record thereby making them internally inconsistent. There was no indication from the testimony provided that these discrepancies should be attributed solely to Petitioner or whether these are scrivener's errors. Having resolved the issue of credibility, the Arbitrator finds that Petitioner's accident arose

out of and in the course of her employment as she was performing employment related tasks in her capacity in production and did so in a time, place and manner she was reasonably expected to be.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the issue of accident, the Arbitrator finds that Petitioner's current condition of ill-being with respect the low back/lumbar spine is casually related to her work accident. Petitioner credibly testified that she had no prior issues with her back before this date of accident and that following this date of accident, she experienced an onset of low back pain which does not appear to have resolved itself. Petitioner's medical records credibly demonstrate a change in her low back/lumbar spine condition following the work accident. there are no subsequent accidents or incidents to Petitioner's low back/lumbar spine that would cut off causal connection. Further, the Arbitrator rejects Dr. Mathers' conclusion that Petitioner suffered nothing more than a lumbar sprain/strain as the weight of the evidence demonstrates that Petitioner sustained a L4-5 disc pathology and there is question whether that pathology also extends to L3-4 and L5-S1 based on discogram. The Arbitrator also relies on the medical opinion of Dr. Koutsky, who testified that Petitioner's lumbar spine condition is due to the work accident. Thus, the Arbitrator finds that under a chain of events theory, Petitioner was a in a state of good health before the accident and following the accident sustained injuries to her lumbar spine.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, Petitioner requested payment of any and all outstanding medical bills. Ax1, Px7. Having found in favor of Petitioner on the issue of accident and causal connection, the Arbitrator makes the following conclusions with respect to various bills in more detail below.

As to the Workers' Compensation Rx Solutions charges for Terocin dispensed on 11/17/16, 1/11/17, 1/13/17, 2/22/17, 4/12/17, 5/24/17, 6/28/17, 7/26/17, the Arbitrator ***denies*** those charges as they are not supported by any medical records in evidence. Px7. There is no reference to Terocin in any medical record, no prescription for Terocin and no documentation to show that Terocin was recommended and distributed. Petitioner failed to provide any testimony as to this prescription and whether she derived any benefit from same. See Px3, Px4.

As to the Rx Development Assoc., Inc. charges for Fexmid, Dendracin lotion and Terocin patches dispensed on 8/18/16 and 3/22/17, the Arbitrator ***denies*** those charges as they are not supported by any medical records in evidence. Px7. There is no reference to any such prescription in any medical record and no documentation to show that these were recommended and distributed. See Px3, Px4.

As to the Metro Health Services charges for toxicology on 11/9/17 and 1/4/18, the Arbitrator ***denies*** those charges as they are not supported by any medical records in evidence. Px5, Px7. There is no reference to any such prescription in any medical record and no documentation to show that these were recommended and performed. As to the 12/7/17 charges, the Arbitrator also ***denies*** these charges noting that while such testing is mentioned in the record, Petitioner failed to provide all necessary data elements necessary to adjudicate this bill.

As to the Metro Health Services charges for oral and topical medications from 3/16/17 thru 1/5/18, the Arbitrator ***denies*** all charges as they are not mentioned or supported by any medical records in evidence. Petitioner failed to provide any testimony as to these prescriptions, their charges and whether she derived any benefit from same. In addition, there is no deposition testimony to support these prescriptions and the charges.

Likewise, Petitioner failed to provide all necessary data elements necessary to adjudicate these bills. The Arbitrator finds that Petitioner failed to prove the reasonableness and necessity for same.

As to the Elmhurst Orthopaedics / Premier Healthcare Svcs Pmt Ctr charges for 11/9/17, 1/4/18 and 2/8/18, the Arbitrator ***denies*** those charges as they are not supported by any medical records in evidence. Px5, Px7. There is no reference to any such prescription in any medical record and no documentation to show that these were recommended and performed. The Arbitrator awards **$3,400.00** for the 12/7/17 charges as this urine test was discussed in connection with Petitioner's pain medications and in fact prescribed by Dr. Koutsky and are referenced in his medical record. The record further shows that the urine test was administered. The Arbitrator finds this prescription reasonable and necessary.

As to the Argus Medical Supply Company charges from 9/7/16 thru 9/29/16, the Arbitrator ***denies*** all charges as they are not mentioned or supported by any medical records in evidence. The Arbitrator notes that the dates of service noted in these bills do not correspond to any medical note in any record. These dates of service, however, do correlate with treatment dates Petitioner may have had with Dr. Glaser but Dr. Glaser's record fail to mention what medical supplies, if any, these charges could relate to. At trial, Petitioner failed to provide any testimony as to these prescriptions, their charges and whether she derived any benefit from same. Likewise, there is no deposition testimony to support these prescriptions and the charges. Finally, the Arbitrator is not persuaded by the medical necessity documentation submitted for the Game Ready system as it does not persuasively indicate reasonableness or necessity. The Arbitrator finds that Petitioner failed to prove the reasonableness and necessity for same.

As to the Advanced Physical Medicine / Dr. Scott Glaser charges from 8/18/16 thru 7/26/17, the Arbitrator finds that these dates of service correspond to medical visits Petitioner had with Dr. Glaser and that such treatment was reasonable and necessary to treat, cure and otherwise relieve Petitioner of the effects of her work-related condition(s). The Arbitrator awards the charges totaling **$2,335.00**.

As to the APM Surgical Group / Dr. Scott Glaser charges from 9/6/16, 10/10/16 and 6/5/17, the Arbitrator finds that these dates of service correspond to medical visits Petitioner had with Dr. Glaser for injections as recommended and that such treatment was reasonable and necessary to treat, cure and otherwise relieve Petitioner of the effects of her work-related condition(s). The Arbitrator awards the charges totaling **$42,692.65**. As to the 2/27/17 date of service, the charge is denied as there is no prescription, recommendation or rationale for repeat medial branch blocks.

As to the Southwest Laboratories LLC charges from 9/6/16, the Arbitrator ***denies*** all charges as they are not mentioned or supported by any medical records in evidence. Px7. The documents submitted reference a 9/6/16 date of service, which corresponds to the date in which Petitioner underwent injections with Dr. Glaser. However, there is no mention in any medical record of any Keith Boyd as noted in the bills and no indication that Dr. Glaser had any assistance for this procedure on that date. At trial, Petitioner failed to provide any testimony as to these charges, who Keith Boyd is and whether she derived any benefit from these services. In addition, there is no deposition testimony to support these prescriptions and the charges. The Arbitrator finds that Petitioner failed to prove the reasonableness and necessity for same.

As to the Berwyn Diagnostics Imaging charges from 8/15/16 and 6/5/17, the Arbitrator ***denies*** all charges as they are not mentioned or supported by any medical records in evidence. Px7. The documents submitted reference a 8/15/16 date of service but there is no corresponding medical record for same. The bill also references a 6/5/17 date of service, which corresponds to the date on which Petitioner underwent her discogram. However, the medical record for that date of service fails to mention Berwyn Diagnostics, and/or Dr. George Kuritza and there is no indication that Dr. Glaser had any assistance for this procedure on that date. At trial,

Petitioner failed to provide any testimony as to these charges, who Gregory Goldstein, George Kuritza and/or Kathryn Engel is and whether she derived any benefit from these services. In addition, there is no deposition testimony to support these prescriptions and the charges. The Arbitrator finds that Petitioner failed to prove the reasonableness and necessity for same.

As to the La Clinica charges, the Arbitrator denies all hot and cold pack charges as they are improper unbundled services. The Arbitrator further denies the 8/26/16 Home Exercise Kit/DME as no medical opinion was given as to its reasonableness or necessity. There is no mention of the Kit in any daily note or in any re-evaluation note other than a form ordering same. The Arbitrator also denies the 8/27/16 ultrasound, EMG/NCV and "standard medical report" charges as there is no corresponding prescription in any initial evaluation, re-evaluation or daily note. Moreover, there is no actual medical document for these charges, study and/or report. The Arbitrator further denies the 8/30/16 "lumb-sacral orthos sag-co" as no medical opinion was given as to its reasonableness or necessity. There is no mention of this item in any daily note or in any re-evaluation note. The Arbitrator further denies the 9/19/16 TENS unit, moist heat pad and garment/electrode charges as no medical opinion was given as to its reasonableness or necessity. There is no mention of these items in any daily flow sheet or in any re-evaluation note.

As to the remaining charges, the Arbitrator finds that Petitioner underwent an extensive, excessive and unnecessary course of physical therapy with La Clinica. Much of Petitioner's daily treatment notes fail to provide any meaningful information as to whether any benefit was derived from near daily therapy sessions. Petitioner failed to provide any testimony as to same. Dr. Koutsky explained therapy was necessary but could not state how many sessions Petitioner had undergone. In reviewing the re-evaluation notes, the Arbitrator notes that by the 12/8/16 re-evaluation, physical therapist Palak Patel noted that Petitioner felt the same every day. Px3:84. By the 1/31/17 re-evaluation, Dr. Gregory Iavarone, DC, correctly observed that Petitioner had not demonstrated much improvement. *Id.* at 64. Yet he continued to prescribe an ongoing and unnecessary course of physical therapy stating that such services are designed to improve and restore the loss of physical functioning following an injury. The Arbitrator assigns little weight to this opinion and finds that Petitioner's treatment became excessive and unnecessary after 12/8/16 re-evaluation and that such services failed to restore any meaningful function, thereby becoming unreasonable. The Arbitrator further assigns little weight to Dr. Glaser's blanket prescription for ongoing therapy as no supporting medical opinion was given. Therefore, the Arbitrator awards charges for dates of service 8/10/16 thru 12/8/16, less the unsubstantiated charges noted above, resulting in an award in the amount of **$11,235.00**, further subject to Sections 8(a) and 8.2 of the Act.

ISSUE (L) ***What temporary benefits are in dispute?***

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. In determining whether Petitioner has met her burden of proving entitlement to TTD, the Arbitrator notes that Dr. Glaser did not issue any opinion or work status note regarding Petitioner's capacity to work. See, Px4. In reviewing La Clinica medical records, some of the re-evaluation notes indicated that Petitioner's work status would be left up to her treating orthopedic surgeon's decision, which the Arbitrator notes was Dr. Koutsky. See, Px3. La Clinica did issue off work slips, however from 8/10/16 – 9/19/16 and again 11/4/10 – 11/25/16. In January 2017, La Clinica continued to recommend that Petitioner remain off work. However, having already found treatment during this time and after with La Clinica to be unreasonable, excessive and unnecessary, the Arbitrator assigns no weight to these opinions and does not rely on these opinions as to the issue of TTD.

Dr. Koutsky's records show that he opined Petitioner was unable to work as of the initial visit on 3/15/17 based upon his assessment of L4-5 bilateral radiculopathy, stenosis and discogenic pain. See, Px5. At that visit, the doctor expressed concern for discogenic pain, noting possible annular tear on MRI at that level. In the

Arbitrator 's view, Dr. Koutsky correctly assessed that Petitioner's lumbar condition had not stabilized and that she was unable to return to work.

The Arbitrator finds that Petitioner's condition failed to stabilize with the course of care she underwent, thereby entitling her to TTD. Respondent failed to introduce any persuasive evidence that Petitioner's condition as noted in her treatment records stabilized and the Arbitrator rejects Dr. Mathers' opinion that Petitioner could return to work. Therefore, the Arbitrator finds and concludes that Petitioner has proven by a preponderance of the evidence that she is entitled to and that Respondent shall pay Petitioner temporary total disability benefits of **$332.28/week** for **66-1/7th weeks**, commencing **8/4/16** through **9/19/16** (6-5/7th weeks), from **11/4/16** through **11/25/16** (3-1/7th weeks) and from **3/15/17** to **4/12/18** (56-2/7th weeks), as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$8,971.83** for temporary total disability benefits that have been paid.

ISSUE (K), (O) ***Is Petitioner entitled to any prospective medical care?***

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having weighed all evidence, the Arbitrator concludes that Petitioner has failed to prove by a preponderance of the evidence that she is entitled to prospective medical care. In so finding, the Arbitrator notes various conflicting, incomplete and equivocal medical opinions as to the type of prospective medical care Petitioner may need.

Dr. Glaser recommended that Petitioner needed was an L3-4 and L5-S1 percutaneous discectomy with Elliquence device. Dr. Glaser opined that Petitioner's need for surgery was the result of the accident and that she had failed all conservative care, including a radiofrequency ablation procedure that never took place. Petitioner failed to reconcile this recommended procedure with Dr. Koutsky's opinion(s).

Dr. Koutsky initially noted L4-5 radiculopathy based on MRI and EMG findings and recommended discectomy or fusion. He later noted that discogram found concordant pain at L3-4 and L5-S1. Following the discogram, Dr. Koutsky continued to recommended discectomy and possible fusion, but failed to specify in the medical record what level(s) and why. In October 2017, Dr. Koutsky testified that he was recommending a three-level fusion from L3 to S1, noting that L2-3 and L5-S1 were causing the axial low back pain and L4-5 was the radicular component. On cross, however, Dr. Koutsky equivocated. When asked whether a one level or two-level fusion would be appropriate for Petitioner, the doctor testified that he did not believe it would suffice completely but that it was not unreasonable. He explained that a one level fusion at L5-S1 with decompression at L5 may be a reasonable alternative. Yet still, Dr. Koutsky endorsed a second opinion with Dr. Dixon. The doctor agreed that the recommended three level fusion was not a firm decision and she may just require one or two levels. Moreover, as to L3-4 and L5-S1, Dr. Koutsky did not explain why L3-4 was not noted anywhere on MRI or EMG and only on discogram. As to L4-5, the doctor failed to adequately explain why L4-5 was not noted on discogram yet he continued to recommended fusion at that level. After his deposition, Petitioner continued to treat with Dr. Koutsky, who continued to recommend surgery and continued to fail to specify what level(s).

Also, of note, the record suggests that Dr. Koutsky never reviewed Petitioner's prior medical records, stating only that she had failed conservative care. Dr. Koutsky did not have the benefit of personally reviewing the results of the discogram, instead taking only a phone note and did not have the benefit of knowing that Petitioner never underwent a radiofrequency ablation procedure and underwent medial branch blocks that were neither recommended or explained by Dr. Glaser yet performed anyway. Finally, at no time during trial did Petitioner reconcile the different medical procedures being recommended and appeared to have no real understanding of what level(s) were being recommended for surgery.

As to Dr. Mathers' opinion, the Arbitrator assigns little weight to the doctor's opinion that Petitioner's lumbar sprain/strain has resolved and that she is no longer in need of further care. Having found in favor of Petitioner on the issues of accident and causal connection, the Arbitrator finds this opinion incomplete and based on a faulty diagnosis.

In summary, the conflicting medical opinions as well as Dr. Koutsky's failure to sufficiently and persuasively address why additional levels may or may not be indicated for surgical intervention demonstrate that Petitioner has failed to prove she is entitled to any particular form of prospective medical care. Based upon this failure of proof, the Arbitrator must deny Petitioner's request for prospective medical treatment.

Signature of Arbitrator

6-18-18
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HUGO ALVAREZ,

Petitioner,

19IWCC0094

vs.

NO: 11 WC 8498

AMI BEARINGS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and the nature and extent of Petitioner's 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.

Findings of Fact

1. On November 10, 2009, while working for Respondent as an assembler, Petitioner was pulling pieces of wood weighing over 35 pounds each from a shelf when the pieces began to fall. As the pieces fell, Petitioner twisted his body, scraped his elbow, and felt his back "snap." Petitioner complained of immediate low back pain and presented to Dr. Nicholas Ruvarec, a chiropractor, on the accident date. Dr. Ruvarec diagnosed Petitioner with a lumbar sprain, lumbar facet syndrome, sacroiliac pain, a knee sprain, and a thoracic sprain. Petitioner was given light duty restrictions that were accommodated by Respondent.

   Dr. Ossama Abdellatif thereafter administered three sets of lumbar epidural steroid injections, lumbar blocks from L3-L4 through S1, and trigger point injections on April 28, 2010, May 12, 2010, and May 26, 2010. Dr. Abdellatif also performed a facet neurolysis at multiple levels on May 26, 2010.

Petitioner underwent a fourth lumbar epidural steroid injection to L4-L5 as well as another lumbar block and facet neurolysis on June 9, 2010.

Petitioner then received a fifth lumbar epidural steroid injection and trigger point injection on June 23, 2010. A discogram further demonstrated pain at L4-L5 and L5-S1.

On July 28, 2010, a sixth lumbar epidural steroid injection was administered along with a discectomy of the L4-L5 disc, a trigger point injection, and another discogram. This discogram yielded the same findings as the June 23, 2010 discogram.

On September 16, 2010, Petitioner presented for an independent medical examination with Dr. Jesse Butler, who found Petitioner had sustained a causally related lumbar strain. Dr. Butler believed Petitioner had plateaued in treatment but did not opine as to maximum medical improvement.

Petitioner next presented to Dr. Ronald Michael of the Illinois Neurospine Institute. Dr. Michael performed four discograms, an intradiscal electrothermal annuloplasty, and a discectomy/biacuplasty.

On October 21, 2011, Petitioner underwent lumbar fusion surgery at L3-L4 and L4-L5. At the §19(b) hearing, Petitioner testified that after the surgery, his left leg pain disappeared, his right leg pain diminished, and his back pain diminished without going away. Following surgery, Petitioner participated in chiropractic therapy and received additional injections.

Finally, on November 6, 2012, Petitioner was evaluated by Dr. Michael Zindrick of Hinsdale Orthopedics by agreement of the parties. Dr. Zindrick disagreed with much of the failed conservative care Petitioner had received prior to the surgery. Dr. Zindrick stated he would have recommended the fusion, but no more than one discogram. He also would not have recommended the biacuplasty or intradiscal electrothermal annuloplasty.

2. The parties proceeded to a bifurcated §19(b) hearing on April 9, 2014 and May 6, 2014. Arbitrator Brian Cronin issued a corrected §19(b) Decision on March 19, 2015, finding Petitioner's accident arose out of and in the course of his employment and caused Petitioner's current condition. Arbitrator Cronin further authorized prospective diagnostic hardware injections, and if necessary, hardware removal.

   In its Decision issued June 16, 2016, the Commission thereafter modified the Decision of the Arbitrator as it related to certain medical bills. The Commission denied payment of bills for all services by Dr. Abdellatif and Chicagoland Advanced Pain & Headache Clinic from April 28, 2010 to April 27, 2011 as well as the chiropractic care from Dr. Ruvarec after 2010. The Commission further affirmed the Arbitrator's denial of all treatment from Dr. Michael, except the November 23, 2010 discogram and October 21, 2011 fusion. The Commission otherwise affirmed the Decision of the Arbitrator, and the parties did not seek further review in the Circuit Court.

3. Following the §19(b) hearing, Petitioner returned to Dr. Zindrick on June 11, 2014. Dr.

Zindrick ordered physical therapy, continued pain medication, and provided modified duty restrictions, including a lifting restriction of no greater than 20 pounds.

Petitioner began physical therapy on June 16, 2014. However, he attended only three sessions before being discharged on June 27, 2014 due to attendance non-compliance.

Petitioner continued treating with prescription medication and work restrictions. On March 2, 2016, Dr. Zindrick reported Petitioner was working light duty and functioning at that level. Dr. Zindrick placed Petitioner at maximum medical improvement but opined that Petitioner would have pain the rest of his live that would require management through periodic Tylenol #3, occasional injections, and activity restrictions, including light duty work. Petitioner's restrictions, including a 15-pound lifting restriction, were continued.

When Petitioner returned September 28, 2016, Dr. Zindrick reported Petitioner had probable hardware pain in addition to his chronic back and leg pain. Dr. Zindrick indicated he did not recommend hardware removal at this time, but it was possible in the future.

On April 25, 2017, Dr. Kenneth Candido authored an independent medical examination report. Dr. Candido diagnosed Petitioner with right-sided sacroiliac joint pain but opined the condition was not causally related to Petitioner's work accident nor prior surgery. He indicated sacroiliac joint dysfunction is due primarily to degenerative arthritis and related conditions. Dr. Candido placed Petitioner at maximum medical improvement and believed he was capable of working without restrictions.

On June 13, 2017, Dr. Zindrick disagreed with Dr. Candido's conclusions and instead continued Petitioner's permanent work restrictions, including a 15-pound light duty lifting restriction. He found Petitioner had ongoing pain and symptoms from his spinal fusion and altered spine biomechanics. Dr. Zindrick indicated he had been concerned throughout his entire treatment of Petitioner that his fusion was not 100% solid. Dr. Zindrick advised Petitioner to continue taking medication and return as needed.

4. The parties proceeded to a final hearing on August 17, 2017 before Arbitrator Maria Bocanegra. Petitioner testified he never returned to full duty work after his accident but has been working full-time accommodated duty for Respondent since July 2013. After the accident, Respondent created a position to accommodate Petitioner's restrictions. Petitioner's current job title is assembly man, the same title he held pre-accident. Petitioner used to pick up orders and organize material; however, he now assembles small parts and does not lift more than 15 pounds. Petitioner did not sustain a pay cut when he returned to work.

   Petitioner testified his family now helps him complete his household responsibilities, including chores, throwing out the garbage, and cutting the grass. Petitioner expressed difficulty with standing up, bathing himself, and changing his clothes. His wife helps him take off his socks and shoes, as it hurts Petitioner to bend over.

   Petitioner also cannot carry his young son as he did before his accident. Petitioner testified

sitting on the floor with his youngest child hurts and frustrates him. Petitioner feels he can no longer help his children nor share in their activities as a result of his accident.

Petitioner further testified he no longer goes to social events because it is tiring to sit down. He no longer goes camping nor plays sports, including basketball and soccer with his children. Petitioner indicated he can only tolerate walking now.

Petitioner further testified he had discussed the possibility of revision surgery with Dr. Zindrick and would like to pursue it in the future if it would help his pain. No surgery had been scheduled at the time of hearing.

Conclusions of Law

Following a careful review of the record, the Commission respectfully disagrees with the Arbitrator's permanent partial disability award of 32% MAW and finds an award of 27.5% MAW to be more appropriate, as Petitioner suffered no loss of earnings and was accommodated full-time by Respondent.

Petitioner's accident occurred before September 1, 2011; therefore, the Commission is not bound by the §8.1(b) enumerated criteria while determining permanent partial disability.

The Commission recognizes that Petitioner has undergone extensive treatment for his low back injury. Despite such treatment, Dr. Zindrick has opined that Petitioner will have pain the rest of his life that will need managed through Tylenol #3, occasional injections, and permanent restrictions. Petitioner also testified to numerous ways his pain has affected his life.

Petitioner's testimony, along with his substantial treatment and permanent restrictions, supports a high permanency award. However, the Commission finds the Arbitrator's award of 32% MAW to be too high, as Petitioner has been continuously accommodated by Respondent and functions full-time in his accommodated position. Petitioner did not sustain any pay cut when he returned to work in July 2013. As Respondent has accommodated Petitioner since 2013, any argument that Petitioner will suffer diminished job prospects if released by Respondent is speculative. The parties presented no evidence to suggest Petitioner was in danger of losing his accommodated position or to establish what the actual labor market would be for Petitioner with his restrictions.

Moreover, although Dr. Zindrick indicated future revision surgery was a possibility, he explicitly stated that he did not recommend it now. No surgery was scheduled at the time of hearing. As Dr. Zindrick discussed the corrective surgery as a future possibility and not a procedure Petitioner definitively needs now, it does not presently justify an inflated permanency award. Petitioner could just as well not need the surgery in the future.

Upon consideration of the entire record and placing great weight on Petitioner's ability to continue working full-time accommodated duty without a loss of pay, the Commission finds Petitioner sustained a loss of 27.5% MAW. The Commission so modifies the Decision of the Arbitrator accordingly. The Commission otherwise affirms and adopts the Decision of the

19IWCC0094

Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 30, 2017, is modified as stated herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $320.00 per week for a period of 137.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 27.5% loss of use of the person as a whole.

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

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 $45,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: FEB 8 - 2019

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/met
o: 12/20/18
46

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

19IWCC0094

ALVAREZ, HUGO
Employee/Petitioner

Case# **11WC008498**

AMI BEARING INC
Employer/Respondent

On 10/30/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.24% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0365 BRIAN J McMANUS & ASSOC, LTD
MARK CONNOLLY
30 N LASALLE ST SUITE 2126
CHICAGO, IL 60602

2837 LAW OFFICES JOSEPH MARCINIAK
ROBERT SABETTO
TWO N LASALLE ST SUITE 2510
CHICAGO, IL 60602

19IWCC0094

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

HUGO ALVAREZ
Employee/Petitioner

v.

AMI BEARINGS, INC.
Employer/Respondent

Case # 11 WC 8498

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 **AUGUST 17, 2017**. After reviewing all of 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 _____

19IWCC0094

FINDINGS

On **November 10, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$24,904.28**; the average weekly wage was **$504.00**.

On the date of accident, Petitioner was **35** 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 **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$4,538.40 (3%BAW advance)** for other benefits, for a total credit of **$4,538.40**. Respondent is entitled to a credit of **$135.65** under Section 8(j) of the Act.

ORDER

Respondent shall pay the medical bills of ATI Physical Therapy in the amount of **$691.36**, subject to Sections 8(a) and 8.2 of the Act. Respondent shall pay the medical bills of Hinsdale Orthopedics in the amount of **$1,182.00**, subject to Sections 8(a) and 8.2 of the Act. Against this specific award, Respondent shall be entitled to a credit for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Petitioner's claim for $120.00 out-of-pocket expenses is hereby ***denied***.

Respondent shall pay Petitioner permanent partial disability benefits of **$320.00/week** for **160 weeks**, because the injuries sustained caused the **32%** loss of the person as a whole, as provided in Section **8(d)2** of the Act. Against this specific award and by stipulation, Respondent shall be given a credit of **$4,538.40 for a** prior permanency advance payment.

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

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

Signature of Arbitrator

10/30/2017
Date

OCT 30 2017

FINDINGS OF FACT

a. Procedural Background

Hugo Alvarez ("Petitioner") alleged injuries arising out of in the course of his employment against AMI Bearings Inc. ("Respondent") occurring on November 10, 2009. On April 9, 2014 and on May 6, 2014, the parties proceeded to arbitration pursuant to section 19(b) before Arbitrator Brian Cronin. Arbitrator Cronin issued his decision on March 5, 2015, finding and concluding that Petitioner's lumbar spine condition was casually related to his work accident and awarded prospective medical care pursuant to Section 8(a) by way of diagnostic hardware injections and/or hardware removal as needed, along with interim benefits (temporary total disability and medical bills). On appeal, the Commission in case 16 IWCC 0408 modified Arbitrator Cronin's decision regarding the portion of the decision concerning medical bills. All else was otherwise affirmed. Px1. Counsel for both parties made opening statements clarifying and narrowing the issues for trial. The Arbitrator hereby adopts and incorporates by reference the previous Arbitration decision and Commission decision in 16 IWCC 0408 as though fully set forth herein and relies on same in rendering the following findings of fact and conclusions of law. Px1.

b. Trial Testimony and Evidence

Petitioner testified via Spanish interpreter/translator Marco Garcia. Mr. Garcia was sworn in and testified that he has been a translator for 15 years and holds a Master's degree in linguistics and education. He further testified that he has taught at both the high school and college level. Mr. Garcia had not met Petitioner prior to the hearing. Petitioner is currently employed with Respondent and has been so for 15 years. Prior to November 10, 2009 his condition was that of a normal person who was active without restrictions. On the date of his accident, November 10, 2009, the Petitioner worked as an order picker and had to take out orders to assemble various pieces. These pieces were on a shelf and when he pulled one of the pieces out the remaining ones fell on him causing him to immediately felt pain in his low back. As a result of this work accident, Petitioner underwent extensive medical care, including chiropractic care, multiple injections and ultimately a lumbar fusion with on October 21, 2011 with Dr. Ronald Michael. Following surgery, Petitioner came under the care of Dr. Zindrick, who recommended metal injections. Petitioner and Respondent eventually proceeded to Arbitration and that treatment and decision is summarized in the Commission's Decision. Px1. Petitioner returned to work for Respondent in June 2013 and he agreed he had been working in an accommodated position ever since.

On June 11, 2014, Petitioner returned to Dr. Zindrick. Px2. Petitioner had been working with a 10-pound lifting restriction. Petitioner reported ongoing leg pain bilaterally along with increased back pain. Impression was chronic back pain improved with epidural steroid injections. The doctor recommended Petitioner continue with medications and increased workload up to 20 pounds. Petitioner was to revisit physical therapy for core stabilization along with a home loan back exercise program. Follow up was scheduled in eight weeks. Petitioner was released to return to light duty and a 20-pound restriction

On June 17, 2014, Petitioner return to ATI Physical Therapy. Px3. At that time, therapists noted that Petitioner had complaints of lumbar and right lower extremity pain post work injury. Petitioner had a history of low back pain, fusion surgery, injections and had previously been in physical therapy. Petitioner presented with decreased active range of motion, bilateral lower extremity weakness, impaired low ab activation and soft tissue

restriction limiting ability to bend, squat and lift from the floor. Petitioner was previously employed as an order picker at a medium physical demand level. Petitioner was then currently functioning at a light physical demand level as an assembler for the last year and reported he has progressed to 20 pounds lifting with continued difficulty and re-injury. Therapists felt Petitioner would benefit from skilled physical therapy in order to restore PLOF. At that time, therapists noted Petitioners previous primary complaints included low back pain and right greater than left lower extremity pain when tired. Petitioner noted that he stands 100% of the time for assembling objects on a table, lifting up to 20 pound bearings, bending to lift 10 to 20 pounds. Current limitations included the inability to complete carrying, climbing ladders or stairs, lifting from floor, lifting overhead, lifting waist to shoulder, pulling of objects to complete work related tasks, pushing of objects to complete work related tasks, squatting, walking and working overhead.

Petitioner attended physical therapy from June 16, 2014, June 18, 2014 and June 19, 2014. Px3. On June 27, 2014, Petitioner was discharged from physical therapy to home exercise program due to attendance noncompliance. Px3.

On August 20, 2014, Dr. Zindrick released Petitioner to return to work modified duty no greater than 15 pounds. Impression was persistent pain status post arthrodesis with improvement with metal injections. The doctor recommended follow-up in three months. Petitioner was to continue current work restrictions.

On January 28, 2015, Petitioner was released to return to work with 15-pound lifting restriction. He continued to have pain. Back pain was constant. Symptoms were worse with sitting, lifting greater than 15 pounds or twisting. Impression was unchanged from prior exam. Petitioner was to continue the same restrictions. Follow up was scheduled in six months.

On March 2, 2016, Petitioner return to Dr. Zindrick. Px2. He reported 90% back pain and 10% leg pain. The doctor noted that Petitioner's condition was permanent and that he would continue to have pain for the remainder of his life. Petitioner needed to be managed behavior by way of restrictions, limited bending, twisting and lifting along with periodic Tylenol Number 3. On occasion, Petitioner would need spinal injections as he has had in the past. He was encouraged to return PRN and released to light duty.

On September 28, 2016, petitioner returned to Dr. Zindrick. Px2. He was still having pain radiating down to the bilateral legs. He complained of numbness and tingling to the bilateral legs. He reported ongoing symptoms described as 40% back pain and 60% leg pain with a burning sensation into his buttock and legs, right greater than left. Sitting aggravated low back pain. X-rays demonstrated L3-5 fusion with hardware in cages in place. Flexion and extension views showed only 3° difference in motion not diagnostic for pseudarthrosis. There was no obvious interior interbody fusion seen specifically at L3-4. Prior flexion extension x-rays appeared to have more motion. On exam, Petitioner had decreased sensation in the right lower extremities. He had positive straight leg raise on the right at 60°. Straight leg raise was negative on the left until 90° at which time he experienced similar symptoms. Impression was status post L3 to L5 spinal fusion with chronic residual back and leg pain, probable hardware pain. The doctor recommended Petitioner see a pain management specialist for pain. The doctor again noted the Petitioners condition was permanent and would require continued management for pain control. The doctor noted that although hardware removal was not indicated at that time, it was something that was possible in the future. Petitioner was released to his current work restrictions and encouraged to follow up as needed.

On March 14, 2017, Petitioner was evaluated by Dr. Candido at the request of Respondent. Rx1. Dr. Candido reviewed all available medical records up to Dr. Zindrick's September 2016 visit. Petitioner complained of back pain that he rated at a level of five on a scale of ten while at rest, and at a level of eight with

increased activity. Dr. Candido noted that walking improved Petitioner's pain levels, and that he continued to drive a motorcycle. At arbitration, Petitioner denied that he rides a motorcycle. Dr. Candido's impression was "right sided sacroiliac joint pain" without radiculopathy or facet joint syndrome. He opined that this condition is due primarily to degenerative arthritis and sometimes as a result of falling or an inflammatory condition. He opined that Petitioner reached MMI for his work-related condition. Although he stated that work conditioning might be beneficial, he opined that Petitioner is not a candidate for pain management. He found a mildly reduced lumbar range of motion, but opined that it was effort-related.

On June 13, 2017, Petitioner returned to Dr. Zindrick for the last time. Px2. Petitioner described constant back pain at 70% back pain and 20% pain down the right leg to the hamstring above the knee and 10% on the left. He had numbness and tingling in the right hamstring. Petitioner was taking Tramadol once per day mostly at night. On exam, he had negative SLR until 90° at which time he experienced back pain. He had pain with flexion at 60° and could extend to approximately 20°. Pain was localized to the lumbar area right greater than left. Impression with status post L3 to L5 spinal fusion with spinous process and pedicle screw hardware. The doctor disagreed with Dr. Candido's conclusions. The doctor continued to recommend work restrictions. Noting the Petitioner was at risk for heavy repetitive lifting activities. The doctor expressed concern that the fusion was not 100% solid. The doctor noted there was gapping bone growth at both the L3-4 and L4-5 interspace and little or no known seen posterior. The doctor rechecked flexion extension x-rays to make sure Petitioner had not loosened across the fusion which is a distinct possibility and would require revision surgery at a later date should this become apparent. The doctor recommended continued 15-pound weight restriction. Petitioner was again released to MMI and was encouraged to return PRN.

Petitioner testified that at no point from the date of the accident through the present has he ever been returned to work full duty by a treating physician. He has continued to work light duty at Respondent and that this is a position that was specifically created for Petitioner. His light duty job now consists of assembling and packaging small pieces for Respondent. His prior job was more mobile and consisted of lifting heavier objects that other employees do now. Petitioner also testified that his condition has never improved to where it was before the accident and in fact it's been worsening.

He testified that prior to the accident he did all the jobs one would do as man of the house including taking out the garbage, playing with his kids, practicing sports with them, and cutting the grass, amongst others. With respect to activities of daily living, the Petitioner testified that standing up is painful and he encounters difficulty bathing himself, bending over, changing his clothes, taking his pants off and putting his shoes and socks on. Petitioner testified that gets tired more easily. Sitting causes pain. Regarding physical activities, Petitioner testified that taking out the garbage and working are more difficult now than before his accident and he no longer takes his children to the park. However, he also testified that one of his children is in the Marines and another is at college. He participates in social activities less because sitting is hard, and he no longer camps or plays basketball or soccer. The only exercise he does is walking.

On cross-examination, the Petitioner testified that he still works full time. Prior to the accident he used to pick orders but now the only thing he does is assembly of small things. Since the last time he testified he has only seen Dr. Zindrick who recommended physical therapy. He also saw Dr. Hassan for one injection given that the workers' compensation insurance did not approve the same. Dr. Zindrick told Mr. Alvarez that he may need a future surgery to correct the previous one. He was previously given hardware injections however the Petitioner testified that something is not right and he continues to have pain.

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Further, the Arbitrator hereby adopts and incorporates by reference the previous Arbitration decision and Commission decision in 16 IWCC 0408 as though fully set forth herein and relies on same in rendering the following conclusions of law. Px1.

The Arbitrator has considered all evidence and concludes that Petitioner has proven by a preponderance of the evidence that his current condition of ill-being as it relates to his low back/lumbar is casually related to his work accident. The record establishes that as a result of Petitioner's work accident, Petitioner's injuries necessitated a lumbar fusion. Post-operatively, Petitioner continued to complain of pain in the low back and legs while under the care and treatment of Dr. Zindrick. Petitioner has also remained on light duty restrictions, which have been accommodated since 2013. At the time of the last Arbitration hearing and at the time of the Commission's decision, Petitioner was recommended for hardware injections. Since then, there is no indication that Petitioner has actually undergone any such injections. Px2. At his most recent appointment on June 13, 2017, Dr. Zindrick determined that the Petitioner was at maximum medical improvement and provided him with permanent restrictions of no lifting more than 15 pounds. These were similar restrictions and recommendations issued by Dr. Zindrick in 2016.

On the issue of causation, Respondent submitted Dr. Candido's report, which found Petitioner's SI joint condition to be unrelated to his work accident or his spine surgery. Dr. Candido recommended Petitioner return to work full duty and without restriction.

Having weighed all evidence, the Arbitrator finds Petitioner's current condition of ill-being with respect to his low back/lumbar spine is casually related to his work accident. The Arbitrator rejects Dr. Candido's conclusion that Petitioner suffers from an SI joint condition as this is the only medical opinion concluding such and the preponderance of the evidence shows that Petitioner continues with low back and leg pain attributable to the effects of the work accident and surgery. Further, Petitioner's initial injuries were to his low back and all of his treatment to date has been to his low back. Moreover, all of Petitioner's complaints that he continues to endorse emanate from his low back, specifically the area that was fused, L3-L4 and L4-L5. That surgery was previously awarded by the Commission and no credible event has broken the chain of causation. As such, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the work injury in question.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Further, the Arbitrator hereby adopts and incorporates by reference the previous Arbitration decision and Commission decision in 16 IWCC 0408 as though fully set forth herein and relies on same in rendering the following conclusions of law. Px1.

The Arbitrator has considered all evidence and concludes that Petitioner has proven by a preponderance of the evidence that certain medical services that were provided to him were reasonable and necessary and that Respondent has not yet paid all appropriate charges for same. At trial, Petitioner alleged an outstanding balance due to ATI physical therapy in the amount of $1,074.62. Ax1. In support thereof, Petitioner appended to the ATI Physical Therapy records outstanding medical charges totaling $691.36 for dates of service June 16, 2014 through June 19, 2014. Petitioner failed to submit any additional evidence in support of the alleged $1,074.62 balance or additional evidence in support of awarding any amount above $691.36. The Arbitrator finds that the

June 16th, 18th and 19th charges are causally related to Petitioner's lumbar spine/low back injury and are for reasonable and necessary dates of services in furtherance of Petitioner's ongoing lumbar spine treatment. Therefore, the arbitrator hereby awards the ATI bill in the amount $691.36, subject to Sections 8(a) and 8.2 of the Act.

At trial, Petitioner alleged out of pocket expenses totaling $120.00. Ax1. Petitioner failed to testify as to how or when those out of pocket expenses were incurred. Further, no additional evidence as submitted in support thereof. Therefore, Petitioner's claim for $120.00 out-of-pocket expenses are denied.

Petitioner further alleged outstanding medical bills due and owing to Hinsdale Orthopedics in the amount of $1,182.00. Ax1. In support thereof, Petitioner tendered a patient ledger from Hinsdale Orthopedics indicating total charges of $1,787.00. Respondent asserts an 8(j) credit in the amount of $135.65, which is reflected in the Hinsdale Orthopedics ledger as payments made by Blue Cross Blue Shield. The Arbitrator finds that the outstanding dates of service and related charges are causally related to Petitioner's condition of ill-being and the work accident. Therefore, Respondent shall pay the outstanding Hinsdale Orthopedic charges of $1,182.00, subject to Sections 8(a) and 8.2 of the Act. Against this specific award, Respondent shall be entitled to 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. Ax1, Rx2, Px2.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Further, the Arbitrator hereby adopts and incorporates by reference the previous Arbitration decision and Commission decision in 16 IWCC 0408 as though fully set forth herein and relies on same in rendering the following conclusions of law. Px1.

The Arbitrator has considered all evidence and concludes that Petitioner has proven by a preponderance of the evidence that Petitioner has sustained significant permanent partial disability as a result of the accident. Petitioner has undergone a lumbar fusion at L3 through L5 resulting in permanent light duty retractions of 15 pounds. This has resulted in a job change, which has been accommodated by Respondent since 2013. At the time of his release from Dr. Zindrick, the doctor expressed concern that the fusion was not 100% solid and alluded to possible revision surgery in the future. Petitioner endorses significant limitation in lifting, work activities and activities of daily living, some of which are consistent with his medical record. The Arbitrator adopts and relies on Petitioner's treatment records over those of Dr. Candido's in determining permanency and the extent of Petitioner's disability.

Based on the foregoing and the record as a whole, Respondent shall pay Petitioner permanent partial disability benefits of **$320.00/week** for **160 weeks**, because the injuries sustained caused the **32%** loss of the person as a whole, as provided in Section **8(d)2** of the Act. Against this specific award and by stipulation, Respondent shall be given a credit of **$4,538.40 for a** prior permanency advance payment.

Signature of Arbitrator

10/30/2017
Date

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LYNDA DOWNING,

Petitioner,

vs.

NO: 16 WC 13325

PRESENCE ST. JOSEPH HOSPITAL,

19IWCC0095

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) and §8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, prospective medical treatment, temporary total 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. 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).

Findings of Fact and Conclusions of Law

The Commission views the evidence regarding Petitioner's cervical and lumbar spine conditions different from the Arbitrator. As such, the Commission reverses and strikes the Arbitrator's Finding regarding causal connection, the Commission strikes the Arbitrator's Conclusions on pages seven through nine and, the Commission strikes the Arbitrator's Order and substitutes the following:

Under the Findings section, Petitioner's current condition of ill-being is not causally related to the accident as explained infra.

Issues and Conclusions

Whether the Petitioner's current condition of ill-being is causally related to the injury, the Commission finds the following:

The issue of causation, including whether an accident aggravated or accelerated a preexisting condition, is a factual question to be decided by the Commission. *Sisbro*, 207 Ill. 2d at 206. In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999).

Based on the totality of the evidence and review of the record as a whole, the Commission finds that the Petitioner failed to establish a causal connection between her current condition of ill-being and accident at work. In so concluding, the Commission relies upon Dr. Bernstein's August 18, 2016 Section 12 opinion report and the Respondent's video surveillance evidence of Petitioner's activities outside of work. The Commission was most persuaded by the investigator's report and the video surveillance relating to Petitioner's rehabbing activities on June 9, 2016, which Petitioner testified was accurate, and which comports with Dr. Bernstein's opinion that Petitioner was at maximum medical improvement four to six weeks after the subject incident. Petitioner testified that she was using some power tools, "probably used a hammer," and was attempting to manually pull the garage door closed, and other physical activities on June 9, 2016. (T, pp. 57-60)

The Petitioner also conceded that on a May 31, 2016, just a few days prior, she completed a medical form at her chiropractor, Dr. Sikorsky's office and indicated having "quite a bit of difficulty" doing household activities and "extreme difficulty" performing hobbies and recreational activities. The stark contrast between the responses on the May 31, 2016 medical form to the activity reported and filmed by the investigator, tarnishes Petitioner's credibility. (T, p. 60)

The Petitioner had a prior cervical sprain, teeth, and head injuries as a result of a work accident in 2010, and treatment for bilateral hand and arm pain and numbness prior to the subject accident, however, she omitted that medical history to Dr. Bernstein. (T, pp. 60-64, Rx3, Rx5) Petitioner was unsure of whether or not she told Dr. Bernstein she had a prior cervical spine MRI in May 2008 and she was unsure of whether or not she provided the 2008 cervical spine MRI to Dr. Stanley either. (T, pp. 65-68) Dr. Bernstein, however, reviewed the 2008 cervical spine MRI and the 2010 cervical spine CT scan. (Rx1) Prior treating records confirm that on December 29, 2011 Petitioner complained of neck pain, numbness and tingling in her left lower leg and sudden pain at times; also shoulder pain and to hands. (Rx3) When she saw the nurse practitioner on June

20, 2014 she had complaints of bilateral arm numbness for which she saw neurology. An EMG showed severe carpal tunnel in her right hand, moderate left hand. She had tortoise veins noted in her left lower extremity; varicose veins also noted right lower extremity. (Rx3)

The Commission further finds that when the Petitioner was examined by Dr. Bernstein on August 18, 2016, he found Petitioner's objective findings were not supported by her subjective complaints and there was evidence of symptom magnification and exaggeration. Dr. Bernstein also opined that her radiographic studies were benign, and she was not a candidate for surgery and would have been at maximum medical improvement four to six weeks after the subject accident for a cervical sprain and her treatment was excessive. Dr. Bernstein opined the February 22, 2016 cervical spine MRI was virtually normal except for a right-sided disc osteophyte complex at C4-5 contributing to neuroforaminal narrowing.

The February 22, 2015, cervical spine MRI radiologist's report showed "Multilevel degenerative discogenic disease with uncovertebral hypertrophy and facet arthrosis throughout the cervical spine resulting in varying levels of central canal and bilateral foraminal stenosis that are chronic as detailed above." When Petitioner saw Dr. Stanley thereafter on March 18, 2016, he opined that the MRI confirmed that she has severe spinal stenosis on the right side at C4-5. His Assessment was that she had right C5 radiculopathy that was improving, and his plan was to treat her with physical therapy for two to four weeks and thereafter she would be able to return to work without any restrictions and be at maximum medial improvement.

One month later, when Petitioner reported she could barely move because of pain that radiated to her right shoulder, Dr. Stanley next characterized the MRI as having a large right-sided disc herniation at C4-C5 contrary to the radiology report. (Px7, 3/18/16) The Commission cannot reconcile Dr. Stanley's initial description of the cervical spine MRI results and his characterization one month later and it was never explained. On April 5, 2016, Petitioner told Dr. Stanley she had ongoing neck pain, tingling into her bilateral hands as well as tingling into her bilateral feet. The feet tingling was a symptom she said was new and minimal; the primary problem was in her neck and hands. (Px7) The Commission notes her bilateral carpal tunnel syndrome was a pre-existing condition. (Rx3)

The Commission notes Dr. Stanley recommended cervical surgery that Petitioner did not want to have, and an epidural steroid injection that she did not want to have, despite her testimony that she wants the treatment prescribed by Dr. Stanley. (Px7, Px12) Dr. Stanley did not offer a causation opinion.

According to the Respondent's witness Charmaine Arosen, after observing the Petitioner when she returned to work in September 2016, the Petitioner did not move her arms at work, she had very stiff carriage, was unable to turn her head without turning her full-body, she had a slow gait and was sometimes limping. This behavior comports with Petitioner's pain behavior when she saw Dr. Bernstein the first time on August 18, 2016 and is inconsistent with the Petitioner's activities on the video surveillance on Thursday, June 9, 2016, Monday, June 13, 2016 and Friday, June 17, 2016 and as described in the investigator's report on June 15, 2016. (Rx10 (a))

The Petitioner's pain complaints were not only at odds with the video surveillance taken on June 9, 2016 but also at odds with Respondent's witness, Ms. Annette Koltvelit's testimony. Ms. Koltvelit testified that she saw the Petitioner at the Huntley Spring Expo on April 6, 2017 working as a realtor at one of the stations, and a brief conversation ensued. Ms. Koltvelit, a trained nurse, also testified that she was trained in taking physical examinations, familiar with pain behaviors and pain charts and when she saw Petitioner, she detected no sign of Petitioner favoring any side, any neck, or shoulder; in fact, Petitioner appeared normal with normal body function, turning to look at Ms. Koltvelit. (T, pp. 95-100)

The Commission further notes that the Petitioner abandoned treatment with Dr. Stanley after the May 12, 2016 office visit in favor of chiropractic treatment. She returned to Dr. Stanley five months later on October 4, 2016. At that time, Dr. Stanley noted on physical examination, that "She does not have any acute weakness on examination at this time." His plan was to obtain a functional capacity evaluation to "confirm validity and determine her current abilities and restrictions." When she returned to Dr. Stanley, Petitioner reported she wanted to proceed with an epidural steroid injection (ESI) and she voiced complaints of low back pain.

Petitioner went to Dr. Tabao at Yarkony Rehabilitation on referral from Dr. Stanley thereafter. At the visit on February 28, 2017, Petitioner reported she cancelled the appointment for her cervical ESI and she reported she was not consistent with any of the exercises in physical therapy for her low back pain although she attended therapy from November to December. Petitioner reported at that point her (low) back pain was more bothersome. The Commission finds that Petitioner's testimony that she wanted treatment recommended by Dr. Stanley is not persuasive based upon the information that Petitioner provided Dr. Tabao. She went to a chiropractor because she did not want cervical surgery and then she refused to get a cervical epidural injection. Petitioner also reported she was involved in a motor vehicle collision years prior. The Rehabilitation Assessment and Plan listed six items: 1. lumbar radiculopathy; 2. multi-level lumbar degenerative disc disease with bulging and protrusion; 3. chronic pain; 4. ***cervical strain;*** 5. Insomnia; 6. impaired activities of daily living and mobility secondary to above. (Emphasis added) Dr. Tabao referred her back to physical and aquatic therapy. (Px12)

Petitioner returned two months later on April 25, 2017. The Rehabilitation Assessment and Plan at this second visit now listed ten issues changing "cervical strain" to "cervical disc herniation" and omitting "chronic pain" (without explanation) and adding "partial thickness tear of the gluteus maximus and gluteus medius tendon insertions at the greater trochanter consistent with grade 3 strains," "obesity," "depression," "myositis and myalgias" and "myofascial pain syndrome." Dr. Tabao noted Petitioner had a right hip MRI and a partial thickness tear of the gluteus maximus and gluteus medius tendon insertions at the greater trochanter consistent with grade 3 strains and noted "She's had this back and hip pain since the date of her injury which was in February 2016. Today she states that everything hurts." Under "Rehabilitation Recommendations," Dr. Tabao's notes contain a causation opinion after only two visits and clearly based upon Petitioner's self-serving history and subjective complaints and without notation of a review of Petitioner's treatment records and without providing any testimony to explain that opinion. Dr. Tabao also added treatment recommendations including epidural steroid injections,

another EMG, physical therapy and medications including Cymbalta for depression and pain. (Px12)

The Commission finds, however, that Dr. Tabao's causation opinion regarding the Petitioner's condition is not reliable given that the opinion was given after two office visits that occurred one year after the date of accident and in the absence of having the Petitioner's complete medical history. Dr. Tabao's notes are also contradictory and never explained how she documented that Petitioner experienced new pain in the right hip at physical therapy since her last visit, and a right hip MRI was ordered, yet she causally relates the pain "since the date of her injury in February of 2016." Therefore, the Commission finds Dr. Tabao's causation opinion is entitled to little weight. *See, e.g.*, Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n, 2014 IL App (3d) 130028WC, 14 N.E.3d 16, 383 Ill. Dec. 184 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.)

The Commission finds that any complaints with respect to Petitioner's carpal tunnel syndrome, lumbar spine, right hip, myositis and myalgias, myofascial pain syndrome, impairment of activities of daily living and mobility, obesity, depression and insomnia, are not related to the subject accident. The carpal tunnel syndrome was well documented in her prior medical records. (Rx3) The Commission also relies upon the fact that the Petitioner's history was positive for a prior motor vehicle accident as reported to Yarkony Rehab on February 28, 2017 and that she rehabbed houses in the past. (Px12)

Further, the Commission finds that Petitioner's complaints in the initial medical histories were confined to her neck, mid-back right arm and shoulder. (Px1, 2/1/16, "Pt is a sitter and was with a patient who became agitated and pushed her. She hit the door with her right arm. She did not hit her head or any LOC. She states her neck is feeling tight now and she is unable to lift her arm. She is able to bend and straighten at the elbow, has good pulses, strength and sensation. She denies any head pain, vision changes, numbness or tingling down her spine or extremities.") The emergency treatment records listed the injured extremity as her "upper extremity right." (Px1) Petitioner went to Physicians Immediate Care on February 3, 2016 and reported a chief complaint of pain of the neck, right shoulder and mid-back since February 1, 2016. (Px2)

On February 4, 2016, Petitioner went to her first physical therapy consult and gave a history of pain in her neck, right shoulder and upper back. (Px2) The pain complaints in her neck, right shoulder and upper back comport with the complaints listed on the occupational work injury report signed by Petitioner on the accident date. (Rx7) The Commission finds the medical histories contemporaneous at the time of injury to be more reliable than those histories given several weeks after the initial accident and there was no mention of low back pain in the initial treating histories, nor does any expert explain how the mechanism of injury could be related to a low back claim of injury.

The Commission notes further that on June 8, 2016 the day before the Thursday, June 9, 2016 rehabbing project, and before the Monday, June 13, 2016 video surveillance was taken showing Petitioner loading boards into her vehicle, that the Petitioner reported to her chiropractor

that her neck and lower back were improving. (Px9) On June 14, 2016, the first visit after these rehabbing projects and videos were obtained, she reported improvement in her pain until Sunday. She reported that Sunday was a busy day and she felt the pain gradually increasing as the day went on. She reports that Monday was also a pretty bad day for her pain. (Px9) The Commission notes that the Petitioner's report of pain was directly related to the amount of physical activity she did.

The Petitioner's presentation on the surveillance videos and corroborating testimony from Respondent's witnesses compels the Commission to find that Petitioner's testimony regarding the extent of her injuries as a result of the work accident is not credible.

Therefore, the Commission finds that Petitioner suffered from a cervical spine strain/sprain that was resolved by August 18, 2016 and that Petitioner's current condition of ill-being is not related to the accident at work on February 1, 2016.

Whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Commission finds the following:

The Commission finds that based upon Petitioner's failure to prove causal connection between her current condition of ill-being and her accident at work, and in reliance upon Dr. Bernstein's first Section 12 opinion report, that medical services provided before August 18, 2016 are reasonable and necessary and any medical treatment thereafter is not related treatment and therefore any claim for medical expenses after August 18, 2016 is denied.

Whether Petitioner is entitled to prospective medical care

The Commission finds that based upon Petitioner's failure to prove causal connection between her current condition of ill-being and her accident at work after August 18, 2016, Petitioner failed to prove she is entitled to prospective medical care and prospective medical treatment after August 18, 2016 is denied.

Relative to Petitioner's entitlement to temporary total disability benefits, the Commission finds the following:

The Commission finds that based upon Petitioner's failure to prove causal connection between her current condition of ill-being and her accident at work after August 18, 2016, the Petitioner is entitled to temporary total disability benefits solely for the periods February 2, 2016 through March 29, 2016, and April 29, 2016 through August 18, 2016.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 18, 2017 is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $549.49 per week for a period of 27-4/7 weeks, commencing February 2,

2016 through March 29, 2016 and April 5, 2016 through August 18, 2016, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical services pursuant to §8(a) and §8.2 of the Act, incurred by Petitioner and submitted into evidence through August 18, 2016 and medical treatment and expenses incurred after August 18, 2016 are denied.

IT IS FURTHER ORDERED BY THE COMMISSION that prospective medical expenses are hereby denied. Respondent shall be given credit, if any, 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.

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 11 2019
KWL/bsd
O:12/11/18
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

DOWNING, LYNDA
Employee/Petitioner

Case# **16WC013325**

PRESENCE ST JOSEPH HOSPITAL
Employer/Respondent

19IWCC0095

On 8/18/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.11% 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:

2208 CAPRON & AVGERINOS PC
STEPHEN J SMALLING
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

2461 NYHAN BAMBRICK KINZIE & LOWRY
JENNIFER RIZK-O'LYNNGER
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) & 8(a)

Lynda Downing
Employee/Petitioner

v.

Presence St. Joseph Hospital
Employer/Respondent

Case # 16 WC 13225

Consolidated cases: N/A

19IWCC0095

An *Application for Adjustment 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 **Wheaton II (Elgin)**, on **July 12, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, February 1, 2016, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident *was* given to Respondent as explained *infra*.

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

In the year preceding the injury, Petitioner earned $42,860.48; the average weekly wage was $824.24.

On this date of accident, Petitioner was 51 years of age, *single* with no dependent children.

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

Respondent shall be given a credit for $16,166.34 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $16,166.34. *See* AX1.

As agreed, Respondent is entitled to a credit of $0 under Section 8(j) of the Act. AX1.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established a causal connection between the injury at work and her ongoing condition of ill-being.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $549.49/week for 72 & 5/7th weeks. commencing February 2, 2016 through March 29, 2016 and April 5, 2016 through September 8, 2016 and September 21, 2016 through July 12, 2017 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from February 1, 2016 through July 12, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall receive a credit of $16,166.34 for TTD benefits paid as agreed by the parties.

Medical Benefits

Respondent shall pay the following outstanding reasonable and necessary medical services incurred by Petitioner and submitted into evidence in Petitioner's Exhibits pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit, if any, 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 Treatment

As explained in the Arbitration Decision Addendum, the Arbitrator awards the prospective medical care as prescribed by Dr. Stanley and Dr. Tabao pursuant to Section 8(a) of the Act.

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

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

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

Signature of Arbitrator

August 17, 2017
Date

AUG 18 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b) & 8(a)

Lynda Downing
Employee/Petitioner

v.

Presence St. Joseph Hospital
Employer/Respondent

Case # 16 WC 13225

Consolidated cases: N/A

19IWCC0095

FINDINGS OF FACT

The issues in dispute include whether there is a causal connection between Petitioner's current condition of ill being and her accident, whether Respondent is liable for various unpaid medical bills, whether Petitioner is entitled to temporary total disability benefits from February 2, 2016 through March 29, 2016 and April 5, 2016 through September 8, 2016 and September 21, 2016 through July 12, 2017, as well as whether Petitioner is entitled to prospective medical treatment as prescribed by Dr. Stanley and Dr. Tabao. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background & Prior Medical Treatment

Lynda Downing (Petitioner) testified that she was employed by Presence St. Joseph Hospital (Respondent) as a Mental Health Counselor and had been so employed since 1984. Petitioner obtained her Master's degree in social work in 1992 and worked for Respondent approximately 30 years prior to the date of the accident. Petitioner's job description was entered as Respondent's Exhibit 6 and outlines the physical requirements of the position. Petitioner further explained that her job consisted of maintaining a safe environment for psychiatric patients, leading therapeutic group sessions, doing 15 minute rounds on each patient, and restraining aggressive patients as needed. Petitioner testified that she and her co-workers must physically restrain patients when they become aggressive. She explained that she had to physically restrain patients a couple of times per week, and sometimes had to take patients to the "quiet room." In those circumstances, she and anyone responding to the call would move the patients by doing "what they need to do."

Petitioner testified that she was not under any physician's care for cervical or low back conditions immediately prior to her accident at work. The medical records reflect that Petitioner did undergo treatment at Quadri Family Practice dating back to October 2009. RX3. The initial records reveal that Petitioner experienced back pain following a motor vehicle accident two years earlier. *Id.* Then, on May 24, 2010, Petitioner was struck by a patient while employed by Respondent causing a cervical strain among other injuries. RX5. Dr. Quadri characterized Petitioner's condition as cervical spine myalgia in his note of September 28, 2010. RX3. Petitioner reached maximum medical improvement as of September 14, 2010. RX5. Petitioner testified that although this injury resulted in a claim that settled in 2010, she explained that it involved a cervical strain and there was no surgical recommendation relating to the neck. RX5.

[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.

Accident

On February 1, 2016, Petitioner testified that she was sent to a medical unit to monitor a psychiatric patient that was there for medical purposes. "Codes" had been called previously on this patient. Petitioner explained that the patient jumped out of his bed and would not follow directives. She directed him to get back into his bed, but he pushed her computer out of the way and shoved her causing her to fall backwards. Petitioner testified that she had to take several steps backwards and, during this event, she felt a "whiplash" type effect in her neck and back.

Medical Treatment

Petitioner testified that she was initially examined in the emergency room. *See* PX1; PX12. She testified that she was then referred to Respondent's occupational health facility, Physician's Immediate Care. Petitioner first sought treatment at Physician's Immediate Care on February 3, 2016. PX2 at 1-22, 78-79. At that time, she complained of neck, right shoulder and mid back pain and was experiencing numbness radiating into her right arm. *Id.* The examining physician ordered an MRI of the right shoulder and Petitioner was placed off work. *Id.*

On February 5, 2016, Petitioner presented with complaints in her thoracic and low back in addition to the cervical pain previously noted. PX2 at 23-39. Petitioner reported developing low back pain that increased in intensity and, as of that date, was noted to be radiating into her right buttock. *Id.* Petitioner was referred for physical therapy, given medications, and kept on work restrictions. *Id.*

Petitioner's symptoms did not resolve in response to the prescribed conservative treatment and, as of February 17, 2016, she reported worsening symptoms. PX2 at 57-76. Petitioner was discharged to an orthopedic physician at Midwest Bone & Joint Institute. *Id.*

Petitioner was first examined by Thomas Stanley, M.D. (Dr. Stanley) of Midwest Bone & Joint on February 18, 2016. PX7 at 6-8. She reported severe neck pain radiating towards her right shoulder including an episode of transient paralysis of her right arm, which resolved, but with ongoing numbness in the area. *Id.* She further complained of pain in her back. *Id.* X-rays taken of her cervical spine showed a disc collapse at C4-5 without dynamic instability. *Id.* Dr. Stanley's initial assessment of Petitioner's condition was right C5 radiculopathy with objective weakness and deltoid paralysis and numbness in the C5 nerve distribution. *Id.* He ordered a cervical MRI. *Id.*

Petitioner underwent the recommended MRI on February 22, 2016. PX7 at 9. The interpreting radiologist noted trace anterolisthesis of C4 on C5 and of C6 on C7 as well as multilevel degenerative discogenic disease with uncovertebral hypertrophy and facet arthrosis throughout the cervical spine resulting in varying levels of central canal stenosis and chronic bilateral foraminal stenosis. *Id.*

Petitioner returned to Dr. Stanley on March 18, 2016. PX7 at 10-11. He reviewed the MRI and noted that it confirmed severe spinal stenosis on the right side at C4-5. *Id.* He ordered physical therapy and imposed a 10-pound lifting restriction. *Id.* Petitioner testified that she attempted to return to work on March 29, 2016 under a modified duty agreement. *See* PX3. She was answering phones in the operator center for about 1-2 weeks on modified duty, but explained that she did not continue because the standing and sitting was too hard for her. On April 5, 2016, Dr. Stanley placed Petitioner off work given her inability to perform the job duties. PX7 at 16-17. At that time, he opined she was unable to return to work pending a reevaluation. *Id.* Petitioner testified that she was in continuous pain at this time and was unable to sit, stand, or be in any certain position for an extended

period.

As of April 21, 2016, in addition to pain radiating into her shoulder and numbness and tingling into her hands, Petitioner reported radiating pain down her lower back. PX7 at 18-19. Given her lack of response to conservative treatment and the length of time that had passed, Dr. Stanley indicated that Petitioner was likely going to require surgical intervention. *Id.* Then, as of April 28, 2016, Dr. Stanley noted that the most significant finding on Petitioner's cervical MRI was a large right-sided disc herniation at C4-C5 with smaller herniations at C3-4 and C5-6. PX7 at 19-23. He noted that she underwent an EMG the prior day which showed chronic bilateral C5 and C6 cervical radiculopathy with no acute denervation together with moderate bilateral carpal tunnel syndrome. *Id.* Petitioner remained off work. *Id.*

On May 12, 2016, Dr. Stanley determined that Petitioner was a surgical candidate for an anterior cervical discectomy and fusion at C4-5. PX7 at 25-26. Dr. Stanley noted that Petitioner was unable to return to work and that her changes were so dramatic that it was necessary to set up surgery as soon as approval was obtained from the workers' compensation carrier. *Id.*

Petitioner testified that before proceeding with the cervical surgery, she wanted to explore other options and sought treatment with Steven Sikorsky, D.C. (Dr. Sikorsky) at Sikorsky Chiropractic Clinic. PX9; RX4. She was first examined at that facility on May 18, 2016 and her cervical condition was noted to be in an acute phase. *Id.* She continued with chiropractic treatment through August 24, 2016. *Id.* Her primary complaints of pain were in the neck, upper back, and low back radiating into her legs. *Id.*

Respondent's Section 12 Examination – Dr. Bernstein

In the interim, on August 18, 2016, Petitioner underwent a medical evaluation with Avi Bernstein, M.D. (Dr. Bernstein) at Respondent's request. RX1. After an examination, reviewing various treatment records, and taking a history from Petitioner, Dr. Bernstein opined that the Petitioner suffered a strain or sprain as a result of the work-related incident and would have been at maximum medical improvement at four-to-six weeks following the accident. *Id.* He felt that Petitioner's medical care had been excessive, unnecessary, and it was not indicated. *Id.* Dr. Bernstein further indicated that Petitioner was malingering, engaging in symptom magnification and exaggerating her condition for the purposes of secondary gain. *Id.*

Work Status

Petitioner testified that she remained off work through September 9, 2016 when she returned to her job. Her supervisor was Elizabeth "Betsey" Solner-Puchniarz. Petitioner testified that she performed her job duties, but it was difficult. She explained that she walked eight hours per day and had a couple of instances of direct contact with aggressive patients, which was difficult. Petitioner also testified that she was in pain with a stiff neck and back pain. She explained that she was not moving fast enough to perform her job or to deal with aggressive patients.

Petitioner testified that she was called at home by her supervisor Ms. Solner-Puchniarz. According to Petitioner, Ms. Solner-Puchniarz chastised her for having a patient follow her into a room. Ms. Solner-Puchniarz told Petitioner that she did not look well, that she saw Petitioner move stiffly and uncomfortably, and that she had received reports from several unidentified co-workers about Petitioner's and the co-workers' safety. Thus, Petitioner testified that Ms. Solner-Puchniarz recommended that Petitioner take more time off. Ms. Solner-Puchniarz told Petitioner to see Charmain, which is what preceded the note of September 22, 2016 and

her application for FMLA benefits. PX6; PX13. This is the last time that Petitioner worked for Respondent. Petitioner testified that she has inquired about available work since September 22, 2016, but she has not been offered work or received any workers' compensation benefits from that date to the present.

Continued Medical Treatment

On October 4, 2016, Petitioner returned to Dr. Stanley who noted that the chiropractic treatment had not resulted in any progress. PX7 at 30-31. He further noted that she had consistent symptoms of cervical radiculopathy since her work-related injury, with an MRI showing a large extruded disc fragment and EMG findings consistent with that diagnosis. *Id.* Dr. Stanley felt that it was unreasonable for Petitioner to return to full duty without any restrictions at that time and reiterated the need for a functional capacity evaluation in the event surgery was not authorized. *Id.* Petitioner testified the functional capacity evaluation was never authorized by the Respondent.

Petitioner was last examined by Dr. Stanley on October 27, 2016. PX7 at 34-35. At that time, Petitioner indicated that she wished to proceed with an epidural steroid injection and Dr. Stanley referred her to Dr. Cherala to undergo that treatment. *Id.* Dr. Stanley also noted that Petitioner was having persistent low back pain that radiated down both legs, right greater than left, into her calf. *Id.* He acknowledged that Petitioner had not received treatment for her lumbar spine since the initial event. *Id.*

On February 28, 2017, Petitioner sought treatment from Michelle Tabao, M.D. (Dr. Tabao) of Yarkony Rehabilitation Associates. PX12. After an examination and reviewing some of Petitioner's prior treatment records, Dr. Tabao diagnosed Petitioner with lumbar radiculopathy, chronic pain, chronic cervical strain, and impaired activities of daily living and mobility secondary to those conditions. *Id.* She recommended another course of physical therapy and prescribed Tramadol. *Id.* Petitioner continued to see Dr. Tabao periodically. *Id.* She was last examined by Dr. Tabao on April 25, 2017. *Id.* Dr. Tabao diagnosed Petitioner with lumbar radiculopathy, a cervical disc herniation, myositis, myalgia, and myofascial pain syndrome. *Id.* She also noted that Petitioner was unable to return to work and opined that Petitioner's pain was a result of her work-related injury in February, 2016. *Id.* Dr. Tabao recommended continued physical therapy and she indicated that Petitioner may benefit from lumbar epidural injections as suggested by Dr. Stanley previously. *Id.*

On April 28, 2017, Petitioner was terminated from her position with Respondent. PX10. Petitioner also testified that the surgery recommended by Dr. Stanley was not authorized by Respondent.

Second Section 12 Examination – Dr. Bernstein

Dr. Bernstein re-evaluated Petitioner at Respondent's request on May 4, 2017. RX2. Dr. Bernstein primarily addressed Petitioner's lumbar spine and noted that she had age appropriate degenerative changes. *Id.* He felt that Petitioner had not suffered any significant injury to her low back as a result of the work-related accident, and that she did not require any specific treatment or care for her low back beyond symptomatic care, home exercises, and consideration of a weight loss referral. *Id.* Dr. Bernstein opined that Petitioner was capable of full-time, full duty work without restrictions. *Id.*

Surveillance Footage

Respondent instituted surveillance of Petitioner on June 9, 2016 through June 28, 2016. RX10(a)-RX10(c). On June 9, 2016, approximately eight hours of surveillance was conducted resulting in 70 minutes of video. *Id.* A

summary description of the activities observed is contained in the investigator's report of that day. *Id.* Petitioner is observed using hand tools in a garage of a home she was renting. *Id.* On June 10, 2016, surveillance was conducted but no video obtained. *Id.* On June 13, 2016, surveillance was conducted for eight hours during which 15 minutes of video was obtained. *Id.* The surveillance of June 17, 22 and 28, 2016 resulted in eight minutes of video depicting Petitioner driving her vehicle, shopping and carrying items purchased. *Id.*

Respondent also obtained video surveillance on May 3 and 4, 2017, the day before and the day of Petitioner's second evaluation by Dr. Bernstein at Respondent's request, as well as on May 12, 2017. RX11(a)-RX11(b). Petitioner is noted to be walking, standing, sitting, entering and exiting her motor vehicle. *Id.*

Ms. Koltveit

Annette Koltveit (Ms. Koltveit) testified that she was employed by Respondent as a Nurse, and had been so employed since February 18, 1976. On April 6, 2017, Ms. Koltveit explained that she ran into Petitioner at the Huntley Spring Expo and spoke with her for approximately 30 seconds. Ms. Koltveit testified she observed nothing unusual about the Petitioner's physical presentation at that time.

Ms. Solner-Puchniarz

Elizabeth "Betsey" (Ms. Solner-Puchniarz) testified that she was employed by Respondent as the Manager of Behavioral Health Services for approximately three years and she is a registered nurse. Ms. Solner-Puchniarz testified that Petitioner reported to her.

Ms. Solner-Puchniarz testified that Respondent's Exhibit No. 6 accurately reflects the work required by a Mental Health Counselor. RX6. She also testified that she was involved in the Petitioner's return to work in September of 2016. Ms. Solner-Puchniarz specifically observed Petitioner having difficulty in moving her head and neck while performing the job duties to which she was assigned. She further observed Petitioner in a videotape obtained from a security camera in the facility where Petitioner was working. Ms. Solner-Puchniarz completed a typed summary of her observations. RX7. Therein, she noted observing Petitioner's inability to turn her head from the right to the left and witnessed the Petitioner struggling in standing up to get out of a chair. *Id.* The physical observations were concerning to Ms. Solner-Puchniarz as the staff needed to be agile due to the violent patients with whom they worked. *Id.* Staff needed to be able to look over their shoulders to see if patients were behind them. *Id.* Ms. Solner-Puchniarz was concerned with Petitioner's physical state in that she would not be able to assist in restraining a patient without getting injured or another staff member getting injured. *Id.*

Ms. Arosen

Charmaine Arosen (Ms. Arosen) testified that she was the Associate Health Nurse for Respondent and had been so employed for approximately 1½ year. She is no longer employed by Respondent.

Ms. Aronsen testified about the health history noted in Respondent's Exhibit 7. She confirmed that the handwritten notes were her observations of Petitioner, where it was noted that Petitioner complained of physical disability and inability to perform her regular job duties in September 2016. RX7. At that time, Petitioner had attempted to return to work in a full duty capacity given Dr. Bernstein's release to return to full duty work. *Id.* Petitioner made the attempt in derogation of her own treating physician's imposition of restrictions. *Id.*

Petitioner attempted to perform the duties, but could not adequately do so. *Id.* Thus, Ms. Arosen testified that she instructed Petitioner that she could not return to work until she had a physician's note releasing her back to full duty. *Id.*

Additional Information

Regarding her current condition, Petitioner testified that her low back and hip are in extreme pain all the time. Petitioner testified that she made low back pain complaints to Dr. Stanley, but he did not address her low back or hip during treatment. Petitioner testified that Dr. Stanley referred her to Dr. Tabao and she provided rehabilitation care as a rehabilitation doctor. Petitioner testified that she remains under the care of Dr. Tabao for her low back condition, but because her insurance ended, she is not actively seeing any doctor at this time. Petitioner testified that she is currently on public aid.

Petitioner testified that she experiences constant neck pain without pain below the level of 5 out of 10. She testified that she currently takes Flexeril and Tramadol on a daily basis. Regarding the low back, Petitioner testified that she experiences pain and stiffness primarily down the right leg and hip and she has to keep shifting her body. Petitioner explained that her low back pain increased over time and she reported it to Physicians Immediate Care and Dr. Sikorsky, but because she was only approved for neck treatment, the physicians would not provide her with low back treatment.

Petitioner testified that the injury has impacted her life tremendously and made everything very difficult. She cannot do anything that she likes to do that she normally could do.

Petitioner testified that she has not been released from care by Dr. Stanley or Dr. Tabao, and neither physician has released her to return to work full duty. Petitioner remains unemployed although she has attempted to return to the workforce by engaging in real estate sales with various companies. She has not otherwise returned to work or received any offer of work from Respondent.

Petitioner testified that she wishes to undergo the medical treatment recommended by her physicians.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

Based on the record as a whole, the Arbitrator finds that Petitioner has established a causal connection between her current condition of ill-being and accident at work. In so concluding, several facts are relevant.

Petitioner had minimal prior medical treatment to the neck, most recently in 2010. She testified that she had a cervical sprain. The treatment records confirm that Petitioner sustained a minor injury. Petitioner worked full duty and underwent no further medical treatment for any cervical condition for six years until her undisputed accident at work. She was evaluated in the emergency room and at Respondent's occupational clinic. The attending physicians noted objective, clinical findings to support Petitioner's complaints related to the neck, right shoulder, and mid back. They also noted abnormal findings consistent with right neck contracture and right shoulder weakness and instability. Petitioner was then referred to an orthopedic surgeon and saw Dr. Stanley on February 18, 2016. He initially diagnosed right C5 radiculopathy with objective weakness and deltoid paralysis and numbness in the C5 nerve distribution. Radiographs confirmed cervical disc collapse at C4-5 without dynamic instability. Following a cervical MRI, Petitioner was diagnosed with severe spinal stenosis at C4-5 on the right. Given Petitioner's ongoing symptoms, Dr. Stanley prescribed an EMG and continued her work restrictions. As with other diagnostic tests, the EMG of April 27, 2016 was consistent with chronic bilateral C5 and C6 cervical radiculopathy. Petitioner failed to respond to conservative treatment (i.e., physical therapy, medications, injections) and Dr. Stanley recommended an anterior cervical discectomy and fusion at C4-5. He noted dramatic changes as reflected in Petitioner's MRI and the chronic radiculopathy at C5 and C6 confirmed in the EMG. Petitioner also sought treatment with Dr. Sikorsky and Dr. Tabao for ongoing symptoms after Respondent discontinued her medical benefits.

Ultimately, throughout her medical treatment and while under the care of Dr. Stanley, Petitioner presented with signs and symptoms consistent with the objective test results and clinical examination findings that were consistent with the diagnosis of cervical radiculopathy and bilateral upper extremity along with cervicalgia. Petitioner had none of these symptoms prior to her accident at work other than treatment for a cervical strain in 2010. Based on the foregoing, the Arbitrator finds sufficient objective medical evidence to support Petitioner's claim that her current condition of ill-being in the cervical and lumbar spine is causally related to her undisputed accident at work. However, Respondent offered the Section 12 examination reports of Dr. Bernstein as well as video surveillance of Petitioner.

Dr. Bernstein's reports reflect his opinions that Petitioner engaged in symptom magnification and sustained nothing more than a strain or sprain as a result of the work accident. In conclusory fashion, he placed her at maximum medical improvement four weeks following the incident and indicated that no further care was necessary. In so doing, Dr. Bernstein appears to take issue with the Respondent's emergency room physician, Occupational Health Clinic, orthopedic specialist, chiropractor and physical rehabilitation specialist Dr. Tabao. Respondent directed all of Petitioner's medical treatment with the exception of Dr. Tabao and Dr. Sikorsky. Dr. Bernstein acknowledged the objective findings of the cervical MRI and the positive EMG as ordered by Dr. Stanley, but maintained that Petitioner engaged in symptom magnification and concluded that she only suffered

a cervical strain. He ignored that Petitioner had no history of medical treatment other than for a cervical strain six years earlier. Dr. Bernstein's opinions are entirely contradicted by the objective diagnostic tests generated during Petitioner's treatment, her lack of medical treatment over a six-year period prior to the undisputed accident, and clinical findings of Petitioner's treating physicians confirming pathology that required medically necessary treatment. The Arbitrator does not find Dr. Bernstein's opinion that Petitioner's condition was wholly degenerative to be persuasive and assigns no weight to his opinions in this case.

Respondent also offered video surveillance conducted by Respondent and reviewed by Dr. Bernstein. While he does not refer to the video as a basis for any of his opinions, the Arbitrator notes that the footage does show Petitioner engaging in activities of daily living such as walking, standing, sitting, and driving a vehicle. However, several short instances of capability in these activities do not overshadow the objective diagnostic and clinical findings noted by Petitioner's treating physicians. The video does not support the contention that Petitioner malingered when noting that only portions show her engaged in the aforementioned activities and comparing the video to the length of Petitioner's medical treatment and the substance of her medical treatment during which she reported symptoms that were diagnostically and clinically confirmed. Moreover, Respondent failed to authorize the functional capacity evaluation ordered by Dr. Stanley in response to Dr. Bernstein's assessment that Petitioner malingered. The Arbitrator finds the video surveillance to be of little probative value as it relates to her current medical condition.

Based on all the foregoing, the Arbitrator finds that Petitioner has established a continued causal connection between her condition of ill-being and accident at work on February 1, 2016.

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

Petitioner claims entitlement to payment of reasonable and necessary medical bills from medical providers that administered care after her accident at work. *See* PX8. Respondent terminated the payment of all medical expenses following Dr. Bernstein's first examination on August 18, 2016. As explained above, the Arbitrator finds that Petitioner has established a causal connection between her current condition of ill-being and accident at work. In so concluding, the Arbitrator does not find the opinions of Respondent's Section 12 examiner, Dr. Bernstein, to be persuasive given the objective medical evidence supporting Petitioner's ongoing complaints.

Based on a review of the medical records and bills submitted into evidence, in conjunction with Petitioner's testimony at the hearing and in light of the persuasive opinions of Dr. Stanley, the Arbitrator finds that Petitioner's medical bills are for reasonable and necessary medical care to alleviate her of the effects of her injury at work. The Arbitrator awards these outstanding medical bills admitted into evidence in Petitioner's Exhibit 8 and orders Respondent to pay these bills pursuant to Section 8(a) and Section 8.2 of the Act.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to prospective medical care, the Arbitrator finds the following:

As explained above, the Arbitrator finds that Petitioner has established a causal connection between her current condition of ill-being and injury at work. Petitioner's condition has not improved thereafter such that her treating physicians, Dr. Stanley and Dr. Tabao, recommend an anterior cervical discectomy and fusion at C4-5 as well as continued physical therapy and lumbar epidural injections. In consideration of the record as a whole, the Arbitrator awards the recommended prospective medical care as prescribed by Dr. Stanley and Dr. Tabao

pursuant to Section 8(a) of the Act as the treatment is reasonable and necessary to alleviate Petitioner from the effects of her injury at work.

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

In light of the causal connection analysis explained above, the Arbitrator turns to Petitioner's claim that she is entitled to temporary total disability benefits from February 2, 2016 through March 29, 2016 and April 5, 2016 through September 8, 2016 and September 21, 2016 through July 12, 2017.

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that he was unable to work*. *Gallentine*, 201 Ill. App. 3d at 887 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

The record reflects that during the claimed temporary total disability periods Petitioner was either placed off work or under light duty work restrictions as imposed by Dr. Stanley, Dr. Sikorsky or Dr. Tabao, which were not or could not be accommodated by Respondent. Indeed, Ms. Solner-Puchniarz and Ms. Arosen testified about their personal observations, as well as Petitioner's reports at work and the observations of others, that Petitioner was unable to perform her work safely. Moreover, Petitioner's treating physicians documented Petitioner's subjective complaints and their objective findings that she was unable to perform her work during the claimed temporary total disability periods.

Thus, the Arbitrator finds that Petitioner has established that she was temporarily totally disabled during the claimed temporary total disability periods from February 2, 2016 through March 29, 2016 and April 5, 2016 through September 8, 2016 and September 21, 2016 through July 12, 2017. Respondent shall receive a credit for temporary total disability benefit payments made as agreed by the parties. *See* AX1.

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

Mary Shanklin,
Petitioner,
vs.

NO: 15WC 42443

City of Springfield,
Respondent.

19IWCC0096

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 20, 2018, is hereby affirmed and adopted.

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

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

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

DATED: FEB 11 2019
d20519
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHANKLIN, MARY
Employee/Petitioner

Case# **15WC042443**

CITY OF SPRINGFIELD
Employer/Respondent

19IWCC0096

On 8/20/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1189 WOLTER BEEMAN LYNCH & ET AL
RANDALL A WOLTER
1001 S 6TH ST
SPRINGFIELD, IL 62703

0332 LIVINGSTONE MUELLER O'BRIEN
DENNIS O'BRIEN
620 E EDWARDS ST
SPRINGFIELD, IL 62703-1639

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
NATURE AND EXTENT ONLY

MARY SHANKLIN,
Employee/Petitioner

v.

CITY OF SPRINGFIELD,
Employer/Respondent

Case # **15** WC **42443**

Consolidated cases: _____

19IWCC0096

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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **7/20/18**. By stipulation, the parties agree:

On the date of accident, **2/16/15**, 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 $**81,065.99**, and the average weekly wage was $**1,558.96**.

At the time of injury, Petitioner was **56** years of age, ***single*** with **no** dependent children.

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

Respondent shall be given a credit of $**73,048.44** for TTD, $**2,596.32** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**75,644.76**.

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 $735.37/week for a further period of **141.125** weeks, as provided in Sections **8(d)2 and 8(e)** of the Act, because the injuries sustained caused **petitioner a 20% loss of use of her person as a whole pursuant to Section 8(d)2 of the Act; a net 5% loss of use of her right hand (after applying the 10% credit from her prior right carpal tunnel injury in case 13 WC 15900) pursuant to Section 8(e); and a 12.5% loss of use of her right arm pursuant to Section 8(e).**

Respondent shall pay Petitioner compensation that has accrued from **2/16/15** through **7/20/18**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Kaureen H Pulia

Signature of Arbitrator

8/8/18
Date

ICArbDecN&E p.2

AUG 20 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 56 year old labor foreman/laborer, sustained an accidental injury to her cervical spine and right upper extremity that arose out of and in the course of her employment by respondent on 2/16/15. Petitioner has worked for respondent since 2005. In 2012 she became foreman, but continued working the same laborer duties as her crew. These duties included concrete work, roofing, ceiling, flooring, asphalt, and roads. Petitioner had prior carpal tunnel claims with respondent, but since 2014 has performed her full duties.

On 2/16/15 petitioner and her crew were getting ready to go out and remove some snow and ice. Everything was set from the night before. At that time, she and her crew placed 300 pounds of salt on a cart. However, after they left for the day, the janitor added another 400 pounds of salt to the cart, which petitioner was unaware of. When petitioner and her crew arrived on 2/16/15 to begin loading the materials to begin snow removal, petitioner grabbed the cart and swung it, not knowing there were 700 instead of 400 pounds of salt on it, she felt a pop in her neck and pain in her right upper extremity.

Petitioner underwent conservative treatment at Springfield Clinic from 2/17/15 through 8/18/16. On 2/17/15 petitioner was assessed with a cervical strain, cervical radiculopathy and strain of the right trapezius muscle. X-rays of the right shoulder showed no acute osseous abnormalities. Petitioner was given work restrictions. On 2/24/15 an MRI of the neck was ordered.

On 3/6/15 petitioner underwent an MRI of her cervical spine. The impression was focal moderate sized right central/paracentral disc protrusion with annular tear slightly flattening the right hemicord at C4-C5; no abnormal spinal cord signal; and, a small central disc protrusion at C6-C7 and disc osteophyte complex resulting in moderate spinal stenosis. On 3/17/15 Dr. DeJong reviewed the MRI and discussed with petitioner that he hoped they could successfully treat the situation nonsurgically, and if that was not successful consideration would be given to a surgical referral. Petitioner was referred to Dr. Narla for interventional measures. Physical therapy was also ordered.

On 4/8/15 petitioner presented to Dr. Narla complaining of neck pain radiating into the right arm. Dr. Narla recommended physical therapy, and a cervical epidural steroid injection if the petitioner wanted. Petitioner reported that she did not know what she wanted to do.

On 6/12/15 petitioner began a course of physical therapy.

On 6/22/15 petitioner returned to Dr. DeJong. She reported that she was worse than before. Dr. DeJong encouraged petitioner to return to Dr. Narla for further consideration of the cervical epidural cortisone injections. He also encouraged her to continue in physical therapy. Dr. DeJong released petitioner on an as needed basis.

On 7/9/15 petitioner underwent aC6-C7 right-sided cervical epidural injection. Petitioner had 3 weeks of relief, before returning to baseline.

As of 9/14/15 petitioner had undergone 9 physical therapy sessions with no permanent improvement in her cervical pain and right arm tingling. As a result, petitioner was discharged from therapy and referred back to Dr. DeJong due to lack of progress.

On 10/5/15 petitioner returned to Dr. DeJong. Dr. DeJong recommended a surgical referral in the Clinic. Dr. DeJong again released petitioner on an as needed basis.

On 10/15/15 petitioner presented to Dr. Rakerry Rahman. He was of the opinion that petitioner had cervical radiculopathy of the C7 nerve root in the setting of multilevel cervical degenerative disc disease. He recommended a 1 level anterior cervical discectomy and fusion at C6-C7.

On 11/12/15 petitioner underwent an IME performed by Dr. Kern Singh, at the request of the respondent. Following his examination and record review Dr. Singh diagnosed a cervical muscular strain and central disk protrusion at C6-C7. He believed petitioner sustained a soft tissue muscular strain to her neck which resolved. He did not believe her current condition was related to the injury on 2/16/15. He believed the C6-C7 disc protrusion was an incidental finding and did not correlate with the petitioner's examination findings. He believed petitioner's treatment had been excessive. He was of the opinion that petitioner could return to full duty work.

On 12/31/15 petitioner filed her Application for Adjustment of Claim claiming injuries to her cervical spine and right upper extremity on 2/16/15 while pulling a cart overloaded with bags of salt.

On 1/12/16 petitioner presented to Dr. Pineda. Dr. Pineda recommended the same procedure as Dr. Rahman on 10/15/15.

On 2/11/16 petitioner returned to Dr. Rahman. He noted that respondent was sending petitioner for a 2nd IME in St. Louis. His surgical recommendation remained the same.

On 7/7/16 petitioner returned to Dr. Rahman. He noted that Dr. Donald Degrange, Respondent's 2nd IME in St. Louis, agreed with both Dr. Pineda and his opinion. As a result, Dr. Rahman reiterated his recommendation for a 1 level anterior cervical discectomy and fusion at C6-C7 for her neck pain and right arm pain.

On 8/19/16 petitioner underwent a C6-C7 anterior discectomy fusion performed by Dr. Rahman. Post-operatively petitioner's neck pain had completely disappeared. She had minimal symptomatology on the left hand with numbness.

Postoperatively, petitioner followed-up with Dr. Rahman and reported persistent pain around the left elbow, radiating down to the 4th and 5th digits.

On 1/4/17 petitioner underwent EMG/NCV of her upper extremities performed by Dr. Narla. The impression was evidence of severe cubital tunnel compression of the ulnar nerve on the right side involving both the motor and sensory components; no definite evidence of carpal tunnel compression of the median nerves; and, evidence of a large fiber distal peripheral neuropathy, possibly related to diabetes. Given petitioner's diabetes and significant prolongation of the distal latencies, it was very hard to assess whether there was any carpal tunnel compression of the median nerves. Clinically petitioner had no symptoms in the median nerve distribution. It was presumed that the distal latency prolongation was secondary to the large fiber neuropathy. It was noted that a surgical option was worth considering with respect to the decompression and transposition of the ulnar nerve on the right.

On 1/10/17 petitioner presented to Dr. Brett Wolters for evaluation of her right hand numbness and tingling and pain. Following an examination and record review Dr. Wolters assessed right carpal tunnel syndrome, right cubital tunnel syndrome, history of type 2 diabetes, and history of anterior cervical discectomy and fusion at C6-C7. Dr. Wolters recommended right carpal and right cubital tunnel release. On 1/19/17 petitioner saw Dr. Rahman and he agreed with Dr. Wolters surgical recommendation.

On 2/1/17 petitioner underwent a Section 12 examination performed by Dr. Michele Koo at the request of the respondent. Dr. Koo performed an examination and record review. Dr. Koo's assessment was that petitioner has right cubital tunnel syndrome, but did not think it was work related. Dr. Koo was of the opinion that petitioner would benefit from a submuscular transposition. Dr. Koo was of the opinion that petitioner's right cubital tunnel syndrome could be related to her work activities.

On 2/20/17 petitioner underwent a right carpal tunnel release and right cubital tunnel release performed by Dr. Wolters. Petitioner followed up postoperatively with Dr. Wolters. This including a course of physical therapy.

On 3/30/17 petitioner followed-up with Dr. Rahman. It was noted that petitioner was close to maximum medical improvement with regards to her neck. Petitioner was instructed to start work hardening and return for final release once complete. Petitioner complained of right hand and elbow pain occasionally radiating into her neck.

On 4/7/17 petitioner last followed-up with Dr. Wolters for her right carpal and cubital releases. Petitioner reported that her numbness and tingling were much better. She complained of some residual pain about the elbow and the hand, but was much better overall. She reported that she was going to begin work hardening for

her neck. An examination revealed mild tenderness about the right elbow and wrist incision, and a normal sensation throughout the right hand. Dr. Wolters was of the opinion that petitioner had reached maximum medical improvement and could work full duty without restrictions. Dr. Wolters released petitioner on an as needed basis.

On 4/20/17 the petitioner underwent a work conditioning evaluation that showed she could benefit from a course of daily work conditioning. Petitioner underwent work conditioning from 4/25/17 to 6/30/17.

On 7/10/17 petitioner underwent a repeat functional capacity evaluation at Memorial Industrial Rehab. Petitioner was found capable of functioning within the "Medium" DOL category (21-50#) for material handling tasks of waist to floor lifts, waist to crown lifts, and front carry. She demonstrated that she was able to perform waist to floor lift with 50 pounds, front carry with 40 pounds and waist to crown lift with 30 pounds occasionally. Petitioner reported that she has had to lift 70-100 pounds in the past at her job, which is a "Heavy" DOL category (1-100C#). She further reported that she also has a crew of several individuals who have offered to help her with lifting heavier weights, if needed.

Petitioner testified that currently she experiences pain in her head and neck when it rains and with other weather conditions. She testified that if she drives over 2 hours her neck bothers her. Petitioner also reported that she has to be careful with some overhead activities because it causes her pain. Petitioner stated that she has limited range of motion of her neck and sometimes put her neck brace on to relieve the pressure. Petitioner stated that she cannot do now what she did before the injury because it causes pain.

Petitioner testified that her current job description is the same as it was before the accident. However, now she gets help from the laborers that work for her. She testified that she did not need their help before the injury.

Petitioner testified that after her right wrist and elbow surgery she can hold and grip, but does not have the same strength as she did before the accident. She testified that if she lifts a lot of weight with her right upper extremity, she has pain in her right wrist/hand, and will sometimes drop it due to pain. She stated that the numbness and tingling has resolved, but the mobility in her right wrist and elbow has decreased.

Robert Williams, a laborer for respondent, was called as a witness of behalf of petitioner. Williams has known petitioner for 20 years, and has worked for petitioner for 5 years. He testified that the duties of petitioner and her crew are all heavy construction duties. He testified that as the labor foreman petitioner has the same duties as the laborers and directs the laborers. Williams stated that petitioner performs all the same labor duties as the laborers. He rated her work as A+. Williams testified that after the surgery to petitioner's neck and right upper extremity petitioner was weaker and not capable of doing the same things given her restrictions. He noted

that petitioner cannot jackhammer or throw. Williams testified that currently petitioner has temp employees working with her and her crew. He testified that the temp employees are working on the regular jobs and doing extra jobs. He stated that the temps also assist petitioner.

The parties stipulated that Robert Shinnick would testified the same as Robert Williams.

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 petitioner was a foreman/laborer at the time of the injury. Petitioner has returned to her regular job but has permanent restrictions of Medium physical demand level, which are lower than the Heavy physical demand level of petitioner's regular duty job. Petitioner has returned to her regular duty job of foreman/laborer but testified that she gets help from the laborers that work for her. Williams noted that petitioner can no longer jackhammer or throw, and gets help from her crew and the temp employees with duties that exceed her restrictions. Therefore, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 56 years old at the time of the accident. Following her release from care on an as needed basis, petitioner returned to work as a foreman/laborer even though she has permanent restrictions that prevent her from performing all the duties associated with her Heavy duty job, given that her restrictions only allow her to perform work at the Medium physical demand level. Petitioner does what she can and gets help from her crew or temp employees if she needs to perform a task that requires abilities above her Medium physical demand level. Petitioner testified that respondent is accommodating her permanent restrictions within her regular duty job of a foreman/laborer. Petitioner made no mention regarding when she felt she would be unable to perform her job with her permanent restrictions. There was no indication that petitioner would be unable to continue working her regular duty job with permanent restrictions with the help of her crew and temporary employees. Therefore, the arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the arbitrator notes that the petitioner offered no evidence regarding her future earnings capacity. Therefore, the arbitrator gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds that on 4/7/17 petitioner complained of some residual pain about her right elbow

and hand, that was better overall. Dr. Wolters found petitioner had reached MMI and could return to work full duty with respect to her right carpal and cubital tunnel releases.

On 7/10/17 petitioner underwent a functional capacity evaluation and was found capable of functioning within the "Medium" DOL category (21-50#) for material handling tasks of waist to floor lifts, waist to crown lifts, and front carry. She demonstrated that she was able to perform waist to floor lift with 50 pounds, front carry with 40 pounds and waist to crown lift with 30 pounds occasionally. Petitioner reported that she has had to lift 70-100 pounds in the past at her job, which is a "Heavy" DOL category (1-100C#). She further reported that she also has a crew of several individuals who have offered to help her with lifting heavier weights, if needed.

Petitioner testified that currently she experiences pain in her head and neck when it rains and with other weather conditions. She testified that if she drives over 2 hours her neck bothers her. Petitioner also reported that she has to be careful with some overhead activities because it causes her pain. Petitioner stated that she has limited range of motion of her neck and sometimes puts her neck brace on to relieve the pressure. Petitioner stated that she cannot do now what she did before the injury because it causes pain.

Petitioner testified that her current job description is the same as it was before the accident. However, now she gets help from the laborers that work for her. She testified that she did not need their help before the injury.

Petitioner testified that after her right wrist and elbow surgery she can hold and grip, but does not have the same strength as she did before the accident. She testified that if she lifts a lot of weight with her right upper extremity, she has pain in her right wrist/hand, and sometimes will drop it due to pain. She stated that the numbness and tingling has resolved, but the mobility in her right wrist and elbow has decreased.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained a 20% loss of use of her person as a whole pursuant to Section 8(d)2 of the Act; sustained a net 5% loss of use of the right hand pursuant to Section 8(e) of the Act (after applying prior credit of 10% loss of use of the right hand in case 13 WC 15900) ; and, a 12.5% loss of use of the right arm pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stuart Brown,
Petitioner,
vs.

NO: 16WC 15522

19IWCC0097

Whelan Security,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, 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 June 13, 2018, 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 $26,500.00. 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.

FEB 11 2019

DATED:
o020519
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BROWN, STUART
Employee/Petitioner

Case# **16WC015522**

WHELAN SECURITY
Employer/Respondent

19IWCC0097

On 6/13/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & EVANS
RUSSEL HAUGEN
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

0560 WIEDNER & McAULIFFE LTD
MATTHEW J ROKUSEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

STUART BROWN,
Employee/Petitioner

v.

WHELAN SECURITY,
Employer/Respondent

Case # 16 WC 15522

Consolidated cases: _____

19IWCC0097

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Urbana**, on **5/10/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12/3/15**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$18,710.58**; the average weekly wage was **$359.82**.

On the date of accident, Petitioner was **72** 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 **$8,312.56** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$8,312.56**.

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 $253.00/week for 62 weeks, commencing 12/10/15 through 5/31/16, 6/22/16 through 6/28/16, and 7/27/16 through 4/5/17, as provided in Section 8(b) of the Act. Respondent shall be given credit of $8,312.56 for temporary total disability benefits already paid.

Respondent shall pay reasonable and necessary medical services related to petitioner's right knee from 12/3/15 through 4/5/17, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner permanent partial disability benefits of $253.00/week for 75.25 weeks, because the injuries sustained caused the 35% 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.

Kaureen H Pulia

Signature of Arbitrator

6/4/18
Date

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 72 year old security officer, alleges he sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 12/3/15. Petitioner works at Amdocs. Petitioner worked the 2nd shift, 3:30-11:30 pm. Petitioner worked 32 hours a day. Petitioner denied he ever had any problems with, or treatment for, his right knee prior to the injury on 12/3/15.

As a security officer petitioner's duties include watching monitors and doing rounds once an hour. In buildings A and D he checks all badges and doors. In building A he also checks the data center. Petitioner also has a Roving duty where he patrols all 6 buildings. This involves checking padlocks and doors, and walking around the campus. Petitioner would also patrol the perimeters of the buildings, and observe everything that was going on. He used a flashlight. Petitioner testified that walking around the campus involved stepping up and down some stairs to check the doors. The lighting was okay. He stated that the generator building had some dark areas where he checks the padlocks.

Petitioner worked in building D from 3:30p-5:30p, then went to building A from 5:30p-7:30p. From 7:30p-9:30p petitioner performed his Roving duties. This involved performing a round each hour. When his boss was there for 2 weeks petitioner had to do the Roving duties twice per hour. Petitioner would then go back to building D for the last 2 hours.

When petitioner does his Roving duties he leaves building A and goes to building B to check the doors and the computer room. He then goes back to building A to check the doors before going to building C to check the doors and generator padlocks. Petitioner then goes to building D and to then to the desk. Petitioner testified that these Roving duties include stepping up and down the lift curb off the sidewalk which is about 5-6 inches, and going up and down about 6 steps when in building A and B, and 2 steps to get to the data center in building D.

On 12/3/15 at approximately 9:15 pm petitioner was working his Roving duties. He had just finished checking buildings A, B and C, and was at the southwest corner of the C building. As he stepped off the curb/rise in an awkward position with his right foot partially on the curb and partially down off the curb he stumbled, took a step, and had pain in his right ankle and swelling in his right knee. Petitioner proceeded to building D and saw Ed Danzer, a coworker. Petitioner told him he hurt his right knee. Petitioner also called Brian Castle and reported the injury. Castle asked him if he wanted someone else to come in and petitioner said no.

On 12/3/15 petitioner completed an Incident Report. He reported that he injured his right knee and right ankle. He indicated that the weather conditions were dry and dark. He wrote " 12-3-15 @ approx. 2115 while on an outside property rnd @the sidewalk corner (s/w) of Bldg C I steped (sic) on the edge of the walk & fell forward. I didn't fall down but I did something to my Rt. ankle & Rt. knee. I came on to Bldg D & called Act. MGr. Castle & told him I would file this form. He said to do so & we will see about in the morn. I said I ."will let you know".

Petitioner worked the next 3-4 shifts, hoping it would get better. When it did not he called Castle and asked where he could go for treatment. Petitioner went to Christie Clinic.

On 12/10/15 Jeff Weiss completed an accident report. Weiss's title is VPHR. The report indicated that the injury occurred at 8:21p on 12/3/15. What petitioner was doing when the accident occurred was indicated as "employee was walking south on sidewalk located on the west side of the building. he stepped off the sidewalk onto the parking lot. When he did, his heel was on the sidewalk, and his toes were on the parking lot. this caused his ankle and knee to turn."

On 12/10/15 petitioner presented to Christie Clinic. Petitioner was referred to SafeWorks. Petitioner presented to Dr. Fletcher at SafeWorks on 12/16/15. Petitioner gave a history of doing his rounds on 12/3/15 and as he was going around a corner he stepped off the curb on the sidewalk with half his foot on and half off, stumbled, and when he regained footing, noticed pain in his right knee. Dr. Fletcher examined petitioner and diagnosed internal derangement of the right knee, and post-traumatic osteoarthritis of the right knee. Primary osteoarthritis of the left knee was also diagnosed. Petitioner was prescribed Naproxen, and was taken off work through 12/23/15. Dr. Fletcher referred petitioner to Dr. Keller. Petitioner continued to follow up with Dr. Fletcher on 11 occasions through 2/8/17.

Petitioner presented to Dr. Keller on 12/16/15 for his right knee pain. Petitioner gave a history of makings his rounds on 12/3/15 and stepping off a curb and twisting his right knee. He rated his pain at 7-8/10. He denied ever hurting his right knee before. Following an examination and x-ray review, Dr. Keller diagnosed right knee medial meniscus posterior horn radial tear with loop joint body and internal derangement. Dr. Keller ordered an MRI.

Petitioner began a course of physical therapy at 217 Rehab on 12/29/15. He gave a history of being a security officer and being on an outside round. He reported that there was a 4" lift along the sidewalk and he stumbled on it, which did something to his right knee. Petitioner was examined, assessed, and a treatment plan was put in place. Petitioner underwent therapy through 1/18/16.

On 1/22/16 petitioner underwent an MRI of his right knee. It revealed a medial meniscus tear with moderate osteoarthritis.

On 1/27/16 petitioner followed up with Dr. Keller. His condition remained unchanged. Dr. Keller reviewed the results of the MRI with him and recommended a right knee arthroscopy, medial meniscectomy, and abrasion chondroplasty. Petitioner agreed with the recommendation. He reported issues with giving way and going up and down stairs.

On 4/4/16 petitioner underwent a right knee arthroscopy, medial meniscectomy and abrasion chondroplasty, medial femoral condyle and patella, and excision of medial synovial plica, performed by Dr. Keller. Petitioner's post-operative diagnosis was right knee and medial and lateral tears, Grade 3 and 4 chondromalacia of the medial femoral condyle, and hypertrophic synovial plica. Post-operatively petitioner followed-up with Dr. Keller on a monthly basis and underwent a course of physical therapy at 217 Rehab & Performance Center that began on 4/6/16.

Petitioner followed-up with Dr. Keller on 4/13/16. He had some mild discomfort. He reported that he was doing home exercises, going to physical therapy, and using a Game Ready machine. Following an examination Dr. Keller continued petitioner in therapy and using his Game Ready machine. He discontinued petitioner's use of Norco and prescribed Tramadol, Meloxicam,and Omeprazole. Petitioner remained off work.

On 4/27/16 petitioner returned to Dr. Keller. He said he was making good progress, and then fell on his right knee in therapy three days ago. He had a contusion, and was concerned about pain and swelling in the right knee. He complained of pain over the patella. Following an examination, Dr. Keller continued petitioner's use of the Game Ready, ice for swelling, NSAIDs, and therapy.

On 5/25/16 petitioner followed-up with Dr. Keller. Petitioner was doing well. He reported that he was better after the fall and had no issues. Dr. Keller noted that petitioner had returned the Game Ready machine and had only one more therapy session that day. He was of the opinion that the fall delayed petitioner's recovery for a short period of time, about 2 weeks. Petitioner stated that he wanted to return to work. Dr. Keller released petitioner to full duty work on 6/1/16. Dr. Keller discontinued petitioner's therapy after 5/25/16.

Petitioner returned to full duty work on 6/1/16. Within a couple of days of returning to work he noticed that his right knee was aggravated and the swelling came back. Petitioner took ibuprofen for his pain.

Petitioner returned to Dr. Keller on 6/22/16. He complained of recurrent pain and swelling in the right knee. He stated that he returned to work and had worsening symptoms, mostly swelling and pain, which limited his ability to walk and do his activities. He rated his pain at a 4/10. Dr. Keller examined petitioner and assessed

continued post-operative pain and swelling likely related to some arthritic changes in the right knee at the time of surgery. Dr. Keller performed an injection into petitioner's right knee. He took petitioner off work. He noted that petitioner may be able to return to work on 6/29/16.

On 7/26/16 petitioner returned to Dr. Keller. He had worsening right knee pain and swelling. He reported that the injections only provided minimal relief. He reported that most of his pain is with walking. He rated his pain at a 8/10. He examined petitioner and diagnosed advanced osteoarthritis with a history of right knee arthroscopy. He recommended a right total knee replacement and took petitioner off work.

On 9/7/16 respondent's attorney sent a letter to petitioner's attorney confirming their agreement and issuing 8 weeks of disputed TTD benefits per Arbitrator McCarthy's recommendation in the amount of $2,024.00. In return for these benefits, petitioner agreed to continue the matter pending receipt of the IME report.

On 10/3/16 petitioner underwent a Section 12 examination by Dr. Aaron Bare, at Northwestern Medicine Orthopedics, at the request of the respondent. Dr. Bare documented petitioner's history. He noted that petitioner reported that he was a security guard. With respect to the injury petitioner reported that he was walking at the time of the injury when he stepped off a sidewalk and onto asphalt. He denied he fell. He felt he pivoted and twisted his knee and had pain. He reported ongoing pain. He denied any prior problems with his right knee. Petitioner also provided a history of his treatment.

Following his examination and record review, Dr. Bare was of the opinion that petitioner has degenerative osteoarthritis in both knees. Although Dr. Bare received a cover letter from respondent's attorney indicating petitioner had treatment to both knees prior to the injury, petitioner denied he ever had any treatment for his right knee. Dr. Bare noted that the MRI of the right knee showed chondromalacia, and that chondromalacia typically has a poor outcome with surgical intervention due to the fact that the person is missing normal healthy cartilage. Dr. Bare was of the opinion that it is not uncommon for individuals over the age of 70 to have degenerative osteoarthritis in the knee.

Dr. Bare believed that petitioner aggravated a pre-existing problem of his osteoarthritic knee in December of 2015. He noted that the limited relief petitioner received from the surgery was to be expected. Dr. Bare believed the medical treatment was appropriate and necessary as it pertains to the injury. He believed that after petitioner reached maximum medical improvement on 6/1/16 no further treatment was indicated or required as it pertains to the work injury. Dr. Bare believed that further treatment of petitioner's knee on 6/29/15 was related to his preexisting degenerative knee. Dr. Bare believed the injury caused a temporary aggravation of a preexisting problem that was treated appropriately within the standard of care. He believed all further treatment

was related solely to his preexisting degenerative condition. Dr. Bare did not believe the injury advanced or accelerated petitioner's right knee condition. He was of the opinion that further medical treatment may include periodic cortisone injections or vicosupplementation. He was further of the opinion that typically with degenerative arthrosis in the knee that has not collapsed on standing x-rays, we typically do not perform total knee replacements. He did not believe petitioner was a candidate for a knee arthroplasty. He was of the opinion that petitioner needs no work restrictions.

On 1/30/17 petitioner underwent a right total knee replacement performed by Dr. Keller. Post-operatively petitioner followed-up with Dr. Keller and underwent physical therapy at ATI that began on 2/3/17.

On 2/8/17 petitioner returned to Dr. Keller. He was doing very well. His pain was 4/10. He ordered physical therapy and told petitioner to continue his home exercises and use the continuous passive motion machine.

On 2/8/17 petitioner also last followed up with Dr. Fletcher at SafeWorks. Petitioner's PDQ total was 97 and his rating was moderate. An examination revealed pain on motion, normal strength, significant crepitus, some generalized swelling with pain at times in the medial suprapatellar area, and decreased range of motion. Dr. Fletcher's diagnoses included pain in the right knee.

On 3/8/17 petitioner presented to Dr. Keller and was doing well. His pain was at 2-3/10. He reported that his arthritic pain was gone, and denied any gross instability. He reported an occasional ache. Petitioner reported that physical therapy was going well. Dr. Keller's recommendations remained the same.

On 4/5/17 petitioner last followed-up with Dr. Keller. Petitioner was extremely happy with his progress. He rated his pain at a 1/10. He stated that he is able to do exactly what he likes to do. Dr. Keller noted that petitioner was done with physical therapy that same day, but would continue with home exercises. Dr. Keller noted that petitioner had made excellent post-operative progress. Dr. Keller released petitioner from his care.

Upon discharge from ATI on 4/5/17 petitioner continued to have impairment with body mechanics that limited his ability to transfer in and out of a chair and walk for more than 30 minutes. Petitioner's pain rating was 0/10 at rest and 4/10 with activity. Prolonged walking caused petitioner pain and soreness. Petitioner could walk with a normal gait pattern but sometimes dragged his right heel. Petitioner had 118 degrees of knee flexion on the right, and 8 degrees of knee extension of the right. His right knee extension was 5/5, and his knee flexion was 4+/5.

On 12/5/17 the evidence deposition of Dr. Brett Keller, D.O., an orthopedic surgeon, was taken on behalf of respondent. He opined that the injury on 12/3/15 resulted in the meniscal issues, his need for non-operative

care, and his need for operative care. He further opined that the injury was also an aggravating issue of an aggravation of a preexisting condition, and his need for a total knee replacement. Dr. Keller opined that all the treatment he provided petitioner was reasonable and necessary to treat petitioner's condition of ill-being.

On cross examination Dr. Keller testified that the right total knee replacement was to address some arthritis in petitioner's knee. He agreed that petitioner had an arthritic right knee before the injury. Dr. Keller testified that petitioner did not give him an accident history of stepping onto an uneven plane.

On redirect examination, Dr. Keller opined that an arthroscopic surgery similar to the one he performed on petitioner typically and often improves symptoms related to meniscus tears, but it can also cause progression of arthritis over time.

On 1/10/18 the evidence deposition of Dr. Aaron Bare, an orthopedic surgeon, was taken on behalf of the respondent. Dr. Bare opined that the arthritis in petitioner's right knee was there before the injury, and the meniscus could have been aggravated, or the meniscus tear could have occurred with the twisting and pivoting he sustained when stepping off of a curb. He further opined that it is possible that the meniscal pathology present on the MRI was directly related to the work injury. Dr. Bare opined that the total knee replacement was needed to address petitioner's arthritis and is not related to his work injury. He was of the opinion that it is related to his chronic, long-standing right knee degenerative condition. Dr. Bare was of the opinion that activities of daily living typically do not lead to arthritis. Dr. Bare was of the opinion that based on petitioner's history of a knee replacement surgery on the left knee, and the presence of substantial arthritis as documented on the objective findings of the arthroscopic surgery on the MRI, it is more likely than not he would eventually need some type of procedure for the right knee similar to what he had done on the left, which was a knee replacement surgery.

On cross-examination Dr. Bare stated that he did not review any medical records that predated the 12/3/15 injury, had not been provided with any medical records after 10/3/16, and had not examined petitioner any other time. Dr. Bare testified that the only knowledge he had regarding treatment to petitioner's left knee was in a cover letter from respondent's attorney. He testified that he saw no medical records regarding the petitioner's left knee.

Included in Dr. Bare's deposition exhibits was a position profile for security with respondent. The working environment indicated that petitioner must be able to lift and maneuver a minimum of 25 pounds and load/unload product within the client site without assistance; would be exposed to adverse and varying weather conditions which may include extremely hot/cold temperatures; have to deal with a fast-paced environment that

required being on your feet for long hours each day; and be able to perform frequent lifting, reaching, bending, walking, sitting, standing, pushing, pulling, and navigating stairwells.

Currently, petitioner avoids stairs, has difficulty getting up off the floor, has weakness in his right knee, does not drive for extended periods of time because his right knee stiffens, can only walk 1-1/2 blocks each way before he has to rest, does not go on uneven ground, and cannot get in his crawlspace at home. Petitioner finds it easier to get in his truck than it is to get in an auto. Petitioner testified that ibuprofen relieves his pain. After petitioner underwent his right total knee replacement he retired.

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

In order for an injury to be compensable, it must arise out of and in the course of the petitioner's employment with respondent. In this case, the parties stipulate that the petitioner was in the course of his employment when the injury occurred. The dispute exists as to whether or not the injury arose out of petitioner's employment with respondent.

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 connection between the employment and the accidental injury. *Technical Tape Corp. v. Industrial Commission,* 58 Ill.2d 226, 317 N.E.2d 515 (1974); *Warren v. Industrial Commission,* 61 Ill.2d 373, 335 N.E. 2d 488 (1975). "Arising out of" is primarily concerned with causal connection to the employment. The majority of cases look to facts showing an increased risk to which the employee is subjected as compared to the general public. Further, the employee must be performing some task in furtherance of the employer's business or incidental thereto. The mere fact that the worker is at the place of injury because of the employment will not suffice.

The burden is on the party seeking an award to prove by a preponderance of the credible evidence the elements of the claim, particularly the prerequisites that the injury complained of arose out of and in the course of the employment. *Hannibal, Inc. v. Industrial Commission*, 38 Ill.2d, 473, 231 N.E.2d 409, 410 (1967); *Illinois Institute of Technology v. Industrial Commission,* 68 Ill.2d 236, 369 N.E.2d 853, 12 Ill.Dec. 146 (1977). The Workers' Compensation Commission, based on the factual situation presented to it, has the obligation and the duty to draw all reasonable inferences from the facts (*City of Chicago v. Industrial Commission,*60 Ill.2d 283, 326 N.E.2d 769 (1975)), including determining the credibility of the witnesses *(Allen v. Industrial Commission,* 61 Ill.2d 177, 334 N.E.2d 142 (1975)) and making judgment thereon.

When dealing with "arising out of" the employment must be a causative factor. There are three categories of risk to which an employee may be exposed: (a) risks distinctly associated with the employment, (b) personal

risks, and (c) neutral risks that have no particular employment or personal characteristics. *Illinois Institute of Technology Research Institute v. Industrial Commission,* 314 Ill.App.3d 149, 731 N.E.2nd 795, 247 Ill. Dec 22 (1st Dist. 2000). The first of these types of risk would be compensable, the second would not, but with respect to the third it is not that clear. With regard to neutral risk, the question of whether an injury arose out of the employment rests on a determination of whether the claimant was exposed to a risk of injury to a greater extent than that to which the general public was exposed. The increased risk may be either qualitative, that is 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 the general public. *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Commission.* 407 Ill. App. 3d 1010 (2011) at 1014.

Petitioner testified that he was required to perform the Roving duties from 7:30-9:30 pm each day. The Roving duties required petitioner to patrol all 6 buildings at Amdocs. This task involves checking padlocks and doors, and walking around the campus. Petitioner would also patrol the perimeters of the buildings and observe everything that was going on by looking up, down, and all around while doing the Roving duties. Petitioner would also carry a flashlight. Although petitioner testified at trial that the lighting was okay, when he completed his accident report on the date of injury he noted that the weather conditions were dry and dark. The arbitrator reasonably infers from the fact that the injury occurred at 9:15 pm that it was dark outside on 12/3/15 when the injury occurred.

Petitioner would perform his Roving duties usually once every hour between 7:30-9:30 pm. However, when his boss was there for 2 weeks petitioner had to do his Roving duties twice an hour.

Petitioner testified that while performing his Roving duties for respondent on 12/3/15, at approximately 9:15 pm, he injured his right knee. Petitioner had just finished checking buildings A, B and C, and was at the southwest corner of the C building. Petitioner testified that while walking around performing his Roving duties for respondent he does not simply walk with his head down or straight ahead. While Roving he is constantly checking all his surroundings by looking up, down, and all around.

While walking and checking his surroundings on 12/3/15 at 9:15 pm at the southwest corner of building C, petitioner stepped off the curb/rise in an awkward position with his right foot partially on the curb and partially down off the curb. Petitioner stumbled, took a step, and had pain in his right ankle and swelling in his right knee. Petitioner completed an accident report that same day and noted that it was dark outside.

In the case at bar, the petitioner argues that he sustained an injury resulting from a neutral risk that arose out of his employment that is compensable under the Act because he was exposed to a risk to a greater degree

than the general public. Respondent argues petitioner was not exposed to a risk to a greater degree than the general public.

This increased risk may be either qualitative or quantitative. It need not be both. For the risk to be qualitative some aspect of the employment must contribute to the risk. For the risk to be quantitative, petitioner must be exposed to the risk more frequently than the general public.

In the case at bar, it is unrebutted that the petitioner is required, as part of his security duties, to perform Roving duties from 7:30-9:30 pm every day he works. During this period petitioner must perform these duties each hour. These duties require petitioner to patrol all 6 buildings. The arbitrator finds it significant that it is unrebutted that petitioner described these activities as involving walking around the campus, patrolling the perimeters of the buildings, and observing everything that is going on by constantly looking up, down, and all around. The arbitrator notes that petitioner was not simply walking along the sidewalk minding his own business and stepped of the curb awkwardly. The arbitrator finds that while petitioner was performing his Roving duties for the benefit of respondent at 9:15 pm at night, he was checking all his surroundings to make sure everything was in order by looking up, down, and all around, and while doing this awkwardly stepped off the curb. The arbitrator also finds it significant that when petitioner completed his accident report, immediately following the injury, that he noted that it was dark outside when he awkwardly stepped off the curb.

Given that the petitioner was not simply walking when he awkwardly stepped off the curb, but rather was patrolling the respondent's property for respondent's benefit by constantly checking his surroundings by looking up, down, and all around when the injury occurred, the arbitrator finds this credible evidence shows that some aspect of petitioner's employment contributed to the risk.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that while performing Roving duties for respondent he was exposed to a qualitative increased risk to a greater degree than the general public. Given that petitioner testified that he only did rounds twice a night, and did not specifically state how many curbs he walked up and down per day, the arbitrator finds the petitioner has not proven that his increased risk was quantitative.

Therefore, the arbitrator finds petitioner has proven by a preponderance of the credible evidence that he sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 12/3/15.

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

Petitioner alleges that his current condition of ill-being as it relates to his right knee is causally related to the injury on 12/3/15. Respondent disputes that petitioner's current condition of ill-being is causally related to the injury on 12/3/15.

It is unrebutted that petitioner did not have any symptoms with, or treatment for, his right knee prior to 12/3/15. It is also unrebutted that petitioner stepped off a curb on 12/3/15 injuring his right knee. Petitioner was 72 years of age at that time.

Petitioner had immediate pain in his right knee following the injury, and reported the same immediately after the injury. Petitioner did not seek immediate treatment in hopes that his condition would resolve after a few days. When it did not, petitioner treated at Christie Clinic, with Dr. Fletcher, and with Dr. Keller.

Petitioner initially underwent a course of conservative treatment that included a course of physical therapy. When petitioner's symptoms did not resolve he underwent an MRI that revealed a torn medial meniscus with moderate osteoarthritis. On 4/4/16 petitioner underwent a right knee arthroscopy, medial meniscectomy and abrasion chondroplasty, medial femoral condyle and patella, and excision of medial synovial plica, performed by Dr. Keller. Petitioner's post-operative diagnosis was right knee and medial and lateral tears, Grade 3 and 4 chondromalacia of the medial femoral condyle, and hypertrophic synovial plica. Petitioner underwent another course of physical therapy.

Petitioner returned to full duty work on 6/1/16 and returned to Dr. Keller 3 weeks later complaining of recurrent pain and swelling in the right knee since returning to work. He reported that after he returned to work he had worsening symptoms of swelling and pain that limited his ability to walk and do his activities. Dr. Keller performed an injection that only provided him with minimal relief. Petitioner continued working and continued to have pain.

On 7/26/16 Dr. Keller diagnosed advanced osteoarthritis, which was more severe than the moderate osteoarthritis that was present before the surgery. A right total knee replacement was performed on 1/30/17. Dr. Keller noted that petitioner had made excellent post-operative progress.

Dr. Keller, when asked about the causal connection between petitioner's current right knee condition and the injury on 12/3/15, opined that the injury on 12/3/15 resulted in petitioner's meniscal issues, his need for non-operative care, and his need for operative care. He further opined that the injury was also an aggravating issue of an aggravation of a preexisting condition, and petitioner's need for a total knee replacement.

Dr. Keller testified that the petitioner's right total knee replacement was to address some arthritis in his knee. He agreed that petitioner had an arthritic right knee before the injury. However, the arbitrator finds it significant that the MRI prior to the surgery showed only moderate osteoarthritis in petitioner's right knee, and after the arthroscopic surgery Dr. Keller noted that petitioner then had severe osteoarthritis in his right knee. The arbitrator finds this finding consistent with Dr. Keller's opinion that an arthroscopic surgery similar to the one he performed on petitioner can cause progression of arthritis over time.

Respondent had petitioner examined by Dr. Bare. Dr. Bare opined that the arthritis in petitioner's right knee was there before the injury, and the meniscus could have been aggravated, or the meniscus tear could have occurred with the twisting and pivoting he sustained when stepping off of a curb. He further opined that it is possible that the meniscal pathology present on the MRI was directly related to the work injury. The arbitrator reasonable infers from this opinion that Dr. Bare was of the opinion that the first surgery was reasonable and necessary, and causally related to the injury on 12/3/15.

With respect to the total knee replacement, Dr. Bare opined that that surgery was needed to address petitioner's arthritis, but is not related to his work injury, but rather to his chronic, long-standing right knee degenerative condition. Dr. Bare was of the opinion that it is more likely than not that petitioner would eventually need some type of procedure for the right knee similar to what he had done on the left, which was a knee replacement surgery. However, Dr. Bare did not address the issue of whether or not the injury on 12/3/15 and subsequent arthroscopic surgery could have accelerated the need for petitioner's right total knee replacement. The arbitrator finds it significant that Dr. Bare formulated these opinions regarding petitioner's right knee condition prior to the injury, without reviewing any medical records that predated the 12/3/15 injury.

Based on the above, as well as the credible evidence, the arbitrator relies on the opinions of Dr. Keller and finds the petitioner's current condition of ill-being as it relates to his right knee is causally related to the injury he sustained on 12/3/15. The arbitrator further finds the opinions of Dr. Keller more persuasive than Dr. Bare's given the fact that no credible evidence was offered to support a finding that petitioner had treatment for his right knee prior to 12/3/15; that petitioner had only moderate osteoarthritis prior to the arthroscopy, and then had severe osteoarthritis of the right knee shortly thereafter; and that Dr. Bare's opinions regarding the need for the right knee total replacement were based solely on a cover letter that respondent's attorney provided with specific facts, some of which were not in evidence, and not on any review of petitioner's medical records prior to 12/3/15. The arbitrator also finds it significant that Dr. Bare never addressed the issue of whether or not the injury on 12/3/15, and the arthroscopy on 4/4/16, could have resulted in an acceleration of the osteoarthritis in petitioner's right knee, thus requiring the need for a total knee replacement sooner than he may have needed one

absent the injury and arthroscopy. He also failed to address the fact that there was no credible evidence offered to support a finding that petitioner was not asymptomatic in his right knee prior to 12/3/15.

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

Having found the petitioner sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 12/3/15, and that his current condition of ill-being as it relates to his right knee is causally related to the injury he sustained on 12/3/15, the arbitrator finds all treatment petitioner received for his right knee from 12/3/15 through 4/5/17 was reasonable and necessary to cure or relieve him from the effects of the injury he sustained on 12/3/15.

Respondent shall pay reasonable and necessary medical services for petitioner's right knee from 12/3/15 through 4/5/17, 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.

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner sustained an accidental injury to his right knee that arose out of and in the course of his employment by respondent on 12/3/15, and that his current condition of ill-being as it relates to his right knee is causally related to the injury he sustained on 12/3/15, the arbitrator finds the petitioner was temporarily totally disabled from 12/10/15 through 5/31/16, 6/22/16 through 6/28/16, and 7/27/16 through 4/5/17, a period of 62 weeks at a rate of $253.00/week. Respondent is entitled to a credit of $8,312.56 for temporary total disability benefits it has already paid.

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 petitioner was a security officer at the time of the injury. However, following his right total knee replacement and release from care petitioner retired. The Arbitrator therefore gives little weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 72 years old at the time of the accident. Following his right total knee replacement and release from care by Dr. Keller, petitioner

was able to return to work, but decided he wanted to retire. Therefore, the arbitrator gives little weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the arbitrator notes that following the right total knee replacement petitioner was able to return to work for respondent, but decided instead that it was time to retire. Additionally, the arbitrator notes that petitioner failed to offer any evidence that his future earnings capacity was diminished by this injury. For this reason, the arbitrator gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator finds that when petitioner was discharged from care by Dr. Keller on 4/5/17 he was extremely happy with his progress. He rated his pain at a 1/10. He stated that he was able to do exactly what he likes to do. Dr. Keller noted that although petitioner was done with physical therapy that same day, he would continue with home exercises. Dr. Keller noted that petitioner had made excellent post-operative progress. Dr. Keller released petitioner from his care.

Upon discharge from ATI on 4/5/17 petitioner continued to have impairment with body mechanics that limited his ability to transfer in and out of a chair and walk for more than 30 minutes. Petitioner's pain rating was 0/10 at rest and 4/10 with activity. It was noted that prolonged walking causes petitioner pain and soreness. Petitioner could walk with a normal gait pattern but sometimes dragged his right heel. Petitioner had 118 degrees of knee flexion on the right, and 8 degrees of knee extension of the right. His right knee extension was 5/5, and his knee flexion was 4+/5.

Petitioner testified that currently he avoids stairs, has difficulty getting up off the floor, has weakness in his right knee, does not drive for extended periods of time because his right knee stiffens, can only walk 1-1/2 blocks each way before he has to rest, does not go on uneven ground, and cannot get in his crawlspace at home. Petitioner finds it easier to get in his truck than it is to get in an auto. Petitioner testified that ibuprofen relieves his pain.

The Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that petitioner sustained a permanent partial disability to the extent of 35% loss of use of the right leg pursuant to Section 8(e) of the Act.

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

Kathy Little,
Petitioner,

vs.

NO: 17WC 4462

Anderson Hospital,
Respondent.

19IWCC0098

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 5, 2018, 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 11 2019
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KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LITTLE, KATHY
Employee/Petitioner

Case# **17WC004462**

ANDERSON HOSPITAL
Employer/Respondent

19IWCC0098

On 6/5/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

3067 KIRKPATRICK LAW OFFICES PC
ERIC WAYNE KIRKPATRICK
3 EXECUTIVE WOODS ST SUITE 100
BELLEVILLE, IL 62226

2461 NYHAN BAMBRICK KINZIE & LOWRY
CODY HARTMAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

KATHY LITTLE
Employee/Petitioner

v.

ANDERSON HOSPITAL
Employer/Respondent

Case # 17 WC 4462

Consolidated cases: _____

19IWCC0098

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Collinsville**, on **November 21, 2017**. After reviewing all of 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 9, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$4,879.88**; the average weekly wage was **$1,219.97**.

On the date of accident, Petitioner was **61** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$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 explained in the Arbitration Decision, Petitioner failed to prove by a preponderance of the evidence that she sustained an accident which arose out of and in the course of her employment on January 9, 2017. All benefits are denied.

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

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

Signature of Arbitrator

May 24, 2018
Date

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KATHY LITTLE
Employee/Petitioner

v.

Case #: 17 WC 4462

ANDERSON HOSPITAL
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On January 9, 2017, Petitioner was 61 years old, married, and had no dependent children. She testified she was employed by Respondent as a Diabetes Nurse Educator and had been so employed for about one month. She had offices in two facilities, including one in the basement of Anderson Hospital, where her falls occurred. Petitioner testified that there were no patient rooms in the basement of the hospital, and that the area between her office and the elevator was not an area used by the general public. While the cafeteria for the hospital is located in the basement, when patients or visitors come down the elevator they turn and walk in the opposite direction.

Petitioner testified that on January 9, 2017, she had been in her office reviewing patient records on the computer, and then left her office for an appointment with a hospital patient. In order to get to the appointment, she had to walk down different hallways to get to the elevator that would take her upstairs to the patient rooms. She described the floors as concrete but "shiny". She testified that she left her office, entered the hallway, and began walking to the elevator. The hallway makes several turns between her office and elevator. Prior to reaching the elevator, she fell in the hallway. She testified that at the time of the fall she was not rushed, was not dizzy, and was stable on her feet. She testified that she had no problems with her hips or knees and had not had any prior treatment to her hips or knees. She stated she had never had any problems with her legs giving way. She was wearing normal clothing, a lab coat, and clog-type shoes. She was carrying a folder and had a few business cards, a cell phone, and an ink pen in the pocket of her lab coat.

Petitioner testified that she turned a corner and walked past a housekeeping cart of some kind. She was about five or six feet past the cart when she fell. She testified, "I was walking and the next thing I knew I was on the floor. I don't remember anything other than that. I don't remember stumbling or the process of falling, just suddenly on the floor." She did not recall hitting her toe on the floor or having weakness in her legs prior to the fall, and she did not see any water

on her clothes after the fall. She testified that after the fall she was in shock and pain, and another employee helped her up and got her a chair to sit in. After a few minutes, she felt a little better and stood up and walked back to her office to ask for help. She advised her co-workers of the accident, requested they notify her manager, and advised she needed to go to the emergency room. She testified that an employee of the hospital walked with her down the same hallway, on the way to the emergency room. While walking, she fell again in the same spot. Thereafter, she was taken to the hospital's emergency room.

With regard to her injuries, Petitioner testified that she sustained a fracture of the right wrist and underwent surgery. She also sustained a hairline fracture of the left wrist. She treated with Dr. Penn and was off work approximately seven weeks after the accident. She continues to have stiffness in her right wrist in the mornings but otherwise has "no real issues with it". It does not affect her ability to do her job. She is able to grip things and is able to open jars and such in the kitchen. She has no issues with regard to her left wrist. She testified that her husband's insurance paid some of the medical bills, but she incurred approximately $990 in out of pocket expenses.

Following the accidents, Petitioner presented to the emergency room at Anderson Hospital on January 9, 2017. She reported dizziness and right wrist pain secondary to a fall. The physician record states, "Patient reports that she was running and trying to answer the phone prior to arrival today when she slipped and put her RUE out to break her fall." She reported that after the fall she became dizzy, diaphoretic, and "saw stars" for a few minutes. She also reported the second fall onto her wrist. Right wrist x-rays showed an acute comminuted distal radial metaphyseal fracture into the distal radial ulnar and radiocarpal joints, and an acute ulnar styloid avulsion fracture. Left wrist x-rays showed no acute fractures or dislocations. It was further noted that Petitioner had a vasovagal episode following the accidents. She was referred to Dr. Penn for follow up. PX1.

On January 10, 2017, an Employee Incident Report was completed by Karen Smith, who indicated that Petitioner approached her after she fell and advised that her right wrist was hurting. Petitioner stated that she looked down to her phone because it was ringing and stumbled and then fell to the floor. PX3.

On February 16, 2017, Petitioner presented to Dr. Timothy Penn of Illinois SW Orthopedics. She reported she had fallen a week prior but was "not sure exactly what happened". She stated she fell, gathered herself, decided to be evaluated in the emergency room, and then fell again. She noted that with the first fall she injured her right wrist, and with the second fall she injured her left wrist. She complained of severe pain in the right distal forearm that radiated and milder pain on the left side. It was noted that she was right-handed. Following a physical examination and review of the x-rays, Dr. Penn recommended open reduction and internal fixation of the right distal radius. PX2. Surgery was performed on January 20, 2017, and the postoperative diagnosis was intra-articular right distal radius fracture. PX1.

Petitioner followed up with Dr. Penn on January 31, 2017, and reported quite a bit of discomfort on the left side. She noted the right wrist was sore but felt better than it did prior to surgery. On examination, she had some limitation of forearm rotation and wrist range of motion on the right side. On the left, she had almost full motion, diminished pinch strength, and tenderness in the distal radial metaphysis area. Right wrist x-rays showed hardware was in a satisfactory

position; the distal radius had been reduced virtually anatomically with respect to length, inclination, and tilt. Left wrist x-rays showed findings consistent with a healing occult distal radius fracture. Dr. Penn noted that the left wrist would be treated nonsurgically and that the right wrist was "doing quite well". Petitioner was instructed to perform gentle exercises for both forearms and wrists. She was given a two-pound lifting restriction and was advised she could start driving in another two weeks. She was to return in one month. PX2.

On February 28, 2017, Petitioner returned to Dr. Penn. She reported "a little bit of stiffness" in her right wrist and some soreness along her incision; she had very little discomfort in her left wrist. On examination, she had full rotation of her right forearm and two-thirds to three-quarters wrist range of motion on the right. She had slightly diminished grip and pinch strength on the right. Repeat x-rays showed the left distal radius fracture was healing in anatomic position and the fixation and anatomic position was unchanged on the right. Petitioner was referred to hand therapy and was to return in six weeks. PX2.

On April 11, 2017, Petitioner followed up with Dr. Penn and reported some stiffness in her right wrist and no trouble on the left side. On examination, she had 90% range of motion on the right when compared to the left and reasonable grip and pinch strength. She had some soreness across the dorsal aspect of the carpus. Repeat x-rays showed healed fracture on the left and anatomic healing on the right. Hardware was unchanged. Petitioner was instructed to continue exercises on her own and return in two months. Dr. Penn noted she would be considered at maximum medical improvement one year post-surgery. PX2.

On May 23, 2017, Petitioner was evaluated by Dr. David Brown, Respondent's Section 12 examiner. She reported that she was walking down the hallway when she fell. She did not recall tripping, slipping, or stumbling, and "just knows she fell". She did not recall losing consciousness or having a dizzy spell before she fell. She did not recall how she fell but just remembered pain in her right wrist afterward. Petitioner stated she reported the incident to her manager, who accompanied her to the emergency room. She noted that within a few feet of where she initially fell, the "exact same thing" occurred again while on the way to the emergency room. She again did not remember slipping, tripping, or stumbling. Petitioner advised she was under no active treatment, denied having any pain in either wrist, and denied numbness or tingling in either hand. She stated she had some swelling and tightness in the right hand and digits in the morning, and also noticed some decreased grip and pinch strength. It appears she made no complaints with regard to the left wrist. RX1.

Dr. Brown reviewed the treatment records from Anderson Hospital and Dr. Penn, including x-rays. He also reviewed a security video (RX2) which showed both of Petitioner's falls. Following a physical examination and review of the records and video, Dr. Brown opined that Petitioner sustained bilateral distal radial fractures, was status post-surgery on the right, and was treated nonoperatively on the left. He further opined that her treatment to date had been reasonable, appropriate, and necessary, and that Petitioner's complaints were consistent with the objective findings. He believed Petitioner was at maximum medical improvement, that no further treatment was necessary, and that she could continue to work without restrictions. RX1.

Petitioner returned to Dr. Penn on June 13, 2017, who noted she was "doing quite well". On examination, she had full rotation of her forearms, excellent grip and pinch strength, and intact neurovascular status bilaterally. She had slight limitation in palmar flexion in the right wrist. She was allowed to return to all activities as tolerated. Dr. Penn noted that the slight residual limitation of motion would probably be overcome over time. Petitioner was released from care. PX2. The Arbitrator notes this is the final treatment record.

Respondent offered into evidence a security video of the hallway in which Petitioner fell. The video commences at 1:01:37 p.m. and runs until 2:19:58 p.m. The Arbitrator viewed the video in its entirety and took great care to view certain portions multiple times. Pertinent observations are as follows:

1:13:36 Janitor enters hallway with a dry dust mop; he proceeds to sweep/dry mop up the hallway toward the camera, then out of view, then back into view and down the hallway.

1:40-1:42 A small group enters and walks down the hallway, in the same area where Petitioner later walked and fell. One women is noted to be in high heels and walks without issue in the same area as Petitioner.

1:48:28 Janitor rolls a small mop bucket down the hallway and parks it at the far end of the hallway. The Arbitrator notes at least five different people walk down the hallway after this occurs, in the same general area where Petitioner later walked and fell. None of them appeared to slip on any water, debris, slick floor, etc. and none of them had any issues walking in the hallway.

1:50:15 Janitor runs what appears to be a wet string mop along the edge of the hallway, right along the baseboard. He turns a corner and goes out of view. The Arbitrator notes two people walk down the hallway following this; neither appeared to have issues doing so.

1:51:56 Janitor comes back into view and mops down the other side of the hallway, again along the edge only and right along the baseboard. The Arbitrator notes that no less than 11 people walk down the hallway after this occurs, one of whom took virtually the same path as Petitioner later did. In addition, at one point a tall gentleman walks back and forth several times in the exact area where Petitioner later walked and fell.

1:57:12 Janitor mops down an adjoining hallway, out of view. The Arbitrator notes that two people walk down the hallway after this occurs and prior to Petitioner coming into view.

2:00:26 Petitioner appears in a white lab coat. She rounds the corner, steps around the housekeeping cart, and takes a few steps. At that point her left ankle rolls toward the outside, causing her foot to slide toward the inside and into her right foot, causing her to trip over it and fall. Shortly thereafter she is assisted off the floor and is provided a chair. The Arbitrator notes that following her fall, five people walk down the same hallway with no issues.

2:02:43 Janitor rolls the small mop bucket back down the hallway and out of view. The Arbitrator notes that four people thereafter walk down the same hallway with no issues. One person in particular walks virtually the identical path that Petitioner had.

2:06:58 Petitioner leaves the hallway, rounding the corner to the left and out of view. The Arbitrator notes that two people thereafter walk down the hallway with no issues, one of whom walks the same path that Petitioner had.

2:13:03 Petitioner again appears in a white lab coat, walking next to another person. She walks around the housekeeping cart and tilts her head down to look at the floor, apparently looking for the place where she previously fell. She walks several more feet down the hallway, at which point her left ankle again rolls to the outside, causing her foot to slide toward the inside and into her right foot, causing her to trip and fall. Petitioner is again assisted off the ground by several

individuals, after sitting on the floor for approximately two minutes. She is assisted into a wheelchair and exits the view of the camera at approximately 2:16:03. The Arbitrator notes that after Petitioner's second fall and before she leaves in a wheelchair, at least nine people walk down the hallway with no issues, including two who walk in the same area that Petitioner did. After Petitioner leaves, five people walk in the hallway with no issues, including one who walks the same path that Petitioner did.

2:19:00 Janitors operates what appears to be a floor buffer from the end of the hallway into an adjoining hallway several times, but does not come down the hallway in question.

CONCLUSIONS OF LAW

The Arbitrator hereby incorporates by reference the above Findings of Fact, and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After review of the evidence and due deliberations, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to issue (C), whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

To obtain compensation under the Illinois Workers' Compensation Act, a claimant must show by a preponderance of the evidence that he suffered a disabling injury arising out of and in the course of his employment. 805 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1013 (1st Dist. 2011); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57 (1989). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill.2d 478, 483 (1989).

"In the course of" employment refers to the time, place, and circumstances surrounding the injury and, to be compensable, an injury generally must occur within the time and space boundaries of the employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 203 (2003). There is no dispute that Petitioner's injury occurred in the course of her employment. She was performing her job duties of going from her office to see a patient in the hospital when she fell. The issue is whether her injuries arose out of her employment.

The "arising out of" component is primarily concerned with causal connection, and is shown when the claimant has demonstrated that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Id.* 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. 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. *Orsini v. Industrial Comm'n*, 117 Ill.2d 38, 45 (1987).

There are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. *Illinois Institute of Technology*

Research Institute v. Industrial Comm'n, 314 Ill.App.3d 149, 162 (1st Dist. 2000). See also *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, 27, 990 N.E.2d 284, 371 Ill.Dec. 384.

Petitioner attempted to establish that her injuries were the result of an employment related risk, *to wit*, walking near a housekeeping cart or machine used to clean the floor and/or an inference that she fell due to the floor recently being cleaned. In this endeavor, however, Petitioner failed. The Arbitrator finds significant that in her testimony, Petitioner made no mention of the machine or a recently cleaned floor as the cause of her falls. In fact, she did not know what caused her to fall. Although she testified that the floor was shiny, she specifically looked and did not find any water on her clothes or the floor after her falls. She failed to indicate any defect on the floor as the cause of her falls. The Arbitrator also finds significant that the security video is void of any indication that there was any defect on the floor or that the machine or condition of the floor played any part in Petitioner's falls.

The Arbitrator also finds significant that Petitioner consistently reported to medical providers and testified at hearing that she did not know why she fell. Her testimony is corroborated by her statement to Dr. Brown during her Section 12 evaluation that she did not recall tripping, slipping, or stumbling. Dr. Brown noted, "She just remembers she fell somehow and then when she sat up on the floor she noted pain in her right wrist." With regard to Petitioner's second fall, Dr. Brown noted, "Again, she doesn't remember slipping, tripping, or stumbling. She just remembers she fell." Petitioner's treating physician, Dr. Penn, noted that she fell but that she was "not sure exactly what happened". Petitioner's statements to both physicians confirm that her fall was not as a result of an employment risk.

The Arbitrator therefore finds that Petitioner's falls were not the result of an employment related risk.

Injuries 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, 27, 990 N.E.2d 284, 371 Ill.Dec. 384; see also *Orsini v. Industrial Comm'n*, 117 Ill.2d 38, 45 (1987) and *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 59 (1989).

The Arbitrator finds that Petitioner's falls were not the result of a neutral risk to which she was exposed to a greater degree than the general public. In so concluding, the Arbitrator finds significant that Petitioner testified at trial that she was not in a hurry immediately prior to her falls. Her testimony is corroborated by the security video, which clearly shows she was walking in a normal fashion. She was carrying a folder at the time but did not testify that its presence in any way contributed to her fall, nor does the security video show that it interfered with her line of vision or her gait in any way. Petitioner testified that she works in the hospital three days a week and on each given day she walks in that hallway "probably eight or nine times". The Arbitrator does not find that this constitutes a quantitative increased risk. Petitioner failed to note any condition which exposed her to a risk greater than that of the general public.

The Arbitrator therefore finds that Petitioner's falls were not the result of neutral risk to which Petitioner was exposed to a greater degree.

Rather, the Arbitrator finds that Petitioner's falls were the result of a personal risk, and further finds that the security video submitted by Respondent is the best evidence as to same. As previously stated, the Arbitrator watched the video in its entirety and viewed several portions multiple times. Particular attention was paid to activities in the hallway immediately prior to and after Petitioner's falls, and to Petitioner's specific movements immediately prior to each fall.

The Arbitrator notes that the janitor was present several times in the hallway, as well as in adjoining hallways at either end. He swept the floor with a wide dry dust mop and shortly thereafter mopped along the edges of the hallway, by the baseboards. At no time did he mop anywhere except along the baseboards, and at no time did he mop in either of the areas where Petitioner fell. Even if one were to infer, as Petitioner proposed, that water splashed out of the bucket as the janitor was wheeling it down the hallway, there is no evidence whatsoever to support that inference. The janitor wheeled the mop bucket down the middle of the hallway at 1:48:28. Following that, no less than 20 people walked up, down, or within the hallway prior to Petitioner's arrival, several of whom walked in the same area as Petitioner. Not one of them slipped, slid, walked gingerly, or otherwise gave any indication that they encountered water on the floor. The janitor wheeled the mop bucket back down the middle of the hallway at 2:02:26. Following that, no less than 20 people walked up, down, or within the hallway. Petitioner is the only person who had difficulty walking on the floor. This corroborates and supports Petitioner's testimony that there was, in fact, no water on the floor.

The Arbitrator further notes that after Petitioner's first fall, no less than 11 people walked up, down, or within the hallway, some in the exact area as Petitioner, and none of them slipped, slid, or tripped on the floor. Likewise, after Petitioner's second fall, no less than 14 people walked up, down, or within the hallway, some in the exact area as Petitioner, and none of them slipped, slid, or tripped.

The Arbitrator finds significant that there were at least 45 people who traversed the hallway in question in the span of nearly one hour and twenty minutes, both before and after Petitioner's falls. Petitioner was the only person who had any difficulty walking in the hallway. Most importantly, after viewing the security footage of Petitioner's falls multiple times, the Arbitrator concludes that the cause of her falls was the rolling of her left ankle. It is very clear that immediately prior to each fall, Petitioner's left ankle rolled, causing her left foot to turn on its side and slide into her right foot, thereby causing her to trip on her own feet and fall. Immediately prior to her ankle rolling on each occasion, it appeared that, as she stepped down onto her left foot, she possibly stepped too far toward the outside of her shoe and stepped "off" the shoe itself. There is no indication that anything connected with her employment caused her ankle to roll and subsequently caused her to fall.

Based on the foregoing and the record in its entirety, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that she sustained an accident on January 9, 2017, that arose out of and in the course of her employment with Respondent. All other issues are rendered moot and the Arbitrator makes no findings regarding same. All benefits are denied.

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

Pablo Irizarry,
Petitioner,

vs.

NO: 16WC 24415

19IWCC0099

Old Dominion Freight,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 5, 2018, 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 $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 11 2019
o020519
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

IRIZARRY, PABLO
Employee/Petitioner

Case# **16WC024415**

OLD DOMINION FREIGHT
Employer/Respondent

19IWCC0099

On 6/5/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4589 BACH LAW OFFICE
JEFFREY R BACH
110 S W JEFFERSON ST SUITE 410
PEORIA, IL 61602

0445 RODDY LAW LTD
ROBERT DOHERTY JR
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Pablo Irizarry
Employee/Petitioner

v.

Old Dominion Freight
Employer/Respondent

Case # **16** WC **24415**

Consolidated cases: ___

19IWCC0099

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Bloomington**, on **May 18, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 6, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**72,156.76**; the average weekly wage was $**1,387.63**.

On the date of accident, Petitioner was **43** years of age, ***married*** 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 $**17,990.68** in group medical paid and $16,100.00 in group disability benefits under Section 8(j) of the Act.

ORDER

Respondent shall pay any and all, outstanding, related, reasonable and necessary medical expenses incurred by Petitioner, as provided in Sections 8(a) and 8.2 of the Act and subject to the medical fee schedule. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $925.09/week for 26 weeks, commencing 7/25/16 through 1/23/17, as provided in Section 8(b) of the Act. Respondent shall receive a credit for any group disability benefits paid to the Petitioner during this time period.

Respondent shall pay Petitioner permanent partial disability benefits of $755.22/week for 21.5 weeks, because the injuries sustained caused the 10% loss of the left leg, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

6/5/18
Date

JUN 5 - 2018

19IWCC0099

FINDINGS OF FACT

This case involves a Petitioner alleging injuries sustained while working for the Respondent on June 6, 2016. Respondent disputes Petitioner's claim and the issues in dispute are: 1) accident; 2) notice; 3) causation; 4) medical expenses; 5) TTD; and 6) the nature and extent of Petitioner's injuries. Just prior to the beginning of this hearing, the parties amended the Application for Adjustment of Claim by changing the accident date from June 11, 2016 to June 6, 2016.

Petitioner testified that he was a P&D (pick-up and delivery) driver for Respondent in June, 2016. His job duties as a P&D driver required him to travel to the terminal in Peru, Illinois to receive his assignment shifts. He would then make approximately seven to eight deliveries in a given day. There were times that he would have to load and unload the product as part of his regular job duties. He acknowledged that there were certain jobs that he would perform where there would be no loading required, certain jobs where the loading would be done completely by him and there were some job assignments where he would have a machine assist in the loading and unloading process.

Petitioner testified that on June 6, 2016, he picked up stacks of tires that were placed in the back of his truck - which he was taking to American Tire in Morton, Illinois. He noted that during the course of his travel to the American Tire facility in Morton, tires would sometimes get knocked over. In this instance, American Tire has a machine that assists in the unloading process. However, in order to effectuate this process, he would occasionally have to knock over the stacks of tires that would sometimes be seven tires high. He estimated the tires could weigh as much as 100 lbs. On the date in question, some of the tires had been knocked over when he arrived at the Morton facility, requiring Petitioner to knock over additional tires. When he knocked over a stack of tires, one of the tires hit a tire that was already on the ground and bounced up and struck him on his left hip/thigh. As a result of this, he felt a pop in his left knee. Petitioner testified that he "walked off" the pain and he was able to complete his shift. He worked over the next several weeks without seeking any medical treatment despite having popping and locking sensations, pain, and swelling like he had never experienced before in the knee. Petitioner testified that during the time between June 6, 2016 and his first visit to Dr. Cote on July 11, 2016, he experienced pain, swelling, popping in the left knee on a daily basis – which he had never experienced prior to his alleged accident date.

Petitioner testified that on June 6, 2016 he came back to the facility and reported the incident to his manager, Ty Anderson, who listened to his complaints and asked Petitioner "what do you want to do about it?" Petitioner testified he did not want to proceed further at that time and wanted to see how things worked out. Petitioner further admitted he did not ask to complete an accident report. Petitioner testified over the course of the next five weeks, he could have asked to complete an accident report but did not do so. When Petitioner missed work the Monday after father's day due to pain complaints in his left knee, he did not complete an accident report on his return to work the next day. Petitioner further testified that he had advised Mr. Anderson on the second day after father's day that he was having problems with his knee but he wanted to pass his DOT physical before addressing his knee complaints.

Mr. Ty Anderson also testified in this matter on behalf of the Respondent. Mr. Anderson was the Respondent's SVC Manager in June, 2016. He testified that on June 6, 2016 he was not working for Respondent that day because he was in Mexico through June 11, 2016. He denied speaking to Petitioner on June 6, 2016 or receiving a phone call from Petitioner on or about June 6, 2016 regarding the Petitioner having suffered any type of a

work accident. However, Anderson acknowledged hearing from Petitioner on June 26, 2016 about a tire bumping Petitioner's leg. On that date Mr. Anderson asked if Petitioner wanted to complete an accident report – which Petitioner declined.

On July 11, 2016 Petitioner first sought treatment with his family physician, Dr. Mario Cote. (PX 1) Dr. Cote diagnosed him with a left knee sprain, and restricted him from crawling, kneeling, and using ladders. Dr. Cote ordered an MRI performed on July 29, 2016 which revealed subchondral edema and loose bodies in his left knee. Dr. Cote referred him to Dr. Michael Shin on August 1, 2016. Dr. Cote drained his knee and injected cortisone into his knee on August 30, 2016.

On August 16, 2016 Petitioner first saw Dr. Shin and gave a history of having been injured at work when a large tire fell on him and pinned his leg. (PX. 2) Dr. Shin diagnosed Petitioner with left knee pain, swelling, and loose bodies. On December 8, 2016, Dr. Shin performed arthroscopic surgery on Petitioner's left knee consisting of medial and lateral meniscectomies and loose body removal. The operative diagnosis was left knee loose bodies, left knee degenerative joint disease plus medial and lateral meniscal tearing. Dr. Shin released Petitioner to return to work with no physical restrictions on January 23, 2017. In his final visit, Dr. Shin noted that Petitioner experienced pain with quick twisting motion rated at 3/10 and lasting a few seconds. He also noted Petitioner complained of slight swelling by the end of the work shift that went away by the next morning with some icing and residual stiffness. Dr. Shin recommended that Petitioner continue to work on his range of motion exercises and continue to take over the counter medication on an as-needed basis.

On October 6, 2017, Petitioner underwent an evaluation at the Respondent's request with Dr. Vijay Thangamani. (RX. 1) Dr. Thangamani did not believe the loose bodies removed from arthroscopic surgery were related to Petitioner's work incident because they were clearly preexisting conditions. Based on the Petitioner's meniscal injury, Dr. Thangamani provided an impairment rating of 1% Lower Extremity Impairment which converts to 1% Whole Person Impairment.

Petitioner testified that he still experiences pain in his knee on daily basis. He takes Aleve every day to help manage his pain. He testified that moving freight into and out of his truck is the most painful work related activity, and that it sometimes causes his knee to lock up. He testified that his knee gets stiff while driving his truck, and that he has to stretch his knee when he gets out of the truck. He further testified that he notices that his knee swells and tightens up.

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony and the medical evidence – all of which provide a consistent history of the Petitioner's left leg being struck by a tire while working. Petitioner testified that he noticed pain, swelling and other symptoms in his left leg after this incident, but did not seek immediate medical attention in an attempt to work through the pain to see if it would go away. There was no evidence introduced at trial that refuted Petitioner's account of injury. Accordingly, the Arbitrator concludes that the Petitioner sustained an accident while working for the Respondent on June 6, 2016.

2. Regarding the issue of notice, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the testimony of both Petitioner and Mr. Anderson. The Arbitrator notes that Petitioner testified that he told his manager, Mr. Anderson about his accident on at least two occasions:

1) the date of accident, and 2) some time after Father's Day in June, 2016. Mr. Anderson denied receiving notice from Petitioner on the date of accident. However, Mr. Anderson did confirm that he learned of Petitioner's accident on June 26, 2016 – which is within the 45 days required under the Act. In light of these facts, the Arbitrator concludes that the Petitioner provided sufficient notice of his accident to the Respondent with the 45 days required under the Act.

3. Regarding the issue of causation, the Arbitrator finds that the Petitioner's current condition of ill-being in his left knee is causally connected to his June 6, 2016 work accident. This finding is supported by the medical evidence, which all show that Petitioner sustained injuries to his left knee requiring surgical intervention. The Arbitrator notes that the Respondent's IME, Dr. Thangamani does not dispute the causal relationship between the Petitioner's meniscal tears and his accident. Based on the medical evidence, the Arbitrator concludes that the Petitioner's June 6, 2016 work accident caused his left knee condition, including the medial and lateral meniscal tears, which ultimately required the Petitioner to undergo surgical meniscectomies.

4. Based on the Arbitrator's findings with regard to the issue of accident and causation, the Arbitrator further finds that the Petitioner's medical treatment for his left knee was reasonable, necessary and related to his June 6, 2016 work accident. Therefore, Respondent shall pay for any of the Petitioner's outstanding, related medical expenses set forth in Petitioner's Exhibit 3-8 and shall receive a credit for any related medical expenses that it has already paid through group insurance.

5. Consistent with the Arbitrator's findings above, the Arbitrator further finds that the Petitioner is entitled to TTD benefits for the period of July 25, 2016 through January 23, 2017. Respondent disputed its liability for TTD based on the issues of accident and notice, but appears to have paid the Petitioner nonoccupational disability benefits. Therefore Respondent shall pay Petitioner temporary total disability benefits of $925.09/week for 26 weeks, commencing July 25, 2016 through January 23, 2017, as provided in Section 8(b) of the Act, and Respondent shall have a credit for any disability benefits paid during that time period.

6. With regard to the issue of nature and extent, the Arbitrator notes that pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. Applying this standard to this claim, the Arbitrator makes the following findings listed below.

(i) Impairment. Dr. Thangamani performed an examination of Petitioner in which he gave Petitioner an AMA impairment rating of 1% Lower Extremity Impairment which converts to 1% Whole Person Impairment for Petitioner's meniscal injury. The Arbitrator gives great weight to this factor.

(ii) Occupation. Petitioner was employed by Respondent as a Pick-up and Delivery Driver at the time of the accident, and was medically able to return to work in his prior capacity as a result of said injury - full duty and without any restrictions. The Arbitrator gives considerable weight to this factor.

(iii) Age. Petitioner was 43 years old at the time of the incident and the Arbitrator gives some weight to this factor.

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

(v) Evidence of Disability. There was evidence of disability corroborated by the medical records, which show that Petitioner suffered a left knee medial and lateral meniscal tear requiring surgical intervention. The evidence shows that Petitioner has some residual complaints of pain, swelling and stiffness with certain work activities as a result of said injury for which he takes over the counter pain medication. Based on the evidence introduced at trial, the Arbitrator gives significant weight to this factor.

Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 10% loss of the left leg, as provided in Section 8(e) of the Act.

STATE OF ILLINOIS)
)
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

Mary Bowles,
Petitioner,

19IWCC0100

vs.

No. 16 WC 06556

Kraft Foods, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 20, 2017 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later 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.

19IWCC0100

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 $7,700.00. 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 11 2019

Joshua D. Luskin

o-02/05/19
jdl/mcp
68

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

BOWLES, MARY
Employee/Petitioner

Case# **16WC006556**
16WC029246

KRAFT FOODS INC
Employer/Respondent

19IWCC0100

On 10/20/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.24% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

19IWCC0100

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)/8(a)

MARY BOWLES
Employee/Petitioner

v.

KRAFT FOODS INC
Employer/Respondent

Case # 16 WC 06556

Consolidated cases: 16 WC 29246

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **October 26, 2016.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0100

FINDINGS

On the date of accident, **July 23, 2015**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$39,821.15**; the average weekly wage was **$765.79**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **1** dependent child.

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

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

Respondent is entitled to credit for any awarded medical expenses paid via group health, and for group short term disability payments paid via the employer during any periods of awarded TTD, pursuant to Section 8(j) of the Act, and Respondent shall hold Petitioner harmless with regard to same.

ORDER

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of her employment on July 23, 2015. The Arbitrator further finds that the Petitioner's right elbow and hand/wrist conditions are causally related to the July 23, 2015 accident.

Respondent shall pay Petitioner temporary total disability benefits of **$510.53 per week** for **14-6/7 weeks**, commencing **June 2, 2016 through September 13, 2016**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit pursuant to Section 8(j) of the Act for any short term disability payments made to Petitioner during the period of awarded temporary total disability, and Respondent shall hold Petitioner harmless with regard to same.

Respondent shall pay reasonable and necessary medical expenses included within Petitioner's Exhibit 1, 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 pursuant to an applicable group health plan, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize the surgeries recommended by Dr. Mall, including right carpal tunnel release, right cubital tunnel release and, if necessary, right ulnar nerve transposition.

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

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

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

Signature of Arbitrator

October 10, 2017
Date

OCT 20 2017

STATEMENT OF FACTS

Petitioner has been employed by Respondent as a machine operator for all 18 years of her employment there. She has worked on Capri Sun filler machines, McGovern's, and Kool-Aid Burst machines, all of which are devices which install a beverage product into flat pouches. The Petitioner testified that these machines are taller than her, even though she is 5'10". To load the packets into the machine, Petitioner has to grasp a handful of the pouches and put them into metal sleeves. Petitioner testified that she grabs as many as her right hand will hold and fills the machine. In describing this activity at hearing, the Petitioner testified: "We call it like a table and you have a box that's open, two boxes that are closed, another box that's opened. You come over here and I grab my left hand in this box and then I straighten them up and load with my right into the metal sleeve and I do that until that one's filled and there's 12 sleeves and I do six with this one and then when those are full I move over here and do six with this one, you know."

While the flat pouches are being filled with juice on one sleeve, she moves on to the next sleeves. When the sleeve locations on the machines are full and running, she grabs boxes filled with straws, carries them over to a wheel and threads them into a machine that attaches straws to pouches. Petitioner testified that there was no part of this procedure that did not involve using her arms or hands. She works from 8 to 12 hours a day with one 30 minute lunch break and two other 15 minute breaks. She stated that in an 8 hour shift, she uses her hands and arms over 6 hours per shift.

Petitioner testified that on 7/23/15 she was loading pouches into her machine when her right hand popped and began hurting. Although Petitioner is left-hand dominant, she testified that she uses her right hand 90% of the time at work to avoid bumping another machine operator to her left. Petitioner was asked to point out the area of her discomfort in her hand, and the Arbitrator noted that Petitioner referred to the palm side of the wrist around the base of the thumb. Petitioner testified that she had never had similar symptoms prior to this incident, never filed a prior workers' compensation claim, and had no prior injuries to her arms or hands.

Petitioner also reviewed an Apex Network Physical Therapy Ergonomic Analysis of her job as a Capri Filler, which was prepared on 3/2/16 at the request of the Respondent. (Px12). The job description states as follows: "Tasks to operate Capri Filler machines include: loading pouches into machine magazines; transferring pouch boxes from pallet to machine; loading cartons onto machines; performing quality checks of pouch weight;

performing quality checks of cartons; loading straw rolls; and sanitize / brush / spray machines each shift. Every two machines are staffed by three workers; therefore the repetitions performed will be distributed among these three workers." (Px12).

The material handling essential functions summary of Petitioner's job included lifting up to 28 pounds on an occasional basis or up to 33% of her shift, 1 pound on a frequent basis or 2/3rds of her shift, carrying up to 28 pounds on an occasional basis up to 1/3rd of her shift, pushing up to 25 pounds of force on an occasional basis up to 1/3rd of her shift pulling, and pulling up to 25 pounds of force on an occasional basis up to 1/3rd of her shift. The material handling section of the report also states: "Comments: (1) Pouch cases are stacked on pallets from 5" to 57" high; Boxes are transferred from the pallet to machine shelf at 35". (2) Straw rolls are removed from packaging box, lifted from center hole of roll at 13" and placed on straw roll holder at 28". (3) Carton stacks vary in weight depending on the number of cartons lifted at one time. (4) Worker grasps a self determined [sic] amount of pouches from the supply box and places into the machine magazine. Different generations of machines result in minor variances in machine heights. (5) Wood pallets weight 62 lbs. One end of a pallet is lifted from the ground to an upright position requiring 30 pounds of force. . . . . .Comments: (1) Force to initiate pushing / pulling motion of 62 lb pallet on concrete surface is 25 pounds of force. May occur one time every 3 to 6 hours and all workers may not be exposed to task on a given shift. Workers utilize an electric pallet jack to transport pallets of cartons and pouch boxes. The Posture and Movement section of the report indicates that Petitioner is required to handle constantly, grasp frequently, and use finger manipulation frequently. Petitioner also uses a water hose to spray the front of her machine. (Px12)

Petitioner testified that the water hose vibrates. She uses pallet jacks, which require force and grip, in addition to loading and unloading machines. Petitioner testified that she does not have diabetes, gout, hypothyroidism, or rheumatoid arthritis, and has been the same height and weight for a long time. She reported no hobbies which involve repetitive gripping or grasping with her hands and arms, with the exception of working out for an hour 2 to 4 times a week. Respondent presented pictures of Petitioner working out, and Petitioner acknowledged participating in said activity and demonstrated same before the Arbitrator.

Following the accident, Petitioner testified that she reported the incident to her employer and was sent to Dr. Knapp at Gateway Regional Occupational Health Services on 7/24/15. The history taken indicates Petitioner reported she was loading 2 pound pouches into a machine all day at work when she developed pain at the base of her right thumb that occasionally radiated into her wrist and elbow. She noted she is left-handed but used her right hand for jobs like this on a daily basis. Ice and NSAIDs had not helped, and she reported her current pain level at 5 out of 10. X-ray with focus on the CMC joint was unremarkable. Dr. Knapp's assessment was right thumb pain secondary to repetitive movement, and he restricted Petitioner from using her right hand pending use of over-the-counter medication and ice/heat pending follow up. (Px3).

Follow-up visits with Dr. Knapp indicated increasing pain in the right hand radiating into her elbow, but no numbness. On 7/27/15, Dr. Knapp prescribed Naprosyn, Prednisone, and Skelaxin, as well as physical therapy, splinting and continued restrictions against right hand use. On 8/3/15, Petitioner reported improvement with therapy but not much improvement with splinting, and that she still had some thumb pain with use but predominantly had a burning type pain radiating up to the elbow. At that point, Dr. Knapp diagnosed lateral epicondylitis and prescribed an elbow strap with continued therapy, light duty and medication. (Px3).

Petitioner returned to Dr. Knapp on 8/5/15, reporting pain that started in the posterior right shoulder radiating distally along the lateral and posterior arm to the lateral elbow and down to the thumb. Petitioner was hesitant to move the right shoulder due to pain. Dr. Knapp again continued the same recommended treatments. On 8/10/15, Petitioner reported a new complaint of right 5th finger discomfort with decreased right shoulder pain with

therapy. On 8/17/15, Petitioner reported right thumb and inner elbow improvement, resolution of right shoulder pain, but ongoing right pinky finger and outer elbow pain. Given her indication of right elbow improvement on 8/24/15, Dr. Knapp held off on an elbow injection but prescribed ongoing therapy and prednisone burst. Due to ongoing complaints or pain radiating proximally and distally from the right elbow, on 8/31/15 Dr. Knapp referred Petitioner to Dr. Milne. (Px3).

Petitioner testified that at that point she was referred by Dr. Knapp, and Respondent's claims adjuster, to Dr. Brown, whom she saw on 9/15/15. His report indicated Petitioner was a left handed machine operator with Respondent and was referred for evaluation of a problem with her right upper extremity. She reported working for Respondent since 1998 and that her job entailed grabbing handfuls of pouches and loading them into a machine, straightening the pouches, lifting 20 pound boxes of pouches and working on a computer. She reported that on 7/23/15 she was loading pouches in a machine when she noticed pain in her right thumb and soon thereafter pain in her lateral and medial right elbow, was diagnosed with lateral epicondylitis and had failed conservative treatment. Following examination, Dr. Brown noted symptoms and findings suggestive of right lateral epicondylitis with a possible medial component. The right elbow was injected and she was prescribed a counterforce strap, home therapy, NSAIDs and a thumb splint. He noted Petitioner most likely had a mild strain. (Px5).

In an intake form for Dr. Brown, completed by Petitioner, she reported her job duties: "I was loading my pouches into 12 sleeves grabbing pouches out of box with my left hand and straightening pouches and loading pouches in front and overhead with my right opening and closing my hand and repeating loading boxes onto [illegible] machine, grabbing 20 lbs boxes full of pouches every 10 minutes, do checks on computer every 20 minutes. I load boxes onto machine. You stay busy. [Illegible] and changing straws, driving a pallet jack with pallets of more boxes and pouches, emptying trash, pulling boxes offline if secondary goes down. Keeping area clean fixing machine when it goes down." (Px5).

When Petitioner followed up on 10/12/15 indicating no improvement with injection and increased elbow pain, Dr. Brown ordered an elbow MRI. (Px5). The 11/2/15 MRI indicated mild lateral epicondylitis without full thickness tear or retraction. A history document associated with this test stated; "hurts to move thumb and pinky, thumb [illegible] area is swollen and hurts on the outer and inner of elbow area burning/itches at elbow and just hurts good at pinky and thumb." (Px6).

Petitioner returned to Dr. Brown on 11/2/15 to discuss the results of the MRI, and he performed a second elbow injection. He also requested a right hand MRI. (Px5). The 11/23/15 right hand MRI was reported by the radiologist and Dr. Brown to be normal. (Px6). Petitioner returned to Dr. Brown on 11/23/15, advising that the second elbow injection provided only temporary elbow relief. He injected the right elbow a third time and indicated he had nothing more to offer regarding the right hand. The strap, home therapy and restricted work were continued. When Petitioner followed up on 1/5/16, she noted improved but ongoing right lateral elbow pain as well as pain in the right 4th and 5th fingers around the MP joints and at the base of the thumb. She was returned to full duty with ongoing conservative treatment. On 1/20/16, Petitioner reported her right elbow pain had increased, with Dr. Brown noting: "It is as bad as it was when I first saw her." Dr. Brown noted persistent, chronic right lateral epicondylitis which had failed extensive non-operative treatment. As a result, Dr. Brown recommended surgery pending workers' compensation approval. (Px5). Petitioner testified that the Respondent did not provide such approval.

Respondent had Petitioner examined by orthopedic surgeon Dr. Burns on 12/10/15. Petitioner denied any specific injury or trauma, indicating her right elbow, forearm and hand symptoms started while performing repetitive motion at work. He indicated that "the exact activity is well outlined in the notes", but the "notes" he

referenced do not appear to be part of the report. Petitioner complained of symptoms in the posterolateral right elbow, dorsal forearm, thenar region of the right thumb with slight extension into the volar wrist and pinky finger. Petitioner reported that only one of Dr. Brown's two injections provided her with any temporary/mild benefit. In December of 2015, Petitioner still had complaints in her posterolateral elbow, the thenar region of the right thumb, and her little finger. His examination showed some lateral epicondylar tenderness and minor complaints with resistance testing, but was otherwise normal. He noted x-rays and MRIs were essentially negative other than mild right epicondylitis. Dr. Burns' working diagnosis was mild lateral epicondylitis, but he noted that Petitioner's presentation appeared "somewhat atypical" with only minimal tenderness and no relief with typical treatment protocols. He indicated that: "All of her complaints including those in the right elbow and the right hand do seem to be related to her repetitive activity at work." Given the unusual presentation, he recommended EMG/NCV testing to rule out any nerve compression syndromes, to try to determine an exact diagnosis and to better be able to comment on causation. He otherwise recommended continued modified work. Dr. Burns did note records which indicated Petitioner may be a personal trainer, and believed that aggressive work outs could contribute to her symptoms. (Rx1).

Petitioner testified she next sought treatment with Dr. Beatty on 2/29/16. Dr. Beatty's notes indicated a history of a 7/23/15 work injury to the right thumb "pad" up to the elbow and down to the 5th finger. The report further states: "Loading pouches on a machine, thumb & thumb pad started swelling told co-worker who said it would go away. It didn't . . ." The report then notes she underwent conservative treatment, including therapy and light duty, before being referred to Dr. Brown. Petitioner noted that Dr. Brown opined that Petitioner had tennis elbow and performed multiple injections with no improvement. Petitioner indicated she is left handed, but at work was right hand dominant. In a handwritten document in the record exhibit titled "Job Description", Petitioner's job was described as follows: "Load pouches into 12 sleeves, grabbing flat pouches out of box with left hand, straighten flat pouches with both hands, loading flat pouches in front and overhead with my right hand, opening and closing my hand and repeating, loading boxes onto box machine or unloading, grabbing 20 lbs boxes that have the flat pouches, put them onto my machine to fill up my machine. I load pouches every 10 – 15 minutes, load rolls of straws onto machine and when straws are about ready to run out you change them around every hour. Bring in supplies with pallet jack about every 4 hours, push barrels of pouches out to P4 then to empty, keep area clean, do safety and quality checks and verify if you can't place pouch stickers onto machine sign initials, you stay busy! Pushing out empty pallets, repacking product." A normal workday was 8 to 12 hours. and involved the use of a box cutter, putty knife and screwdriver throughout the day. Dr. Beatty noted Dr. Brown had recommended surgery but it had not been approved. Dr. Beatty's exam findings are difficult to decipher in the report, and the Arbitrator could not make out a specific diagnosis in the report, but he recommended a thumb wrist support and a possible Kenalog injection if needed. It is unclear if the injection was to be directed to the elbow or thumb area. (Px7).

The Petitioner then underwent EMG/NCV testing on 5/13/16 with Dr. Phillips. Dr. Phillips noted that Petitioner reported a sudden onset of left greater than right upper extremity pain, numbness and weakness, and that her most significant pain was at the right lateral elbow consistent with epicondylitis. Dr. Phillips notes Petitioner also reported right volar wrist pain with intermittent numbness in the thumb and fifth digits. The impression from the EMG/NCV was mild right carpal tunnel and mild ulnar neuropathies bilaterally at the elbows that was actually worse on the left. Dr. Phillips believed that Petitioner's elbow pain appeared to be related to chronic lateral epicondylitis. (Px8).

Petitioner then sought another opinion from Dr. Mall on 5/27/16. He indicated that Petitioner reported pushing and pulling from 25 to 70 pounds "all day long" as a machine operator for Respondent over the past 18 years. She indicated she developed fairly substantial right hand and right elbow pain while loading pouches in a machine on 7/23/15, and was subsequently restricted to light duty and underwent conservative treatment, including three

elbow injections. Dr. Mall indicated some incorrect facts, noting Petitioner had undergone bilateral wrist MRIs and that EMG had shown bilateral CTS, but following examination his diagnosis was right lateral epicondylitis. He echoed the determination of Dr. Brown that Petitioner had failed conservative treatment and needed lateral epicondylar surgery, recommending debridement, partial epicondylectomy and microfracture. He continued Petitioner on light duty in the meantime. (Px9).

Surgery was performed on 6/2/16 which involved a right elbow lateral epicondyle debridement with a partial lateral epicondylectomy, microfracture and repair of the ECRL tendon to the lateral epicondyle. Dr. Mall's report noted the ECRB tendon was severely degenerated with poor tissue quality, and the surgery included K-wire and anchors. (Px10).

On 6/15/16, Dr. Burns issued an addendum report responding to a letter from Respondent's counsel, after he had the opportunity to review the results of EMG/NCV testing, the results of an ergonomic study (Rx2) and what appears to have been a surveillance video of the Petitioner working out. He indicated minimal peripheral nerve involvement based on the EMG/NCV, that the ergonomic study indicated minimal risk of injury and that the exercise video depicted repetitive activity involving both upper extremities. Dr. Burns stated: "It is likely (Petitioner's) upper extremity complaints are multifactorial in character and nature given this updated information. The exercise regimen shown on the DVD is a prevailing factor in her upper extremity complaints if she engages in such a regimen on a regular basis." He did not indicate any change in his prior opinion that the job duties were contributory to Petitioner's lateral epicondylitis. (Rx3).

Following surgery, Petitioner was held off work until being released to light duty as of 6/16/16. She testified that her condition improved, however her follow-up visits with Dr. Mall on 7/15, 8/12 and 9/9/16 noted continued symptoms in her wrist and the thenar area of her elbow with numbness and burning sensation in a median nerve distribution. Her ulnar symptoms had improved with night splinting. He believed that these symptoms were due to right carpal tunnel and cubital tunnel syndromes, and he recommended decompression surgeries at the elbow and wrist, as well as possible right ulnar nerve transposition. (Px9). On 9/9/16, Dr. Mall released the Petitioner to return to full duty on 9/14, noting she still had symptoms but they were better than when he first saw her, and that she should pay attention to how much better or worse her hand and elbow symptoms were while working. As of Petitioner's last 10/7/16 visit, Petitioner continued to have right hand and elbow symptoms, the elbow was injected, and Dr. Mall continued to recommend these surgeries. (Px9).

Dr. Mall testified via deposition on 9/12/16. A board certified orthopedic surgeon, Dr. Mall testified that he specializes in upper extremity conditions. He testified that he reviewed all the materials associated with the care and treatment of Petitioner, including the ergonomic analysis from Apex Physical Therapy (Rx2). Dr. Mall agreed with Dr. Brown's assessment that Petitioner was in need of surgery for her chronic lateral epicondylitis, and when she did not improve, believe that she was in need of surgery for her chronic right carpal and cubital tunnel syndromes. Dr. Mall testified that it was his opinion that Petitioner's job duties for Respondent, combined with the absence of any comorbid risk factors, pointed to her work, specifically the gripping and grasping in the repetitive nature of her job duties, as being the cause of her conditions. While he agreed that the ergonomic analysis indicated Petitioner was at low risk of musculoskeletal injuries, he testified that the analysis described job duties that were nevertheless repetitive and in many cases involved gripping and grabbing with force, lifting and carrying. With regard to lateral epicondylitis, Dr. Mall testified that repetitive activities and lifting cases and pallets, especially those of larger widths, can contribute to the conditions. With regard to carpal and cubital tunnel, Dr. Mall testified: "So I think while the assessments throughout the job may indicate that the job duties may not require a lot of heavy lifting and heavy grasping and gripping, the overall assessment of this does demonstrate that this is a job that is – at least puts people at a risk of carpal and cubital tunnel syndrome, and really what we're looking at is could this be an aggravating factor for her, and I do believe it is. I mean, she really

has no other risk factors, and so one would expect that this could play a significant role in her development of those conditions." He also testified that using the extremity awkwardly due to the epicondylitis could then impact carpal and cubital tunnel conditions. Dr. Mall testified he held the Petitioner off work from 6/2/16 through 9/13/16. (Px13).

On cross examination, Dr. Mall was asked about Petitioner's workout regimen and the opinion of Dr. Burns that such activity was the prevailing cause of the Petitioner's condition, and he testified that this activity was only performed for short time periods a few days per week, which was not comparable to the work she did for Respondent for 40 hours per week. He did agree that an activity performed repetitively in and of itself may not be causative, unless it also involved force, impact and/or awkward positioning. However, he noted that something that might not be very forceful for a 200 pound man could still be significantly forceful for someone of Petitioner's size. He agreed that rest between repetitive activities is "helpful" to repetitive type conditions. Dr. Mall acknowledged that Dr. Phillips' EMG/NCV findings were mild, but testified that the designation of "mild" isn't as important as the fact that there is a designation of a condition and that conservative treatment failed to resolve the related symptoms in terms of making a surgical recommendation. (Px13).

The noted ergonomic analysis was performed with regard to Petitioner's job duties by Apex Network Physical Therapy on 3/2/16. This evaluation determined: ". . . the position does not include risk factors such as repetition, duration, posture, force or vibration at levels that would contribute to musculoskeletal injuries. . . ." Noting the job involved grasping 8.1 times per minute, the conclusion was grasping time of 1.08 hours out of an 8 hour shift, or 13.5% of the time. (Px12; Rx2).

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, and WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator initially notes that, with regard to many alleged repetitive trauma injuries, including those in the current case, issues of accident "arising out of" the employment and causation are intertwined. As such, these issues will be addressed together.

As to the issue of accident, both Dr. Mall and Dr. Burns opined that, based on the Petitioner's stated history of her job duties, the job duties would be considered repetitive. While Dr. Burns, Respondent's examiner, did not specify that his opinion was based on the ergonomic analysis, he did review that analysis prior to issuing his second report (Rx3), and he did not indicate in that addendum that his original opinion, that the job duties are a causative factor, changed in any way. The Petitioner testified in unrebutted fashion that she had been performing the same job for Respondent for 18 years. The Arbitrator, who also heard the testimony of Petitioner and reviewed her historical job descriptions in the medical records as well as the ergonomic analysis, agrees with these conclusions and finds that the Petitioner sustained accidental injuries which arose out of and in the course of her employment due to her repetitive work activities.

In this case, the Arbitrator places significant weight on the fact that Respondent selected Petitioner's initial treating physicians, Dr. Knapp and Dr. Brown. Both took a detailed job description from Petitioner consistent with her testimony, treated Petitioner's condition as a work-related injury, and sought approval from Respondent

for care and treatment for Petitioner. Dr. Brown even recommended surgery for Petitioner's condition, and requested that Respondent approve same. Respondent then had Petitioner examined by Dr. Burns, who concluded: "All of her complaints including those in the right elbow and the right hand do seem to be related to her repetitive activity at work." While the Respondent requested a supplemental report after providing additional information including the ergonomic analysis and surveillance of Petitioner performing work out activities, he did not change this opinion, but rather only indicated that he felt the work-out activities were the prevailing reason for the conditions. The Arbitrator notes that, under current Illinois law, the Petitioner need only prove that a work accident is a cause of the condition of ill-being, not the prevailing or main cause. Thus, even if the work-out activities were a cause or the prevailing cause, this does not preclude the work duties also being a cause.

The Arbitrator found the Petitioner to be a credible witness, and finds the opinions of Dr. Mall to be persuasive and, in their most essential elements, consistent with the opinions of Dr. Burns.

The Arbitrator finds that the Petitioner's right upper extremity conditions of ill-being, those being lateral epicondylitis, carpal tunnel syndrome and cubital tunnel syndrome, are causally related to her job duties with the Respondent.

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

The Petitioner submitted medical expenses which are alleged to be for reasonable and necessary treatment causally related to the accident of 7/23/15 as Petitioner's Exhibit 1. The Arbitrator has determined that the conditions of ill-being at issue and being treated are causally related to the accident, and the preponderance of the evidence supports that this treatment was in fact reasonable. The Arbitrator therefore finds that the Petitioner is entitled to payment of the medical expenses contained in Px1 by the Respondent.

The parties stipulated that the Respondent is entitled to credit under Section 8(j) of the Act for any causally related medical expense payment made via Respondent's group health carrier prior to hearing. With regard to any such expenses for which such credit is received, the Respondent shall hold the Petitioner harmless pursuant to Section 8(j).

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds, relying on the opinions of Dr. Mall for the reasons noted above, that the Petitioner is entitled to right carpal tunnel and cubital tunnel release surgeries and, if determined to be necessary by Dr. Mall, right ulnar nerve transposition surgery, and the Respondent shall authorize these procedures pursuant to Section 8(a) of the Act.

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:

Dr. Mall testified that he held the Petitioner off work from the time of the 6/2/16 surgery through 9/13/16, with a 9/14/16 release to return to full duty. The Petitioner testified, and the records support, that she was held on restricted work duties for various periods of time as well, however no testimony was elicited indicating that the

Petitioner was not working during such periods. As such, the Arbitrator finds that the Petitioner is entitled to TTD benefits from 6/2/16 through 9/13/16. Pursuant to Arbx1, the Respondent's dispute regarding TTD was based on liability for same.

While the exact amount paid was unclear at the time of trial, the parties stipulated that Petitioner received short term disability benefits during a period or periods when she was off work, and that Respondent is entitled to credit for same.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Corey E. Esser,
Petitioner,

vs. NO 16 WC 11669

19IWCC0101

State of Illinois,
Illinois Youth Center-Kewanee.
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 sole 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 July 27, 2018, 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.

19IWCC0101

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: FEB 1 1 2019

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

o-02/06/19
jdl/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ESSER, COREY E
Employee/Petitioner

Case# **16WC011669**

16WC001461

ILLINOIS YOUTH CENTER KEWANEE
Employer/Respondent

19IWCC0101

On 7/27/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% 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:

0412 RIDGE & DOWNES
EILEEN LIAO
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

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

6066 ASSISTANT ATTORNEY GENERAL
BRETT D KOLDITZ
500 S SECOND ST
SPRINGFIELD, IL 62706

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUL 27 2018

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

STATE OF ILLINOIS)

)SS.

COUNTY OF ROCK ISLAND)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

COREY E. ESSER
Employee/Petitioner

Case # 16 WC 11669

v.

Consolidated cases: 16 WC 1461

ILLINOIS YOUTH CENTER KEWANEE
Employer/Respondent

19IWCC0101

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Rock Island**, on **July 16, 2018**. By stipulation, the parties agree:

On the date of accidents, **02/04/2016**, Respondent was operating under and subject to the provisions of the Act.

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

On each such date, Petitioner sustained 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 causally related to each accident.

In the year preceding the injury, Petitioner earned **$65,161.72**, and the average weekly wage was **$1,253.11**.

At the time of injury, Petitioner was **46** years of age, ***married*** with **0** dependent children.

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

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

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

The Arbitrator finds that Petitioner's injuries sustained caused **30% loss of the right leg**. Respondent shall receive a credit of 24% of the right leg from Petitioner's prior settlements in case numbers 06 WC 54174 and 14 WC 10635 pursuant to Section 8(e)17 of the Act. Taking into account the prior credit, Respondent shall pay Petitioner the sum of **$751.86**/week for a further period of **12.9** weeks, as provided in Section **8(e)** of the Act .

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

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

Signature of Arbitrator

7/26/18
Date

19IWCC0101

FINDINGS OF FACT

This case involves a Petitioner alleging injuries sustained while working for the Respondent on June 16, 2015 (case number 16 WC 1461 involving the left leg) and on February 4, 2016 (case number 16 WC 11669 involving the right leg). Although both cases have been consolidated, this decision will address the Petitioner's February 4, 2016 accident with the only issue being the nature and extent of the Petitioner's injuries.

Petitioner was a shift supervisor at the Illinois Youth Center Kewanee. He had been employed for 17.5 years and his job duties required him to handle a variety of inmate problems at the facility, ranging from housing unit refusals and staff assaults to physical altercations with other inmates. Petitioner had meniscus surgery on his right knee in 2013 but testified that he had no right knee complaints when he arrived for work on February 4, 2016. On February 4, 2016, Petitioner was restraining an inmate at the housing unit when his knee twisted and he heard his right knee pop as he was putting the inmate in his cell. Following his undisputed accident, he presented to Dr. Ahearn, who referred Petitioner to Dr. Stewart at ORA Orthopedics. Dr. Stewart ordered an MRI of Petitioner's right knee taken on February 24, 2016, which showed a medial meniscus tear of the right knee and diffuse chondromalacia patellae. (PX 2). On April 25, 2016, Dr. Stewart performed surgery on Petitioner involving medial meniscal tear debridement and loose body removal of the right knee. During surgery Dr. Stewart found grade 2 changes on the undersurface of the patella and in the trochlea, grade 3 changes on the far medial portion of the tibial plateau measuring approximately 4mm in diameter, and a medial meniscus tear. Petitioner followed surgery with 4 months of physical therapy and was released to work full duty on July 28, 2016. Petitioner testified that he still feels weakness and pain in both his knees, with his right knee being worse than his left. Petitioner indicated he is now unable to run, jog, play golf, or climb ladders. Petitioner testified can no longer run to respond to calls at work. Petitioner indicated his left leg has more mobility than his right leg; his right knee can only bend to about a 60 degree angle. Petitioner stated he occasionally takes 1000mg of Ibuprofen and Hydrocodone for the pain.

The Arbitrator takes judicial notice that the Petitioner has prior settlements under case number 06 WC 54174 for 4% loss of the right leg and under case number 14 WC 10635 for 20% loss of the right leg.

CONCLUSIONS OF LAW

With regard to the issue of nature and extent, the Arbitrator notes that pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. Applying this standard to this claim, the Arbitrator makes the following findings listed below.

(i) Impairment. No permanent partial disability impairment report and/or opinion was submitted into evidence and therefore the Arbitrator gives no weight to this factor.

(ii) Occupation. Petitioner was employed as shift supervisor at the time of the accident, and was medically able to return to work in his prior capacity as a result of said injury. The medical evidence indicates Petitioner could

19IWCC0101

return to work full duty and without any restrictions. Petitioner testified that he is currently a Lieutenant who serves as a training coordinator for the Respondent and that because of his injury he cannot run to respond to calls at work. The Arbitrator gives considerable weight to this factor.

(iii) Age. Petitioner was 46 years old at the time of the incident. The Arbitrator gives some weight to this factor.

(iv) Future Earning Capacity. There was no evidence that Petitioner's future earning capacity has been impacted by this accident and therefore the Arbitrator therefore gives little weight to this factor.

(v) Evidence of Disability. There was evidence of disability corroborated by the medical records, which show that Petitioner suffered: grade 2 changes on the undersurface of the patella and in the trochlea, grade 3 changes on the far medial portion of the tibial plateau measuring approximately 4mm in diameter, and a medial meniscus tear, which required Petitioner to undergo surgery involving medial meniscal tear debridement and loose body removal of the right knee, followed by four months of physical therapy. The medical evidence shows that Petitioner had a good recovery from his injuries but Petitioner testified that his current complaints include limited range of motion, with weakness and pain in the knee that limits his activities of running, climbing and golfing for which he occasionally takes pain medication. Petitioner testified that his current complaints are worse in his right knee than his left. Based on the evidence introduced at trial, the Arbitrator gives significant weight to this factor.

Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 30% loss of the right leg, as provided in Sections and 8(e) of the Act. Respondent shall receive a credit of 24% of the leg from Petitioner's prior settlements pursuant to Section 8(e)17 of the Act

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Corey E. Esser,
Petitioner,

vs.

NO 16 WC 01461

State of Illinois,
Illinois Youth Center-Kewanee.
Respondent.

19IWCC0102

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the sole issue of 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 July 27, 2018, 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.

19IWCC0102

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: FEB 1 1 2019

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

o-02/06/19
jdl/wj
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ESSER, COREY E
Employee/Petitioner

Case# **16WC001461**

16WC011669

ILLINOIS YOUTH CENTER KEWANEE
Employer/Respondent

19IWCC0102

On 7/27/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% 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:

0412 RIDGE & DOWNES
EILEEN LIAO
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

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

6066 ASSISTANT ATTORNEY GENERAL
BRETT D KOLDITZ
500 S SECOND ST
SPRINGFIELD, IL 62706

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUL 27 2018

Ronald A. Rascia, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)

)SS.

COUNTY OF ROCK ISLAND)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

COREY E. ESSER
Employee/Petitioner

v.

ILLINOIS YOUTH CENTER KEWANEE
Employer/Respondent

Case # **16** WC **1461**

Consolidated cases: **16 WC 11669**

19IWCC0102

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Rock Island**, on **July 16, 2018**. By stipulation, the parties agree:

On the date of accidents, **06/16/2015**, Respondent was operating under and subject to the provisions of the Act.

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

On each such date, Petitioner sustained 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 causally related to each accident.

In the year preceding the injury, Petitioner earned **$65,161.72**, and the average weekly wage was **$1,253.11**.

At the time of injury, Petitioner was **45** years of age, ***married*** with **0** dependent children.

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

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

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

The Arbitrator finds that Petitioner's injuries sustained caused **20% loss of the left leg**. Respondent shall receive a credit of 7.5% of the left leg from Petitioner's prior settlement in case number 06 WC 54174 pursuant to Section 8(e)17 of the Act. Taking into account the prior credit, Respondent shall pay Petitioner the sum of **$735.37**/week for a further period of **26.875** weeks, as provided in Section **8(e)** of the Act .

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

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

Signature of Arbitrator

7/26/18
Date

JUL 27 2018

19IWCC0102

FINDINGS OF FACT

This case involves a Petitioner alleging injuries sustained while working for the Respondent on June 16, 2015 (case number 16 WC 1461 involving the left leg) and on February 4, 2016 (case number 16 WC 11669 involving the right leg). Although both cases have been consolidated, this decision will address the Petitioner's June 16, 2015 accident with the only issue being the nature and extent of the Petitioner's injuries.

Petitioner was a shift supervisor at the Illinois Youth Center Kewanee. He had been employed for 17.5 years and his job duties required him to handle a variety of inmate problems at the facility, ranging from housing unit refusals and staff assaults to physical altercations with other inmates. On June 16, 2015, Petitioner was responding to an alert for a staff assault when he felt his left knee pop. Petitioner testified that he had a prior surgery on his left knee in 1986 but had no complaints when he arrived for work on the date of injury. On June 17, 2015 Petitioner presented to Dr. Ahearn at Ahearn & Associates Medical Center with complaints of left knee pain following the June 16th altercation. Dr. Ahearn ordered an MRI for Petitioner's left knee and referred him to Dr. Stewart at ORA Orthopedics. An MRI of Petitioner's left knee taken on July 10, 2015 showed some subtle finding of a grade 1 strain injury of the medial collateral ligament. (PX 2). On September 28, 2015, Petitioner underwent a left knee arthroscopy and left lateral meniscal tear debridement. He followed surgery with two months of physical therapy and returned to work on December 1, 2015. Petitioner was able to work with no restrictions until he sustained a subsequent injury to his right leg on February 4, 2016 (which is the subject of case number 16 WC 11669 and will be addressed in a separate decision). Petitioner testified that he still feels weakness and pain in his knee, with his right knee being worse than his left. Petitioner indicated he is now unable to run, jog, play golf, or climb ladders. Petitioner testified can no longer run to respond to calls at work. Petitioner indicated his left leg has more mobility than his right leg; his right knee can only bend to about a 60 degree angle. Petitioner stated he occasionally takes 1000mg of Ibuprofen and Hydrocodone for the pain.

The Arbitrator takes judicial notice that the Petitioner has a prior settlement under case number 06 WC 54174 of 7.5% loss of the left leg.

CONCLUSIONS OF LAW

With regard to the issue of nature and extent, the Arbitrator notes that pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. Applying this standard to this claim, the Arbitrator makes the following findings listed below.

(i) Impairment. No permanent partial disability impairment report and/or opinion was submitted into evidence and therefore the Arbitrator gives no weight to this factor.

(ii) Occupation. Petitioner was employed as shift supervisor at the time of the accident, and was medically able to return to work in his prior capacity as a result of said injury. The medical evidence indicates Petitioner could return to work full duty and without any restrictions. Petitioner testified that he is currently a Lieutenant who serves as a training coordinator for the Respondent and that because of his injury he cannot run to respond to calls at work. The Arbitrator gives considerable weight to this factor.

19IWCC0102

(iii) Age. Petitioner was 45 years old at the time of the incident. The Arbitrator gives some weight to this factor.

(iv) Future Earning Capacity. There was no evidence that Petitioner's future earning capacity has been impacted by this accident and therefore the Arbitrator therefore gives little weight to this factor.

(v) Evidence of Disability. There was evidence of disability corroborated by the medical records, which show that Petitioner suffered: a grade 1 strain injury of the medial collateral ligament and a left lateral meniscal tear, which required Petitioner to undergo a left knee arthroscopy and left lateral meniscal tear debridement, followed by two months of physical therapy. The medical evidence shows that Petitioner had a good recovery from his injuries but Petitioner testified that his current complaints include occasional weakness and pain in the knee that limits his activities of running, climbing and golfing for which he occasionally takes pain medication. Based on the evidence introduced at trial, the Arbitrator gives significant weight to this factor.

Based on the factors above, the Arbitrator concludes the injuries sustained by Petitioner caused a 20% loss of the left leg, as provided in Sections and 8(e) of the Act. Respondent shall receive a credit of 7.5% of the leg from Petitioner's prior settlement pursuant to Section 8(e)17 of the Act

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

JAMES M. SULLIVAN II,

Petitioner,

vs. NO: 16 WC 10736

EXPRESS SERVICES, INC.,

Respondent.

19IWCC0103

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective treatment, temporary total disability (TTD) benefits, and credits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n,* 291 Ill. App. 3d 734, 740 (4th Dist. 1997) (citing *Kirkwood v. Indus. Comm'n*,

84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Indus. Comm'n,* 51 Ill. 2d 533, 536-37 (1972).

The Commission writes only to modify the Arbitrator's Decision to properly state the credit due to Respondent. The parties had stipulated at arbitration that Respondent would receive a credit of $4,952.46 for TTD previously paid, as well as $5,175.38 for medical bills paid, for which credit may be allowed under Section 8(j) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 21, 2018, is hereby modified as stated above; all else is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $300.00 per week for a period of 19 2/7 weeks, commencing February 13, 2016 through June 26, 2016, that being the period of temporary total incapacity for work under Section 8(b) of the Act. This award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses as detailed in Petitioner's Exhibit 13, pursuant to Sections 8(a) & 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the L5-S1 fusion surgery as recommended by Dr. Mathew Gornet.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for TTD previously paid in the amount of $4,952.46, and for medical bills previously paid in the amount of $5,175.38, for which credit may be allowed under Section 8(j) of the Act. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving credit as provided in Section 8(j) of the Act.

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

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

19IWCC0103

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 $58,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: FEB 13 2019
MJB/pm
O: 2-05-19
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

SULLIVAN II, JAMES M
Employee/Petitioner

Case# **16WC010736**

EXPRESS SERVICES INC
Employer/Respondent

19IWCC0103

On 6/21/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1409 KEVIN BOYNE PC
1803 N BELT WEST
BELLEVILLE, IL 62226-5926

2623 McANDREWS & NORGLE LLC
BRYAN McCARTY
53 W JACKSON BLVD SUITE 315
CHICAGO, IL 60604-3607

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)

James M. Sullivan II
Employee/Petitioner

v.

Express Services, Inc.
Employer/Respondent

Case # 16 WC 10736

Consolidated cases: n/a

19IWCC0103

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on April 19, 2018. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, February 12, 2016, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $450.00.

On the date of accident, Petitioner was 43 years of age, married with 0 dependent child(ren).

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

Respondent shall be given a credit of $4,952.46 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $4,952.46.

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

ORDER

Respondent shall pay reasonable and necessary medical services provided to Petitioner as identified in Petitioner's Exhibit 13, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the L5-S1 fusion surgery recommended by Dr. Mathew Gornet.

Respondent shall pay Petitioner temporary total disability benefits of $300.00 per week for 19 2/7 weeks, commencing February 13, 2016, through June 26, 2016, as provided in Section 8(b) of the Act.

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

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

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

William R. Gallagher

William R. Gallagher, Arbitrator
ICArbDec19(b)

June 17, 2018
Date

JUN 21 2018

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on February 12, 2016. According to the Application, Petitioner was "Lifting" and sustained an injury to the "Body as a whole" (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 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent, a company that provided temporary workers to various entities. Petitioner was assigned to work as a forklift operator at Oldcastle Lawn and Garden (hereinafter referred to as "Oldcastle"). Petitioner's job duties required him to move pallets loaded with landscaping materials from one place to another. Petitioner testified that Oldcastle's parking lot was weathered and had a significant number of potholes. Because of the potholes, the ride on the forklift and bumpy and it was common for landscaping products to fall off of the pallet while they were being moved.

February 11, 2016, was Petitioner's first full day of work at Oldcastle. Petitioner was moving bags of rocks and he estimated the weight of each bag to be 75 to 80 pounds when some of the bags fell off. When that occurred, Petitioner had to get off of the forklift and stack the bags back onto the pallet. When Petitioner performed that task, he experienced an onset of back pain.

Later that same day, Petitioner was moving bags of fertilizer. Several of them fell off and Petitioner again got off of the forklift. Petitioner then stacked the bags of fertilizer on a new pallet. When he did so, Petitioner again experienced an onset of low back pain.

At trial, Petitioner testified he had no prior back injuries or symptoms. Further, Petitioner stated he was 5'7" tall and weighed 150 pounds.

Petitioner was able to complete his shift on February 11, but he continued to have low back pain as well as pain referable to his buttocks, hips and right leg. When Petitioner worked the following day, February 12, 2016 (the date of accident alleged in the Application), he continued to perform essentially the same work activities he performed the day before. At that time, Petitioner had to restack approximately 200 bags of fertilizer. While Petitioner had another worker assisting him, Petitioner stated this caused his back to become worse and he felt pain going into his buttocks and down his legs. However, Petitioner continued to work even though he was in considerable pain.

Petitioner was scheduled to work the next day, February 13, 2016 (which was a Saturday). Because of his symptoms, Petitioner sent a text message to his supervisor, Jason Phillips, and advised that he would not be able to work that day. Phillips received the text and responded stating "Don't work hard, work smart. That's how you got into this position." Petitioner acknowledged that he did not specifically inform Phillips that he had sustained a work-related injury when he sent him the text.

Petitioner initially sought medical treatment on February 13, 2016, at Memorial Hospital ER. According to the ER record of that date, Petitioner had an acute onset of low back pain three days prior after performing heavy lifting. Petitioner had no prior history of chronic back pain or surgeries. It was also noted Petitioner had a prior history of depression and substance abuse. X-rays of the lumbar spine were obtained which revealed moderate/advanced degenerative disc disease at L5-S1. Petitioner was diagnosed with a low back sprain, prescribed medication and discharged (Petitioner's Exhibit 1).

Petitioner testified that his pain got progressively worse on Sunday, February 14, 2016. The following day, Monday, February 15, 2016, Petitioner contacted Respondent and informed Respondent of the accident and that he was unable to work. Petitioner also provided a written report to Respondent of the injury on February 17, 2016 (Petitioner's Exhibit 14).

Respondent directed Petitioner to go to Midwest Occupational Medicine where he was seen by Dr. George Dierkers on February 16, 2016. Petitioner advised Dr. Dierkers of his work activities of February 11 and 12, and that he had severe low back pain. Dr. Dierkers opined Petitioner had low back pain and noted that Petitioner was a "thin person" who had "overdone it." Because of Petitioner's intense pain complaints, Dr. Dierkers ordered an MRI scan (Petitioner's Exhibit 2).

On February 18, 2016, Petitioner sought medical treatment from Dr. Donald Adams, his family physician. At that time, Petitioner advised Dr. Adams that his back started hurting on February 11, 2016, after lifting bags of rock. Petitioner complained of low back pain, more on the left than right, with shooting pain into his legs. Dr. Adams also ordered an MRI scan of Petitioner's lumbar spine (Petitioner's Exhibit 3).

The MRI was performed on February 23, 2016. According to the radiologist, there was a hyperintense signal in the posterior paraspinal musculature suggesting a muscle strain injury and a small central disc protrusion at L5-S1 (Petitioner's Exhibit 1).

Petitioner was again seen by Dr. Adams on February 25, 2016. He reviewed the MRI and agreed it revealed a muscular injury and a small disc protrusion at L5-S1. He authorized Petitioner to remain off work and referred him to pain management (Petitioner's Exhibits 3 and 4).

Petitioner was evaluated at Memorial Hospital Pain Management on February 29, 2016. According to its record of that date, Petitioner advised that his back pain started on February 12, 2016, after lifting bags of rock, fertilizer and mulch. Petitioner was diagnosed with a strain of the lumbar paraspinal muscles. It was recommended Petitioner continue treatment with Dr. Adams (Petitioner's Exhibit 6).

Petitioner went to the ER of Memorial Hospital on March 11, 2016. He complained of mid to low back pain which he related to lifting while at work approximately four weeks prior. Petitioner was directed to follow-up with pain management (Petitioner's Exhibit 1).

Petitioner was subsequently seen by Dr. Adams on March 17, 2016. Petitioner continued to have low back pain with radiation into the right leg. Dr. Adams continued to authorize Petitioner to remain off work (Petitioner's Exhibits 3 and 4).

Petitioner began physical therapy at Memorial Hospital on March 18, 2016. According to a form completed and signed by Petitioner, he had lower back pain with shooting pain in his legs which he related to heavy lifting at work on February 12, 2016 (Petitioner's Exhibit 1).

Petitioner was again seen by Dr. Adams on April 14, 2016. Petitioner continued to complain of low back pain and it was noted that Petitioner was scheduled to be seen by an orthopedic surgeon on June 6, 2016. Dr. Adams continued to authorize Petitioner to remain off work (Petitioner's Exhibits 3 and 4).

At the direction of Respondent, Petitioner was examined by Dr. Peter Anderson, an orthopedic surgeon, on May 26, 2016. In connection with his examination of Petitioner, Dr. Anderson reviewed medical records provided to him by Respondent. Dr. Anderson's findings on examination were normal and he opined that the MRI revealed some paraspinal spasm, but was otherwise unremarkable. He opined Petitioner sustained a back strain, the accident only caused a temporary aggravation of back pain, Petitioner could return to work without restrictions and no further treatment was indicated (Respondent's Exhibit 1).

Petitioner was seen by Dr. Matthew Gornet, an orthopedic surgeon, on June 6, 2016. When seen by Dr. Gornet, Petitioner advised that he sustained an injury on February 12, 2016, while driving a forklift that was carrying stacked bags of rock on a pallet. The forklift hit a pothole which caused many of the bags to fall off of it. Petitioner then lifted the bags to restack them and developed significant low back pain. Petitioner stated he did not have any prior significant problems with his low back. Dr. Gornet examined Petitioner and reviewed the MRI scan. He opined that the MRI revealed an annular tear at L5-S1 (Petitioner's Exhibit 7).

Dr. Gornet ordered physical therapy and referred Petitioner to Multicare Specialists. He also indicated he was going to obtain a new MRI and that Petitioner should also undergo some injections. Further, Dr. Gornet opined that Petitioner's current symptoms were related to the work injury (Petitioner's Exhibit 7).

Petitioner was treated at Multicare Specialists from June 14, 2016, through July 21, 2016. When Petitioner was initially evaluated there on June 14, 2016, Petitioner advised that he was injured on February 12, 2016, when he was driving a forklift moving stacked bags of rock on a pallet. Because it was a bumpy ride, some of the bags fell off of the pallet. Petitioner then had to restack the bags and, in so doing, injured his back. The treatment Petitioner received at Multicare Specialists was physical therapy and chiropractic treatment (Petitioner's Exhibit 9).

On July 25, 2016, the MRI that had been ordered by Dr. Gornet was performed. According the radiologist, there was a central disc herniation at L5-S1 and a small midline disc bulge at L4-L5. Dr. Gornet saw Petitioner that same day and reviewed the MRI. He opined it revealed disc pathology at L5-S1 and possibly some pathology at L4-L5 as well. Dr. Gornet referred Petitioner to Dr. Kaylea Boutwell for epidural injections (Petitioner's Exhibits 7 and 8).

Petitioner was seen by Dr. Boutwell on August 11 and August 25, 2016. On August 11, 2016, Dr. Boutwell administered an epidural steroid injection at L4-L5, and on August 25, 2016, Dr. Boutwell administered an epidural steroid injection at L5-S1 (Petitioner's Exhibit 10).

Dr. Gornet next saw Petitioner on October 6, 2016, and Petitioner advised that the injections had only provided him with temporary relief. Dr. Gornet noted that Dr. Anderson did not note the objective findings on the MRI scan. In regard to Dr. Anderson's opinion that the accident was a temporary aggravation of Petitioner's back condition, Dr. Gornet observed that Petitioner continued to have low back symptoms. Dr. Gornet also stated that if Petitioner continued to have symptoms, the next step would be a CT discogram and MRI spectroscopy. He also opined Petitioner my benefit from an L5-S1 fusion (Petitioner's Exhibit 7).

The discogram was performed on November 15, 2016, and it was negative for any pathology at L4-L5. However, the procedure confirmed that Petitioner had disc pathology at L5-S1. The MRI spectroscopy was also performed and it was negative for any issues at L4-L5 (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. Donald deGrange, an orthopedic surgeon, on December 7, 2016. In connection with his examination of Petitioner, Dr. deGrange reviewed medical records and diagnostic studies provided to him by Respondent. Dr. deGrange's findings on examination revealed a diminished range of motion and a positive straight leg raising test, but no spasm. He opined that the MRIs of February 23, 2016, and July 25, 2016, revealed an annular fissure of L5-S1 and moderate degenerative disc disease. Dr. deGrange opined Petitioner had sustained a lumbar strain and his complaints were indicative of significant psychological overlay with the subjective complaints and findings being inconsistent with the diagnostic studies he reviewed. He opined Petitioner did not need any further medical treatment and could work without restrictions (Respondent's Exhibit 3).

Petitioner was seen by Dr. Gornet on February 28, 2017, and Petitioner advised he obtained a job driving a forklift, but that it did not require a lot of heavy lifting. At Petitioner's request, Dr. Gornet authorized Petitioner to return to work without restrictions on a "trial" basis (Petitioner's Exhibit 7).

Dr. Gornet subsequently saw Petitioner on June 12, 2017, and August 28, 2017. Petitioner was working full time, but continued to have significant low back symptoms. Dr. Gornet renewed his recommendation Petitioner undergo surgery at L5-S1 consisting of either a fusion or disc replacement at that level (Petitioner's Exhibit 7).

Dr. Gornet was deposed on March 13, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Gornet stated that the objective findings on examination and diagnostic procedures clearly indicated Petitioner had sustained a disc injury at L5-S1 (Petitioner's Exhibit 15; pp 7-9).

Dr. Gornet stated that he recommended Petitioner undergo an anterior lumbar fusion at L5-S1. In regard to causality, Dr. Gornet testified that there was a causal relationship between the condition he diagnosed and the accident of February 12, 2016. He denied that psychological distress would exclude Petitioner as being a suitable surgical candidate (Petitioner's Exhibit 15; pp 18-21).

Dr. deGrange was deposed on April 4, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. deGrange's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. deGrange stated Petitioner had sustained a lumbar strain as result of the accident of February 12, 2016, that the MRI findings were of no clinical significance in regard to L5-S1, and that there was a significant psychological component in regard to Petitioner's ongoing complaints. He testified Petitioner did not require any further medical treatment (Respondent's Exhibit 4; pp 12-18, 25-27).

On cross-examination, Dr. deGrange agreed that Petitioner's degenerative conditions as revealed in the diagnostic studies could have been asymptomatic until the incident of lifting the bags of rock as described by Petitioner. Further, he agreed that if such an accident caused a significant amount of pain, that, in some instances, an individual might be a candidate for an L5-S1 fusion (Respondent's Exhibit 4; pp 39, 44).

Dr. Anderson was deposed on April 11, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Anderson's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Anderson testified that there were not findings on examination indicative of injury and that Petitioner had just sustained a back strain (Respondent's Exhibit 2; p 7-9).

On cross-examination, Dr. Anderson stated that the type of injury Petitioner sustained would have temporarily aggravated the degenerative condition at L5-S1. However, he also agreed that there was no indication Petitioner had any back symptoms prior to the accident (Respondent's Exhibit 2; pp 20-21).

Respondent terminated payment of temporary total disability benefits to Petitioner effective June 21, 2016. That termination was based upon Dr. Anderson's report of May 16, 2016.

At trial, Petitioner testified he returned to work on June 27, 2016, for Access Staffing. Petitioner stated he had informed Access Staffing of his condition and limitations, but they were able to find a job for him working on an assembly line that conformed to his restrictions. Petitioner stated his lifting is limited to five to 10 pounds, but that his back still continued to bother him.

Petitioner continued to work for Access Staffing through sometime in January, 2017. At that time, Petitioner was able to find another job as a forklift driver. Petitioner stated that he was still in pain, but the job did not require any lifting. However, for Petitioner to obtain the job, he stated he needed a full duty release. This was why Petitioner requested the full duty release from Dr. Gornet.

At trial, Petitioner stated he still has significant low back pain even though he has continued to work as a forklift driver. He does want to proceed with the fusion surgery as recommended by Dr. Gornet.

Jason Phillips testified on behalf of Respondent at trial. Phillips was Oldcastle's plant manager. He stated Petitioner was present at a meeting in which, among other things, safety issues were described. He stated Petitioner would have been informed that all accidents were to be reported

immediately. Further, Phillips stated he had observed Petitioner working and saw nothing out of the ordinary. He did acknowledge receipt of the text message Petitioner had sent him, but that it said nothing about Petitioner having sustained an injury at work.

On cross-examination, Phillips stated that Oldcastle's facility is 55 acres with 15 acres of it being the parking lot. Further, Phillips supervises approximately 40 to 45 employees as well as three supervisors. He conceded it was not possible to observe everyone.

Conclusions of Law

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

The Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of his employment for Respondent on February 12, 2016.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding the circumstances of the accident was unrebutted. As was noted herein, Petitioner provided reasonably consistent histories of how the accident of February 12, 2016, occurred to all of his medical providers, including Respondent's Section 12 examiners.

While Petitioner did not report the accident on the same day it occurred, February 12, 2016, he did report the accident on February 15, 2016. Petitioner's reluctance to immediately report the accident was understandable because he had just started work for Respondent on February 11, 2016.

The Arbitrator was not persuaded by the testimony of Respondent's witness, Jason Phillips, in regard to that issue. As noted herein, Oldcastle's facility encompassed a large area of 55 acres, 15 of which were the parking lot. Further, Phillips was responsible for supervising 40 to 45 employees as well as three supervisors.

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

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of February 12, 2016.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony that he had no back injuries or symptoms prior to the time he worked at Oldcastle was unrebutted.

There was no question that Petitioner did sustain a work-related back injury on February 12, 2016.
Petitioner underwent multiple diagnostic procedures all of which revealed that Petitioner had disc pathology at L5-S1.

The Arbitrator was not persuaded by the opinion of Dr. Anderson that Petitioner only sustained a temporary aggravation of back pain because Petitioner had no prior back symptoms and has experienced ongoing significant back symptoms since the time of the accident.

Dr. deGrange's opinion that the MRIs only revealed an annular fissure at L5-S1 was inconsistent with both the radiologist's opinion and that of Dr. Gornet.

Dr. Gornet opined that his findings on examination and the diagnostic tests were consistent with Petitioner having sustained a disc injury at L5-S1 as result of the accident of February 12, 2016.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Gornet to be more persuasive than those of Dr. Anderson and Dr. deGrange.

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

The Arbitrator concludes that all the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as noted in Petitioner's Exhibit 13, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the fusion surgery recommended by Dr. Gornet.

In support of this conclusion the Arbitrator notes the following:

As aforestated, the Arbitrator found the opinion of Dr. Gornet to be more persuasive than those of Dr. Anderson and Dr. deGrange.

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

The Arbitrator concludes Petitioner is entitled to payment of temporary total disability benefits for 19 2/7 weeks, commencing February 13, 2016, through June 26, 2016.

In support of this conclusion the Arbitrator notes the following:

Petitioner was under active medical treatment and authorized to be off work for the aforestated period of time.

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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SARA DUNHAM,

Petitioner,

vs. NO: 18 WC 5780

STATE OF ILLINOIS/VIENNA CORR. CTR.,

Respondent.

19IWCC0104

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and law, amends the Arbitrator's Decision to reflect the correct, injured finger, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n,* 291 Ill. App. 3d 734, 740 (4th Dist. 1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Indus. Comm'n,* 51 Ill. 2d 533, 536-37 (1972).

The Commission writes only to modify the PPD award to reflect the correct injured finger in this claim. The Arbitrator had awarded five-percent (5%) loss of use of the right index finger. Per the Application for Adjustment of Claim and the evidence in the record, Petitioner had injured

her right middle finger. Thus, the Commission modifies the PPD award to reflect five-percent (5%) loss of use of the right middle finger; all else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 29, 2018, is hereby corrected as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $635.63 per week for a period of 6/7 weeks, or from February 1, 2018 through February 6, 2018, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses as detailed in Petitioner's Exhibit 1, pursuant to Sections 8(a) & 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for medical benefits that have been paid through its group carrier, if any, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit as provided in Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $572.06 per week for a period of 1.9 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused five-percent (5%) loss of use of the right middle finger.

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 other amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: FEB 13 2019
MJB/pm
O: 2-05-19
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DUNHAM, SARA
Employee/Petitioner

Case# **18WC005780**

STATE OF ILLINOIS/VIENNA CORR CTR
Employer/Respondent

19IWCC0104

On 6/29/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JUN 29 2018

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

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SARAH DUNHAM
Employee/Petitioner

v.

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

Case # 18 WC 05780

Consolidated cases: ____

19IWCC0104

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **April 4, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0104

FINDINGS

On **January 28, 2018,** Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$49,579.09**; the average weekly wage was **$953.44**.

On the date of accident, Petitioner was **26** years of age, ***single*** with **0** dependent child(ren).

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services as outlined in Petitioner's group exhibit, as provided in § 8(a) and § 8.2 of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of **$635.63**/week for **6/7** weeks, commencing **January 29, 2018 (February 1, 2018)**, through **February 6, 2018**, as provided in § 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$572.06**/week for **2.15** weeks, because the injuries sustained caused the **5%** loss of the **right index finger**, as provided in § 8(e) of the Act.

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

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

Signature of Arbitrator

6/27/18
Date

JUN 29 2018

FINDINGS OF FACT

Petitioner is a Correctional Officer employed at Respondent's Vienna Correctional Center facility. (T.8) On January 28, 2018, Petitioner was walking out of the control room door when her hand got caught and smashed between the door frame and the door. (T.8-9) The door is the only means of ingress and egress to the control room, and the door is made of heavy steel weighing hundreds of pounds. (T.9) Petitioner testified that the door closes very rapidly. Petitioner testified that she walks in and out of the control room multiple times during the shift, and it is a regular part of her job. (T.10) She testified she sees none of this type of door outside of the prison setting. (T.10)

Respondent brought two witnesses to the hearing. Mark Dixon is a Maintenance Carpenter at Respondent's Vienna facility, and he corroborated Petitioner's testimony that the control room door closes rapidly and stated that it "drops a little bit faster right there at the end." (T.26-27, 29) He agreed that this would injure a finger caught in the way. (T.29)

Respondent also called Major William Peckinpaugh, who is a shift supervisor at Respondent's Vienna facility. (T.20-21) He was a witness to Petitioner's accident. (T.22) He testified that he was familiar with the door that operates the entrance/exit to the control room, and it operates with an electronic button which when pushed opens it from the inside. (T.22-23) He testified to what he saw on January 28th, stating:

> As I was walking towards roll call, before I turned the corner there, Officer Dunham was coming out of the control room, and she was -- she was kind of looking down at the floor, and then she looked up at me, and I said something to her, and she still had her hand backwards, which appeared to me to be like a natural motion to stop the door from slamming because the door slams all the time. (T.23)

After Major Peckinpaugh said something to Petitioner, her hand was still there, the door closed, and she pulled her hand down very fast. (T.23-24) He initially believed it was just a smashed finger; however, Petitioner went to the restroom and a few minutes later approached Major Peckinpaugh with a bleeding finger, told him she had gotten her finger cut, and he sent her to the facility healthcare unit. (T.23-24) When asked by Petitioner's counsel if Petitioner's testimony was in any way inaccurate, he stated no. (T.25)

Following the incident, Petitioner went to Hardin County General Hospital and gave them a consistent history of the injury. (PX3) There Petitioner was diagnosed with a subungual hematoma and right middle finger laceration. *Id.* X-rays were normal. *Id.*

When Petitioner's symptoms continued, she was referred by her primary care physician to Dr. Steven Young, an orthopedic hand specialist. (PX4, 1/29/18; PX5, 2/14/18) There the history of the incident was taken, and Petitioner was diagnosed with a soft tissue type crush injury to the right long finger involving the nail at the distal edge. (PX5, 2/14/18) She was given a splint and returned to work with no inmate contact. (PX4, 2/14/18-2/16/18) When Petitioner

returned to Dr. Young's office on March 28, 2018, the assistant noted that Petitioner continued to have some tenderness of the distal tip of her finger, but was otherwise doing well. (PX5, 3/28/18) Petitioner was then released from care. *Id.* Petitioner only missed 8 days of work after which she returned to work light duty for 4 weeks. (T.12)

Petitioner candidly testified that at Arbitration that despite the improvement with splinting and medication, she still experiences symptoms with excessive typing and writing for long periods of time. (T.12-13) She also has difficulty with her dominant right hand if she is on a unit opening and closing with keying. (T.12-13)

Respondent did not have Petitioner examined.

CONCLUSIONS OF LAW

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

The Supreme Court holds that the term "accident" encompasses anything that happens without design or any event that is unforeseen by the victim. *E. Baggot Co. v. Indus. Comm'n*, 125 N.E. 254, 255 (1919). An injury is also accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (1955). 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. *Id.* Petitioner's injuries clearly occurred in the course of her duties. The issue is whether her injuries arose out of her employment.

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). Stated another way:

> [A]n 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. [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. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 204, 797 N.E.2d 665, 672 (2003)

In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work *or* (when the risk is a neutral risk encountered during the course of employment) that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.*; *Adcock v. Illinois Workers' Comp. Comm'n*, 2015 IL App (2d) 130884WC, ¶ 39, 38 N.E.3d 587, 596. This increased risk may be **qualitative**, such as some aspect of employment that contributes to risk,

or quantitative, such as the number of times they are required to encounter the risk. *Springfield Urban League v. Illinois Workers' Comp. Comm'n*, 2013 IL App (4th) 120219WC, 990 N.E.2d 284, 290 (4th Dist. 2013).

The courts have held that when some aspect of the employment environment increases the likelihood of injury from an otherwise benign risk, the injury is compensable, as it constitutes a qualitative increased risk of injury. In *Central Illinois Public Service Co.*, the claimant was injured when an employer's building was collapsed during tornados and severe wind storms; however, the ammonia fumes and scalding steam largely contributed to the injuries which caused the claimant's death. *Central Illinois Public Service Co. v. Indus. Comm'n*, 291 Ill 256, 126 N.E. 144 (1920). In awarding compensation, the Supreme Court stated, "While the risk arising from the action of the elements, such as a cyclone, is such a risk as all people of the same locality are subjected to, independent of employment, yet the circumstances of a particular employment may make the danger of receiving a particular injury through such storm an exceptional risk, and one to which the public generally is not subjected. Such injury may be then said to arise out of employment." *Id.* Similarly, in *Eisner Food Stores v. Indus. Comm'n,* the claimant was injured by a fallen sign due to a wind damage, which the Court noted was a "structure peculiar to the supermarket." *Eisner Food Stores v. Indus. Comm'n*, 33 Ill. 2d 474, 476, 211 N.E.2d 683, 684 (1965). The Supreme Court held that the Commission was "warranted in finding that the presence of the sign wall was an 'exceptional risk and one to which the public generally is not subjected.'" *Id.*

Here, Petitioner testified without rebuttal that the doors of Respondent's facility were extremely heavy steel doors which were not present outside of the prison system. (T.10) The door also closed rapidly. *Id.* Petitioner further testified that this was the only means of ingress or egress and that she walks through this door multiple times a day. (T.10) She was thus subject to not only a qualitative increased risk of injury, but also a quantitative one. Her testimony was corroborated by both of Respondent's witnesses. Respondent's maintenance carpenter, Mark Dixon, confirmed that the control room door closes rapidly and stated that it "drops a little bit faster right there at the end." (T.26-27, 29) He agreed that this would injure a finger caught in the way. (T.29) Moreover, Major William Peckinpaugh, Respondent's shift supervisor, confirmed that there was nothing incorrect about Petitioner's testimony. (T.20-21, 25) Based upon the law and the evidence, the Arbitrator finds that Petitioner sustained her burden of proof in establishing that her accidental injuries arose out of and in the course of her employment.

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

Issue (K): What temporary benefits are in dispute? (TTD)

Respondent only disputed liability for medical expenses and temporary total disability expenses based on its dispute as to accident. (AX1) Based on the above findings regarding

accident, the Arbitrator finds that Petitioner is entitled to medical and temporary total disability benefits. The Arbitrator finds that all of Petitioner's medical care was conservative and reasonable. With regard to temporary total disability benefits, Petitioner claims entitlement to benefits for a period of 1 1/7 weeks, from January 29, 2018, through February 6, 2018. (AX1) However, under § 8(b) of the Act, where a period of temporary total incapacity for work lasts more than 3 working days and less than 14 days, compensation begins on the 4th day of the period of incapacity. 820 ILCS 305/8(b). Petitioner is therefore entitled to 6/7 weeks of temporary total disability benefits.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner continues to serve as a Correctional Officer and testified that she has difficulty writing for long periods of time and turning keys to open and close doors when working in a gallery unit. (T.12-13) The Arbitrator places greater weight on this factor.

(iii) **Age**: Petitioner was 26 years old at the time of her injury. (AX1) She is extremely young and must live and work with her disability for the vast majority of her working career. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time), the Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: There is no direct evidence of reduced earning capacity contained in the record. The Arbitrator places no weight on this factor.

(v) **Disability**: As a result of her accidental injury, Petitioner sustained a subungual hematoma/soft tissue type crush injury to the right long finger involving the nail at the distal edge of her right dominant hand. (T.12-13; PX3; PX5, 2/14/18) Despite the improvement with splinting and medication, she still experiences symptoms with excessive typing and writing for long periods of time. (T.12-13) She also has difficulty with her dominant right hand if she is on a unit opening and closing with keying. *Id.* The Arbitrator finds Petitioner's testimony fully supported by the record, as she continued to report tenderness as of her final treatment visit with Dr. Young. (PX5, 3/28/18) The Arbitrator therefore places substantial weight on this factor.

Based upon the foregoing, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 5% loss of her right index finger.

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

Michael E. Smith,
Petitioner,

vs.

NO: 15WC 26677

Caterpillar, Inc.,
Respondent.

19IWCC0105

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 14, 2018, 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 13 2019

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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MJB/jrc
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, MICHAEL E
Employee/Petitioner

Case# **15WC026677**

CATERPILLAR INC
Employer/Respondent

19IWCC0105

On 3/14/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.85% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0192 CUSACK GILFILLAN & O'DAY
DANIEL P CUSACK
415 HAMILTON BLVD
PEORIA, IL 61602

5411 CATERPILLAR INC
AMANDA WATSON
100 N E ADAMS ST
PEORIA, IL 61629-4340

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael E. Smith
Employee/Petitioner

v.

Caterpillar, Inc.
Employer/Respondent

Case # 15 WC 26677

Consolidated cases: N/A

19IWCC0105

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Peoria**, on **February 16, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 20, 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.

In the year preceding the injury, Petitioner earned **$37,190.40**; the average weekly wage was **$715.20**.

On the date of accident, Petitioner was **58** years of age, *married* with **0** dependent children.

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, **$7,368.30** in non-occupational indemnity disability benefits and **$25,242.00** for other benefits, for a total credit of **$32,610.30.**

Respondent is entitled to a credit for medical bills paid in the amount of **$25,242.00** through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment with Respondent and, as such, all benefits are denied. The remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, **$7,368.30** in non-occupational indemnity disability benefits and **$25,242.00** for other benefits, for a total credit of **$32,610.30.**

Respondent is entitled to a credit for medical bills paid in the amount of **$25,242.00** through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

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

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

Melinda M. Pope-Sullivan

Signature of Arbitrator

3/13/18

Date

MAR 14 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael E. Smith
Employee/Petitioner

Case # 15 WC 26677

v.

Consolidated cases: N/A

Caterpillar, Inc.
Employer/Respondent

19IWCC0105

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he is 62 years old and that he is employed by Respondent. He testified that his job required him to do final testing on tractors before they were cleared for delivery. He testified that in order to test the various tractors, he would have to climb up five stairs to a work platform, both at the side of the tractors and at the front. He testified that he would do this by stepping onto a five-step staircase that was moveable and was positioned at the back half of the tractor, which would enable him to reach a work platform that gave him access to the driver's seat to perform his tests. He testified that, in addition, he would go up five steps in the front of the tractor to perform his work there. He testified that he was trained to do it this way and that there was no other way to get to the work platform without trying to jump up the height of five stairs.

Petitioner testified that he would, at a minimum, work on 8-10 tractors per day. He testified that he would have to go up and down each tractor a minimum of four times with regard to the driver's station and two times with regard to the front of the tractor. He testified that he worked in a secure location where the public was not allowed. He also testified that if issues or problems arose during his testing, he would often have to go down to retrieve a tool, gauge, gasket, or other item and that he would then have to come back up the stairs to fix whatever issue arose. He testified that issues were encountered about 85% of the time.

Petitioner testified that on June 20, 2014, he was going up the steps to hook up a tractor and that when he lifted his left leg off the floor, he felt a sharp pain and pop in the back of his left knee. He testified that he went to the company doctor, Dr. Miller, on the day of the accident and four other times between June 20, 2014 and August 4, 2014. Petitioner admitted that during that time his knee got better and that on July 1, 2014, he was returned to work even though his knee was still bothering him. He testified that Dr. Miller told him that his problem was arthritis.

Petitioner testified that he worked with pain in the knee which became progressively worse over the next ten months. He testified that during this ten-month period, he took Advil in an attempt to get him through the pain. He further testified that during that period he was laid off for one month, had two weeks of Christmas vacation and had another week of general vacation. He testified that it took him two months to get in to see Dr. Mitzelfelt due to the doctor's schedule. He testified that he chose Dr. Mitzelfelt because he had previously been a patient of his for unrelated issues.

Petitioner testified that he saw Dr. Mitzelfelt and that he immediately ordered an MRI. He testified that based on the MRI results, Dr. Mitzelfelt performed surgery on July 13, 2015. He testified that following the surgery his knee pain improved and that he returned to work full duty on October 26, 2015. He testified that the surgery helped his knee and that he only has occasional pain in the knee at this time. He testified that he did have the knee injected with Euflexxa post-surgery and that he also had some physical therapy.

With regard to prior left knee problems, Petitioner testified that in 2007 he hurt his left knee getting off an escalator at work. He testified that following that injury, he returned to work full duty and the pain completely resolved.

On cross examination, Petitioner agreed that when the incident occurred in June of 2014, he was never restricted and that he continued full duty while he was treating with Dr. Miller. He agreed that he continued working full duty until the date of his surgery in mid-2015.

The transcript of the deposition of Dr. Mitzelfelt was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. Dr. Mitzelfelt testified that he is an orthopedic surgeon and that he concentrates on knee reconstructions, total knee replacements, hip replacements, shoulder reconstructions and shoulder replacements. (PX1).

Dr. Mitzelfelt testified that he first saw Petitioner on June 5, 2015 for his left knee. He testified that Petitioner stated that he was at work, that he was climbing a ladder to get up to a platform and that he was going up when he felt a pop in the back of the left knee, after which he had had some discomfort but continued to work that day. He testified that Petitioner had a typical presentation for a meniscus injury in that he really did not have any pain before and that he felt a pop. He testified that Petitioner noticed some swelling in the knee and some discomfort, so he went to medical at Cat who told him that nothing was wrong. He testified that Petitioner indicated that he kept having discomfort, that he had pain off and on and that it started to get worse, at which point he saw him. He testified that Petitioner had mild effusion, that he had pain over the posterior or popliteal area in the back of the knee, anterior and medially, that he had excellent flexion and that he lacked a few degrees of terminal extension. He testified that he thought that Petitioner sustained a meniscal injury and that x-rays revealed some degenerative changes. He testified that he recommended an MRI and prescribed some anti-inflammatories. (PX1).

Dr. Mitzelfelt testified that the MRI revealed that Petitioner had arthritic changes, mild to moderate depending on which joint you were referring to, throughout the knee, that he had complex medial and lateral meniscal tears and that he had a parameniscal cyst, a chronic ACL tear, cystic degeneration of the PCL and tendinitis. He testified that surgery was performed on July 13, 2015 and that after surgery Petitioner did well. He testified that Petitioner had also been receiving some injections for arthritis, which were Euflexxa injections. He testified that Petitioner still had some discomfort just from the arthritis. (PX1).

Dr. Mitzelfelt testified that the ACL was pre-existing, the PCL was pre-existing and that the majority of the arthritis throughout the knee was probably pre-existing but was asymptomatic. He testified that the history that Petitioner gave was "classic" for a meniscal tear which was going up stairs and feeling a pop, as well as difficulty getting terminal extension. He testified that Petitioner could have had damage to the meniscus before but what happened at that point was that he tore it enough to displace it. He testified that the treatment done for the first year after surgery was secondary to the initial injury or the tear of the meniscus. He testified that he related the inflammation and pain to the accident of June 20, 2014 and that everything done for treatment and a year of observation was also related to the accident. He testified that the arthritis was exacerbated by the tear. He testified that he had Petitioner off work from July 31, 2015 [*sic*] through October 22, 2015. He testified that he last saw Petitioner on February 9, 2016 and that they completed the Euflexxa series. He testified that Petitioner was having good days and bad days and that he was to return in three months. (PX1).

On cross examination, Dr. Mitzelfelt agreed that when describing the incident when he was talking to him on June 5, 2015, Petitioner described a specific incident. He testified that Petitioner stated that he was climbing. He testified that Petitioner's history was "spot on" for tearing a meniscus at that time. He agreed that between June 20, 2014 and when he saw Petitioner for the first time on June 5, 2015, some of his testimony was a bit speculative because he did not see Petitioner during that year timeframe. (PX1).

On cross examination, Dr. Mitzelfelt agreed that meniscal tears could happen when someone had arthritic changes in the absence of any trauma. He denied that there was anything on the MRI that would have indicated to him for any reason that the meniscal tears happened in a traumatic event. As to Petitioner's condition in the last year since surgery, Dr. Mitzelfelt agreed that it was not surprising that someone with Petitioner's level of arthritic changes would have waxing and waning of symptoms. He agreed that he allowed Petitioner to return to work full duty in October of 2015 and that since that time, Petitioner had been under no restrictions. (PX1).

On redirect, Dr. Mitzelfelt agreed that he did not see Petitioner for the accident until June 5, 2015, which was a little less than a year after the alleged accident. He agreed that Petitioner last saw a doctor at Cat on August 4, 2014, so there was about a 10-month gap from that time until he saw him. He agreed that he was not aware of any doctors that Petitioner saw during that period of time. He testified that he did not know of anything Petitioner may have done to have gotten through that period of time, such as self-help mechanisms. (PX1).

The medical records of Midwest Orthopaedic (dated June 5, 2015 through November 5, 2015) were entered into evidence at the time of arbitration as Petitioner's Exhibit 3.[1] The records reflect that Petitioner was seen on June 5, 2015, at which time it was noted that he was complaining of left hip pain and left knee pain, that he stated that he had been experiencing clicking and popping intermittently when walking and that he located his pain over his kneecap and lateral hip joint for the past 30 days. It was noted that Petitioner complained of radiating pain, stating that he had received no previous treatment despite having been consulted after injuring his knee stepping up a platform at work. The assessment was noted to be that of osteoarthritis, localized, primary involving the pelvic region and thigh and tear of the medial cartilage or meniscus of knee. It was noted that there was a concern for internal derangement in regard to the left knee and that an MRI would be ordered. It was noted that as to the left hip, they would proceed with a left hip cortisone injection in an effort to alleviate the pain he experienced due to his arthritic changes. Petitioner was also given a prescription for Mobic to help him manage his pain conservatively while he completed his MRI scan. (PX3).

The records of Midwest Orthopaedic reflect that Petitioner was seen on June 30, 2015, at which time it was noted that he stated that his knee pain continued unchanged since his last visit where he had now reportedly endured knee pain for approximately one year. The assessment was noted to be that of tear of medial cartilage or meniscus of knee; tear of lateral cartilage or meniscus of knee. It was noted that Petitioner met the clinical and radiographical criteria for left knee arthroscopy and debridement, partial medial and lateral meniscectomies with possible chondroplasty and that he wished to proceed. At the time of the July 17, 2015 visit, it was noted that Petitioner was seen for a post-operative evaluation and that he was four days status post left knee arthroscopy and debridement. Petitioner presented for a dressing change. It was noted that Petitioner could slowly resume activities as tolerated and that he was advised against doing any deep knee bends, squats, lunges or high-impact activity. The Therapy Assessment dated August 21, 2015 noted that Petitioner presented with left knee stiffness and weakness five weeks status post arthroscopic debridement of medial and lateral meniscus and that he would require skilled physical therapy to restore full motion, strength and endurance to allow him to return to a job requiring squatting, ladders and hours on his feet. (PX3).

[1] Any markings that appear in the exhibit were not made by the Arbitrator.

The records of Midwest Orthopaedic reflect that Petitioner was seen on August 27, 2015, at which time it was noted that an ongoing post-operative therapy program had been initiated and that he reported popping under the kneecap and persistent pain which worsened with therapy. It was noted that x-rays of the knee performed on that date were interpreted as revealing mild to moderate osteoarthritis. It was noted that a discussion was had regarding the role of injection therapy for the temporary treatment of arthritis symptoms as well as the risks, benefits and limitations. Petitioner was given a left knee cortisone injection and it was noted that clearance would be obtained for Euflexxa injection. (PX3).

The records of Midwest Orthopaedic reflect that Petitioner was seen on October 22, 2015, at which time it was noted that he stated that the cortisone injection on August 27th helped alleviate pain temporarily, that his knee had intermittent swelling, that he had nocturnal pain and that he requested a gel injection. It was noted that a discussion was had regarding the role of viscosupplementation in the treatment of arthritis. The left knee was injected with Euflexxa and a supplemental cortisone injection. It was noted that Petitioner would be given a work note to resume work on October 26, 2015. A Return to Work slip was issued on October 1, 2015, indicating that Petitioner was unable to work until October 22, 2015. A Return to Work slip was issued on October 22, 2015, indicating that Petitioner could return to work with no restrictions or limitations on October 26, 2015. (PX3).

The records of Midwest Orthopaedic reflect that Petitioner was seen on October 29, 2015, at which time he was seen for a second injection in the left knee Euflexxa series. It was noted that Petitioner reported improvement in symptoms thus far and was ambulating well unassisted. Petitioner was given the second injection in the left knee Euflexxa series. At the time of the November 5, 2015 visit, it was noted that Petitioner returned for his third Euflexxa injection in his left knee, which was performed on that date. (PX3).

The medical records of Pekin Hospital (dated June 10, 2015) were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner underwent an MRI of the left knee on June 10, 2015, which was interpreted as revealing (1) tricompartmental degeneration; there are complex medial and lateral meniscus tears as described with extensive parameniscus cyst formation along the anterior and lateral aspect of the knee joint; (2) chronic ACL tear, partial interstitial tear and/or cystic degeneration of the PCL; (3) mild distal quadriceps and partial tear with tendinosis of the semimembranosus tendon. (PX4).

The medical records of Pekin Hospital (dated July 9, 2015) were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner underwent pre-anesthesia care planning on that date. (PX5).

The medical records of Pekin Hospital (dated July 13, 2015) were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The records reflect that Petitioner underwent surgery by Dr. Mitzelfelt on that date, which was that of a left knee arthroscopy and debridement with (1) partial synovectomy; (2) excision superior and inferior plical complexes; (3) excision of a portion of the anterior fat pad; (4) chondroplasty; (5) partial lateral meniscectomy; (6) excision of the 1 cm anterior cystic structure. According to the Operative Report, the pre-operative diagnosis was that of left knee medial and lateral meniscus tears and the post-operative diagnoses were that of (1) synovitis; (2) superior and inferior plical complexes; (3) large anterior fat pad; (4) 1 cm cystic structure anterior lateral to the anterior cruciate ligament; (5) complex tear in the lateral meniscus; (6) degenerative tearing of the anterior medial meniscus, which was noted to be stable; (7) grade 3 chondromalacia patella, grade 2-3 chondromalacia medial joint, grade 3 chondromalacia of the lateral femoral tibial joint. (PX6).

The medical records of Pekin Hospital (dated August 5, 2015) were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records reflect that Petitioner underwent venous Doppler

of the left lower extremity on August 5, 2015, which was interpreted as negative for deep vein thrombosis of the left lower extremity. (PX7).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 8.

The IME Report of Dr. Gross was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The report reflects that an IME of the left knee was performed on September 8, 2016. It was noted that Petitioner was a Laborer for Caterpillar where he had worked for 11 years and that on June 20, 2014, he was stepping up on a ladder at work and was at the top of his tractor when his right foot was on the ladder and that he raised his left leg to step when he felt a pop over the posterior aspect of his left leg followed by pain. (RX1).

The report noted that Dr. Gross opined that the diagnosis was that of left knee osteoarthritis involving mostly his lateral compartment moreso than his medial and patellofemoral compartments. It was noted that Dr. Gross opined that based on the description of his mechanism of injury, he believed that Petitioner had a strain of his left knee as it related to the work injury of June 20, 2014. It was noted that there was the potential that Petitioner may have had a popliteal cyst which may have ruptured at that point in time causing the pain in the posterior aspect of his knee and that based on his mechanism of injury, Dr. Gross did not believe that he had an injury to either his medial or lateral meniscus, nor did he believe that Petitioner had any injury to the cartilage surfaces of his medial, lateral or patellofemoral compartments. Dr. Gross noted that at the time of the injury Petitioner's pain was mostly over the posterior aspect of the knee and that he had negative provocative signs for meniscal pathology and had improvement with regards to the pain over the posterior aspect of his knee after treatment by Dr. Miller and was returned to all activities at work. Dr. Gross noted that it was not until later after Petitioner returned to work that he started having further problems with his knee mostly in the anterior and lateral aspects of his knee, which was different than the problem he had at the time of his injury where his pain was mostly over the posterior aspect of his knee. (RX1).

The report reflects that Dr. Gross did not believe that the surgical intervention performed in July of 2015 was caused or hastened by the alleged injury of June 20, 2014 based on the fact that the mechanism of injury did not fit for a meniscal tear, specifically for medial or lateral meniscus tears. It was noted that Dr. Gross opined that they were both complex tears that were more degenerative in nature with the underlying degeneration of Petitioner's knee and that there were also cysts in the meniscal tears, which was consistent with a long-standing process. It was also noted that at the time of the initial injury on June 20, 2014, Petitioner's pain was in the posterior aspect of the knee and not over the medial or lateral aspects of his knee, where he had the most significant pathology seen at the time of his surgical intervention. (RX1).

The report reflects that Dr. Gross opined that Petitioner reached maximum medical improvement when he was released by Dr. Miller on August 4, 2014. It was noted that Dr. Gross did not believe that the Euflexxa injections were causally related to the June 20, 2014 accident and that they were related to the underlying degeneration of Petitioner's knee which pre-dated the injury, was not caused by his injury nor was it hastened by it based on the mechanism of injury and his evaluation and the symptoms at the time of the injury of June 20, 2014. It was noted that Dr. Gross opined that the prognosis for Petitioner's left knee was fair, that he had underlying degeneration of his knee which would continue to progress over time causing him further problems and that he may require further management with the use of Euflexxa injections. It was noted that Dr. Gross opined that the more definitive procedure at some point in time would be an arthroplasty procedure, either a unicompartmental arthroplasty or a total knee arthroplasty, and would be related to the underlying degeneration of Petitioner's knee, which was not caused by the work injury nor was it hastened by the work injury based on the mechanism of injury and Petitioner's examination at that time. It was further noted that no further management of Petitioner's knee was related to the work-related injury of June 20, 2014. (RX1).

The transcript of the deposition of Dr. Gross was entered into evidence at the time of arbitration as Respondent's Exhibit 2. Dr. Gross testified that he is an orthopedic surgeon specializing in sports medicine and that he is board-certified in orthopedics and subspecialty-certified in sports medicine. (RX2).

Dr. Gross testified that he saw Petitioner for an IME on September 8, 2016, at which time he stated that he was stepping up a ladder at work to the top of his tractor with his right foot on the ladder, that he raised up his left leg to step and that he felt a pop in the posterior aspect of his knee and developed pain in his left knee. He testified that he reviewed the medical records of Caterpillar and Dr. Mitzelfelt, as well as the deposition transcript of Dr. Mitzelfelt. He testified that he discussed the specifics of the alleged incident with Petitioner and that he did not disagree with his summation, which was that he was stepping up a ladder at work when this occurred. (RX2).

Dr. Gross testified that the most significant thing that he saw in the past medical or surgical history that he reviewed was that Petitioner's mechanism of injury was not the typical mechanism of injury to sustain any type of meniscal pathology and that it often happened with some sort of loading or twisting-type activities or even hyperflexion-type activities. He testified that in addition, Petitioner's initial evaluation by Dr. Miller did not reveal any significant swelling of the knee, that he had good range of motion of the knee and that he did not have any provocative signs for meniscal pathology on any of the evaluations by Dr. Miller. He testified that Petitioner only had tender palpation over the posterior aspect of his knee, which was less than indicative of any type of meniscal pathology and that most people with meniscal pathology complained of joint line pain. He testified that Petitioner's examination was more consistent with a degenerative knee or even possibly a rupture of a popliteal cyst with his complaint of a pop over the back of his knee when he was stepping up. (RX2).

Dr. Gross testified that based on his review of the medical records, the history he took from Petitioner and his physical examination, the diagnosis of Petitioner's left knee condition was that of osteoarthritis involving mostly his lateral compartment more than his medial patellofemoral compartment. He testified that based on the mechanism of injury, he thought that Petitioner may have ruptured a popliteal cyst based on his mechanism and his complaints at that point in time. He testified that popliteal cysts were not uncommon with individuals that had degeneration of their knee or cartilage degeneration. He testified that it was not uncommon for an individual that had a popliteal cyst to say that they were stepping up or moving their leg or bending, extending their knee and that they felt a pop in the back of their knee and developed some swelling in the knee and calf area and pain in the posterior aspect of the knee. He testified that he did not believe that the need for the July 2015 arthroscopic surgery performed by Dr. Mitzelfelt was caused or hastened by the alleged incident of June 20, 2014 and that this was based on Petitioner's mechanism of injury in addition to his initial complaints and examination when he was seen by Dr. Miller, at which time he had no provocative signs for any type of meniscal pathology. He testified that Petitioner had improved and was released to go back to duty, and even at the time of his release he had minimal complaints with some pain over the posterior aspect of the knee and that it was not until a little less than a year later that he presented with complaints of knee pain to Dr. Mitzelfelt in a different area than it was at the time of his initial presentation to Dr. Miller. (RX2).

Dr. Gross testified if Petitioner suffered an injury on June 20, 2014, he believed that he would have reached maximum medical improvement when he was released by Dr. Miller on August 4, 2014. He testified that he did not believe Petitioner's ongoing need for the Euflexxa injections was causally related to the incident of June 20, 2014. He testified that he believed that the prognosis for Petitioner's left knee was fair, that he had underlying degeneration of the knee and that at some point as he continued to age the degeneration would progress. He testified that the Euflexxa injections were a reasonable and necessary course of treatment to postpone any further surgical intervention and that at some point Petitioner may need further definitive management such as an arthroplasty. (RX2).

Dr. Gross testified that the typical mechanism of injury for a meniscal injury or tear was a loading activity where one was loading the tibiofemoral joint and they had a torque on their knee. He testified that this would generally be when one was weightbearing. (RX2).

On cross examination, Dr. Gross testified that he did not review any records that suggested Petitioner had any type of knee pain before June 20, 2014. He agreed that the location of pain was significant to his evaluation. He testified that it would be very unlikely for Petitioner to have some sort of meniscal pathology if it was not seen in a physical examination. He testified that when Dr. Miller released Petitioner he had some mild pain and aching over the posterior aspect of his knee and some mild aching over the medial tibiofemoral joint line, but that his examination at that time was negative for provocative signs for meniscal or ligament pathology. (RX2).

On cross examination, Dr. Gross agreed that he had not reviewed any medical records for the timeframe between when Petitioner was released by Dr. Miller and when he saw Dr. Mitzelfelt. He testified that he did not know if Petitioner was laid off. He testified that he did not know how many vacations Petitioner had during that timeframe. He testified that he did not know how long it took for Petitioner to see Dr. Mitzelfelt, nor did he know whether Petitioner employed any self-help mechanisms or took over-the-counter painkillers during that period of time. He testified that Petitioner indicated to him that after his release by Dr. Miller, a few months later he started having some pain in the anterior and lateral aspect of his knee. (RX2).

On cross examination when asked what he thought happened to Petitioner's knee on June 20th, Dr. Gross responded that he thought that he stepped up and probably had a rupture of a popliteal cyst or had a strain of the posterior aspect of his knee. (RX2).

On redirect, Dr. Gross agreed that he did not believe that a meniscal injury occurred on June 20, 2014. (RX2).

The Caterpillar Medical Records were entered into evidence at the time of arbitration as Respondent's Exhibit 3. The records reflect that Petitioner was seen on June 20, 2014 at 11:35 pertaining to an Incident Date of June 20, 2014 at 10:30 a.m. It was noted that Petitioner was stepping up on a ladder to work on the top of a tractor, that he had his right foot on the ladder and that as he raised up his left leg he felt a pop in the back of his knee and then pain in the leg. It was noted that no bruising, swelling or deformity was noted, that Petitioner displayed full range of motion and that 400 mg of Ibuprofen was given. (RX3).

The Caterpillar records reflect that Petitioner was seen on June 24, 2014, at which time it was noted that he was previously asymptomatic until June 20, 2014 at 10:30 a.m. when he was walking up a standard stair ladder in assembly, that his right foot was weightbearing as he lifted his left leg to move to the next step and that he felt a "pop" in the back of the left knee and subsequent pain. It was noted that Petitioner had had no locking or giving way, that initially he had noticed some swelling diffusely which had resolved, that he noted no discoloration and that he had seen no outside provider for evaluation. It was noted that since then the pain had improved but had not completely resolved in the posterior knee area, that there was no known injurious mechanism and that he carried only his body weight at the time the pain began while going up the ladder. It was noted that Petitioner had only once other occurrence of left knee pain on October 1, 2007, when had posterior left knee pain develop while squatting to pick up some papers off the floor. It was noted that Petitioner was under no restrictions and could self-accommodate. Petitioner was instructed to return for a recheck in one week or as needed. (RX3).

The Caterpillar records reflect that Petitioner was seen on July 1, 2014, at which time it was noted that he was improved and had no pain residual except for low-grade constant discomfort in the posterior left knee. It was noted that Petitioner now had normal, asymptomatic function at all times and that he was

comfortable with prolonged weightbearing, climbing and squatting. At the time of the August 4, 2014 visit, it was noted that Petitioner was improved and that he had a mild ache in his posterior knee and mild ache transiently along the medial femoral tibial joint line. It was noted that Petitioner could do all essential job requirements and was to return as needed. (RX3).

The Caterpillar records reflect that Petitioner was seen on July 1, 2015, at which time it was noted that he was requesting to see the company physician to discuss the latest findings of an MRI. At the time of the July 2, 2015 visit, it was noted that Petitioner brought his MRI results and a dictated visit from Dr. Mitzelfelt that he requested be reviewed by the adjuster. It was noted that Petitioner reportedly had surgery scheduled on the left knee to occur on July 13, 2015. Petitioner underwent a Non-Occupational Return to Work Evaluation on October 22, 2015, at which time it was noted that he had recovered well from his surgery without complication and that he had residual osteoarthritis for which he had received cortisone injections and had started a Synvisc series that had gone well. (RX3)

The Caterpillar Employment Information was entered into evidence at the time of arbitration as Respondent's Exhibit 4. The Short-Term Disability and Group Pay History was entered into evidence at the time of arbitration as Respondent's Exhibit 5.

CONCLUSIONS OF LAW

With respect to disputed issue (C), the Arbitrator finds that Petitioner failed to prove that he sustained an accidental injury on June 20, 2014 that arose out of and in the course of his employment with Respondent.

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

The "arising out of" component refers to an origin or cause of the injury that must be in some risk connected with or incident to the employment, so as to create a causal connection between the employment and the accidental injury. *Id.* There are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks, which have no particular employment or personal characteristics. *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2103 IL App (4th) 120219WC, ¶ 27; *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC. Injuries resulting from a neutral risk are not generally compensable and do not arise out of the employment unless the employee was exposed to the risk to a greater degree than the general public. *Id.*

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

within a reasonable time before and after work, are generally deemed to have been received in the course of the employment." *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶21.

In *Nabisco Brands*, the Court stated the act of walking down stairs at an employer's place of business by itself does not establish a greater risk than that faced outside of work by the general public. *Nabisco Brands v. Industrial Comm'n*, 266 Ill.App.3d 1103 (1st Dist. 1994). The Court also went on to state that the need to traverse stairs is not unique to an employee's employment. *Id.* at 1107.

The Arbitrator notes that the current case is unique as it involves not a fall on steps, but rather an injury that allegedly occurred when Petitioner simply raised his left leg to reach a normal stair step. The Arbitrator further notes that the current case lacks any suggestion that the repetitive use of the steps injured Petitioner's knee or contributed to the alleged injury. Rather, Petitioner appears to assert that lifting his left leg - while completely weightbearing with his right leg - is an accident that arises out of his employment with Respondent.

The Arbitrator finds that there is no evidence in the record indicating the stairs were defective or hazardous. Furthermore, there is no evidence that Petitioner was holding any work-related tools or other items that increased his risk of injury. The evidence reveals that the stairs had handrails on both sides and there was no evidence that was proffered by Petitioner demonstrating that the staircase increased the effects of the alleged injury. The evidence further reveals that Petitioner did not trip, slip or fall, but rather that he simply lifted his left leg to reach a stair step. As Petitioner provided no evidence to show his alleged injury occurred because of a risk connected to his employment, the Arbitrator finds that Petitioner failed to prove an accident arose out of his employment. As a result thereof, the Arbitrator finds that Petitioner failed to prove that he sustained an accidental injury on June 20, 2014 that arose out of and in the course of his employment with Respondent.

In light of the Arbitrator's findings with disputed issue (C), the Arbitrator makes no findings with respect to disputed issues (F), (J), (K) and (L), as those issues are rendered moot. The claim is denied.

STATE OF ILLINOIS)
) 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

Heather N.Robbins,

Petitioner,

vs.

NO: 15 WC 29197

19IWCC0106

Blessing Hospital,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 14, 2017, is hereby affirmed and adopted.

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

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

19IWCC0106

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 14 2019
TJT:yl
o 2/5/19
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROBBINS, HEATHER N
Employee/Petitioner

Case# **15WC029197**

19IWCC0106

BLESSING HOSPITAL
Employer/Respondent

On 12/14/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0834 KANOSKI BRESNEY
CHARLES N EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

2461 NYHAN BAMBRICK KINZIE & LOWRY
NANCY WILENSKY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

19IWCC0106

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

Heather N. Robbins,
Employee/Petitioner

v.

Blessing Hospital.
Employer/Respondent

Case # 15 WC 29197

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 **Springfield**, on **November 9, 2017.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 30, 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 **$21,228.48**; the average weekly wage was **$408.24**.

On the date of accident, Petitioner was 24 years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$10,507.12** for TTD, **$1,336.65** for TPD, **$0** for maintenance, and **$815.66** for other benefits for a total credit of **$12,659.43.**

Respondent **shall** receive credit for any medical bills paid pursuant to Section 8(j) of the Act per the written stipulation of the parties.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$272.16/week** for **137 1/7 weeks**, commencing **12/1/14 through 12/1/15** and **2/5/16 through 5/4/17,** as provided in Section 8(b) of the Act, with Respondent receiving credits as stipulated.

Respondent shall pay Petitioner temporary partial disability benefits from **12/2/15 through 2/4/16** totaling **$1,486.30** as set forth below as provided in Section 8(a) of the Act, with Respondent receiving credit for **$1,336.65 paid**.

Respondent shall pay Petitioner maintenance benefits of **$272.16/week for 16 2/7** weeks, commencing **5/5/17** through **8/26/17,** as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of **$23,365.09,** as found in PX 6, and as provided in Sections 8(a) and 8.2 of the Act, with credit for previous payments by worker's compensation and employer sponsored health insurance and subject to the stipulation of the parties.

Respondent shall pay Petitioner permanent partial disability benefits of **$253.00/week for 100 weeks**, because the injuries sustained caused the **20% loss of the person as a whole,** as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

December 11, 2017
Date

DEC 14 2017

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds:

On November 30, 2014, Petitioner reported an accident that occurred while taking a patient to the restroom. Petitioner wrote, "patient was using restroom, I was waiting by door she finished and started to walk out and passed out and fell on me." Petitioner claimed an injury top her back and left shoulder. Under "Cause of Injury" Petitioner marked the following: Caught in/between objects; contact with object; patient care (action); lifting/handling. (RX 8)

Medical records from Blessing Hospital show that Petitioner was seen in the emergency room on November 30, 2014 stating that she "was walking with a patient and the patient passed out on her and fell onto her abdomen. (Petitioner) then fell back and hit her left scapula on an IV pole." The history further indicates that Petitioner, who was 8 weeks pregnant, was complaining of left shoulder pain. Records indicate that she was being seen for pain in her shoulder and was diagnosed with contusions to the shoulder and abdominal region. (PX 1, p. 41) She was noted to have swelling and tenderness in her left shoulder. (PX 1, p. 45) X-rays of her scapula for back pain were read to show no fractures. (PX 1, p. 48) An ultrasound, performed to evaluate the fetus, was normal. Petitioner was discharged with a prescription for Flexeril and told to follow up with her primary care physician. (PX 1, p. 46)

A note from Quincy Medical Group dated December 1, 2014 states that Petitioner called in reporting that someone at work had passed out on her the day before and she had gone to the emergency room. Petitioner (who was pregnant) denied any bleeding or cramping. Her doctor was going to be advised. (PX 2, p. 107)

Petitioner was next seen at Blessing Corporate Services Employee Health on December 1, 2014. She was examined by Brenda Ellingson, a nurse. Petitioner gave a history of her accident. She was diagnosed with a left shoulder strain and neck strain and referred for physical therapy. Petitioner was given work restrictions. (RX 2)[1]

X-rays taken of Petitioner's cervical spine and left shoulder on December 3, 2014 were normal. (PX 1, pp. 51-52)

Physical therapy was initiated on December 4, 2014. Records from Advance Physical Therapy show that Petitioner underwent an initial evaluation on that date complaining of pain in her lateral neck, upper trapezius area and radiating in to her lateral arm to the fingertips of a 7/10 severity. (PX 3, p. 119) She reported that her pain was exacerbated by turning her head, raising her arm to the side or any movement of her head or arm. On examination, she was noted to have pain and spasm in her upper trapezius on the left and limited range of motion in her cervical spine to the left side. (PX 3, p. 120)

Petitioner was re-examined at Blessing Corporate Services Employee Health on December 5, 2014 at which time she reported she was in too much pain after trying physical therapy the day before and so not much was accomplished. Her diagnoses and restrictions were unchanged. Petitioner was given a sling for her shoulder. (RX 2[2])

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[1] The actual notes from this visit weren't admitted into evidence.

[2] The actual notes from this visit weren't admitted into evidence.

Petitioner returned to Blessing Corporate Services Employee Health on December 11, 2014 reporting continued difficulty with physical therapy despite attempts at taping. Nurse Ellingson recommended Petitioner be examined at Quincy Sports and Occupational Medicine. (RX 2)[3]

Petitioner was seen at Blessing Corporate Services on December 18, 2014 and her pain complaints now included her left arm and fingertips along with hypersensitivity to light touch. Petitioner reported she was dropping things such as a carton of milk. Her pain was noted to be so bad Petitioner felt nauseated. Again, it was recommended that she be seen at Quincy Sports Medicine. (RX 2)[4]

Petitioner was seen at Blessing Hospital on December 26, 2014 due to pregnancy-related issues. (PX 1, pp. 54 – 73)

On January 5, 2015, Petitioner returned to Blessing Corporate Services where she was seen by Brenda Ellingson, a register nurse. The visit was labeled as "workers' compensation" and a copy of the note was sent to Respondent's insurer. Petitioner's neck was better but she was still experiencing a sharp pain into her left arm with hand swelling. She was unable to remove her wedding ring. Petitioner had been elevating her arm in a sling when she was out but not at home. At home, she was using a pillow. Petitioner also mentioned occasional thoracic/upper back pain and some left hand weakness. Occasionally, she noted some right arm pain. Petitioner was also noted to be in her first trimester of pregnancy. Petitioner's exam was consistent with a neck, thoracic and left shoulder strain. It was recommended that she see Dr. Daniels to determine what, if any, additional treatment she needed. She was also continued on a five pound lifting restriction. (PX 4, p. 236)

Petitioner was examined by Dr. Daniels on January 9, 2015 with complaints of a left shoulder injury. She complained of sharp pain in her arm and into her fingertips. Petitioner reported that a patient was being assisted to the restroom, passed out and Petitioner was able to catch her but they both fell to the ground and an IV pole hit her and she started having sharp pains down her arm and into her fingertips. To date, Petitioner had been treated through Employee Health and had undergone physical therapy. Petitioner reported being left-handed and having difficulty writing and holding items. She advised that "One of the therapists felt the top of her back and her neck and informed the patient that it feels like there is bone on bone." (PX 4, pp. 237-238) Examination revealed good range of motion of the neck except with an inability to touch her chin to her chest, Spurling maneuver produced symptoms around the T-spine and C-spine area. Cuff muscles seemed to be fine and she had a little bit of impingement. Hawkin's testing was negative and the rest of the examination was negative. Dr. Daniels noted that her therapy needed to be adjusted as he felt it was aggravating things. She was offered some medications. Noting she had an injury at work he thought most of her symptoms "right now" were facet with, possibly, a little bit of tendinopathy but he didn't think anything "too bad" was going on. She was to continue physical therapy with a different regimen. (A return to duty and recheck sheet was referenced but not included in the exhibit). (PX 4, pp. 237-238)

On January 13, 2015, Petitioner sought treatment with Dr. Johnson, her family doctor, at Quincy Medical Group. Dr. Johnson wrote: "Pt here today for back pain. She states she hurt her back while taking a pt to the rest room. Her pt passed out during transfer, pt states her pt and her fell to the floor along with the IV pole. She now has thoracic spine pain that shoots down her left shoulder to her fingertips." PX 2, p. 65. Petitioner also complained of edema in her left fingers and an inability to lift a gallon of milk without dropping it due to numbness and pain. She continued to have complaints of left shoulder weakness. Dr. Johnson stated Petitioner could have T1, T2 facet issues and expressed concern about further therapy or adjustments absent x-rays of the thoracic spine. In light of Petitioner's pregnancy, he was concerned about ordering x-rays. Straight

[3] The actual notes from this visit weren't admitted into evidence

[4] The actual notes from this visit weren't admitted into evidence

leg raise was positive and Petitioner complained of low back pain shooting up to her neck and arm pain shooting from her neck. Petitioner admitted a history of depressive disorder. She was diagnosed with acute back pain in the left side with sciatica as well as mild left winging of the scapula and cervicalgia of the left arm with numbness and weakness. The doctor noted that he could not explain Petitioner's low back complaints or left leg complaints in light of the imaging findings. He noted that although Petitioner was left-handed, she was unable to hold a pen to write and was tender over her mid and lower thoracic spine with some pain in her lumbosacral area. In light of weakness in her dominant hand, Dr. Johnson opined that she would not be able to do any work and he gave her a release from work until further notice. He further noted he was going to speak with her therapist regarding treatment. (PX 4, pp. 239-241; PX 2, pp. 65-66)

A therapy discharge summary on February 2, 2015 indicated that Petitioner had attended 8 of 10 sessions and continued to experience pain at a level of 7/10. (PX 3, p. 141) She continued to demonstrate decreased range of motion in her cervical spine when last tested on January 2, 2015. (PX 3, p. 141) It was recommended that she be discharged from therapy due to a lack of subjective or objective change in her status. (PX 3, p. 142)

Per Dr. Johnson, Petitioner underwent a lumbar MRI on February 5, 2015 which did not demonstrate any central canal or neural foraminal stenosis. (PX 2, p. 163)

Petitioner returned to see Dr. Johnson on February 6, 2015, reporting that her back pain was getting worse as her pregnancy progressed. Her pain, at times, was very severe and she would sometimes crawl later in the day. She was unable to work. Her sacroiliac notches were tender on the left and any maneuver or straight leg raising to 30 degrees was quite uncomfortable. He felt that she had sciatica but would defer to her obstetrician and refer her to neurology. He noted her MRI was negative so he didn't think a neurosurgeon would have any input. Petitioner was referred to Dr. Austin Hake at Quincy Medical Group. (PX 2, pp. 69 – 70, 165 – 171)

Petitioner was seen by Dr. Hake in the Neurology department of Quincy Medical Group on February 23, 2015. (PX 2, pp.73-78) Petitioner provided a brief history of injury, and complained of pain in her neck and back with pain shooting down her left arm with numbness and tingling. She reported daily pain that could reach a 10/10 level. He noted that her x-rays and MRI were normal. On examination, he noted decreased pin prick sensation in the left arm, decreased vibration sensation in the left leg to the knee, and a winged scapula on the left. Dr. Hake indicated that Petitioner should return to physical therapy for her winged scapula as well as be referred to an orthopedic doctor, noting that Dr. Sullivant, another neurologist at the clinic, had confirmed that finding. He indicated that her neck pain, numbness and weakness in her left arm were concerning for brachial plexopathy or cervical radiculopathy. He suggested a cervical MRI and EMG to address those concerns. He felt that her low back pain was related to a lumbar strain. He noted that with her left shoulder and low back injuries, she should be on light duty. She was referred to orthopedics. She was diagnosed with cervicalgia, left arm numbness and weakness, low back pain, and left leg diffuse vibratory sense. (PX 2, p. 73 - 78)

Petitioner was seen by Matt Bruns, a nurse practitioner in the Orthopedic Department at Quincy Medical Group, on February 25, 2015. Petitioner's history of accident was described as "in the bathroom with the patient when she passed out and subsequently fell on her, knocking her into the wall. She states that when she fell into the wall she struck the corner near her left shoulder blade. She states that as she fell the IV pole and pump toppled onto them as well." Petitioner reported that she had been off work because light duty was not being offered. Her complaints included numbness and tingling in her hands in the mornings and pain in the left shoulder that was increased with lifting. On examination, NP Bruns noted tenderness in the posterior lateral aspect of the shoulder and the medial border of the left scapula. He did not detect scapular winging, saying that it must be subtle if present. He noted crepitus on range of motion and a positive impingement sign. He concluded that she had symptoms consistent with subacromial bursitis and impingement and recommended a

corticosteroid injection in the shoulder. Dr. Derhake felt that Petitioner had no indication of any shoulder injury other than soft tissue injury. He was concerned that the reported numbness and tingling were related to her pregnancy and that it was unlikely that there would be any way to solve this until the end of her pregnancy. He also felt it was unlikely she would suffer any injury to the long thoracic nerve due to the mechanism of injury. He performed a steroid injection to the subacromial bursa and recommended a return to full duty in one week. He performed that injection after obtaining approval from her obstetrician and recommended continued therapy. He kept Petitioner off work for a week (until 3/6/15). (PX 2, pp. 79-88)

On March 4, 2015 Petitioner telephoned Quincy Medical Group and spoke with Kimberly Gash, a registered nurse. Petitioner reported no relief from the shoulder injection. NP Bruns didn't feel Petitioner's shoulder was the cause of her pain and recommended she return to see Dr. Hake. Ms. Gash further noted that if hand numbness/tingling was the problem he recommended an appointment with Dr. Bingham for a possible carpal tunnel injection. Petitioner was so advised and relayed that she already had an appointment with Dr. Hake and didn't wish to see Dr. Bingham until after her baby is born in case the symptoms would then go away. (PX 2, p. 113)

Records show that Petitioner returned to physical therapy at Advance Physical Therapy on March 5, 2015. (PX 3, pp. 143-147) She reported current pain at 6/10 which was 8/10 at its worst. She also reported pain in her low back, neck and left hand, as well as numbness and tingling and reported an incident when her left shoulder locked and she had difficulty bringing it down while dressing. A course of physical therapy was begun and continued through April 6, 2015. (PX 3, pp. 148 – 190)

Petitioner was seen for a cervical spine MRI on March 17, 2015. At T3-T4 there was slight contact of the left cervical spinal cord without any definite foraminal narrowing as a result of a tiny paracentral disc protrusion. There was no cervical spinal canal stenosis or cord impingement. The MRI of the spine was read as normal. (PX 2, pp. 156-157, 204-205)

Petitioner returned to Dr. Hake's office on March 24, 2015. Petitioner reported continued left arm pain and numbness and tingling in her hand, but her low back pain had improved. She reported that the injection in her shoulder did not help. She noted that she had trouble lifting her arm in therapy. He noted that she had undergone a cervical MRI that showed mild to borderline bulging discs at C5/6 and C6/7 but was otherwise unremarkable. Dr. Hake questioned whether Petitioner had a "left plexopathy" and suggested EMG testing. He suggested that Petitioner continue therapy for the improving low back pain. Dr. Hake recommended a referral to Washington University (PX 2, pp. 84-88)

Petitioner completed physical therapy on or about April 6, 2015. Examination revealed weakness in the left relative to the right shoulder and the therapist recommended further therapy to resolve the arm issue. (PX 3, pp. 148 – 190)

Petitioner underwent the EMG on April 17, 2015 by Dr. Hake which was interpreted as normal. (PX 2, pp. 90-91)

Petitioner was seen at the Emergency Room at Blessing Hospital on April 27, 2015 for pregnancy-related issues. (PX 1, pp. 74 – 95)

Petitioner was again seen at the Emergency Room at Blessing Hospital on May 22, 2015 for pregnancy-related issues. (PX 1, pp. 96 – 139)

Petitioner gave birth to a baby girl in late May of 2015, two months premature.

Records show that Petitioner returned to Dr. Johnson on August 20, 2015, who noted that Dr. Hake had referred her to a specialist for her back problems. (PX 2, pp. 103- 104) He noted that Petitioner was only able to lift her left arm minimally before it locked. She reported that even typing caused pain as well as any lifting or carrying. He noted on exam Petitioner's arm locked up with nearly all function. Petitioner had delivered a baby girl three months earlier (and two months premature). She reported difficulty just managing the baby, especially lifting and carrying the baby or articles of care for the baby because of her injury. Petitioner wasn't working as she had been told there was no light duty available. She had also been training to be a surgical tech but couldn't do that and was changing to another area. Dr. Johnson indicated that he would work with WC and Dr. Hake to get the surgical consultation completed.

An office note from Quincy Medical Group dated August 28, 2015 indicates that Petitioner's case worker called and said Petitioner had the okay to call "Nifty" at Washington University in St. Louis and schedule an appointment for her shoulder issues. However, the doctor also needed to address Petitioner's work status at the time of the appointment. (PX 2, p. 124)

On September 10, 2015, Petitioner filed her Application for Adjustment of Claim herein. (AX 2)

Petitioner saw Dr. Johnson on September 18, 2015 and he noted that Blessing Hospital was requesting a work status form. He noted that Petitioner could not stand or walk due to pain in her shoulder and upper back with any motion of her torso. He noted that she could not lift her baby that weighed nine pounds to feed or burp her. He noted that she had been able to lift 1 or 2 pounds with some repetition but developed pain. He noted that fine manipulation with her dominant left hand would wear her out and cause tingling in her wrist and forearm. Dr. Johnson indicated that he would fill out a form setting forth Petitioner's limitations for Blessing Hospital. (PX 2, p. 184)

On November 5, 2015, Petitioner saw Dr. LaBore at Washington University who recorded a consistent history of her work-related accident. (PX 4, pp. 111-113) Petitioner reported sharp to burning and aching pain since her accident, that was moderate to severe and was worse when moving her arm. He noted that her primary pain was deep to the lateral acromion. He noted on physical examination that her shoulder range of motion was limited to 120 degrees of elevation and extension/internal rotation to her sacrum. He noted sudden pain onset with45 degrees of external rotation. He noted that O'Brien's, Yergaoson's and Speed's testing was were all provocative of pain localized deep in the acromion. He recommended an MRI/arthrogram of the left shoulder to evaluate her for labral or rotator cuff tears. Dr. LaBore issued a light duty slip indicating that she could return to work with no overhead work, no reaching/lifting with the left upper extremity and recommended desk work with as needed position changes for pain control. (PX 4, p. 201) An MR arthrogram of the left shoulder was completed on November 20, 2015 which was read by the radiologist to show a complex tear involving the extreme posterior aspect of the superior labrum extending into the superior, mid and inferior aspects of the posterior labrum. (PX 4, p. 203) The tear included the inferior labrocapuslar complex in its mid aspect and the inferior quadrant of the anterior labrum.

Petitioner was under surveillance on November 5, 2015. Video shows her leaving a building with another person carrying an infant carrier. She is also seen sitting in the car. (RX 4)

Petitioner followed up with Dr. Johnson on November 24, 2015 to review the MRI results and the visit with Dr. LaBore. (PX 2, pp. 38-39) They discussed that her employer was requiring her to return to work. Dr. Johnson noted that she was having significant left arm pain that was exacerbated with 20 to 30 minutes of work even on a keyboard, after which she required a one-hour break for resolution of the pain. He noted that the work offered to her was stuffing envelopes and/or working in the one day surgery waiting room assisting in

notification of patient's families which involved working at a desk and bringing patients to the phone. He noted that it was possible she could do this working 20 to 30 minutes at a time with one hour breaks for recovery of pain but in a whole day it would be hard for her to do more than 2 hours of work given her need for frequent breaks. He noted significant limitation in the movement of her shoulder. Dr. Johnson provided her with a return to work slip to work with her right hand or 20 to 30 minutes with her left arm on a light basis, with one hour breaks to recover from pain exacerbations. He noted that the MRI clearly showed very significant complex tears in the labrum, and that repairing the tears was going to require a very complex surgery. He noted that she would have chronic pain and very limited abilities for a long time.

A note in Dr. LaBore's records indicated that Petitioner was to be informed that the MRI showed labral tearing and he was recommending that she consult with their sports surgeon regarding repair. (PX 4, p. 193)

Petitioner returned to work on a restricted duty basis December 2, 2015.

Surveillance taken on December 5, 2015 showed Petitioner pushing a cart through a parking lot, lifting and placing bags into the rear of the vehicle, and moving a child's car seat into the vehicle. (RX 5)

Petitioner returned to see Dr. Johnson on December 10, 2015 reporting that she was supposed to work 4 hours the previous Wednesday but was only able to work 3. (PX 2, p. 40) Petitioner reported that she was to work again that night and wanted a work note as she had been unable to reach the surgeon in St. Louis. She reported that her arm would hurt even when she was just sitting at a desk, and that she had experienced pain after just 30 minutes at work. He noted that his previous work restrictions had not been honored. Dr. Johnson indicated that he would keep her off work that night and wrote a note outlining her acceptable duties. (PX 2, p. 41a)

A note from Dr. LaBore's records indicates that on December 10, 2015, Petitioner had called reporting that she was following her work restrictions but was having difficulty completing her 4 hour shift. She reported that pain was causing her great difficulty after an hour into her shift and was requesting a reduction in her hours or to be off work. She also reported that she had to drive 45 minutes to her employment and this was also aggravating her pain. (PX 4, p. 193)

Dr. LaBore issued a work slip on December 14, 2015, indicating that Petitioner was unable to return to work "due to driving duration aggravating shoulder pain". (PX 4, p. 191)

On December 17, 2015, Petitioner was seen by Dr. Robert Brophy of Washington University Orthopedics on referral from Dr. LaBore. (PX 4, pp. 97-99) She gave a history of her work injury on November 30, 2014 when she went to catch a heavy patient who fell back on her. She was using her arms to protect her abdomen and felt a sharp onset of pain in her left shoulder. Petitioner complained of persistent pain in her left shoulder since that time. He noted mild posterolateral tenderness over the left shoulder. He noted that active forward flexion was 130 degrees on the left compared to 170 on the right. Passively bringing forward flexion to 170 degrees was very painful. Active abduction was 165 degrees on the right and 100 on the left. Again, passive abduction to 160 degrees was painful. Petitioner had a positive O'Brien's sign on the left. Strength testing was painful on the left. Internal rotation was to T3 on the right but T5 on the left. Dr. Brophy reviewed plain films as well as the MR arthrogram that had been done. Dr. Brophy opined that due to Petitioner's lack of improvement with conservative treatment, she should have arthroscopy to evaluate the labrum and most likely repair the labrum. He reviewed the risks and benefits of surgery as well as the anticipated recovery process. Dr. Brophy provided a work release indicating that Petitioner could return to work with no use of the left upper extremity and frequent breaks. (PX 4, p. 103)

Notes from Dr. Brophy's office indicate that "Julie" was contacted for authorization of surgery but indicated on December 23, 2015 that she was going to obtain a utilization review. (PX 4, p. 102)

Petitioner saw Dr. Johnson on December 31, 2015 reporting ongoing shoulder pain. She was to have surgery with Dr. Brophy in the near future but workers' compensation had not yet cleared it. On examination she had somewhat restricted range of motion and pain with direct palpation. She could use her hand and make a good tight fist. Petitioner had not worked the day before because she had severe pain before going to work. Petitioner also reported that Respondent was not honoring the rest breaks as part of her light duty. Petitioner was told to return in one month. (PX 2, p. 42)

On January 14, 2016, "Julie" indicated that the utilization review had confirmed surgical authorization but on January 19, 2016, "Roberta" called indicating that she was going to obtain an IME first, which was set for March 10, 2016. (PX 4, p. 102)

Petitioner returned to Dr. Johnson's office on January 15, 2016, reporting that she understood her surgery to be approved. (PX 2, p. 44) She reported difficulty working 4 hours as scheduled and Dr. Johnson noted that she was not being given her scheduled rest breaks that Dr. Johnson had recommended. Petitioner reported so much pain in her left arm that her hand would shake. Dr. Johnson indicated that he was re-issuing his work note indicating that she could work 30 minutes with a 30 minute rest break and no more than 4 hours per day and no contiguous work days and not more than 3 days per week.

Petitioner returned to see Dr. Brophy on February 2, 2016, who noted that surgical approval was still being sought with an IME being scheduled. (PX 4, p. 95) He noted that Petitioner was having quite a bit of pain in her shoulder and had been working but having pain after being a work a few hours. On exam, he noted that she had pain with active or passive range of motion above 100 degrees on the left, and related her pain to her labral tear. Dr. Brophy recommended that she limit her work to 4 hours per day and not use her left upper extremity.

Petitioner followed up with Dr. Johnson on February 4, 2016, reviewing that she had returned to Dr. Brophy and had an IME scheduled. (PX 2, pp. 12 - 13) She reported that she had been unable to finish her four hour shift. He noted that she was currently having to leave work after two hours because the pain was so severe and struggled to get home safely. He noted that she still had limited range of motion of her shoulder and significant pain in her upper back. At this point, Dr. Johnson indicating that he was taking her off work because he did not believe it was safe for her to work.

On March 10, 2016, Petitioner presented to Dr. George Paletta for a Section 12 examination per Respondent's request. Petitioner gave a history that a patient stood up and she passed out and "hit my stomach and I was pregnant." Petitioner reported she tried to support the patient but was unable to do so. Petitioner stated, "I tried to hold her up but the IV pole came crashing down on top of my left shoulder and we fell down." She described injuring her left shoulder when she "hit the back of my left scapula on the wall as we went down." Dr. Paletta reviewed an MRI of the left shoulder. It showed some signal and morphology abnormalities involving the posterior superior labrum suggestive of a posterior labral tear. Dr. Paletta diagnosed Petitioner with a probable posterior labral tear of the left shoulder and unexplained radicular symptoms of the left shoulder. The doctor felt Petitioner's mechanism of injury described would not be typical for causing or aggravating a labral tear. Typically, a posterior labral tear is the result of a posteriorly directed traumatic force on the shoulder which would drive the humeral head or ball of the arm bone posteriorly so that it sheared the labrum causing a tear. This can also be caused by injury with the arm in an abducted or externally rotated position such as in a throwing position. Petitioner did not describe such a mechanism of injury. While Petitioner did correlate the onset of her pain to the work injury of November 30, 2014, it was the doctor's

opinion that the injury did not cause, accelerate, or aggravate a labral tear. Dr. Paletta opined Petitioner could return to work with restrictions of no lifting above chest level and no repetitive overhead activities below chest level. Petitioner could lift, push, pull, and carry up to 15 pounds. Dr. Paletta recommended an arthroscopy, but felt the need for the arthroscopy was not related to the work accident. (RX 2)

Petitioner returned to see Dr. Johnson on April 4, 2016. (PX 2, pp. 17 - 18) He noted that she remained off work because she was having so much pain that her blood pressure was going up. She still reported some blood pressure problems at home if she was more active. She reported being unable to carry or take care of her daughter because she was getting bigger. He opined that she had demonstrated beyond doubt that she could not work for a multitude of reasons including pain exacerbation and blood pressure elevation related to the increased pain.

In his addendum report of May 5, 2016, Dr. Paletta again stated the work incident of November 30, 2014 was not a causative, aggravating, or accelerating factor of Petitioner's left shoulder condition. After reviewing video surveillance footage from November 5 and December 5, 2015, it was clear that Petitioner was able to perform a far greater level of activity than she claimed. Taking this into consideration, it was the doctor's opinion that Petitioner could return to work without restriction. In the doctor's opinion, the treatment up to the time of the independent medical examination was reasonable and necessary. Petitioner did have some blunt trauma to the left shoulder that could have resulted in a contusion but it did not result in any labral pathology. Other than the initial evaluation and symptomatic treatment, it was the doctor's opinion that Petitioner's ongoing treatment was not necessary as a result of the work injury. After review of the surveillance footage, Dr. Paletta opined Petitioner had reached maximum medical improvement as she could clearly use her arm without obvious restriction, limitation or evidence of pain. The doctor felt Petitioner might want to consider EMG and nerve conduction studies to evaluate her apparent neurologic complaints; however, this was not related to the work incident. (RX 3)

Petitioner returned to Dr. Johnson's office on May 16, 2016 again and reviewed her problems with persistent pain, inability to work, and considerable frustration at the delay in providing surgery for her injured shoulder being reported. She had been seen by a surgeon more than three months earlier who felt she needed surgery and the workers' compensation physician who saw her 2 ½ months ago concurred. However, for some reason that information had not been passed on to the proper person. Since then Petitioner has not had surgery and isn't undergoing any therapy and is slowly declining. Her infant child was growing and becoming more difficult to care for and Petitioner was unable to work. Her blood pressure had been elevated which Dr. Johnson felt primarily stemmed from her pain. That day, her blood pressure was normal. (PX 2, pp. 19-20)

Petitioner saw Dr. Johnson again on June 20, 2016, who reviewed the IME opinion and reviewed Petitioner's history of no prior neck or shoulder problems and the onset of pain with her work-related accident. (PX 2, pp. 21-22) Petitioner reported that she was now dropping things and was depressed over her inability to work and care for her daughter. Dr. Johnson noted that Petitioner had been seen by a private investigator lifting her child out of a car seat and lifting a box out of a car and, consequently, the carrier thought she could go back to work. He also noted, "They went so far as to say that she must have had a prior injury and that the work injury could not of [sic] cause the issues that she has now." Dr. Johnson noted that Petitioner had demonstrated elevated blood pressure after trying to work due to her pain. He reiterated that Petitioner had no problems with her left shoulder before the injury at work. He felt she needed surgery. Petitioner was described as tearful during the visit. She was dropping things at home and becoming depressed over all the delays and the inability to work and take care of her daughter who was now 1 year old gaining weight and more difficult to care for from a lifting perspective. Her examination was positive for ongoing problems. Dr. Johnson felt she might need to go back to physical therapy or a pain clinic. "She may yet need to apply for Social Security disability." Petitioner appeared to have good strength when her arms were straight out forward. Her discomfort and limitation is when

she is reaching up over the shoulder level or over her head. "Any or all of these movements and motions may be required for her to perform the duties of nursing." She was to return in one month. (PX 2, pp. 21 -22)

On July 14, 2016, Dr. Brophy wrote Petitioner was a nurse with a history of accident on November 30, 2014 when she caught a patient. She caught a patient with her left arm, and tried to keep the patient off her stomach as she was pregnant at the time. She had sharp pain on the left shoulder. An MR arthrogram was obtained and identified a labral tear and a surgical repair of labral tear was recommended. Given Petitioner's history, there was "no other likely explanation for this injury and associated symptoms." Dr. Brophy felt the appropriate next step in management was surgery to evaluate and treat. (PX 4, p. 78)

Petitioner returned again to Dr. Johnson on August 1, 2016, who reviewed her situation and his frustrations again. (PX 2, pp. 2-3)

Petitioner offered the evidence deposition of Dr. Robert Brophy taken on August 30, 2016 prior to Petitioner's surgery as PX 5. When asked about the causal relationship between Petitioner's work related accident and the condition he diagnosed and the surgery he recommended, Dr. Brophy opined that the condition was "most likely related to that event". Dr. Brophy testified that "..catching a patient is similar to what linemen do in football when they're blocking and dealing with an opposing player. It's well known that it's very common for linemen to get posterior labral tears. We treat a lot of those in professional football players. It's a similar sort of movement as to what she would've been doing with a heavy patient. In addition, if you look at the text book description of a superior labral tear, it's associated with a traction injury onto the arm. For example, lifting on a heavy couch. What she did with the patient would've been a very similar movement. So if you look at the—what we think about for mechanism, she certainly had an event that would've been very similar to described mechanisms for this injury". (PX 5, pp. 10-11) Dr. Brophy testified that in examining Petitioner, he did not note any behaviors suggesting pain out of proportion to her findings and felt that the pain she described was consistent with her objective testing. (PX 5, pp. 21-22) He also affirmed that a labral tear in a 24 year old woman is unusual and is more likely to be traumatic than degenerative. (PX 5, pp. 22-23)

Dr. Johnson re-examined Petitioner on October 11, 2016, in order to clear her for her upcoming surgery. Regarding her shoulder, Dr. Johnson documented significant pain especially in the deltoid and scapular area of the left side when she stirs or writes for a longer period of time (Petitioner being left-handed). With flexion against resistance both inward rotation and flexion resulted in significant pain in the deltoid and scapula. Petitioner reported little difficulty carrying something like a jug of mil when her arm is fully downward and she is not using the rotary muscles of her shoulder to lift but when she does lift she notices significant pain in the deltoid and, occasionally, the scaphoid area. Petitioner was cleared for surgery. (PX 2, pp. 186 – 189)

Petitioner underwent surgery with Dr. Brophy on October 19, 2016, consisting of an arthroscopic glenohumeral debridement. The post-operative diagnosis was left shoulder labral tear and subacromial bursitis. Intra-operative findings included a type 1 SLAP tear with no frank instability at the biceps anchor but some fraying and flaps coming into the joint. There was a small partial thickness cuff tear at the inner surface of the infraspinatus. (PX 4, pp. 42-44)

Records show that Petitioner underwent an initial evaluation at Advance Physical Therapy on October 24, 2016 (PX 3, pp. 65-67) and began a course of physical therapy that continued to February 27, 2017. (PX 3, pp.3-68)

Petitioner returned to see Dr. Brophy on December 1, 2016 reporting continued pain at a level of 6/10 that could increase to 8/10 at times. (PX 4, p. 39) On physical examination, she had full forward flexion and

abduction and Dr. Brophy opined that she was making progress with range of motion. He recommended that she continue with therapy.

Dr. Johnson re-examined Petitioner on December 5, 2016. Petitioner reported unimproved pain and popping and locking of her shoulder. Her range of motion was pretty good. Petitioner told the doctor that her surgeon reported that she tore her rotator cuff and the labrum. "She also has a congenital issue in play." Dr. Johnson had looked at the operative report which showed some significant subacromial bursitis which "of course will cause some discomfort and dysfunction." They discussed her blood pressure. Noting that Petitioner had waited two years for surgery, he felt her healing would not be as rapid or complete and she might continue to have some pain and disability. (PX 2, pp. 192-195)

Petitioner returned to Dr. Brophy's office on January 17, 2017 reporting that she was still having pain every day at a 2/10 level that was at 4/10 at times. (PX 4, p. 8) Her only stated concern was some popping with active range of motion. On examination she had good range of motion and strength and Dr. Brophy noted some mild superficial crepitus with active and passive range of motion palpable over the lateral acromion. Dr. Brophy indicated that he was not worried about any intra-articular issues at that point and recommended continued therapy and a return in six weeks.

On January 17, 2017, Petitioner again returned to see Dr. Brophy. She reported she still had pain every day. Her current pain level was 2 out of 10 (worst was 4 out of 10). Her only concern was with some popping with active range of motion. On examination, Petitioner had 0 to 175 degrees of forward flexion bilaterally, and 0 to 170 degrees of abduction bilaterally. She had 5 -5 supraspinatus strength on the left compared to 5/5 on the right. She did have mild superficial crepitus with active and passive range of motion palpable over the lateral acromion. The impression was Petitioner was healing up and progressing following left shoulder surgery. Petitioner was to return to the clinic in six weeks or sooner if problems arose. She would likely be approaching maximum recovery at that time, in mid-March 2017. (PX 4, p. 8)

Petitioner presented to Dr. Johnson on February 13, 2017. She was still having pain in the left upper back and attending physical therapy. She was to see her surgeon in March. Petitioner's range of motion was better; however, she was still having trouble lifting. Dr. Johnson wrote, "Her surgeon was [sic] told her she will not be able to return to work and [sic] anything other than a desk job. I tend to agree. Her disability is gone on for so many months now about 2 years is very difficult for her to assume her previous position." On exam her back was negative for tenderness. She displayed good range of motion of her shoulder and neck and good distal strength with good grasp and good distal circulation sensation. Petitioner reported being unable lift a gallon of milk or her child. Dr. Johnson was going to keep an eye on her until she would next see her surgeon. She appeared more upbeat and ready to return to work then she had before due to pain and ongoing struggles with workers' compensation. (PX 2, pp. 197 - 203)

Petitioner returned to see Dr. Brophy on March 2, 2017 reporting pain every couple of days. (PX 4, p. 7) She reported current pain of 1/10 that would sometimes go up to 3/10, and continued to notice some popping. Dr. Brophy opined that she did not have any major structural issue to address and felt that she was approaching maximum improvement. He recommended that she transition to a home exercise program and return in two months. He did issue a return to work slip releasing Petitioner to "desk work only" as of March 8, 2017. (PX 4, p. 277)

Petitioner returned to Dr. Brophy on May 4, 2017 reporting continued pain every couple of days. Her current pain level was 2/10 and could go up to 4/10. She reported intermittent symptoms with activities of daily living and picking up her daughter. He noted full motion but some continued crepitus on range of motion of the left shoulder. He noted some mild discomfort on the end range of motion on the left. Dr. Brophy opined

that she did not need further follow-up and was at maximum improvement. He noted that she would continue to have intermittent symptoms going forward but should contact him if those symptoms worsened. He released her to return as needed. (PX 4, p. 276)

Respondent offered the evidence deposition of Dr. Paletta taken on May 12. 2017. Dr. Paletta testified that the accident that he claimed that Petitioner related to him was striking the back of her shoulder with an IV pole, and he opined that a blunt trauma to the back of the shoulder could not cause a labral tear. (RX 1, pp. 14-15) On cross-examination, Dr. Paletta admitted that Petitioner told him that a patient had passed out and fell against her and that she tried to support the weight of the patient as she was falling. (RX 1, pp. 18-19) He acknowledged that Petitioner's history and the medical records he reviewed documented a sudden onset of pain with her work injury that persisted until he saw her. (RX 1, pp. 21) In discussing the video surveillance that he relied upon in his second report, Dr. Paletta was unable to relate the length of the video and acknowledged that he had no knowledge of the weight of the baby being lifted or the baby in a child carrier. (RX 1, p. 24) He also acknowledged that he had no knowledge of the contents of the boxes that she was shown lifting so had no knowledge of their weights. (RX 1, p. 25) Dr. Paletta acknowledged that he could not testify with any certainty that the lifting that Petitioner was observed to do in the video was in excess of the restrictions that he had recommended for her in his initial evaluation. (RX 1, pp. 25-26) He acknowledged that his diagnosis of a probable labral tear and the appropriateness of surgery for that condition would not change if she were performing activities that were within the restrictions he had previously described. (RX 1, p. 27)

The Arbitration Hearing

Petitioner's case proceeded to arbitration on November 9, 2017. Petitioner was the only witness. The disputed issues were accident, causal connection, medical bills, temporary total disability, temporary partial disability, maintenance and the nature and extent of any injury.

Petitioner testified that on November 30, 2014, she was employed as certified nurses assistant (CNA) at Blessing Hospital in Quincy. On that date in the course of her duties, she was assisting a patient to and from the bathroom. Petitioner testified that when the patient stood up to return to her bed with Petitioner standing in front of her to assist, the patient suddenly passed out and fell striking Petitioner striking her in the stomach. Petitioner testified that she had her forearms extended to catch the patient, and when the patient struck her stomach, she attempted to raise the patient up to protect her stomach and unborn child, then fell to the floor with the patient and her IV pole falling on top of her. Petitioner testified that the patient was about her size and would have weighed 125 to 130 pounds. Petitioner testified that she noticed immediate burning pain in her back at the scapula and in her left shoulder and she had a welt across her back at the shoulder blade. Petitioner testified that she was directed to go to the hospital's emergency room and reported the accident there rather than first completing an accident report. Petitioner testified that she had an ultrasound at that time to confirm that the baby was alright and she also had an x-ray of her scapula. She testified that she was taken off work by the emergency room doctor.

She further testified that she was directed by Respondent to follow up with Brenda Ellingson, a nurse practitioner, through Blessing Hospital, on December 3, 2014, who ordered additional x-rays of her cervical spine and left shoulder, both of which were read to show no acute fractures. (PX 1, pp. 51-52) Petitioner testified that NP. Ellingson also prescribed physical therapy, which Petitioner began on December 4, 2014 at Advance Physical Therapy.

Petitioner testified that his course of therapy she undertook in December of 2014 did not help her. Petitioner testified that she sought treatment with Dr. Johnson in January of 2015.

Petitioner testified that she gave birth to her daughter on May 26, 2015 and that treatment for her injury was delayed during the later stages of her pregnancy. It was Dr. Johnson who referred her to Dr. LaBore in St. Louis.

Petitioner testified that she was contacted by Respondent regarding return to light duty work based upon Dr. LaBore's restrictions. She testified that there was a delay in offering her light duty work because they were trying to find somewhere to put her. Petitioner testified that she returned to work on December 2, 2015 and that the work consisted of sitting at a desk in the OB department letting patients enter the department and responding to questions. She testified that in performing this work, she had no arm rests on her chair to support her arm, and was also engaged in activities like stapling papers and sorting papers to provide patient information for the patients to take home, which was all strenuous on her left shoulder. Petitioner testified that she was experiencing a lot of pain during this time. She testified that Blessing Hospital is approximately 43 miles from her home each way, and driving that distance using her left arm on the steering wheel would cause her arm to catch. She also testified that she had been having difficulty with her blood pressure at the time of the birth of her daughter and she was having difficulty controlling her blood pressure because of the amount of pain that she was in due to her shoulder injury. Petitioner testified that due to these difficulties, Dr. Johnson placed additional restrictions upon her work activities and eventually took her completely off work on February 4, 2016.

Petitioner testified that these conservative treatments were not helping. Petitioner testified that she was continued off work during this time (March and April of 2015). Petitioner testified that her TTD benefits were stopped between August and October of 2015 because the insurance carrier felt she had been overpaid after having her child in May.

Petitioner testified that her surgery was delayed due to disputes raised by Respondent. Petitioner testified that during this time before surgery that she was having difficulty doing ordinary household chores. She testified that she was unable to do the vacuuming, do laundry or fold clothes. She testified that folding laundry would cause her arm to lock up. She experienced pain in caring for her newborn daughter, though she weighed only two pounds at birth. She testified that she experienced no improvement in her pain during this period of delay.

Petitioner acknowledged being under video surveillance and having had a chance to review those videos. She recalled that the videos showed her lifting her daughter who might have weighed 6 -7 lbs. at that point in time. Petitioner testified to having difficulty lifting her daughter but having to do it regardless because she is her mother. Petitioner testified to learning to deal with the pain in order to care for her daughter.

Petitioner testified that since her surgery the pain is not as intense and she has more range of motion, but she still cannot do many things that she did before. Petitioner testified that she never had any difficulties with her left arm or shoulder before this accident.

Petitioner testified that she attempted to return to work at Blessing Hospital and sought work at various other employers before returning to work as a classroom aid at Griggsville Perry School District middle school. She testified that in doing that work, she has experienced sharp pain in reaching up and writing on a board with her left hand, noting that she is left hand dominant. She testified that in those situations, she experiences a crampy achy feeling and a felling as if her shoulder is going to lock up. Documentation offered into evidence as Petitioner's Ex. 7 show that she applied for over 20 positions at Blessing Hospital and eight other employers.

Petitioner testified that at that final appointment, Dr. Brophy told her she would still have issues with her arm. Petitioner testified that she continues to have difficulty with a stirring motion and folding clothes still

causes aching and occasional sharp pains, but Dr. Brophy told her that she was "basically where it's going to be at" and would not improve. She testified that he told her that she would be unable to return to a CNA job because of the issues that she would continue to have with her arm.

In her daily activities, Petitioner testified that she has difficulty caring for her two children who have been born since this accident. She described an incident where her daughter was sitting in her lap with her head resting against Petitioner's left shoulder which caused sharp pain. Petitioner testified that recently, while trying to bake a cake, she found that the stirring motion still caused her pain. She also testified that she now vacuums with her right arm because it hurts to use her left. She reported that she must take breaks while folding clothes because of the pain that activity causes. She testified that she avoids many outside activities, like pulling weeds with her left arm, due to pain. Petitioner testified that she has pain in her left shoulder daily that varies in intensity but is always there. She testified that lifting her daughter or trying to carry books also causes pain. Petitioner testified that she no longer works out and her husband now must do some of her household chores, like cleaning the bathtub, due to her pain in her dominant arm. Petitioner testified that she is unable to raise her left arm beyond 45 degrees in front of her or above shoulder height to the side as at that point it feels like it locks up. She testified that the strength in her left arm has declined substantially. She testified that she was unable to hold her new son when he was first born in her left arm because it would start to hurt after five minutes. Petitioner testified that she has found that about 10 pounds is the most that she can lift without any discomfort, but can lift more if she is using her right arm to hold most of the weight and her left arm as just a guide.

Petitioner testified that she would have difficulty with several typical duties of a CNA at this point, such as picking a patient up in bed or repositioning a patient in bed. Petitioner testified that prior to her accident she was planning on becoming a surgical tech and was attending classes toward that end. Petitioner testified that she now is unable to perform the duties of a surgical tech so she had changed the focus of her schooling to a more general education Associate's degree.

On cross-examination Petitioner was questioned at length about the details of her accident. Petitioner explained that she was walking backwards out of the restroom, that the patient was facing her, that the patient "went down" and Petitioner hit the corner of the wall and had to raise the patient up and she was extremely dead weight. She further testified to feeling a sharp and burning pain almost instantly as she went to catch the patient and then when she hit the wall and the IV pole fell on top of them, she felt a sharp pain.

Petitioner was asked about the video surveillance which was shown during cross-examination. She acknowledged that the video also shows her lifting a box of formula that she testified weighed about 8 pounds. She testified that this would have been difficult as well, though she can lift more since her surgery. When asked if the activity shown on the video contradicted the limitations Petitioner was telling her doctors about during that same time period, Petitioner replied "No" and went on to explain that she had to take care of her daughter even if her arm hurt as she was her mother.

Petitioner testified to having a second baby on July 31, 2017.

Proofs were closed.

The Arbitrator concludes:

1. **Accident:** Petitioner sustained an accident on November 30, 2014 that arose out of and in the course of her employment.

Petitioner credibly described a patient passing out while she was assisting the patient from the bathroom. Petitioner described reaching out with her arms to catch the patient to not only protect the patient from injury while falling, but also to protect her own abdomen due to Petitioner's pregnancy. The initial emergency room record recorded immediately following the incident states that Petitioner "was walking with a patient and the patient passed out on her and fell onto her abdomen". Petitioner was in the course of her employment as she was on the clock and working. Petitioner's accident arose out of her employment because she was engaged in a work-related risk at the time of the accident.

Respondent's dispute as to accident appears to be based upon credibility issues contending that Petitioner's descriptions of the accident have been inconsistent and contradictory. The Arbitrator disagrees. Petitioner's injury form (RX 8) identified several factors that Petitioner felt caused her injuries. While there may be some variance in Petitioner's many descriptions of her accident thereafter, they are, overall, consistent. Furthermore, Petitioner appeared to be in good health prior to and on the day of the accident. Petitioner's accident report references back and left shoulder injuries. Petitioner testified to developing a "welt" on her left shoulder blade after the accident. She testified that one of the nurses looked at her shoulder blade, saw it, and then sent her down to the emergency room. The ER records note Petitioner was given instructions for a contusion. This would be consistent with Petitioner's testimony. The Arbitrator further found Petitioner's explanations for the activities portrayed in the video surveillance credible. Nothing shown on the video contradicted restrictions in effect at that time. Furthermore, these video clips were short and brief and showed activities greatly varying with what Petitioner would be doing as a CNA. Petitioner was a credible witness.

2. **Causation:**

Petitioner's current condition of ill-being in her left shoulder is causally related to her November 30, 2014 accident. In so concluding the Arbitrator relies upon Petitioner's credible testimony, the treating medical records, a chain of events analysis and the more persuasive opinion of Dr. Brophy, Petitioner's treating physician.

Dr. Brophy provided a detailed explanation of his causation opinion based upon a more accurate understanding of Petitioner's work- related accident. Dr. Paletta's opinion appears to be based upon an incorrect or incomplete understanding of the accident, assuming that she suffered only a blow to the back of her shoulder. It does not appear that Dr. Paletta was provided with Petitioner's injury report (RX 8) which documented various factors contributing to Petitioner's injuries. Had he reviewed it, he might have questioned Petitioner about those factors and asked for additional details, particularly as she identified "lifting" as one of the factors. Petitioner testified that she caught an unconscious falling patient in her arms before falling back with the patient on top of her. She also described lifting the patient. The Arbitrator finds Petitioner's descriptions to be credible, and not contradicted by less detailed descriptions in the medical records.

The Arbitrator further notes that Petitioner's initial treatment was primarily through Respondent's occupational/employee services department. Respondent did not submit those records into evidence. Therefore, exactly what might have been included in them is unknown. While Dr. Paletta mentioned them in hs report, the accuracy and completeness of his summary is unknown given the actual records weren't introduced.

3. **TTD:**

Petitioner is awarded TTD benefits from December 1, 2014 to December 1, 2015 and from February 5, 2016 to May 4, 2017, a period of 137 1/7 weeks.

Petitioner was taken off work as of December 1, 2014 and did not return to work thereafter until December 2, 2015 when she did so on a restricted duty basis. Between December 1, 2014 and December 2, 2015 Petitioner was either off work completely or under restrictions that Respondent did not/could not accommodate. While Respondent contends that Petitioner should not be entitled to TTD benefits from August 2, 2015 through October 25, 2015, it provided no basis for terminating TTD benefits as of August 2nd. Prior to February 25, 2015, Dr. Hake had Petitioner under light duty restrictions. He then referred Petitioner to Dr. Derhake who saw her on February 25, 2015, gave her an injection and told her she could return to full duty work as of March 6, 2015. He did tell her to follow up. Petitioner telephoned Dr. Hake's office on March 4, 2015 reporting no improvement in her shoulder after the injection and she was told to follow up with Dr. Hake which she did on March 24, 2015. Dr. Hake did not make any change in her restrictions but felt she should be seen at Washington University. Petitioner continued with physical therapy, underwent an EMG, and then gave birth prematurely. At this juncture, neither Dr. Johnson nor Dr. Hake had deemed Petitioner to be at maximum medical improvement. They were continuing to treat her symptoms and she was being referred for additional care. Petitioner is entitled to TTD benefits through December 2, 2015 when she returned to restricted duty work for Respondent. While Petitioner saw Dr. Labore on November 5, 2015 and he released her to restricted duty at that visit Petitioner testified, without rebuttal, that she was not offered specific light duty by Respondent until December 2, 2015. Petitioner testified, without rebuttal, that the delay was due to Respondent attempting to find work that fit her restrictions. Petitioner remained temporarily and totally disabled until light duty work was actually offered.

Thereafter, Dr. Johnson took Petitioner completely off work on February 4, 2016 due to the persistent problems she had been reporting over multiple appointments and Respondent's failure to follow his previous recommendations. His decision was based upon not only Petitioner's exacerbation of symptoms in her left shoulder but also the effect that her persistent pain had upon her blood pressure. It is also noted that Petitioner underwent surgery on her left shoulder on October 19, 2016 and was not released to "desk work only" until March 8, 2017. She was not released from care and placed at MMI until May 4, 2017. Petitioner is entitled to TTD from February 5, 2016 through May 4, 2017, based upon her testimony regarding persistent pain during that period as well as the opinions of Dr. Johnson and Dr. Brophy.

Respondent is allowed credit for any TTD paid ($10,407.12) and for employer-sponsored disability paid to Petitioner ($815.66).

4. **TPD:**

Petitioner is awarded temporary partial disability (TPD) benefits from December 2, 2015 through February 4, 2016, a period of 9 2/7 weeks.

Petitioner testified that she was offered light duty work by the Respondent as of December 2, 2015 and continued to attempt that work with considerable difficulty until she was taken completely off work again by Dr. Johnson on February 4, 2016. Records submitted by Respondent show that Petitioner earned a $31.44 for the period through December 5, 2015, $83.84 for the period from December 6 to December 19, 2015, $175.54 for the period from January 3, 2016 to January 2016 and $162.44 for the period from January 17, 2016 to January 30, 2016. These periods total 6 4/7 weeks, which times Petitioner's stipulated average weekly wage would total $2,682.71. During that period, Petitioner earned a total of $453.26. Thus, during these periods, a differential is due of $1,486.30. (($2,682.71 - $453.26)2/3) Respondent is entitled to a credit for $1,336.65 paid during those periods.

5. Maintenance:

Petitioner is awarded maintenance benefits from May 5, 2017 through August 26, 2017, a period of 16 2/7 weeks.

Petitioner was released to desk work only as of March 8, 2017. Dr. Brophy, when he last saw Petitioner, did not remove that restriction. Petitioner credibly testified, without rebuttal, that she was released by Dr. Brophy with advice to avoid strenuous activity and not return to the work as a CNA. Dr. Johnson concurred that Petitioner could not return to work as a CNA. Petitioner sought a return to work with Respondent at more than 20 positions and sought work with 8 other employers before finding work as a teacher's aide on August 28, 2017. As Respondent did not accept Petitioner back to work at a suitable job and as Petitioner has demonstrated a good faith effort to seek alternative work and ultimately found work, Petitioner is awarded payment of maintenance equal to her TTD rate for the period from May 5, 2017 until her successful return to work on August 27, 2017 in recognition of her vocational rehabilitation through a self-directed job search.

6. Medical expenses:

Petitioner is awarded the medical bills found in PX 6 subject to the Medical Fee Schedule and Respondent shall receive credit for any bills previously paid, per the stipulation of the parties.

Respondent disputed medical bills primarily on the issue of causation. Having found in Petitioner's favor on the issues of accident and causation, the Arbitrator finds that the Respondent should pay the medical bills offered into evidence as Petitioner's Exhibit 6, subject to the medical fee schedules and subject to the stipulation of the parties regarding payment of bills.

7. Nature and extent:

In addressing an award of permanent partial disability, the Arbitrator must address the factors set forth in Section 8.1b of the Act:

a. AMA impairment evaluation: No AMA impairment rating was offered in this case so this factor is given no weight.

b. Occupation of the injured employee: Petitioner was a CNA at the time of her injury and has been unable to return to that profession. Both Dr. Brophy and Dr. Johnson concurred in that regard. (See RX 2, p.

200) She has sought out lighter alternative work and credibly described some difficulties with certain aspects of that work, although it appears she is able to perform the essential functions of the position. This factor is given significant weight.

c. Age of the employee at time of injury: Petitioner is 27 years of age and has a prolonged period of future employment in which she must accommodate and deal with the residuals of this injury. This factor is given significant weight.

d. Employee's future earning capacity: No evidence was offered as to what Petitioner is earning in her new position. No evidence was presented to show what, if any, impact Petitioner's injury has had on her future earning capacity although she did testify, without rebuttal, that she was pursuing education to become a surgical tech at the time of her injury and had to give that goal up due to her ongoing symptoms, limiting her ability to advance her goals in the healthcare field. Therefore, this factor is given some weight.

e. Evidence of disability corroborated by medical records: At her final appointment, Dr. Brophy acknowledged that Petitioner was continuing to suffer pain on a regular basis and opined that she would have intermittent symptoms going forward. Petitioner credibly described her persistent pain and limited motion and its impact upon her everyday life. Petitioner's testimony regarding her ongoing symptoms and limitations is generally supported by the treating medical records. This factor is given significant weight.

Taking into account these factors, the Arbitrator finds that Petitioner has suffered significant permanent partial disability as a result of this accident, and awards 20% of a person-as-a-whole.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF MC LEAN)

☒ 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

Tim Larkin,

Petitioner,

vs. NO: 15 WC 30746

19IWCC0107

State of Illinois/Illinois State University,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 12, 2017, is hereby affirmed and adopted.

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

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

DATED: FEB 14 2019
TJT:yl
o 2/5/19
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LARKIN, TIM
Employee/Petitioner

Case# **15WC030746**

SOI/ILLINOIS STATE UNIVERSITY
Employer/Respondent

19IWCC0107

On 12/12/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0225 GOLDFINE & BOWLES PC
KEVIN ELDER
4242 N KNOXVILLE AVE
PEORIA, IL 61614

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

0988 ASSISTANT ATTORNEY GENERAL
JORDAN HOMER
500 S SECOND ST
SPRINGFIELD, IL 62706

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

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

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

DEC 12 2017

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

Larkin
Employee/Petitioner

v.

SOI/Illinois State University
Employer/Respondent

Case # **15** WC **30746**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael K. Nowak**, Arbitrator of the Commission, in the city of **Bloomington**, on **2/23/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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 **8/14/15**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$37,264.76**; the average weekly wage was **$716.63**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **no** dependent children.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $16,328.24. as set forth in Petitioner's exhibit 3, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of $447.75/week for 6 4/7 weeks, commencing 10/2/15 through 11/16/15, as provided in Section 8(b) of the Act.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of **$429.98**/week for a further period of **43** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **20% loss of use of the right leg**.

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

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

Signature of Arbitrator

11/29/17
Date

ICArbDec p. 2

FINDINGS OF FACT and CONCLUSIONS

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

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

Petitioner is now a 53 year old building service worker (B.S.W.) or maintenance man for Illinois State University, where he has worked fulltime since 1992. He generally works second shift, from 5:00 p.m. until about 1:00 a.m.

On August 14, 2015, a Friday, around 8:00 p.m., Mr. Larkin was mopping a stairwell. As he walked backwards, his foot slipped in soapy water and he twisted his right knee. He yelled out as he felt a sharp pain in his right knee. A co-worker, Jay Eganhouse, came over to check on him right away. He completed his shift that night without medical treatment and without notifying his supervisor Leah Donnelly of his accident.

The following Tuesday, August 18, 2015, Petitioner sought medical treatment for his right knee with Dr. Lawrence Li, an orthopedic specialist, whom he had seen in the past (Petitioner Exhibit 2) The accident and symptom history given to Dr. Li was, "while waxing the floors he felt his knee give out...He reports the waxed floors were wet and he stepped on a sand paper like area on the floor. His foot became stuck and he slipped." (Petitioner Exhibit 2, p. 21) Dr. Li suspected a lateral and medial meniscus injury and ordered an MRI. The MRI was done later that day and showed a tear of the body and posterior horn of the lateral meniscus and a small vertical tear in the medical meniscus. The MRI also showed some chondral loss. (Petitioner Exhibit 2, p. 46)

The next day, August 19, 2015, Petitioner reported his accident and right knee injury to his supervisor Ms. Donnelly. She testified on behalf of Respondent. Her supervisors report is Respondent's Exhibit 1. Petitioner's Form 45 was completed on August 26, 2016. It states that Petitioner was mopping floors and slipped while walking backwards, twisting his right knee. (Petitioner Exhibit 1, p. 1)

Petitioner continued working until his right knee surgery on October 2, 2015. Dr. Li performed a right knee arthroscopy with partial medial and lateral meniscectomy and an abrasion chondroplasty of the femoral trochlea and patella. (Petitioner Exhibit 2, pp. 39-40) Post-operatively, Petitioner testified that several complications occurred. He developed a blood clot from his right leg that went to his lungs. He also developed pneumonia and was hospitalized for a week following his surgery. While hospitalized, he detoxed from his pain medication. Following his release from the hospital, and at his wife's urging, he entered a two week detoxification residential program for pain medication withdrawal. While in this program, he began his physical therapy for his right knee. Mr. Larkin saw Dr. Li in follow-up on October 30, 2015. He was released to return to work in 2 weeks. He had no further follow-up with Dr. Li. (Petitioner Exhibit 2, p. 45)

Petitioner was sent for a §12 exam on December 7, 2016, with Dr. Nikhil Verma. (Respondent Exhibit 2) Allegedly, Mr. Larkin did not tell Dr. Verma of his August 14, 2015 mopping accident. However, Dr. Verma did review the supervisors report of accident, and the records and operative report of Dr. Li dated October 10, 2015. Dr. Verma felt that the MRI did <u>not</u> show any frank meniscal tears. (Respondent's Exhibit 2, p. 2) Ultimately, Dr. Verma opined that since Mr. Larkin did not report a specific accident to him and instead

reported gradually worsening right knee pain since 2000, that there is no causal relationship, and that Petitioner's right knee diagnosis is degenerative chondromalacia. (Respondent's Exhibit 2, p. 3)

Mr. Larkin testified that he previously had a left knee arthroscopic surgery by Dr. Li. He did not injure his left knee at work. He also testified that he had had injections into both of his knees in the distant past for "cartilage replacement." He had never had any prior right knee surgery. He testified that he told Dr. Verma about his August 14, 2015 accident. Petitioner denied having any subsequent right knee injuries.

On cross-examination, Petitioner testified that he was not wearing protective anti-slip "footies" because none were available for him. He used his personal sick days to cover his lost work time. He is able to complete all of his work tasks now, but he asks for assistance with anything heavy.

Ms. Donnelly, his supervisor, testified that accidents are to be reported immediately, which Mr. Larkin did not do. She testified that anti-slip foot coverings should have been available, but admitted on cross-examination that sometimes her employees don't wear them. She indicated Petitioner is able to do all of his job duties now. Ms. Donnelly testified that Petitioner has worked for her for many years and that she has generally found him to be truthful. She admitted on cross-examination that Mr. Larkin would likely have been mopping on August 14, 2015 as this was part of his job at that time.

Based upon the above, the Arbitrator finds that Petitioner has established that a compensable accident occurred on August 14, 2015.

As to the issue of causal connection, Dr. Li opined, "Diagnosis: Right knee medial and lateral meniscal tear, chondral loss along the femoral trochlea from an injury at work. The mechanism of his work injury is one which would cause the medial and lateral meniscus tears." (Petitioner Exhibit 2, p. 37) As for the MRI findings, the Arbitrator notes that the interpreting radiologist, Dr. Alex Krasny, observed and specifically described the lateral meniscus tear, even noting the possibility of a displaced meniscal fragment. Dr. Krasny also specifically described the suspected medial meniscus tear. (Petitioner Exhibit 2, p.46) Intra-operatively, Dr. Li observed a "...small tear in the posterior horn of the medial meniscus..." and "...central tearing of the lateral meniscus...," and removed multiple loose bodies in the joint lines. (Petitioner Exhibit 2, pp. 39-40, operative report) A single mopping accidental injury to the right knee was clearly reported to Dr. Li and was included in Petitioner's accident reports. These histories were reviewed by the independent examiner. Dr. Verma's reason for denying a causal connection is based upon the alleged lack of accident history given to him directly by Petitioner in December 2016, and based upon his disagreement with Dr. Li and Dr. Krasny on the MRI findings.

The Arbitrator finds the opinions of Dr. Li more persuasive that those of Dr. Verma. The MRI findings of two meniscal tears were confirmed by Dr. Li during surgery. The Arbitrator accordingly finds that the requisite causal connection has been proven by Petitioner.

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

Issue (K): **What temporary benefits are in dispute?**

Respondent based its dispute as to medical expenses and temporary total disability based upon the issues of accident and causation. Having found the issues of accident and causal connection in favor of Petitioner, it logically follows that the reasonable and related medical bills and liens and temporary total disability benefits are also properly awarded.

Petitioner's Exhibit 3 evidences medical expenses of $16,328.24. This is a compilation of three outstanding medical bills and a health insurance lien. The lien amount is $5,774.65. It is a lien for Health Alliance, which Petitioner has due to his employment with Respondent, so they are entitled to an 8(j) credit in this amount.

Respondent shall pay reasonable and necessary medical services of $16,328.24, as set forth in Petitioner's exhibit 3, 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.

As for the issue of T.T.D. benefits, Petitioner testified that he worked up until his surgery. The surgery was 10/2/15. Dr. Li's post-surgical follow up was on 10/30/15. Dr. Li released Petitioner to "return to work in 2 weeks." (Petitioner Exhibit 2, p.45) Petitioner returned to work on Monday, November 17, 2015.

Respondent shall pay Petitioner temporary total disability benefits of $447.75/week for 6 4/7 weeks, commencing 10/2/15 through 11/16/15, as provided in Section 8(b) 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 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes Petitioner continues to work as a maintenance worker, which is likely a medium to heavy occupation, which means that his right knee is likely to remain symptomatic at work. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 51 years old at the time of his injury, with a remaining sixteen years to work. Petitioner has diminished healing capacity and a low threshold for future injury as a result thereof. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b). Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. Petitioner suffered two torn menisci as a result of his work accident. Following his surgery he developed serious complications including a post-operative blood clot, pneumonia, and became dependent of his prescribed pain medication. As a result he was hospitalized for an additional week. He returned to full duty work within six and a half weeks. Mr. Larkin testified that he is able to perform all of his job duties currently, but that he gets assistance for heavier jobs. He further testified that weather changes cause his right knee to ache. He wears braces on both of his knees while at work. He notices pain with squatting and kneeling. He also notices knee swelling after a more physical day of work. He testified that his co-workers sometimes call him, "snap, crackle and pop" due to his creaking knees. The Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 20% loss of use of the right leg pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Herron,
Petitioner,

vs. No: 14 WC 32479

19IWCC0108

HTH Companies Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on July 13, 2017, is hereby affirmed and adopted.

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

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

19IWCC0108

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 14 2019

Joshua D. Luskin

o-02/05/19
jdl/wj
68

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HERRON, DAVID
Employee/Petitioner

Case# **14WC032479**

HTH COMPANIES INC
Employer/Respondent

19IWCC0108

On 7/13/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0149 WARREN E DANZ PC
710 N E JEFFERSON ST.
PEORIA, IL 61603

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT E MACIOROWSKI
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60606

STATE OF ILLINOIS)
)
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

David Herron
Employee/Petitioner

v.

HTH Companies, Inc.
Employer/Respondent

Case # 14 WC 032479

19IWCC0108

An *Application for Adjustment 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 **Springfield**, on **May 22, 2017**. After reviewing all of 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 the date of accident, **09/09/14**, 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 **$29,120.00**; the average weekly wage was **$560.00.**

On the date of accident, Petitioner was **42** years of age, ***married*** with **0** dependent children.

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

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

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

Respondent ***shall*** receive credit for the medical bills paid as shown in RX 3.

ORDER

Respondent shall pay reasonable and necessary medical expenses in the amount of **$23,256.59** as found in PX 7 subject to the Medical Fee Schedule as provided in Section 8(a) and 8.2 of the Act. Respondent shall receive credit for those medical bills paid as reflected in RX 3.

Respondent shall pay Petitioner permanent partial disability benefits of **$336.00/week** for **71.75 weeks**, because the injuries sustained caused the **35% loss of use of the left hand**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued between **September 9, 2014** and **May 22, 2017** and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

July 8, 2017
Date

JUL 13 2017

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner alleges he injured his left arm/wrist on September 9, 2014 while working for Respondent. Respondent disputes that an accident occurred at work.

The Arbitrator finds:

Decatur Ambulance Service was called to Tate &-Lyle on September 9, 2014 regarding a possible arm injury. Upon arriving Petitioner was found sitting upright in a chair. His arm had been splinted but incorrectly. Upon removing the splint an obvious fracture to Petitioner's left wrist was apparent. Another splint was provided. According to the report Petitioner stated he got his hand caught in between a truck and a box. He rated his pain at a "6" on a scale of "1 – 10." Petitioner was loaded onto a cot and into the ambulance. Morphine was given but Petitioner reported it didn't help his pain "too much." Petitioner was transported to St. Mary's Hospital ER. (PX 4)

Petitioner presented to St. Mary's Hospital in Decatur on September 9, 2014 reporting that he had been working for Tate & Lyle that morning when his "arm got caught" while attempting to help another truck back up. The Emergency Room noted that Petitioner reported being at work at 7 a.m. earlier that day when his left hand was "pinched" between a work vehicle and a heavy box. Petitioner complained of severe pain and deformity to his left wrist since then. Petitioner was diagnosed with a left radiocarpal dislocation, admitted for surgery, and underwent emergent closed reduction. Dr. Kefalas performed the surgery. Petitioner was discharged the same day. (PX 1)

On September 9, 2014 Kenny Morgan completed a written statement:

> We where [sic] changing 17 Bld. Box. David Herron was spotting and I Kenny Morgan was driving Call Off truck. I was in the process of backing truck up at that time. David was on the passenger side, he was in my view the hole [sic] time then he went around to the driver side of the truck once again he was in my view. Not once did I ever see him in between the rails of the truck or the Box. The truck never slammed into the box. I never knew that anything was wrong intill [sic] he left with Jeff. Nor did he even yell or [?] like he had been hit by truck or even in pain. (RX 5)

Dr. Jeffery Smith examined Petitioner on September 10, 2014 and issued a letter to Dr. Kefalas thereafter. According to the letter Petitioner had injured his left wrist on September 9, 2014 when he was helping to back up a truck at his work site and he got "bumped." Dr. Smith wrote, "It is not clear to me exactly what happened. He states it did not get pinched between a building. He states he did not fall on it. He states he was actually just moving the arm quickly when the injury occurred. It did not get crushed, pulled or any significant trauma to it." On examination Petitioner had some swelling in his left wrist. Dr. Smith recommended an MRI to more thoroughly evaluate the left wrist. Petitioner was then supposed to return. (RX 1)

Petitioner signed his Application for Adjustment of Claim herein on September 15 (or 19), 2014. He alleged a left wrist/arm injury when "crushed by truck." (AX 2)

Petitioner presented to the office of Dr. Smith on September 23, 2014 regarding his left wrist. Dr. Smith noted that Petitioner had a scapholunate ligament tear, an LT injury and what appeared to be a TFC avulsion injury in addition to his previous perilunate dorsal dislocation. Surgical repair of the

scapholunate ligament tear was recommended along with stabilization of the LT joint and open repair of the TFC. (PX 3)

Petitioner underwent surgery with Dr. Smith on September 24, 2014 for a left wrist dorsal perilunate dislocation. During the surgery Petitioner underwent an open repair of the scapholunate ligament, placement of the SLIC screw as bone repair, and posterior interosseous nerve ligation. The doctor noted in his Operative Report that Petitioner had completely disrupted the scapholunate ligament. (PX 2)

Petitioner followed up with Dr. Smith on October 7, 2014 at which time he was doing well with no swelling, drainage or erythema. He was to be placed in a short arm cast and return in four weeks. Petitioner was prescribed Norco for pain control. Dr. Smith indicated Petitioner could return to work on a light duty basis (no use of the left hand). (PX 3)

Dr. Smith re-examined Petitioner on November 4, 2014. At that time Petitioner had good motion of his fingers with good capillary refill and diminished pain complaints. X-rays were satisfactory. He was put back in the short arm cast and was told to return in one month. His restrictions remained unchanged. (PX 3)

Petitioner returned to Dr. Smith's office on December 2, 2014. He was still doing well with good signs of healing. X-rays showed that the scapholunate angle had been restored to about 45 degrees and there was just a little bit of palmar tilt to the lunate. Otherwise, things looked good. Dr. Smith noted there appeared to be some confusion whether Petitioner's injury happened at work. He wrote, "The patient assures me this is the only injury he has had to the wrist. The circumstances surrounding this are in my mind not necessarily conclusive, but pretty clear that this is what occurred. I have no reason to believe there was another injury nor was this a chronic problem that he has been dealing with." Petitioner was to return in four weeks. His restrictions remained unchanged. (PX 3)

Petitioner's ongoing progess was noted at his January 6, 2015 exam with Dr. Smith. He was placed in an Exos brace at that time with no changes in his restrictions. (PX 3)

Petitioner returned to see Dr. Smith on February 5, 2015 reporting that he was doing well but experiencing some stiffness which the doctor expected. His range of motion was also limited. Petitioner was to continue with his brace and work restrictions and return in one month. (PX 3)

At the request of Respondent, Petitioner was examined by Dr. David Fletcher on February 18, 2015. His report of February 24, 2015 is found in RX 3. In reviewing Dr. Fletcher's report, it shows that Petitioner did provide Dr. Fletcher with a picture of his left wrist that Petitioner took at 7:00 a.m., while at the St. Mary's ER. Dr. Fletcher wrote that Petitioner was spotting a truck on September 9, 2014 to pick up a roll off box. The end of the roll off truck started to smash Petitioner's wrist between the truck and the box so he quickly jerked his arm down to avoid his left hand/wrist being crushed. Petitioner told the doctor that he acutely wrenched his wrist when he jerked his arm away. He denied any pre-existing injury.

Petitioner's complaints included an intermittent sharp pain and stiffness (moreso at night). He also complained of a shooting pain from his wrist up his forearm and down into his ring and pinkly fingers as shown on a pain drawing he completed. Dr. Fletcher felt Petitioner had sustained a serious acute injury to his left wrist. He wrote, "Apparently, there is some question where this injury occurred because his left wrist was not crushed." Dr. Fletcher commented that Petitioner described an acute wrenching injury from jerking his arm/wrist to avoid his arm/wrist being crushed. Dr. Fletcher did not believe a wrenching injury would cause that violent of an acute injury. He felt the picture and x-rays taken the morning of the injury suggested a very acute injury.

Dr. Fletcher took x-rays during the exam and noted that the proximal portion of the SLIC screw appeared to "violate" the superior cortex of the scaphoid. He felt a thin cut CT scan should be performed to confirm the placement of the screw and if the cortex was violated he recommended a proximal row carpectomy or wrist fusion.

Dr. Fletcher further found features of peripheral neuropathy that Petitioner had reported symptoms regarding since the start of the injury and that would be related to an acute wrist dislocation. He felt electrical studies should be performed to rule out ulnar neuropathy at the wrist. If the studies were negative and the CT scan showed no violation of the scaphoid Dr. Fletcher would place Petitioner in work hardening for four to six half days while continuing transitional work (which Petitioner was doing). He could not yet comment on maximum medical improvement.

Dr. Fletcher saw no pain behaviors. He agreed with temporary job restrictions.

The report shows that Dr. Fletcher had an opportunity to review all the treating records including the ER records, the records of Dr. Kefalas and those of Dr. Smith.

Petitioner returned to Dr. Smith's office on March 5, 2015, reporting he had seen Dr. Fletcher in February of 2015. He reported ongoing stiffness, as expected, but could fully fist and extend his fingers. Petitioner's primary complaint was some numbness to his small and ring finger and achiness up the ulnar aspect of his forearm. Petitioner was instructed to continue with his brace and be careful with left wrist activity. Petitioner's restrictions were unchanged. A nerve conduction study was ordered to evaluate for cubital tunnel syndrome. (PX 3)

Petitioner contacted Dr. Smith's office on March 11, 2015 advising that he was choosing to wait until a later date for the nerve conduction study. (PX 3)

Dr. Smith re-examined Petitioner on April 2, 2015 at which time Petitioner was doing "pretty well" with some pain and good stability of his wrist. Range of motion was about fifty percent with 40-50 degrees of flexion and extension. Radiographs were good. Petitioner was told to continue working on range of motion and advised he would never have a normal wrist as far as range of motion. However, the doctor felt he would continue to get better but had to have realistic expectations. His work restrictions as a safety attendant remained in effect. (PX 3)

Petitioner once again presented to Dr. Smith on June 2, 2015 and reported he was working primarily watching manholes. He was doing "really well" with little pain and improved flexion. Petitioner was advised to continue "cautious activity" with the wrist. Petitioner wished to empty 50 lb. bags and the doctor felt he could do so. He also wished to help with scaffold building and was allowed to do so. Petitioner was to return in four weeks. (PX 3)

As of June 30, 2015 Dr. Smith felt Petitioner could progress to more normal activity slowly and gradually. He was to return in one month. (PX 3)

Dr. Smith again met with Petitioner on July 30, 2015. Petitioner reported he was lifting and cutting 50 pound bags and operating a fork lift. He was doing well and told to continue his current work status. Petitioner was to return towards the end of August after the doctor had a chance to speak with the designer of the SLIC screw regarding long term placement of it. (PX 3)

When Petitioner returned to see Dr. Smith on August 25, 2015 he was doing pretty well and denied any complaints or problems. He had sixty degrees of flexion on the left and 85 degrees on the right. Extension was about 40-45 degrees on the left and about 80 on the right. The screw was in great position and holding the reduction nicely. He was told to progress to more activity. Dr. Smith was to speak with the screw's designer regarding removal. (PX 3)

Dr. Smith re-examined Petitioner on September 29, 2015. Petitioner was noted to be "doing nicely." He had good motion of his fingers and could fully fist and extend the fingers. Flexion was about 40 degrees and extension was 30 degrees. He had good supination and pronation. Dr. Smith wished to leave the screw in place. They discussed removal but Petitioner did not wish to be laid up with any surgery and wanted to continue working to get caught up. Petitioner was allowed to return to regular activity. (PX 3)

Petitioner again saw Dr. Smith on November 24, 2015. Petitioner reported returning to work for two days and being fired from Tate & Lyle. He was doing really well on exam with good alignment of the wrist and about 60 degrees of flexion and extension. Supination and pronation was normal. He had very little, if any, pain or discomfort and good motion of his fingers. The screw was in great position. He was told to progress to regular activity as desired. The doctor wrote, "As far as the etiology of the wrist goes, this is only the result of significant trauma." He was released to return as needed. (PX 3)

Dr. Smith's Deposition

The deposition of Dr. Jeffrey M. Smith was taken on February 23, 2016. (PX 6) Dr. Smith is a hand surgeon. He testified that he saw Petitioner early on September 10, 2014 after Dr. Kefalas had performed a closed reduction on Petitioner's left wrist. Petitioner had been referred to him for an open surgery. Dr. Smith testified to reviewing the ER history from St. Mary's. He also took a history from Petitioner. Based upon his review of all that it was his understanding that Petitioner sustained a wrist dislocation. Some reports indicated Petitioner hyperextended his wrist when he caught it between a truck and a large container/box. Dr. Smith's record wasn't quite clear as to exactly what happened but it was "high energy." Dr. Smith felt the report he gave to the ER, Dr. Kefalas and the "WorkSafe doctor, Dr. Fabrique,"[1] were all consistent and consistent with his injury. According to them, Petitioner had caught his hand between a truck and a box of some kind and quickly jerked it out to avoid becoming crushed. (PX 6, pp. 1 -6)

Dr. Smith testified that Dr. Kefalas did a great job of reducing Petitioner's wrist especially since it is very difficult to do so. (PX 6, p. 7) He further testified that according to the x-rays and picture Petitioner's carpal bones were not sitting end on end but rather side by side. The dislocation tore the ligaments and the bones overlapped each other. It would be an extremely painful injury. (PX 6, p. 8)

Dr. Smith testified that Petitioner, clinically, did well post-surgery. As of their visit in November of 2015 Petitioner had pretty good motion and his pain was well controlled. Dr. Smith explained that Petitioner would never have normal motion after such an injury. Dr. Smith felt there was a good chance he would need, at least, one more operation. The SLIC screw may need to be removed at some point. There is also a high incidence of progression with arthritis in this type of injury. (PX 6, p. 10)

Dr. Smith felt Petitioner should expect some limitation in his range of motion. His strength was pretty good. Over time, he may have further loss of motion. Petitioner, according to the doctor, was very compliant with instructions and very easy to work with. He was of the opinion that Petitioner's condition in his left wrist was causally related to the accident occurring and the history of the September 9th injury. (PX 6, pp. 11 -12)

On cross-examination Dr. Smith acknowledged that histories are only somewhat important to him. It was not clear to him when he met with Petitioner on September 10th exactly what had happened. According to Dr. Smith, Petitioner stated that he didn't get his hand pinched between a building. He did not fall on it. "He states he actually was just moving his arm quickly when the injury occurred. He said it did not get crushed, pulled or other – any significant trauma to it." (PX 6, pp. 13-14) He agreed that when

[1] Not in the record

Petitioner was last seen in November of 2015 he was doing "really well," not pretty well. (PX 6, p. 17) He acknowledged that when he last saw Petitioner he did comment that Petitioner's injury occurred as a result of "significant trauma." (PX 6, p. 19) Dr. Smith was then asked if the history initially provided to him by Petitioner would not be the type of history that would cause the trauma he diagnosed and treated, to which Dr. Smith replied "Partially." He agreed that moving one's hand quickly would not be considered a significant trauma or cause the type of condition he diagnosed. He added, "Moving your hand quickly wouldn't create this injury. Now, this was always a confusing issue for me. He wrote on his intake form, before I talked to him, and his history was that it was caught between a box and a truck at work. The report that he gave to the ER was that it was caught between a box and a truck at work. The report that he gave to [Dr. Kefalas] was that it was caught between a truck and a box at work. By the time he saw me, I don't know what kind of medications he had been on, I don't know what kind of pain he was having, I'm sure he was in pain, so I was a bit confused about exactly what had happened and he wasn't able to describe it very well to me." (PX 6, pp. 19 – 21) Dr. Smith agreed that he didn't document that Petitioner was under any medication or appearing confused when he met with him. (PX 6, p. 21) Dr. Smith agreed that if the history Petitioner provided to him was correct, that history would not have caused the condition he treated Petitioner for. (PX 6, p. 21)

Dr. Smith agreed/assumed that the histories given closer in time to the event tend to be more accurate. (PX 6, p. 25)

Dr. Smith testified on redirect examination, that he still wasn't clear how Petitioner was injured. (PX 6, p. 26) Dr. Smith further testified that Petitioner's injury was consistent with the history provided on the patient intake form in his office[2]. (PX 6, p. 34) According to Dr. Smith, Petitioner filled out the upper extremity history form before seeing the doctor and described his injury as follows: "Yesterday, left hand caught between a truck work and a box. And I pulled it out before it got squashed."

Dr. Smith felt that Petitioner sustained a high-energy injury. He testified that he had an MRI done on September 24, 2014 and it took him two surgeries to repair the ligaments between the scaphoid and lunate bones, an operation performed with a screw placement to hold the two bones together while the ligaments heal and then pin the bones so that the healing of the other ligament would occur. Dr. Smith, after the surgery, continued to follow Petitioner until releasing him to full duty on September 29, 2015. He testified that it was his understanding that Petitioner's job duties were physically demanding with lots of heavy lifting. He testified that when he last saw Petitioner in November of 2015, Petitioner gave him a history of doing "pretty well," and he noted good alignment. He testified that when he last saw Petitioner, Petitioner had normal supination and pronation. He had a loss of 20 degrees in flexion and extension. He had good range of motion of his fingers. He testified that in November of 2015, he advised Petitioner to return if he had any problems and he had not. He testified that in terms of additional surgery to remove the screw or arthritis, time will tell. There was no recommendation at the time of his last examination to do any additional surgery. (PX 6)

Deposition of Dr. Fletcher

The deposition of Dr. David Fletcher was taken on March 23, 2016. (RX 2) Dr. Fletcher, board certified in occupational and preventative medicine, testified that Petitioner told him he had no physical contact with anything when he was hurt. He jerked his arm to get out of harm's way. He further testified that such history contrasted with the one given to his nurses as he told them his left wrist had been smashed between a truck and a box. (RX 2, pp. 1 – 12)

Dr. Fletcher agreed Petitioner had evidence of a scapholunate ligamentous tear that required closed reduction. He further testified that his MRI suggested a TFCC tear of the wrist but his clinical

[2] Which was not a part of the record but certainly available to both parties

exam didn't show any evidence of the tear. He was concerned about some ulnar nerve involvement at Guyon's Canal in the wrist but he had no evidence of chronic regional pain syndrome. (RX 2, pp. 12 – 17)

Dr. Fletcher felt all of Petitioner's treatment had been appropriate. It was further his understanding from new material supplied to him that Petitioner was released at maximum medical improvement in late 2015. (RX 2, pp. 17-18)

Dr. Fletcher was asked several questions about the photograph taken by Petitioner of his left wrist. He agreed he showed some anatomic deformity of the wrist but he could not see any evidence of a soft tissue injury – no abrasion, ecchymosis or other kind of evidence of direct trauma to the left wrist that would correlate with the history provided to the ER physician and Dr. Kefalas. Dr. Fletcher explained that the initial emergency room records from Dr. Kefalas and the ER physician are inconsistent with the physical exam appearance, including the photographs. He felt that if Petitioner had, indeed, sustained a "direct, physical, high energy type of injury" he would have experienced some violation of the soft tissue. He felt the injury as shown in the photograph appeared more consistent with an injury that would be a little bit older than just a couple of hours. (RX 2, pp. 18 – 22)

Dr. Fletcher agreed that Petitioner gave a couple of different histories to Dr. Smith, including one where he didn't get his hand/wrist pinched or caught. (RX 2, p. 22)

Dr. Fletcher opined that the history provided by Petitioner to him would not have caused the condition for which Dr. Smith performed surgery. He testified that the type of injury sustained by Petitioner was significant and required a high energy type of traumatic event to cause disruption of the scapholunate ligament. It would need to be a fall or a direct blow to the wrist to cause that type of disruption. He felt Petitioner sustained an injury outside of work and came to work with it. The injury in the photos appeared several hours old. Dr. Fletcher did not feel "jerking" would cause the substantial trauma depicted in the x-rays and requiring a reduction of the dislocation and then pinning of the scapholunate ligament. He further added that even Dr. Smith had testified in his deposition that the mechanism of injury reported by Petitioner to him about jerking the hand/wrist would not cause that type of injury. (RX 2, pp. 22 -25)

On cross-examination Dr. Fletcher agreed that Petitioner sustained an acute, severe injury. He agreed that it would be an extremely painful injury. Dr. Fletcher agreed that if Petitioner had "pinched" his hand between a vehicle and the box that could potentially cause his injury. However, Dr. Fletcher stressed that the problem with the case was that Petitioner had given conflicting histories regarding the mechanism of injury. (RX 2, pp. 25 – 30)

Dr. Fletcher further testified that in his experience the most contemporaneous history is usually, in his opinion, the best history. He acknowledged that Petitioner told him he was spotting a truck to pick up a roll-off box and the end of the roll-off track started to "smash my wrist between the truck and the box." He felt that history, however, was different than the one given to the ER and Dr. Kefalas as Petitioner repeatedly denied to the doctor having any kind of physical force strike his wrist. He basically "pulled it out fast before there was going to be a crush injury, but he was emphatic his left wrist was not crushed." (RX 2, pp. 31-32)

Dr. Fletcher was also asked about Petitioner's ability to work the morning of the 9th if he had been hurt away from the work site. Dr. Fletcher did not think Petitioner had begun working until a little bit after 6:00 a.m. He couldn't answer if Petitioner could have worked that long as he didn't know Petitioner's pain tolerance. (RX 2, p. 37)

Additional Medical Treatment

Petitioner returned to see Dr. Smith on April 19, 2016, having last been seen on November 24, 2015. Petitioner was reportedly doing pretty well. He denied any tremendous amount of pain but had limitations with motion. Supination and pronation was noted to be 80 degrees. Wrist flexion was 50 degrees. Extension was 20 – 30 degrees. He could fully fist his fingers and extend them. JAMAR grip strength was 36 kg. maximum on the left. The screw remained in good position although a little bit of lucency about the tip of the screw was noted. They discussed use and abuse of the left arm. Petitioner was advised to try and avoid repetitive lifting of more than 40 to 50 lbs. He was also told to avoid activities that cause a lot of extension to the wrist. Petitioner was to return in six months. (PX 3)

Petitioner has undergone no further treatment since April 19, 2016.

Deposition of Dr. Kefalas

Dr. John Kefalas was deposed on August 19, 2016. (PX 5) Dr. Kefalas saw the patient quickly after his arrival at the E.R. The history given to Dr. Kefalas at that time is that the "Petitioner was working at Tate and Lyle on September 9, 2014 and he was attempting to help a truck back up. As the truck came closer to him, he realized the truck wasn't going to stop and so he had to get out of the way and his left hand was out I guess between the back of the truck and this object. His hand got caught in between these two spaces and it pulled out his arm." Dr. Kefalas testified that his history was consistent with that given in the E.R. His left hand was pinched between a work vehicle and a heavy box. Dr. Kefalas further testified that at the time he saw him Petitioner was in quite a bit of pain. Dr. Kefalas explained that it was a serious condition and admitted him immediately for surgery at the operating room under general anesthetic. Dr. Kefalas commented that this was a complex injury and he referred the patient to Dr. Jeff Smith for surgical consultation the next day. Dr. Kefalas also commented that this was a very painful type of injury and Petitioner was under significant medication when being referred to Dr. Smith. Dr. Kefalas testified that it would be highly unlikely that Petitioner would have been able to show up for work and work for an hour or more with this injury before going to the E.R. Dr. Kefalas responded to the question as to the cause of the accident and stated, "I believe one could state within a reasonable degree of medical certainty that the injury that Mr. Herron sustained September 9, 2014 where he described his left wrist being caught between two objects is causally related to his left perilunate dislocation, yes." Dr. Kefalas was asked whether the condition could have been present for a day or more and he acknowledged that it was a possibility, but added that, in all honesty, it would not be something that anyone could live with for a day because of the pain. Dr. Kefalas described this as a high-energy trauma and it took a lot of energy to dislocate the wrist. (PX 5)

The Arbitration Hearing

Petitioner's case proceeded to arbitration on May 22, 2017. The issues in dispute were accident, causal connection, medical bills, and the nature and extent of any injury. Numerous witnesses testified at the hearing.

Danny Cox, a paramedic employed by the Decatur Ambulance, testified that he had been an EMT since 1988. He testified to his certifications and employment and stated that on September 9, 2014, he was on duty at 6:30 a.m. when he received a call to go to Tate and Lyle Plant for an emergency call. He arrived at 7:17 a.m. and found Petitioner sitting in a chair wearing a splint on his left arm. He asked Petitioner what happened and Petitioner stated that he caught his arm between a wall and a box. He removed the splint which had been put on incorrectly and put a gauze on Petitioner's left hand and called the fracture a silver fork because it had a curve in it. He recorded the pain complaints from Petitioner as a six out of ten. He stated that based on the location and the visual he had it looked like a fresh fracture. He could tell that both bones were broken because it looked different. He stated that although he did not

have an X-ray, it was an obvious fracture where there had to be a gross deformity to the limb. He found that it was a very obvious distinct fracture. The history given to the EMT was that Petitioner caught his hand between the truck and a box. Mr. Cox testified that he definitely remembered Petitioner and remembered Petitioner's fracture because it was the first one of those that he had ever seen that looked "like that." The nature of the injury caught his attention. He stated that Petitioner's pain complaints were six out of ten. Mr. Cox also testified that it looked like a fresh fracture. Mr. Cox distinguished that it was a fresh fracture by stating that an initial fracture would be deformed and would involve a lot of pain, but an old fracture would have a great deal of swelling along with the bruising.

Mr. Cox was asked if he had a way of telling how old the fracture was and he stated that if the fracture was a new fracture, there was going to be a great deal of pain and deformity. He stated as time passes, you will get swelling, bruising, and cyanosis after a period of time. He stated that everybody is different, but a fresh fracture is going to be deformed and have a lot of pain. He stated that an older fracture will have a great deal of swelling and bruising.

Mendi Getz, a paramedic who worked alongside Danny Cox that day, also testified on behalf of Petitioner. She stated that Petitioner could not have driven to work with a fracture like that. She testified she has been an EMT since 1998 with two years of college and continual education to require a state license. She worked for Decatur Ambulance since 2006. Ms. Getz testified that when she arrived at Tate and Lyle with her partner she observed Petitioner sitting in a chair. The history given to her was that Petitioner was backing up a vehicle and had his hand out. It then got caught between a box and a truck from what she recalled in her report. She noted the injury to the left wrist and her evaluation was that the splint put on was improperly so she removed it and re-splinted it properly. She noted that Petitioner was in significant pain at the time. She called the fracture a silver fork fracture, which meant that if you hold the hand it would hold up basically like a fork with a curve. Ms. Getz was asked whether Petitioner could have driven any vehicle with the injury she observed, to which she stated, "No, not with a fracture like that, no." Ms. Getz testified that you would have to have a zero tolerance for pain to drive to work and stated that she could not personally do that. She also stated that she has not seen one single person who has worked with fractures.

Petitioner testified that on September 9, 2014 he was a spotter for the driver of a roll back truck that picked up large boxes at the Staley Tate & Lyle Plant in Decatur, Illinois. Petitioner was working for Respondent, a subcontractor, at Tate & Lyle. Petitioner testified that he had worked at his job for Respondent for about five years before the accident and during that time he had no difficulty with his job nor did he have any disciplinary issues against his work. He had a good attendance record. He had never missed any work for any health problems at all. He never had a workers' compensation claim or any injury whatsoever prior to September 9, 2014.

Petitioner testified that on the date of injury, September 9, 2014, he checked in to work at 6:30 a.m. having driven his car to work, taking around ten minutes. That morning he got up at five o'clock and drove to the company parking lot. He parked his car and went through the security gates. He testified that he was never late for work. He testified that he was wearing a hoodie with long sleeves, admitting that the hoodie would cover up his right and left upper extremities. He first went to the break room where he would put his lunch on a shelf. He then went to a safety meeting, which is held each day and conducted by the safety supervisor, Gary Hart, to review the conditions of the day. Petitioner testified that he was then assigned to the roll off truck as a spotter with a co-worker, Kenneth Morgan. Petitioner denied having any problems or trouble with his left hand or wrist before coming to work that morning.

Petitioner testified that he and Kenneth Morgan proceeded toward the roll-off truck. Petitioner then went to the break room where he bought donuts and sodas for himself and Kenneth Morgan. He

carried them to the truck and they ate breakfast before proceeding to the first dumpster to pick up a (30) roll off dumpster (a big box that sits very high). Petitioner testified that as Mr. Morgan proceeded to back up, Petitioner was behind the truck spotting and guiding Mr. Morgan. Petitioner testified that as the truck was backing up his left arm got caught in between the back of this truck and the box. As he felt the pressure of the arm, it became pinched and he pulled it out quickly. He felt immediate pain.

Petitioner testified that he then waved down another employee who was driving by in a truck and told him that he got his left arm hurt when he caught it in between the end of the truck and a box. Petitioner stated that he had felt pressure on his arm and yanked his arm down and that is when the arm was hurting and that is when he stopped one of the guys coming by who took him to the office. Petitioner reported that his arm started to get pinched, but his reaction was to pull his arm up and out because it could have been pinched off. He went to the HTH office and Jeff Binkley called for an ambulance. Gary Hart, the safetyman, was also there. Petitioner was then taken to the E.R. at St. Mary's Hospital.

Petitioner testified to his medical care thereafter, all of which was consistent with what is found in the medical records. Petitioner testified that after being discharged from St. Mary's Hospital for the reduction performed by Dr. Kefalas, he was sent home and given a prescription to fill. He testified that the last medication he took prior to seeing Dr. Smith was the IV in the hospital. He testified that he did not fill the prescription prior to seeing Dr. Smith.

Petitioner testified that he did take a photograph of his left wrist while in the emergency room. Petitioner testified that he shared that photograph with Dr. Fletcher. That photograph was admitted into evidence as Petitioner's Exhibit No. 8.

Petitioner testified that he returned to work shortly after his surgery, being paid his full salary and there was no claim for temporary total disability benefits.

Petitioner testified that he was released to full duty by Dr. Smith in September of 2015 and was terminated three days later for failure to fill out proper paperwork. Petitioner testified that another individual was also terminated with him for failure to fill out the proper paperwork.

Petitioner testified that he has difficulty using his left wrist at the current time; it is stiff in the morning regardless of weather and it is not as strong as his opposite hand. He described it as being stiff like a sprained ankle as it stays real "tight." He testified that his normal duties included building scaffolding and he couldn't do that because of the "percentage of this" and stiffness. He further testified that "they" put him on a fork truck because the levers were on the right. In his opinion, he's still "kind of" doing light duty work on a fork truck.

Petitioner testified that after being terminated Petitioner has been unable to find any other work. When asked if he has been looking, he replied in the affirmative adding "here and there." He has performed construction work most of his life. Petitioner has a 12th grade education. He is still looking for work.

Petitioner denied returning to Dr. Smith or seeing anyone else explaining that Dr. Smith told him his arm was how it was going to be and there was nothing else to do unless the hardware is removed but Petitioner explained that he couldn't afford to sit out for another year with his arm "like that."

On cross-examination Petitioner was questioned at length about the accident and when asked if his arm made physical contact with the two objects (the truck bed and the box/dumpster) Petitioner replied in the affirmative adding that his arm was almost pinched.

Petitioner further testified that he didn't return to see Dr. Smith after the doctor released him. He also testified that every time he saw Dr. Smith, he would see Dr. Fletcher two days later. Petitioner disagreed that he told Dr. Fletcher that he didn't get his arm caught.

Respondent called Kenneth Lee Morgan. Mr. Morgan was the truck driver working with Petitioner at the time of the alleged accident. Mr. Morgan stated he worked for Respondent a couple of years and was a roll-off truck driver. He reported to work at like 5:30 a.m. and attended a safety meeting before he and Petitioner started work. Morgan testified at the time of accident Petitioner was backing up a truck and Petitioner was out spotting. Petitioner was on the passenger side and went over to the driver's side. Morgan testified that he did not see the accident happen. He did not know what happened to Petitioner until Jeff Binkley, a different employee took him to the medical. He states that another employee Jeff Binkley and Joe McKinney came up and asked him what happened. Morgan testified that he was with Petitioner at the Safety Meetings prior to the work accident and Petitioner had no complaints at that time. He made no observation and did not see Petitioner holding his arm or nothing like that before the accident. He stated that he worked with Petitioner for a year and that Petitioner's work was good. He stated that Petitioner trained him when he first got his job and kept paperwork and made sure that it was done because you could lose your job if it wasn't. He described Petitioner as a good worker. He described the truck as being very big and it was roll off, which would be used to pick up a box such as a dumpster. He knew Petitioner was on the driver's side doing the spotting. He testified that he "did not see the accident, but it could have happened, yes sir." He acknowledged that the area of work was close quarters and you have a lot of close over hangs. He described it as a dangerous plant. He acknowledged that Joe McKinney and Jeff Binkley requested that he fill out a report before he left on the date of accident. They told him to write it out as to what happened. Mr. Morgan admitted that it could have happened and it was truly an accident. He stated it was not intentional. He did not know for sure. Jeff Binkley, after coming back from the hospital, questioned him and he states he told them that there is so much stuff going on – you are looking constantly. You have a boom going up on the back of the truck. There is a lot of stuff going on, and it could have been. He stated he did not deny it and he did not know. He testified that prior to the accident he saw no evidence of any injury such as holding his arm or any favoring or complaints. Mr. Morgan was asked if he had admitted that he ran into Petitioner's hand whether that would have affected his employment, and he stated that he didn't think so. He also testified that it would be hard to say whether he would have been written up. He acknowledged that he had a good relationship with Petitioner and they were a team and he saw no reason why Petitioner would blatantly lie.

Petitioner's medical bills are found in PX 7.

Photographs of Petitioner's left wrist are found in PX 8.

The Arbitrator concludes:

Issue (C) Whether Petitioner sustained an accident on September 9, 2014 that arose out of and in the course of his employment with Respondent.

Petitioner sustained an accident on September 9, 2014 that arose out of and in the course of his employment with Respondent. In support thereof the Arbitrator notes the following,

Respondent relies heavily upon Dr. Fletcher's opinion that Petitioner, in all likelihood, came to work with his injury. In support of Dr. Fletcher's opinion Respondent suggests that Petitioner had a short drive to work which he, arguably, could have endured despite pain, that he was wearing a hoodie that covered his arms (and, therefore, any sign of injury), that he did not yell or cry out after the alleged accident, that the paramedics acknowledged there could be other causes for Petitioner's type of injury,

and that his co-worker, Ken Morgan, who was with him at the time of the accident (albeit in the truck driving) saw no signs of an accident. Respondent also questions whether Petitioner was hurt at work since the photograph of his arm taken at the E.R. showed no evidence of a soft tissue injury or abrasion to Petitioner's skin.

While the Arbitrator finds Respondent's position reasonable, two important bits of testimony came out during the hearing leading her to find in Petitioner's favor.

Respondent's witness, Mr. Morgan, was with Petitioner the morning of the alleged incident and was given no signs or complaints of his injury before the accident. The Arbitrator finds it very significant that Petitioner testified that he went in and purchased sodas and donuts for he and Mr. Morgan before they began working. Petitioner also testified that he carried them out to the truck. Petitioner was not cross-examined on this activity. His testimony was unrebutted. Mr. Morgan did not testify that Petitioner had any problems performing that activity or outward signs of an injury. No one testified that Petitioner didn't use both hands or, at least, his left hand/arm, to carry the items to the truck. Dr. Smith and Ms. Getz, the paramedic, both testified that if Petitioner had injured himself before coming to work he would have had great difficulty using that hand/arm. The Arbitrator considers this unrebutted testimony to be very strong supportive evidence that Petitioner had not injured himself prior to coming to work that morning.

While Petitioner's medical records contain somewhat varying accounts of the exact mechanism of injury all the histories place Petitioner at the back of the truck and assisting with its backing up to a box/dumpster. It would not seem unreasonable for Petitioner to have been a little off on his description given the circumstances and appearance of his arm.

Kenneth Morgan, Respondent's witness and Petitioner's co-worker, stated that Petitioner was spotting his truck to pick up a big dumpster. He stated that Petitioner had walked over to the driver's side, but he did not see the accident happen. Mr. Morgan stated that Petitioner had taught him and that Petitioner was a good employee. He had worked for him for years. He stated that although he did not see the accident, it could have happened, and acknowledged that the area worked was close quarters and that you have a lot of close overhangs. He described it as a dangerous plant. Mr. Morgan was asked to fill out a letter that letter which contained admissions he did not see the accident. He acknowledged however that there is so much stuff going on that you are looking constantly. He stated that there was no reason for Petitioner to lie.

Petitioner was taken to the ER at St. Mary's, where he gave the history of backing up a truck and as the truck came closer, he realized the truck would not stop, and so he had to get out of the way and his left hand was caught between the back of the truck and a box. That is also the history of Dr. Kefalas, who was the surgeon that first came in and placed his fracture surgically back in place. Dr. Smith, who saw Petitioner the next day, admitted that his intake form (not included in the record) was consistent with the history given to the other medical providers.

Dr. Smith admitted that it was not exactly clear what had happened to Petitioner, but acknowledged that he doesn't really get concerned over the history, because his primary focus is the injury, diagnosis, and treatment. Dr. Smith acknowledged that at the time he dictated the history, he did not look at Petitioner's intake form or the other medical history. Dr. Smith acknowledged that the injury he diagnosed was consistent with the history given to that of the ER and that of Dr. Kefalas.

The ambulance drivers, Danny Cox and Mendi Getz, both stated that Petitioner sustained a silverfork fracture and gave a history that the left hand got caught between a truck and a box. Danny Cox acknowledged that it was a fresh fracture because Petitioner was deformed and he was in a lot of pain. He could tell both bones were broken because they looked different. Mendi Getz obtained the same

history that Petitioner was backing a vehicle with his hand out and it got caught between a box and a truck. She noted that Petitioner was in severe pain and administered morphine. While Ms. Getz reluctantly acknowledged on cross-examination that Petitioner could have possibly injured himself before coming to work, she further testified that, in her opinion, Petitioner could not have driven any vehicle to work with a fracture like that and that she never saw a person work with fractures of that nature. Danny Cox stated it looked like a fresh fracture because an older fracture would have had a lot of swelling and bruising.

Petitioner testified that he felt "pressure" on his left arm, like it was being pinched, as it was between the box/dumpster and the end of the truck bed. As he felt the pressure on his arm he yanked his arm down because he feared it was going to get caught or pinched between the two if he didn't. When asked if his arm was actually pinched, he explained that it started to get pinched and he pulled his arm up and out to free it. He further testified that his arm made physical contact with the box/dumpster and the end of the truck. He was wearing a hoodie that day so his left arm was covered by fabric. Petitioner was taken to the HTH medical office and he reported the injury to Jeff Binkley and Gary Hart, the safetyman, who put his hand in a splint. Neither Gary Hart nor Jeff Binkley were called as a witness in the case. While Dr. Fletcher stressed the lack of abrasions and soft tissue injuries present in the photograph, Petitioner was wearing a hoodie with his arms covered at the time of the accident. Furthermore, Petitioner described a "pinching feeling" that he was experiencing and trying to avoid leading up to his moving of his arm out of harm's way. Abrasions and soft tissue injury might not be apparent under those circumstances.

Petitioner, who has worked for Respondent for five years, and never filed a claim or had any disciplinary or attendance matters at all, was a credible witness regarding the accident. There was witness testimony that Petitioner could not have worked or driven to work with this injury prior to his shift if he in fact had the fracture prior to the accident. Respondent's witness, Mr. Morgan, established that he was with Petitioner that morning and displayed no signs or complaints of his injury before his accident.

Petitioner's failure to fully and accurately describe how the accident occurred doesn't mean that it did not occur whatsoever. Petitioner has a 12th grade education and consistently described the circumstances surrounding the accident despite using some different words at times. More importantly, Respondent's primary contention in this case has been that the injury occurred before Petitioner came to work. However, the Arbitrator has found that he didn't injure his arm before going to work leading to the conclusion that it had to have occurred at work and in the general manner as Petitioner described.

Issue (F) Causal Connection.

Petitioner's current condition of ill-being in his left hand/wrist is causally connected to his work accident of September 9, 2014. In so concluding the Arbitrator relies upon the opinion and testimony of Dr. Smith and Dr. Kefalas as well as a chain of events. Petitioner denied any prior injuries to his left hand/wrist. She further notes that Dr. Fletcher acknowledged that a pinching could cause such an injury. He also did not have an accurate understanding of the mechanism of injury or Petitioner's work activities prior to the accident, including the ability to carry sodas and donuts to the truck with no indication of any difficulty.

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 a claimant's establishment of a causal nexus between injury and illness, employers are responsible for the employees' medical care reasonably required in order to diagnose, relieve, or cure the

effects of the claimant's injury. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d 13 (2000); *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill.App.3d 527, 758 N.E.2d 18 (1st Dist. 2001).

Petitioner submitted the following medical expenses as found in PX 7:

St. Mary's Hospital	$10,506.90
Decatur Memorial Hospital	$ 2,626.06
Dr. Jeffrey Smith	$ 6,242.73
Decatur Ambulance	$ 943.60
HSHS Medical Group	$ 70.87
Dr. Keith Fabrique	$ 69.69
Associated Anesthosiologists of Decatur	$ 1,596.00
Diversified Services	$ 64.82
Clinical Radiologists	$ 113.00
St. Mary's Occupational Health Services	$ 1,022.92

The Arbitrator finds that these medical expenses appear reasonable and consistent with the type of treatment rendered for Petitioner's injury. No evidence to the contrary was presented. Petitioner is awarded those expenses (which total $23,256.59) and Respondent shall pay same subject to the Medical Fee Schedule. Respondent shall receive credit for those medical bills paid as reflected in RX 3.

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 gives no weight to this factor.

(ii) **Occupation**: Petitioner returned to work as a laborer/operator for Respondent. He was released to return to work with no restrictions. While he is not currently employed by Respondent, that is not a direct result of his injury. Petitioner's termination was for reasons unrelated to the accident or injury. The Arbitrator gives some weight to this factor.

(iii) **Age**: Petitioner was 42 years old at the time of his injury. As such, he may reasonably be expected to live and work with his disability for a number of working years. The Arbitrator thus gives some weight to this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity as a result of the injury. While currently unemployed Petitioner failed to prove that his unemployment is a result of his injury herein. The Arbitrator gives no weight to this factor.

(v) **Disability**:

Petitioner suffered a perilunate intercarpal dislocation of the left wrist. It was described as a dislocation with torn ligaments and bones overlapping each other so they rested side by side rather than end to end. After the original surgery to realign the bones, Dr. Smith placed a S.L.I.C. screw below the two bones together, and then pinned the bones of the ligaments. Petitioner wore a cast for six months and underwent therapy. Dr. Smith stated that after the injury Petitioner would never have normal motion and would have a permanent loss in his range of motion. Dr. Smith testified to 60 degrees as to flexion and extension as compared to the normal range of 80 to 90 degrees. Petitioner returned back to work for three days and was terminated on the third day for reasons unrelated to his injury. He did not testify to any problems working for Respondent within those three days. Dr. Smith's office notes prior to the final visit in November of 2015 suggest Petitioner was progressing well with work activities. While Petitioner testified that he has been unable to find work, his effort has been very minimal as he explained that he has looked for work "now and then" and he presented no corroborating documentation for his job search efforts. More importantly, there is no objective evidence in the record suggesting that Petitioner's inability to work since his termination is related to his injury. He was released without restrictions and, by Dr. Smith's notes, was doing quite well. Furthermore, Petitioner's testimony about essentially having to work light duty and being unable to build scaffolds was, not only somewhat confusing, but also unsupported by medical opinion. Dr. Smith's records indicate that Petitioner did work light duty for some time after his surgery and he did return to work building scaffolding. Petitioner also testified that he has not returned to see Dr. Smith since being released in November of 2015; yet, the records in evidence show that he returned to see the doctor in April of 2016. The significance of the findings noted in the doctor's records for that visit is difficult to determine since Petitioner did not testify about the visit, his level of activity at that time, or why the doctor cautioned Petitioner about his level of activity as he did. While Petitioner sustained a significant injury with some residuals primarily affecting range of motion the Arbitrator cannot find that Petitioner has lost a trade or profession as a result of the accident. The Arbitrator gives weight to this factor, relying in significant part on Dr. Smith's records through November of 2015.

While the Arbitrator found Petitioner credible regarding his account of the accident, she found his testimony regarding the nature and extent of his injury less persuasive and perhaps motivated, in some part, by his termination.

Based upon the foregoing, Petitioner has sustained the 35% loss of use of the left hand as a result of his accident.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Baugh,

Petitioner,

19IWCC0109

vs.

NO: 12 WC 34403

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner is a 45-year-old employee of Respondent, who described his job as a heavy equipment operator/hoisting engineer. Petitioner has been working for Respondent for about 21 years. At the time he was injured Petitioner was making $45.10 per hour. Petitioner's job involved multiple duties. Petitioner ran heavy equipment of different types, fueled them, checked fluid levels, and changed filters. He had to know how to operate all the equipment. On the date of accident, September 20, 2012, Petitioner testified that he was assigned to a big grinder, a big milling machine. He stated there is a man on top steering the machine and a guy at the bottom that controlled the cut, how deep the cut should be. Petitioner stated that Willie Sideman was on top steering the machine. Petitioner stated that his duties that day was to control the cut, depth of the machine cuts, and to clear jams, if any. Petitioner stated that there are other things on the machine, like gates. He stated he

had to make sure they were all clear and make sure everything was working well from the bottom. Petitioner testified that clearing asphalt that could be jammed on the conveyor belt was a pretty common thing. Petitioner viewed PX 3 and identified the 9-photos of the equipment as it looked that day. The grinder machine is for grinding up asphalt and spitting it out the other end. He identified the location he was at on the 6th photo. Petitioner testified that as they were cutting on that day they went over a speed bump (for slowing traffic). Petitioner stated that a lot of times when they go over a speed bump instead of the grinder grinding it into small pieces, it kind of spits back big chunks and jams the belt. Petitioner identified, on that photo, where he was when he was trying to clean out the jam that day. Petitioner stated the machine belt stopped moving due to the jam. Petitioner stated that generally when it jams like that you go halfway up there and you try to break the jam free, break the chunk out to free the jam. Petitioner testified that when he was there, trying to free the jam he was sucked up into the grinder. Petitioner stated that he was kind of hanging over to hit the chunk to break it free. He stated he broke the chunk and the belt kicked in and he took a ride on the belt. Petitioner stated that it was he and his co-workers understanding that the belt was turned off at the time as they always to do that. When he tried to unjam the machine, the machine was not running. Petitioner viewed photo #3 and indicated it showed an arm at the end of the machine. When he was sucked into the machine he was spit out of the machine at the other end by that arm on the machine where shown. The medical records indicated he was launched from that conveyor belt at 15-20 miles per hour; Petitioner agreed with that. Petitioner traveled about 23 feet forward from a height of about 20 feet and fell down to the asphalt.

- Petitioner agreed that after he was thrown out the other end of the machine an ambulance was called, and he was taken from the scene to Advocate Christ Medical Center. He suffered a long list of injuries. Petitioner presented to the hospital as a Code Yellow with his multiple injuries. Petitioner was an inpatient at Christ Hospital from September 20, 2012 through October 8, 2012; a part of that time he was in intensive care. Petitioner suffered 2 fractured ribs on the left side, and 2 fractured vertebrae (L2 & L3). Petitioner also suffered a hemothorax that required 2 surgeries and placement of chest tubes. Petitioner suffered a pelvic fracture and a left shoulder rotator cuff tear that required surgical intervention. Petitioner suffered left and right biceps tears, a right elbow ulnar nerve injury, and an avulsion fracture in his right elbow. Petitioner suffered a left hip labral tear with a surgical recommendation. Initially, with his long list of injuries, the immediate concern had been placement of the chest tubes to help drainage. Petitioner had surgery 5 days later when they placed chest tubes on the left side, to help him breathe and for the drainage of the fluid from his lungs. The chest tubes were removed about 7 days later. The first surgery to remove the chest tubes was performed on September 25, 2012 and the 2nd surgery was done on October 17, 2012. With Petitioner's multiple injuries, he was seen by multiple doctors. He saw Dr. Ho at the University of Chicago regarding his left shoulder rotator cuff. Dr. Ho recommended surgical intervention and also gave Petitioner an injection. The November 26, 2012 history to Dr. Ho noted the injuries of his left hip, pelvis, vertebral fractures, and right arm ulnar nerve injury. Dr. Ho recommended that physical therapy begin and consultations with other doctors. Petitioner was referred to Dr. Goldberg who found Petitioner suffered from the 2 vertebral fractures and recommended formal therapy for that. On December 12, 2012 Petitioner was referred to Dr. Angeles for a

surgical consult regarding his right elbow. Petitioner underwent surgery to his right elbow due to the ulnar nerve injury nerve damage (records indicating a causal connection). Petitioner also suffered an avulsion fracture to that elbow. Petitioner had a long course of treatment in January at the University of Chicago and after the elbow surgery the doctors then focused on his shoulder. Petitioner was diagnosed with left and right biceps tears and he had an injection to his left shoulder. Petitioner was also referred to Dr. Nho at Midwest Orthopedics regarding his hip injury. Dr. Nho diagnosed a labral tear and recommended surgery. Petitioner believed the doctor said that he observed the left hip labral tear on the MRI. Petitioner believed that he received an injection to his hip about May 14, 2013. Petitioner had been referred to Advocate Pain Management Center for pain management for his multiple injuries. There Petitioner still suffered from pain in his right elbow, both shoulders, left hip, and some pain from the rib fractures. Petitioner testified that left hip surgery for the labral tear and debridement was recommended again. Petitioner returned to Dr. Ho at the University of Chicago who recommended that Petitioner have left shoulder rotator cuff repair. Petitioner testified that he never had that surgery. The surgeries Petitioner did have were the 2 at Advocate for placement and removal of the chest tubes and the elbow surgery (right ulnar nerve transposition). Petitioner agreed that he had extensive treatment for his shoulder, elbow and hip from September 2013 through December 2013. On December 26, 2013 Petitioner testified that he was prepped for surgery for his left shoulder, but he did not have that surgery, as he understood that his blood pressure was a little high that day and they sent him home.

- Petitioner agreed the University of Chicago records in 2015 indicated he wanted to proceed with the left shoulder arthroscopic surgery. At that point he was still suffering from the left shoulder rotator cuff tear, left hip labral tear, right ulnar nerve damage, and was still symptomatic with his right shoulder as well. Petitioner treated throughout 2015. Petitioner remained off work in 2016; he had been off of work for close to 5 years. Petitioner testified that he would agree if records indicated he was ordered off work for 5 years and a month. Petitioner stated that he had a lot of treatment over those years and waited probably over a year, as Respondent would not approve the shoulder surgery. Petitioner did ultimately return to work once it was determined that he was able to return to work. Petitioner had treated for the multiple injuries for 5 years and no doctor during that time had released Petitioner to return to full duty from all of his injuries.

- Petitioner did return to work on October 11, 2017. As to his right elbow injury. Petitioner testified that currently his hand sometimes tightens up and he has trouble with his little finger. Petitioner testified that he still gets tingling in his fingers for no apparent reason. Petitioner stated that sometimes it hurts a lot and other times not so much; definitely not the same as before he was hurt. As far as his left hip (labral tear), Petitioner stated that he certainly does notice a difference when he walks. Petitioner testified that after a short period he can do some walking, but he starts feeling pain, it hurts. He stated that he cannot walk as fast or as far as he was able to do before the injuries. In regard to his left and right biceps tears, Petitioner stated that sometimes when he opens like a pop can he will get a pain in either one. He stated he now has what they call 'Popeye' arms. He noted that his arms are not the same, that you can see they are not the same. Again, he noted the pain on either side when he opens things with his hands (The Arbitrator noted Petitioner grasping

first the right bicep and squeezing, indicating structural change, then the same with the left bicep; distal then forward). In regard to the left shoulder (surgical recommendation) Petitioner stated he does not have strength in that shoulder, he gets pain there sometimes and he cannot move it like before, he gets pain moving it certain ways. In regard to the hip, Petitioner had a pelvic fracture, which causes him pain when he walks a little further. Petitioner also stated that he cannot walk as far or fast as before. With respect to the fractured vertebrae, Petitioner stated that he gets a lot of stiffness in his back and a little sore. Petitioner also stated that he cannot bend as much. With respect to the fractured ribs, Petitioner stated that he does not notice much difference; the pain went away after a couple of years although he sometimes still feels a tweak in his chest now and then. Petitioner testified that when he did return to work people did not believe he was returning after all that. Petitioner stated (embarrassingly) that his crew kind of treats him like an old man now. He stated that they help Petitioner with stuff he needs to do. Petitioner stated a lot of people did not return after injuries that were a lot less than his. Even though there is no official 'take-it-easy' rule, his crew does look out for him at work. Petitioner testified that there are things he used to do that he can no longer do at work. Petitioner stated there are some machines he cannot run anymore. He cannot run the big grinder anymore. He stated some small things, like a bobcat, are hard for him to get into so he does not do it anymore. Petitioner testified his boss does not assign him things he understands are difficult for Petitioner.

- Petitioner testified that prior to the accident he never suffered an injury to his right elbow. He had a prior right-hand injury, but he went for treatment that day and that was it. He had never filed a prior WC claim and never lost any time from work due to a hand injury that he recalled.

The Commission finds Respondent indicated causal connection as an issue on their Petition for Review but did not directly address the issue in their Statement of Exceptions, therefore, it is deemed as waived. Regardless, the evidence and testimony are unrebutted and supports an ongoing causal connection to Petitioner's current condition of ill-being. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to causal connection.

The Commission finds Petitioner testified that prior to the accident he never suffered an injury to his right elbow. He had a prior right-hand injury, but he went for treatment that day and that was it. He had never filed a prior Workers' Compensation claim as to those body parts and never lost any time from work due to a hand injury that he recalled.

The Commission notes that neither party submitted an AMA impairment rating report. Petitioner was 45 at the time of the accident (now about 51). Petitioner was returned to 'full duty' upon asking for a full release to return to his former position. Petitioner is still working in that position so there is no apparent impact on future earnings. Petitioner suffered multiple injuries and lost about 5 years from work during recovery. There is no question that Petitioner suffered 2 fractured

ribs and a hemothorax that required insertion and removal of chest tubes. Petitioner also underwent right elbow surgery for transposition of the ulnar nerve. Petitioner still has pain, tingling and numbness to his hand as well as arm pain and weakness and difficulty even opening a can of soda. Petitioner also has hand atrophy and CTS as result of the accident. Petitioner was prescribed shoulder surgery but despite requests from the surgeon, Respondent never authorized it, so Petitioner ultimately gave up trying to get it. Petitioner had pelvic and vertebral fractures and a labral tear that he declined surgery for. Petitioner testified of his difficulty walking distances now along with back stiffness and problems bending. Petitioner noted the deformities in his biceps ('Popeye' like arms). While Petitioner returned to full duty, he reported his problems using certain equipment due to his limitations. Petitioner's supervisor and crew keep him from doing things they know are difficult. Petitioner's testimony of his ongoing condition and problems is unrebutted and supported in treatment records. The person as a whole award for the rib fractures and hemothorax is supported by Petitioner's unrebutted testimony and the records, as is the award for the fractured vertebrae and pelvis. Petitioner suffered a left shoulder torn rotator cuff/AC injury, and had post-traumatic arthritis. Surgery was recommended for the shoulder but Respondent never approved it, so Petitioner eventually just opted not to pursue that surgery. The evidence and testimony supports the awards for person as a whole (MAW), (rib fractures [9% loss MAW-45 weeks], lumbar fractures [2% loss MAW-10 weeks], pelvic fracture- 10% loss MAW-50 weeks], rotator cuff tear/AC injury, post traumatic arthritis and recommended left shoulder surgery [15% loss MAW-75 weeks]) and that portion of the award is, herein, affirmed.

The Commission finds Petitioner has right hand CTS and progressive atrophy and small digit trigger finger. There was no surgery, but given the multiple issues ongoing, the Arbitrator's award of 20% loss of use of the right hand [41 weeks] is supported by the evidence and testimony and is, herein, affirmed. Petitioner suffered a left leg labrum tear and other injuries and had a cortisone injection. Although surgery was recommended, Petitioner declined that surgery. The Commission, herein, affirms the award of 25% loss of use of the left leg [left anterosuperior labrum tear, iliopsoas injury, injection and recommended surgery-53.75 weeks] as supported in the evidence and testimony.

The Commission finds that Petitioner suffered a left biceps tear and has left arm deformity and weakness. Petitioner's testimony is supported in the records. The award of 12 % loss of use of the left arm [30.36 weeks] is supported by the evidence and testimony and is herein affirmed.

Petitioner suffered a right arm injury resulting in a right biceps tear and right elbow nerve injury with surgical intervention (ulnar nerve transposition). Petitioner has a right arm deformity and ongoing issues including weakness after a poor surgical result. The Commission, however, finds the award as to the right arm to be excessive, and, herein, modifies to find a total loss of use of 40% [101.2 total weeks] of the right arm considering both of the right arm injuries.

The Commission notes that Petitioner had a very lengthy recovery of about 5 years with extensive treatment and pain management. Petitioner's multiple injuries clearly affect his work and activities

19IWCC0109

of daily living just with walking and bending. The Commission finds the decision of the Arbitrator as not totally contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to Permanent partial disability as to the person as a whole, left arm, right hand, and left leg. The Commission, herein, modifies only as to the right arm award, finding a total of 40% loss of use of the right arm [considering both the right biceps tear, and right ulnar nerve injuries] as more appropriate and supported with the evidence and testimony.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 406.31 total weeks, as provided in §8(d)(2), and 8(e) of the Act, for the reason that the injuries sustained caused the loss of 36% of his person as a whole [combined total-180 weeks], 12% loss of use of the left arm [30.36 weeks], 20% loss of use of the right hand [41 weeks], 25% loss of use of the left leg [53.75], and 40% loss of use of the right arm [101.2 total weeks].

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 14 2019
d-12/20/18
DLG/jsf
045

David S. Gore

Stephen Mathis

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0109

BAUGH, CHARLES
Employee/Petitioner

Case# **12WC034403**

CITY OF CHICAGO
Employer/Respondent

On 7/16/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.10% 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:

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CHICAGO, IL 60602

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

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHARLES BAUGH
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # 12 WC 34403

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 **George Andros**, Arbitrator of the Commission, in the city of **Chicago**, on **March 29, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On 9/20/2012, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 **$93,808.00**; the average weekly wage was **$1,804.00**.

On the date of accident, Petitioner was **45** 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 **$0.00** for TTD, $0.00 for TPD, **$0.00** for maintenance, and **$0.00** for other benefits.

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

ORDER

The Arbitrator finds that Petitioner's injuries are causally related to the March 6, 2015 work injury.

The Arbitrator finds that Respondent shall pay Petitioner & his attorney of record $712.55/week for 436.67 weeks, because the injuries sustained resulted in:

- 9% loss of use under 8d2 for the fractures to the left 6th and 7th ribs and the post thoroscopy and post thoracostomy due to the hemothorax and post injury fluids; 45 weeks of permanent partial disability;
- 2% loss of use under section 8d2 for the 2 vertebra fractures at L2, L3; 10 weeks of permanent partial disability;
- 10% loss of use under section 8d2 for the pelvic fracture; 50 weeks of permanent partial disability;
- 15% loss of use under section 8d2 for the left shoulder rotator cuff tear, a/c joint injury, post traumatic arthritis plus recommended left shoulder surgery; 75 weeks of permanent partial disability;
  The Arbitrator adopts Dr. Ho's 8/26/16 opinion as a finding of fact in this case at bar that he will be candidate for future left shoulder surgery causally connected to the accident herein ;
- 12% loss of use of the left arm under 8(e) for the left biceps tear; 30.36 weeks of permanent partial disability;
- 12% loss of use of the right arm under 8 (e) for the right biceps tear; 30.36 weeks of permanent partial disability;

- 40% loss of use of the right arm for the right elbow ulnar nerve injury and transposition plus sequela & very poor result , neuropathy/avulsion fracture that required surgical intervention; 101.2 weeks of permanent partial disability;

- 20% loss of use of the right hand as per Dr. Nacke diagnosis of progressive atrophy of intrinsics, right carpel tunnel syndrome, trigger finger of right small finger. 41 weeks of permanent partial disability;

- 25% loss of use of the left leg for the left anteriorsuperior labrum tear, iliopsoas injury at tendon attachment hip labral tear requiring cortisone injection and surgical recommendation. The Arbitrator finds in the case at bar and so adopts Dr. Nho of Rush Medical Center the petitioner was recommended hip surgery and may need it in the future as sequence of the accident in the case at bar. 53.75 weeks of permanent partial disability.

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

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

#001 Arb George Andros

Signature of Arbitrator

June 26,2018

Date

STATEMENT OF FACTS & CONCLUSIONS OF LAW 12 WC 034 403

Accident

Petitioner was attempting to clear a jam in the grinder machine he was operating when he was drawn into the road grinder and thrown out the other end through a shoot He was ejected then hurled 20 feet onto the ground. Petitioner testified that because of this accident, he injured both shoulders, his upper torso, ribs, right knee, low back, pelvis, and lung. (TR pgs. 19-21). The Arbitrator adopts the records of all treating doctors as to the exact nature and extent plus description of the final condition of injuries.

Petitioner's medical treatment

At Christ Hospital ER, Petitioner complained of pain on his left side, and left shoulder, as well as pain in his 6th and 7th ribs. (PEX#4 pg. 283). Petitioner had multiple abrasions to his arms, knees, and elbows. (PEX#4 pg. 1303). Dr. Dirig-Do reviewed Petitioner's x-ray results and found left rib fractures, a nondisplaced fracture in the right iliac bone, as well as a hemothorax. (PEX#4 pg. 6, 1299). On September 25, 2012, Petitioner underwent thoracostomy on his left side.

Petitioner was discharged on October 8, 2012 plus ordered to avoid heavy lifting of more than 10 pounds and to avoid contact sports for 6 weeks. Patient was told to return after repeat ex-ray. (PEX#4 pg. 1300).

Petitioner presented to Dr. Roderick H. Birnie at University of Chicago Medicine on October 25, 2012. Petitioner complained of left hip pain, lower back pain, and left shoulder pain. (PEX#5 pg. 14). Dr. Birnie ordered new testing. Dr. Sherwin Ho later examined him complained of left shoulder pain. Dr. Ho ordered Petitioner to undergo physical therapy and to return within 6 weeks for reevaluation and a possible MRI of Petitioner's left shoulder. (PEX#5 pg. 14 -21).

On November 26, 2012, Petitioner returned to University of Chicago Medicine complaining of low back pain radiating to the front of his abdomen. (PEX#5 pg. 47). Petitioner also complained of burning pain in his right forearm with weakness and clumsiness of his right hand.

Dr. Birnie reviewed Petitioner's x-rays and diagnosed Petitioner with transverse lumbar vertebral process fractures on the left side at L3-L4, as well as an ulnar nerve injury in his right arm. Dr. Birnie recommended that Petitioner consult with Dr. Edward J. Goldberg and ordered tests. Dr. Birnie ordered Petitioner to remain off work and continue to undergo physical therapy.

On December 10, 2012 Petitioner told Dr. Goldberg that he was experiencing low back pain in the midline and slightly to the left radiating toward the abdomen. Dr. Goldberg recommended Petitioner undergo physical therapy and referred him to Dr. David Cheng.(PEX#6 pg. 37)

On December 12, 2012 Dr. Birnie said the studies revealed Petitioner had severe right ulnar nerve neuropathy at the elbow, consistent with severe cubital tunnel syndrome. Dr. Birnie referred Petitioner to Dr. Jovito G. Angeles for surgical discussion including a cubital tunnel release and anterior ulnar nerve transposition. Dr. Birnie ordered Petitioner to remain off of work until he was able to be evaluated by Dr. Angeles and ordered Petitioner to continue to undergo physical therapy for his back and left shoulder.

On January 21, 2013, Petitioner complained to Dr. Angeles of right hand weakness and numbness in the ring and small finger, as well as diminished grip strength in his right hand. (PEX#5 pg. 68). Dr. Angeles noted that Petitioner had a positive Tinel sign at the elbow and noticeable interosseous wasting of his right hand. (PEX#5 pg. 69). Dr. Angeles ordered Petitioner to obtain x-rays of his elbow, which showed a small curvilinear density in the area of the cubital tunnel. (PEX#5 pg. 69). Dr. Angeles recommended that Petitioner undergo an open ulnar nerve transposition to release pressure off of his ulnar nerve. (PEX#5 pg. 70). Dr. Angeles noted that this may improve function in the right hand but that Petitioner may never obtain full strength compared to the contralateral side. (PEX#5 pg. 70). The petitioner did in fact undergo a right ulnar nerve transposition on February 28th, 2013

Petitioner followed up with Dr. Ho at University of Chicago Medicine on January 22, 2013. Petitioner complained of left shoulder pain and stated he did not think physical therapy had improved this pain. Dr. Ho noted that Petitioner had a partial tear of the biceps tendon and a Popeye deformity. (PEX#5 pg. 79). Additionally, Dr. Ho reviewed Petitioner's MRI and found that Petitioner had some arthritis in the AC joint. Dr. Ho opined that Petitioner's pain was related to impingement and rotator cuff tendinosis and gave Petitioner a subacromial injection to resolve the pain. (PEX#5 pg. 79).

On January 23, 2013, Petitioner reported pain over the left thorax and left low back pain with radiation to the left groin. Petitioner told Dr. Cheng that his pain has not improved since his accident and that he has been off work. Dr. Cheng noted that Petitioner's low back pain was severe and that Petitioner was exhibiting discomfort in the low back and groin. Dr. Cheng ordered Petitioner to undergo a CT before the next visit and to remain off work. (PEX#6 pg. 34).

On February 5, 2013, Petitioner told Dr. Cheng that his low back pain and left groin pain was most bothersome. Dr. Cheng noted that Petitioner exhibited worsening groin pain with hip flexion, abduction and internal rotation. Dr. Cheng increased Petitioner's pain medication and referred him to Dr. Shane Nho for his groin pain.

As stated above, On February 28, 2013, Petitioner underwent a right ulnar nerve transposition at the elbow performed by Dr. Angeles at University of Chicago Medicine. (PEX#5 pg. 109).

On March 5, 2013 Petitioner complained to Dr. Ho of continued left shoulder pain and stated that the subacromial injection did not help him much. (PEX#5 pg. 164). Dr. Ho never did surgery.

On March 11, 2013 Petitioner reported numbness on his right mid thumb area. Dr. Angeles noted continued wasting of the 1st dorsal interossei muscle and an edema in Petitioner's elbow. Petitioner was diagnosed with right cubital tunnel syndrome and Dr. Angeles ordered him to refrain from any pushing, pulling, lifting, or any repetitive movements on his right upper extremity. (PEX#5 pg. 169).

On March 15, 2013 Petitioner complained to Dr. Nho of intermittent but sometimes severe left groin pain. Dr. Nho noted that Petitioner had some radiographic evidence of acetabular impingement and ordered an MRI.

On April 8, 2013, Dr. Angeles noted that Petitioner was still exhibiting right sided significant interossei wasting of the intrinsics and had a 2 point discrimination of about 15 mm in the ulnar nerve distribution. (PEX#5 pg. 182). Additionally, Dr. Angeles stated that Petitioner's grip strength was slightly diminished to the contralateral side. (PEX#5 pg. 182). Dr. Angeles opined that it was going to take a significant amount of time until Petitioner started regaining musculature and sensation on his right side. (PEX#5 pg. 182). Dr. Angeles ordered Petitioner to remain off of work. (PEX#5 pg. 182).

As to the hip, on April 23, 2013 the MRI revealed that Petitioner had abnormal signals in the anterosuperior labrum. Dr. Nho noted that the radiologist found a tear in the iliopsoas at tendon attachment. Dr. Nho recommended an injection done on May 14, 2013.

On May 20, 2013 Dr. Angeles referred Petitioner to the Pain Clinic for management of his right upper extremity neuropathic pain.

On June 11, 2013 Petitioner told Dr. Cheng that the injection he received in his hip had not improved his pain. Dr. Cheng recommended that Petitioner follow up with Dr. Nho about his low back pain to ensure it was not arising from the hip. (PEX#6 pg. 10). Dr. Cheng opined that if the hip was ruled out as the cause of Petitioner's lower back pain, he should return to Dr. Goldberg. (PEX#6 pg. 10).

On June 21, 2013 Petitioner presented to Dr. Kenneth Candido at Advocate Pain Management. Petitioner complained of right arm and hand pain over the ulnar distribution that constantly burned with every movement in the right hand. Petitioner stated the pain was constant and was not improved by surgery and rated the pain an 8/10. Additionally, Petitioner complained of left hip pain that he rated a 7/10. Petitioner stated his hip pain was made worse by walking and radiating to the frontal hip. At this visit he prescribed Petitioner Exalgo.

Petitioner reported to Dr. Nho on July 2, 2013 that he initially had a good response to the cortisone injection but that it wore off very quickly. Dr. Nho diagnosed Petitioner with a left hip labral tear due to underlying femoroacetabular impingement. Dr. Nho stated that Petitioner had exhausted his conservative treatment options and recommended that he undergo a left hip diagnostic arthroscopy, labral repair, acetabular rim trimming, debridement, synovectomy, femoral osteochondroplasty, and capsular plication.

Petitioner reported to Dr. Candido on July 19, 2013 constant right anterior forearm burning with numbness and tingling of digits 4 and 5. Petitioner also complained of low back pain which he rated a 5/10. He ordered him to remain off work until further notice. (PEX#8 pg. 19).

Petitioner reported to Dr. Ho on July 24, 2013 no improvement in his left shoulder. Dr. Ho noted that the left shoulder arthroscopy that was recommended at the previous visit was denied by Petitioner's insurance. Dr. Ho ordered Petitioner to undergo another MRI to determine how to proceed surgically. (PEX#5 pg. 195).

On July 26, 2013 Petitioner reported that he continued to drop objects from his right hand. Dr. Angeles ordered Petitioner PT and to continue to refrain from pushing, pulling, and lifting with the right upper extremity

.

On August 20, 2013, Petitioner underwent an MRI at University of Chicago Medicine. Dr. Larry Dixon concluded that a gadolinium contrast was noted within the subacromial/subdeltoid bursa. Dr. Dixon opined that this could be related to an occult full-thickness rotator cuff tear as opposed to postsurgical changes. Dr. Dixon also noted a nonvisualization of the long head of the biceps, and suggested that this could represent a retracted tear versus postsurgical changes. Additionally, Dr. Dixon stated a posterior glenoid hypoplasia was suggested.

On August 21, 2013 Petitioner complained to Dr. Candido that his pain was aggravated by physical therapy. Dr. Candido noted that Petitioner expressed desires to return to work and recommended that Petitioner continue/complete physical therapy. (PEX#8 pg. 16).

On September 3, 2013 Petitioner complained to Dr. Nho of ongoing left hip pain, but stated that he learned to live with it. Dr. Nho noted that he and Petitioner agreed not to proceed with surgery at that time and deferred any further treatment to Dr. Cheng. Dr. Nho ordered Petitioner to remain off work until further evaluation by Dr. Cheng.

On September 9, 2013 Petitioner continued to complain to Dr. Angeles of postoperative pain and reported having problems with fine motor control. Petitioner stated that he had still been dropping things and had decreased strength in his right hand. Dr. Angeles noted that although Petitioner was able to work light duty, Petitioner's job had nothing for him to do. Dr. Angeles ordered Petitioner to continue to undergo physical therapy and strengthening and recommended Petitioner get another EMG.

Petitioner returned to Advocate Pain Management on September 18, 2013 for a follow up with Dr. Candido. On September 18, 2013 Petitioner complained to Dr. Candido of sharp pain in his right hand and left shoulder. He ordered Petitioner to complete 4 weeks of additional physical therapy.

Petitioner reported both distal right upper extremity pain as well as left shoulder pain. Additionally, Petitioner complained of left rib pain at T4. Petitioner also reported weakness in his right hand as well as numbness or tingling of the right medial forearm and hand. Dr. Candido noted that Petitioner's right hand neuropathic pain was stable and that he was likely at MMI for that injury. (PEX#8 pg. 11).

On October 21, 2013, Petitioner told Dr. Angeles he continued to have difficulty with grip and carrying things. Petitioner stated that his pain was constant and burning in quality, and that it radiated from the ulnar mid forearm all the way down into the small and ring fingers. Dr. Angeles noted that Petitioner had intrinsic atrophy in his right hand as well as thenar atrophy. The EMG showed significant prolonged distal motor latency to the 1st dorsal interosseous and that the results were essentially unchanged from Petitioner's previous EMG. Dr. Angeles ordered Petitioner to refrain from any pushing, pulling, or lifting with his right arm, recommended that Petitioner continued multimodal pain management, and discussed the possibility of an ulnar nerve stimulator.

On November 1, 2013 Petitioner reported to Dr. Candido both distal right upper extremity pain as well as left shoulder pain. Further he has weakness of his right hand as well as numbness of the right medial forearm and hand. Dr. Candido continued Petitioner's Exalgo and Norco.

Petitioner followed up with Dr. Ho on December 6, 2013 to discuss his upcoming shoulder surgery. Petitioner reported that he continued to experience left shoulder pain. Dr. Ho diagnosed Petitioner with a rotator cuff partial articular surface tear in his left shoulder and acromioclavicular joint posttraumatic arthritis. Dr. Ho noted that Petitioner had a Popeye sign in both shoulders. Additionally, Dr. Ho and Petitioner discussed Petitioner's left shoulder arthroscopy, rotator cuff repair, decompression and distal clavicle resection.

On December 26, 2013, Petitioner went to University of Chicago Medicine for his left shoulder arthroscopy, rotator cuff repair, decompression and distal clavicle resection. Petitioner was prepped for surgery, but then the surgery was cancelled.

On January 15, 2014 Petitioner complained to Dr. Candido of burning pain in the right forearm distal.

Petitioner complained to Dr. Ho on February 2, 2015 of continued left shoulder pain and informed Dr. Ho that he had been unable to return to work or full activity . Dr. Ho diagnosed Petitioner with a left shoulder superior labral tear with or without biceps tear and a near full-thickness articular surface rotator cuff tear with possible AC joint arthritis The MRI demonstrated a large near full-thickness articular sided tear of the supraspinatus and that there was evidence of AC joint arthritis. Dr. Ho stated that Petitioner would proceed with the previously cancelled left shoulder arthroscopy once approved, which included an arthroscopic rotator cuff repair, with possible biceps tenodesis, labral debridement, and a subacromial decompression with possible distal resection. (PEX#5 pg. 265).

On October 19, 2015, Dr. Ho noted that Petitioner has not been able to return to work because of his ongoing shoulder pain, but that Petitioner was still awaiting approval for surgical intervention. Dr. Ho noted that Petitioner had a decreased range of motion and marked increase in pain with any shoulder elevation above 90 degrees. Additionally, Dr. Ho noted that Petitioner had a chronic Popeye deformity consistent with his biceps tendon rupture.

On March 16, 2016 Dr. Candido continued Petitioner's Exalgo prescription and ordered him to continue/complete his physical therapy sessions.

On August 29, 2016 Dr. Ho diagnosed Petitioner with a near full-thickness rotator cuff tear in the left shoulder. Dr. Ho noted that although he reported continued pain in the left shoulder, Petitioner wanted to return to work to his regular job duties. Dr. Ho released Petitioner to return to regular job duties as of September 1, 2016. (PEX#5 pg 303). Dr. Ho recommended an arthroscopic rotator cuff repair if Petitioner experiences future problems with the shoulder. (PEX#5 pg. 303).

On February 2, 2017, Petitioner presented to Dr. Elliot Nacke at Hinsdale Orthopaedics for evaluation of his right hand pain and numbness. (PEX#9 pg. 4). Petitioner told Dr. Nacke that he had undergone a right ulnar nerve decompression but felt minimal relief of his symptoms. Petitioner complained of burning pain in his right hand and reported feeling an intermittent snapping at his right elbow. Dr. Nacke diagnosed Petitioner with right ulnar neuropathy and right carpal tunnel syndrome. (PEX#9 pg. 6). Additionally, Dr. Nacke noted progressive atrophy in Petitioner's hand and triggering in his right small finger. (PEX#9 pg. 5). Dr. Nacke ordered Petitioner to obtain another EMG and to remain off work. (PEX#9 pg. 3, 6).

Conclusions of Law

I. Whether Petitioner's current condition of ill-being is causally related to the September 20, 2012 work injuries?

Based upon the totality of evidence, the Arbitrator finds that Petitioner's injuries are causally related to the September 20, 2012 work injury.

Petitioner was able to perform his job duties without issue prior to September 20, 2012. The Arbitrator finds that the Petitioner testified credibly regarding the facts surrounding this occurrence, his medical treatment, and current condition of ill-being. This is based on his timely and direct and clear answers to questions, correlation of his answers to records, and observations of his demeanor. He was very eager to answer and extremely knowledgeable of his course of years of treatment. Moreover, he was forthright during very, inciteful cross-examination by defense counsel.

Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury. Dunteman v. Illinois Workers' Comp. Comm'n, 2016 IL App (4th) 150543WC, ¶ 42. A work-related injury "need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." Id. As long as there is a "but-for" relationship between the work-related injury and subsequent condition of ill-being, the employer remains liable. Id.

At Christ Hospital, he underwent a thoracoscopy and subsequent chest tube placement. Petitioner underwent a thoracostomy due to the hemothorax. For the injuries to his pelvis and hip, Dr. Nho at Rush administered a cortisone injection to Petitioner's hip and subsequently recommended surgery, consisting of a left hip diagnostic arthroscopy, labral repair, acetabular rim trimming, debridement, synovectomy, femoral osteochondroplasty, and capsular plication. Petitioner ultimately chose not to undergo this surgical procedure.

For this injuries to his arm, Petitioner came under the care of Dr. Angeles who recommended and performed surgery, consisting of right ulnar nerve transposition at the elbow.

For his shoulder injury, Petitioner came under the care of Dr. Ho who recommended surgery, consisting of a left shoulder arthroscopy, rotator cuff repair, decompression and distal clavicle resection.

For his back injuries, Petitioner came under the care of Dr. Goldberg and ultimately Dr. Cheng. Dr. Cheng ordered Petitioner to cease physical therapy for his back injury as he did not feel it would help improve Petitioner's back pain.

II. What is the nature and extent of the injuries?

Petitioner's testimony and the medical evidence document multiple difficulties he experienced with activities requiring the use of his right arm, both shoulders, back, hip, pelvis, and lungs. Petitioner testified he continues to experience pain and discomfort. (TR pgs. 32-40). Petitioner testified that he is unable to perform the same work tasks in the same manner that he was able to since before the incident. (TR pg. 40).

The Arbitrator adopts the actual medical conclusion in the record as follows: the Petitioner was released to "full duty" by doctor(s) of his own choosing at medical centers frequently highlighted in Commission precedent.

Moreover, no one from either side testified in concert or in rebuttal to the the idea that he receives help in performing certain tasks , or, is " carried " so to speak during the work day by his fellow co-workers. It was clear that as a heavy equipment operator he certainly can perform his work over many months. This is tempered by the testimony he avoids certain machine operations. A strict reading of section 8(d)2 leads to the conclusion he is not displaced from his trade, job designation nor has he lost benefits from his long time employer or his craft's local 150 union.

Section 8.1(b) of the Act requires consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) states, "No single factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by a physician must be examined." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. Reported Level of Impairment

An AMA impairment rating was not done in this matter.

2. Petitioner's Occupation

At the time of his injury, Petitioner worked as a hoisting engineer for the City of Chicago and worked in that position for over 20 years. Petitioner testified that his position as a hoisting engineer requires him to run heavy equipment, perform safety checks, fuel equipment, change filters, and check fluid levels of the equipment, among other things. (TR pgs. 10-11). Additionally, Petitioner testified that he is unable to perform the same tasks in the same manner as before this accident. (TR pgs. 38-39). Specifically, Petitioner testified that he no longer operates some of the machines he used to, like the grinder machine, Bobcats, and some other large equipment outside of an end loader. (TR pg. 40). Petitioner testified that this is due to his inability to climb onto the larger equipment. (TR pg. 40). This is balanced by the best circumstance in the case at bar that a heavy equipment operator for the City encounters a great many multiple pieces of equipment , all described by the Petitioner. He is not displaced from his craft, most fortunate for him, plus reflective of his clear desire to return to his prior level of recovery.

Due to the labor-intensive job requirements of Petitioner's occupation and Petitioner's inability to perform all the same tasks on certain equipment as before his accident, the Arbitrator gives more weight to this factor. This is tempered by being released to " full duty" by his orthopedic doctor(s) who coordinated that variable in his care.

3. Petitioner's Age at the Time of Injury

Petitioner was 45 years old at the time of the injury and is currently 51 years old. His younger middle age is a neutral factor.

4. Petitioner's Future Earning Capacity

Petitioner testified that he continues to experience pain daily. (TR pg. 32-40). Specifically, he still experiences tingling in his fingers, pain all over, and Petitioner testified that his right hand will tighten up. (TR pg. 33). Petitioner also testified that he notices a difference in his left hip and pelvis when he walks. (TR pg. 33). He testified that he is not able to walk as far or as fast as he could before the accident. (TR pg. 33-34). Additionally, Petitioner testified that he experiences pain and difficulty in both biceps when performing simple tasks like opening a bottle of soda. (TR pg. 34). Petitioner testified that he suffers from a noticeable Popeye deformity that feels like a baseball in his arm. (TR pg. 34-36). Petitioner also testified that he experiences stiffness and pain in his low back and that he can't bend as much as he used to. (TR pg. 37). Furthermore, Petitioner testified that he still experiences pain in his left shoulder, that he no longer has the same strength, and that he can't move the way he used to. (TR pg. 36).

The Arbitrator finds that no specific evidence is cited on record that Petitioner's future earning capacity is diminished by his various injuries and resulting surgeries. To find contra wise is speculation and conjecture outside the record. Thus, the statutory citation to loss of future earning capacity is not shown in the four corners of the record to be any factor in the case.

5. Evidence of Disability Corroborated by Medical Records

Petitioner's medical records at PEX #4, PEX #5, PEX #6, PEX #7, PEX #8, and PEX #9 establish that Petitioner suffered multiple , severe injuries to various parts of his body. his right arm, left shoulder - biceps, hip/pelvis region , thoracic area, and to an extent to his low back. Further, more than one doctor found significant pathology to the right hand, as sequela of the accident. Some conditions required surgery. As to surgery to the left shoulder, it was denied: later, the worker decided not to undergo the same. This section 8 factor is the highest level of all factors in determining his permanent partial disability under the workers compensation act, as amended.

Therefore, the Arbitrator finds that Respondent shall pay Petitioner and his attorney shown as the attorney of record the permanent partial disability benefits of $712.55/week calculated below , for the following injuries, as provided under Section 8 of the Act:

- 9% loss of use under 8d2 for the fractures to the left 6th and 7th ribs and the post thoroscopy and post thoracostomy due to the hemothorax and post injury fluids; 45 weeks of permanent partial disability;

- 2% loss of use under section 8d2 for the 2 vertebra fractures at L2, L3; 10 weeks of permanent partial disability;

- 10% loss of use under section 8d2 for the pelvic fracture; 50 weeks of permanent partial disability;

- 15% loss of use under section 8d2 for the left shoulder rotator cuff tear, a/c joint injury, post traumatic arthritis plus recommended left shoulder surgery; 75 weeks of permanent partial disability;
  The Arbitrator adopts Dr. Ho's 8/26/16 opinion as a finding of fact in this case at bar that he will be candidate for future left shoulder surgery causally connected to the accident herein ;

- 12% loss of use of the left arm under 8(e) for the left biceps tear; 30.36 weeks of permanent partial disability;

- 12% loss of use of the right arm under 8 (e) for the right biceps tear; 30.36 weeks of permanent partial disability;

- 40% loss of use of the right arm for the right elbow ulnar nerve injury and transposition plus sequela , neuropathy/avulsion fracture that required surgical intervention; 101.2 weeks of permanent partial disability;

- 20% loss of use of the right hand as per Dr. Nacke diagnosis of progressive atrophy of intrinsics, right carpel tunnel syndrome, trigger finger of right small finger. 41 weeks of permanent partial disability;

- 25% loss of use of the left leg for the left anteriorsuperior labrum tear, iliopsoas injury at tendon attachment hip labral tear requiring cortisone injection and surgical recommendation. The Arbitrator finds in the case at bar and so adopts Dr. Nho of Rush Medical Center the petitioner was recommended hip surgery and may need it in the future as sequence of the accident in the case at bar. 53.75 weeks of permanent partial disability.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Theresa Dawson,
Petitioner,

vs.

Costco,
Respondent.

19IWCC0110

NO: 14 WC 31399

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, permanent disability, causal connection, 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 September 21, 2017, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,500.00. 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.

FEB 14 2019

DATED:
o12/20/18
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0110

DAWSON, THERESA
Employee/Petitioner

Case# **14WC031399**

COSTCO
Employer/Respondent

On 9/21/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4073 LAW OFFICES OF SCOTT B SHAPIRO
218 N JEFFERSON ST
SUITE 401
CHICAGO, IL 60661

0210 GANAN & SHAPIRO PC
JULIE M SCHUM
210 W ILLINOIS ST
CHICAGO, IL 60654

19IWCC0110

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

Theresa Dawson
Employee/Petitioner

v.

Costco
Employer/Respondent

Case # **14** WC **31399**

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 **George Andros**, Arbitrator of the Commission, in the city of **Chicago**, on **July 19, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 27, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$42,285.36**; the average weekly wage was **$813.18**.

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

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

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

Respondent shall be given a credit of **$19038.73** for TTD, **$0** for TPD, **$0** for maintenance, and **$17045.21** for other benefits, for a total credit of **$36083.94**.

Respondent is entitled to a credit of **$3692.96** under Section 8(j) of the Act.

ORDER

No further TTD benefits are awarded.

Respondent shall pay Petitioner and her attorney permanent partial disability benefits of $487.91/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, 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.

#001 George J. Andros
Signature of Arbitrator

Sept 18,2017
Date

SEP 21 2017

FINDINGS OF FACT 14 wc 31399

Theresa Dawson (hereinafter "Petitioner") was employed by Costco (hereinafter "Respondent") in August of 2014 as a maintenance worker. On August 27, 2014, she was lifting a box of jeans from the floor onto a pallet under the table when she felt pain in her back. The incident itself is not disputed.

Petitioner was seen by Dr. George Thomas Evergreen Park the following day. She gave a consistent history of accident and complained of pain in her lower back. On examination, she had some reproducible pain on the right L5-S1 paraspinal muscle but a negative straight leg raise. She was diagnosed with muscle spasms for which medication and 5-7 days off work were prescribed.

Subsequent to that, Petitioner began treatment with her pain management doctor, Dr. Variskojis, on September 2, 2017. She had been treating prior to the incident for headaches which she testified she had her "whole life." At that examination, Dr. Variskojis diagnosed left low back pain, left lumbar neuritis and a probably L5-S1 disc displacement. An MRI was recommended as well as physical therapy. She took Petitioner off all work pending reevalution.

The same day, Petitioner say Dr. Thomas again. He continued to diagnose a sprain with muscle spasm and indicated she could return to full duty work as of September 4, 2017.

The MRI was performed on September 10, 2014, and was interpreted to show a 2.5mm diffuse disc protrusion and narrowing of the left neuroforamen at L3 exiting the nerve root. At L4-L5 there was also a 2 mm diffuse disc protrusion and the spinal canal was compromised at that level. After the MRI, Dr. Variskojis recommended a lumbar transforaminal injection.

At the request of Respondent, Petitioner was evaluated by Dr. Phillips, an orthopedic surgeon specializing in the spine, on December 23, 2014. On examination, Petitioner had normal posture and gait. She had pain during straight leg raising on the left only and noted pain with range of motion in the hip. After review of her complete medical records and MRI, Dr. Phillips opined that Petitioner's symptoms at that point were not attributable to her lumber spine. He

felt her problems were related solely to her hips and she should undergo a hip evaluation.

After the IME, on January 13, 2015, Petitioner returned to Dr. Variakojis who referred her to Dr. Michael Stover, a hip specialist, at Northwestern University Orthopedics. He evaluated Petitioner on January 26, 2015. Dr. Stover diagnosed her with left hip impingement for which prescribed an injection.

The hip injection was performed on February 23, 2015 followed by an MRI for the hip. She underwent a second hip injection on March 23, 2015.

Subsequent to that injection, Dr. Stover released Petitioner for the hip condition on May 4, 2015, with no restrictions for that condition.

Petitioner then went to see Dr. Darwish on June 9, 2015. Dr. Darwish recommended a discogram and took Petitioner completely off work.

On August 28, 2015, Dr. Darwish reviewed the discogram and, based on the discogram, he recommended a lumbar fusion surgery.

Dr. Phillips performed a records review in July of 2015. He reviewed the additional records of her care to that point and concluded that, relative to the work incident, Petitioner suffered only a lumbar sprain. He noted she had evidence of very mild disc degeneration but opined that surgery was unnecessary. In his deposition he testified that the discogram testing performed by Dr. Darwish was not reliable and he would not perform surgery based solely upon the same

Petitioner underwent surgery on September 23, 2015 at LaGrange Hospital. Dr. Darwish performed a lumbar fusion and no complications are noted on the operative report.

Subsequent to surgery, Petitioner continued following up to Dr Dawish and released to work full duty as of March 11, 2016. She returned to work for Costco at that time.

Petitioner was last seen by Dr. Darwish on April 4, 2017, when she was released from all care with no indications that any further medical treatment would be needed.

CONCLUSIONS OF LAW

The previous findings of fact are hereby incorporated into every section of the Conclusions of Law.

With regards to "F", is Petitioner's current condition causally connected to the alleged work injury, the Arbitrator concludes as follows:

It is undisputed that Petitioner suffered from pain in her lower back subsequent to lifting at work. The initial course of care was accepted and as evidence by the stipulations of the parties, benefits were paid by Respondent.

Immediately following the incident, Petitioner treated with her personal pain management physician, Dr. Variskojis, who diagnosed lower back pain, neuritis, and possible disc displacement. She was treated with only injections and no mention was made of any potential for the need for surgery.

Petitioner was then seen by Dr. Phillips, an orthopedic surgeon whose practice and research have all revolved around the spine. Dr. Phillips opined, based upon his examination and his review of all the records to that point – including the MRI films, that Petitioner's symptoms were more likely an issue of the hip.

Dr. Variskojis apparently agreed as she referred Petitioner to an orthopedic specializing in the hip and not the back. She was ultimately released by Dr. Stover for the hip on May 4, 2015.

Though Petitioner went for further care, she went to a new physician – Dr. Dawish. It is unclear if he had any of the prior records. He immediately recommended a discogram and Petitioner concedes, based upon that discogram, recommended surgery.

When Dr. Phillips performed his records review in July of 2015, he reiterated that the mechanics of Petitioner's spine as shown on the MRI, showed only minimal degeneration. He concluded she did not need further care and could return to work full duty.

Based upon the totality of the evidence, , the Arbitrator concludes that the opinion of Dr. Phillips is adopted as extremely more persuasive and that Petitioner suffered only from a lumbar sprain. The Arbitrator therefore concludes that the lumbar fusion surgery was not causally related to the work incident.

With regards to "K", Petitioner's entitlement to TTD, the Arbitrator concludes as follows:

In light of the Arbitrator's conclusions with regards to causal connection, the Arbitrator finds that Petitioner was capable of returning to work full duty as of the conclusion of her treatment with Dr. Stover on May 4, 2015, when she was released to return to work with no restrictions. The Arbitrator declines to award any TTD benefits after that point.

With regards to "J" were the medical services provided to Petitioner reasonable and necessary and has Respondent paid all appropriate charges, the Arbitrator concludes as follows:

Based upon the Arbitrator's findings with regards to causal connection, the Arbitrator concludes that Petitioner suffered from a lumbar sprain with aggravation of left hip impingement for which she reached MMI as of May 4, 2015. No further medical beyond that date is awarded.

With regards to "L" what is the nature and extent of the injury, the Arbitrator concludes as follows:

With regards to the instant case, based upon the above conclusions, the Arbitrator finds that Petitioner suffered from a lumbar sprain with aggravation of mild degenerative disc disease and left hip impingement. As for treatment, Petitioner underwent two injections to her back and two to her hip. She was ultimately released full duty for both conditions. She also testified that she currently does not

take any medications for either condition and has not seen a physician since her release.

She is currently 60 years old. Based on her testimony and the wage records submitted into evidence, Petitioner is back at Costco, working full duty with no impairment of her earnings. She testified that she is back working in the clothes section. As this is the exact section she was working the day she was injured, the Arbitrator finds it fair to conclude that she has returned to her pre injury position. No evidence was presented that her future earnings or status have been in any way impaired by her injury.

No impairment ratings have been submitted for consideration.

Based on the above, the Arbitrator concludes that Petitioner is entitled to permanent partial disability benefits of 10% loss of use of the person as a whole.

With regards to "M" should any penalties or fees be imposed upon Respondent, the Arbitrator concludes as follows:

Under the Act, penalties are appropriate in cases where Respondent's conduct has been unreasonable or vexatious. In the instant matter, Respondent had an IME with a respected spine physician, Dr. Phillips. He recommended a course of care which Respondent clearly authorized.

When Petitioner then began treatment again, with a new physician, Respondent again exercised their right to seek the opinion of an independent doctor. They did so swiftly as Dr. Phillips second report was issued within two months of Petitioner's return to care. Based upon the opinion of that physician, they denied any further treatment.

Respondent's actions were clearly within the bounds of the Act and were in no way unreasonable or vexatious nor did any of their actions cause an unreasonable delay. They relied upon the opinion of a respected physician throughout.

Therefore, the Arbitrator concludes that no penalties or fees are merited.

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

KEVIN WRIGHT,

Petitioner,

vs.

NO: 13 WC 42388

CITY OF HARVEY,

Respondent.

19IWCC0111

DECISION AND OPINION ON REVIEW

This cause comes before the Commission on the timely reviews filed by both parties of the Decision of Arbitrator Cronin finding that Petitioner sustained accidental injuries on November 26, 2013, arising out of and in the course of his employment, that Petitioner established a causal connection between his accidental injuries and his right-elbow condition of ill-being; that Petitioner established an average weekly wage of $1,398.65; that Petitioner was temporarily totally disabled from November 27, 2013, through April 20, 2014, September 12, 15, and 18, 2014, from January 14, 2015 through September 10, 2015; that Respondent shall be given a credit for PEDA payments during that time; that Petitioner was entitled to maintenance benefits from December 2, 2015 through August 18, 2016 in the amount of $34,766.58 and that Respondent shall be given a credit for $32,959.13 paid in maintenance; that Respondent shall reimburse $8,271.66 in medical expenses and Respondent shall be given a credit if the bill has already been satisfied; and that Petitioner shall receive a wage differential in the amount of $519.64 per week from August 19, 2016 thorough Petitioner's 67th birthday under Section 8(d)1 of the Act.

Respondent's issues on review are average weekly wage and benefit rates.

Petitioner's issues on review are nature and extent, maintenance, the 8(j) credit, and incidental vocational expenses.

After considering the entire record, and for the reasons set forth below, the Commission affirms the Arbitrator's findings as to incidental vocational expense and temporary total disability benefits and maintenance benefits duration, but otherwise modifies the Decision of the Arbitrator. The Commission finds that Petitioner did not meet his burden of proof in regard to his

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secondary employment, and thus Petitioner's average weekly wage was improperly calculated by the Arbitrator. The Commission modifies the Arbitrator's award of temporary total disability and maintenance. Additionally, the Commission affirms the award of a wage differential, but modifies the benefit rate awarded by the Arbitrator.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, who was a 56-year-old firefighter/engineer at the time of his work accident on November 26, 2013, worked for the City of Harvey Fire Department beginning in 1985. (T. 34) He was promoted to Engineer, the job held at the time of the work accident. (T. 78) He had worked as a licensed paramedic until 1994 when the Harvey Fire Department discontinued their ambulance service. (T. 108-9)

2. Petitioner testified his salary from the City of Harvey in 2013 was $64,280.95 and that he received no additional pay for seniority. (T.14) He testified he also worked a side job as a paint mixer at Sears for 24 hours per week at $9.50 per hour. (T. 16) There was no evidentiary support regarding the number of hours worked or hourly rate Petitioner was paid by Sears, beyond the testimony of the Petitioner.

3. Petitioner testified that on November 26, 2013, while responding to a structure fire, his feet became tangled in a hose and he fell and struck his right elbow. (T. 17) Petitioner went to Ingalls Memorial Hospital and was later referred to an orthopedic doctor. He saw Dr. John Fernandez at Midwest Orthopaedics at Rush on January 31, 2014 and began treatment. (T. 18-19)

4. Petitioner was off of work from November 27, 2013, until Dr. Fernandez returned him to work without restrictions on April 21, 2014. (T. 60) Petitioner was off of work again on September 12, 2014, September 15, 2014 and September 18, 2014 to undergo injections. (T. 61) Petitioner was recommended surgery and put on restricted work on January 13, 2015. (T.24) Petitioner returned to work with restrictions on September 11, 2015. (p. 28)

5. Petitioner testified that he was paid his full salary PEDA from the City of Harvey between November 28, 2013 and April 20, 2014. (T.102) He was paid his PEDA salary continuation at his regular salary from January 4, 2015 through November 20, 2015. (T. 103) He was paid maintenance and temporary total disability by Harvey at $709.32 per week from November 4, 2015 through August 18, 2016. (T. 103)

6. Petitioner began looking for a job when he began job placement services with EPS Rehab and Ed Steffan. (T. 76) He received job placement services through August 18, 2016. (T. 85) Petitioner is currently engaged in a job search. (T. 38)

7. Ed Steffan credibly testified that Petitioner was employable and placeable for positions in the labor market within his current skills, education and abilities. (T. 223) Mr. Steffan felt Petitioner was ideally suited for the job of 911 dispatcher should he increase his

typing skills and recommended programs in which Petitioner could do so. (T. 230) Mr. Steffan testified that Petitioner could earn $14 to $22 per hour based on Petitioner's skills and the stable labor market.

8. The deputy chief of the City of Harvey credibly testified that a full-time firefighter works 49 hours per week. (T. 166) He testified that Petitioner's pay records were accurately reflected in RX2 for November 26, 2013 through April 21, 2014, Rx3 for January 14, 2016 through November 20, 2015, Rx4 from November 26, 2013 through November 26, 2014, and Rx5 for November 26, 2012 through November 26, 2013. (T. 175-180) Petitioner's regular earnings from the City of Harvey for the year prior to the accident were $60,890.19. (Rx5) Based on that evidence, which the Commission finds to be more persuasive than the wage records purported in Px12, for the 52-week period preceding the accident, Petitioner had an average weekly wage of $1,170.97.

9. The Arbitrator found that Petitioner sustained accident injuries on November 26, 2013, arising out of and in the course of his employment, and that Petitioner established a causal connection between the accident and his condition of ill-being. The Arbitrator awarded medical expenses in the amount of $8,271.66 subject to a potential credit. The Commission affirms the Arbitrator's findings as to accident, causal connection, and medical expenses.

10. The Arbitrator awarded temporary total disability benefits in the amount of $932.43 per week based on an average weekly wage determined by primary employment with Respondent and secondary employment with Sears, for a total duration of 55 3/7 weeks, and subject to an 8(j) credit. The Arbitrator additionally awarded maintenance benefits for 37 2/7 weeks in the amount of $798.32 per week, subject to a credit of $32,959.13 for benefits paid. The Commission affirms the Arbitrator's award with respect to the duration of the temporary total disability benefits and maintenance benefits awards, however modifies the amount of each of the awards to reflect the correct average weekly wage based on the evidence submitted at trial. The Commission finds that the average weekly wage for the 52 weeks preceding the accident was $1,170.97, and therefore the amount of temporary total benefits awarded is modified to $780.64, and the maintenance benefit rate, likewise, is reduced to $780.64.

11. The Arbitrator awarded a wage differential of $519.64 per week from August 19, 2016 through July 8, 2024, the date of the Petitioner's 67th birthday. The Commission affirms the award of a wage differential as well as the finding that the Petitioner is capable of earning $19 per hour as a dispatcher. However, the Commission modifies the amount of the wage differential under §8(d)1 to $367.64 per week. Petitioner would be earning $1,311.46 per week from the City of Harvey (Px12) and was employable as a dispatcher at $760 per week. (1,311.46 – 760.00 = 551.46 x 66 2/3 = $367.64)

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $780.64 per week, or $16,170.40, for a period of 20 5/7 weeks, from November 27, 2013 through April 20, 2014, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall be given a §8(j) credit in the amount of $16,170.40 for regular salary continuation/PEDA payments.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $780.64 per week, or $334.56, for a period of 3/7 week, for September 12, 2014, September 15, 2014, and September 18, 2014, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall be given a §8(j) credit in the amount of $334.56 for regular salary continuation/PEDA payments.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $780.64 per week, or $26,764.80, for a period of 34 2/7 weeks, from January 14, 2015 through September 10, 2015, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall be given a §8(j) credit in the amount of $26,764.80 for regular salary continuation/PEDA payments.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $780.64 per week, or $29,106.72, for a period of 37 2/7 weeks, for from December 2, 2015 through August 18, 2016, that being the period of maintenance benefits under §8(a) of the Act. Respondent paid Petitioner maintenance/TTD benefits from November 24, 2015 through August 11, 2016, for a total amount of $32,959.13. Respondent shall be given a credit in the amount of $32,959.13 for the maintenance/TTD benefits paid. The overpayment of maintenance benefits shall be applied as a credit against the remained of the award.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $367.64 per week for a period of August 19, 2016 through July 9, 2024, the date of the Petitioner's birthday, as provided in §8(d)1 of the Act, for the reason that the injuries sustained caused the impairment of the Petitioner's earnings

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $8,271.66 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

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

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

The party commencing 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 15 2019

Charles J. DeVriendt

Joshua D. Luskin

CJD/dmm
O: 121918
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WRIGHT, KEVIN
Employee/Petitioner

Case# **13WC042388**

CITY OF HARVEY
Employer/Respondent

19IWCC0111

On 2/14/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.62% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2512 THE ROMAKER LAW FIRM
PATRICK G SEROWKA
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

1295 SMITH AMUNDSEN LLC
GAIL A GALANTE
3815 E MAIN ST SUITE A-1
ST CHARLES, IL 60174

19IWCC0111

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

Kevin Wright
Employee/Petitioner

v.

City of Harvey
Employer/Respondent

Case # **13** WC **42388**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago** , on **8/19/2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **11/26/2013**, 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 $**72,746.19**; the average weekly wage was $**1,398.65**.

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, in part,*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent is entitled to a credit of $**32,959.13** for maintenance/TTD benefits paid, as well as a credit of $**51,683.26**, pursuant to Section 8(j) of the Act, for a total credit of $**84,642.39**.

ORDER

Respondent shall pay Petitioner 20-5/7 weeks of temporary total disability benefits at a rate of $932.43 per week, or $19,314.36, for the period 11/27/13 through 4/20/14. Respondent shall be given a Section 8(j) credit in the amount of $19,314.36 for regular salary continuation/PEDA payments.

Respondent shall pay Petitioner 3/7 weeks of temporary total disability benefits at a rate of $932.43 per week, or $399.61, for September 12, 15, and 18, 2014. Respondent shall be given a Section 8(j) credit in the amount of $399.61 for regular salary continuation/PEDA payments.

Respondent shall pay Petitioner 34-2/7 weeks of temporary total disability at a rate of $932.43 per week or $31,969.29, for the period 1/14/15 through 9/10/15. Respondent shall be given a Section 8(j) credit in the amount of $31,969.29 for regular salary continuation/PEDA payments.

Respondent shall pay Petitioner 37-2/7 weeks of maintenance benefits at a rate of $932.43 per week, or $34,766.58, for the period 12/2/15 through 8/18/16. Respondent paid Petitioner maintenance/TTD benefits at a rate of $798.32 per week, from 11/24/15 through 8/11/16, for a total amount of $32,959.13. (R.Ex.6, p. 3) Respondent shall be given a credit in the amount of $32,959.13 for the maintenance/TTD benefits paid.

Respondent shall pay Petitioner $8,271.66 for the unpaid medical bills from Midwest Orthopaedics at Rush ($166.00) and Gold Coast Surgicenter ($8,105.66), pursuant to Section 8(a) and subject to Section 8.2 of the Act. If the Gold Coast Surgicenter bill for $8,105.66 has already been satisfied, then Respondent shall be given a credit.

Respondent shall pay Petitioner $519.64 per week from 8/19/16 through 7/8/24, the date of the petitioner's 67th birthday, because the accidental injury caused an impairment of the petitioner's earnings, pursuant to 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

February 12, 2017
Date

FEB 14 2017

19IWCC0111

FINDINGS OF FACT:

The petitioner testified that he has a high school degree with some college fire science courses. He was hired by the City of Harvey Fire Department in 1985. He completed paramedic training at Ingalls Hospital, which included medical terminology and anatomy. He worked as a licensed paramedic for 10-15 years until 1994 when Harvey stopped using the ambulance. He was promoted to engineer, the job he held on the accident date. He had a leadership role as on call lieutenant. He was the vice president of the firefighters' union 20 years ago. (Tr. 34, 76-80, 112)

The petitioner testified that on November 26, 2013, he was employed as a firefighter/engineer. The firefighter job involves preventing and suppressing fires and providing emergency medical assistance. His job duties involved inspecting buildings, responding to fire alarms, extinguishing fires, rescuing people, responding to car accidents and driving trucks. He liked serving the people and saving lives. He used fire hoses that weighted 40-45 pounds uncharged and 60 pounds charged. The spreader weighed 90 pounds and a K-12 saw weighs 35 pounds. (Tr. 9-13, P.Ex.13)

The petitioner testified that in 2013 he had a second job at Sears Hardware/Gilbert Brothers in Schererville, Indiana, since 1997, as paint manager and paint mixer. The job involved mixing paint, customer service and cash register. The City of Harvey Fire Department was aware of the second job. He was the paint manager for 6-7 years. He worked 24 hours/ week and earned $9.50 per hour. (Tr. 15-16, 35, 94-97, 119)

Deputy Chief Willie Buie, City of Harvey Fire Department, testified that his job duties include handling the paperwork for work injuries. A full-time firefighter works 49 hours per week, scheduled 24 hours on shift and 48 hours off shift. He testified that R.Ex.5 accurately

reflects the petitioner's earnings from 11/26/2012 to 11/26/2013. He testified that R.Ex.1, the 2013 to 2015 attendance records, accurately reflect the days the petitioner worked and the days he was off work. The days he was off work for the work injury are marked JI. H is a paid Haines day. The PEDA salary continuation payments that a firefighter receives while off work for a work injury are full pay through the regular payroll, 98 hours per pay period. He testified that R.Ex.2 and R.Ex.3, the petitioner's pay history from 11/26/2013 to 4/21/2014 and from 1/14/15 to 11/20/15, accurately reflect his payroll earnings/salary/PEDA payments for those periods. He testified that R.Ex.4 accurately reflects the petitioner's earnings from 11/26/13 to 11/26/14. (Tr. 165-167, 174-175, 180)

The payroll record from 11/26/2012 to 11/26/2013 shows that the petitioner had regular earnings of $60,890.19. (R.Ex.5) For the union contract year of 5/1/15 to 4/30/16, the engineer salary for the petitioner was $68,195.66 per year. (P.Ex.12)

The petitioner testified that on 11/26/2013, he tripped over a hose and fell after putting a flashlight back in the truck the scene of a fire. He struck his right elbow. (Tr. 16-18) On November 26, 2013, he was treated at Ingalls Hospital ER. The diagnosis was right elbow pain. He was referred to Ingalls Occupational Health and released to return to work with restrictions. From November 27 to December 18, 2013, he treated at Ingalls Occupational Health with a diagnosis of right elbow pain and lateral epicondylitis. Medication, physical therapy and work restrictions were prescribed. (P.Ex.1)

On January 31, 2014, he began treating with John J. Fernandez, M.D. The new patient information form states that he was referred by his attorney, Patrick Serowka. The form indicates that the petitioner has a history of right knee surgery in 2007, is right-handed, and plays golf recreationally. Upon examination, Dr. Fernandez gave a diagnosis of right lateral

epicondylitis and right cubital tunnel syndrome. Physical therapy and work restrictions were prescribed. On February 11, 2014, the right elbow MRI showed a partial tear of the extensor tendon at the lateral epicondyle and mild/moderate strain of the radial collateral ligament. On February 11, 2014, Dr. Fernandez administered a right elbow epicondylar injection. (P.Ex.2) He received physical therapy from February 7 to March 14, 2014 at Accelerated/Athletico. He received work hardening from March 24 to April 18, 2014 at Accelerated/Athletico. On April 18, 2014, the petitioner was able to lift 100 pounds, which met the HEAVY job requirements of his job of a firefighter. (P.Ex.9) On April 21, 2014, Dr. Fernandez released him to return to work without restrictions. (P.Ex.2)

The petitioner was off work from November 27, 2013 to April 20, 2014, during which time he received full PEDA/salary. He returned to work without restrictions on April 21, 2014. He noticed right elbow pain and hand numbness. (Tr. 20-21, 60)

On June 24, 2014, he returned to Dr. Fernandez and complained that his right elbow pain returned. He was working full duty. The diagnosis was right elbow lateral epicondylitis and cubital tunnel syndrome. Dr. Fernandez administered a right elbow injection. He recommended a PRP injection. He released the petitioner to return to work without restrictions. (P.Ex.2)

On August 11, 2014, the petitioner was examined by William Vitello, M.D., an orthopedic surgeon, at the respondent's request. The diagnosis was right elbow lateral epicondylitis and cubital tunnel syndrome, which was related to the November 26, 2013 work injury. He recommended a right elbow PRP injection. Right elbow surgery was an option if he remained symptomatic. He was able to work full duty without restrictions as he had been doing. (R.Ex.18)

From September 8, 2014, to December 1, 2014, upon a referral from Dr. Fernandez, Joshua Blomgren, D.O., treated the petitioner for right lateral epicondylitis. On September 8, 2014, Dr. Blomgren gave a PRP injection to his right elbow and placed him off work for 2 weeks. On September 22, Dr. Blomgren prescribed physical therapy and released him to return to work without restrictions. (P.Ex.2)

The petitioner was off work 3 duty days: September 12, 15, and 18, 2014. He was paid full salary. He returned to work without restrictions on September 24, 2014, which was his next scheduled work day. (R.Ex.1, Tr. 61)

From September 29, 2014 to January 12, 2015, he received physical therapy at Accelerated/Athletico. (P.Ex.9) On December 1, 2014, Dr. Blomgren, made a diagnosis of right elbow lateral epicondylitis and ulnar neuropathy, and found that he did not respond to the PRP injection. He was referred back to Dr. Fernandez. He was released to return to work without restrictions. (P.Ex.2)

The petitioner testified that in October and November 2014, his right elbow felt worse. (Tr. 23) On January 13, 2015, he saw Dr. Fernandez and complained of right elbow pain. He wished to proceed with surgery. Dr. Fernandez agreed, and took the petitioner off work. He was prescribed off work. (P.Ex.2) He has been off work since January 14, 2015.

On February 27, 2015, Dr. Fernandez performed surgery on the petitioner's right elbow to address his right elbow ulnar neuropathy/cubital tunnel syndrome and right elbow lateral epicondylitis with common extensor tendinopathy. Surgery consisted of right elbow ulnar nerve release, in situ cubital tunnel release, partial lateral epicondylectomy with debridement of common extensor origin and step-cut lengthening of the common extensor tendon. (P.Ex.2)

From March to April 15, 2015, he received physical therapy at Accelerated/Athletico. From April 20 to April 30, 2015, he received physical therapy at Pelican Sports & Rehabilitation in Naples, Florida. He was on a pre-planned, family vacation in Florida where they go every year. (Tr. 25) From May to June 4, 2015, he received physical therapy at Accelerated/Athletico. (P.Ex.8 and P.Ex.9)

From June 8 to July 20, 2015, he underwent work conditioning at Accelerated/Athletico. The petitioner provided the job description; his job as a firefighter was a HEAVY physical demand level. On July 17, 2015, he met 73.68% of the job demands. He showed the physical capability and tolerance to function at the heavy physical demand level. He was able to lift 100 pounds from floor to waist and from 12 inches to waist, which met the job demands. He lifted 65 pounds waist to shoulder; the job demand was 100 pounds. He carried 100 pounds for 50 feet; the job demand is 100 feet. Although not tested on this date, he met the 50 pound overhead lifting, as well as reaching, bending, squatting kneeling, crawling, stair climbing, walking, sledge hammer/vent roof and grip job demands. He performed occasional ladder climbing; the job demand was frequent. He performed 145 pound victim drag; the job demand was 165 pounds. He performed occasional ladder climb; the job demand was frequent. For the hose pull, he felt increased pain and stiffness after finishing the task. The therapist recommended continued work conditioning 4.5 hours per day for 4 days week for 2 more weeks. On July 20, he met the 40 rung ladder climb; he performed 150 pound victim drag. (P.Ex.9; R.Ex.21)

On July 21, 2015, Dr. Fernandez discontinued work conditioning. The petitioner felt that he plateaued; they discussed continuing work conditioning versus home therapy. Dr. Fernandez recommended home therapy including strengthening at his personal gym. They discussed possibly returning him to work nine months from surgery. On August 18, 2015, they discussed

giving it more time versus a functional capacity evaluation ("FCE"). Dr. Fernandez prescribed an FCE at Accelerated/Athletico. No follow-up appointment was necessary. Dr. Fernandez stated that he would provide a work status report based on the FCE. (P.Ex.2) The adjuster approved the FCE at Accelerated/Athletico. (P.Ex.9)

The petitioner testified that he decided to have the FCE at ATI, instead of Accelerated/Athletico because he thought it would be better to get a different opinion. The petitioner chose ATI. (Tr. 68)

On August 26, 2015, the petitioner was re-examined by Dr. Vitello. His diagnosis was status post right lateral epicondylar debridement and cubital tunnel release. Dr. Vitello stated that the petitioner's subjective complaints appeared somewhat out of proportion to his physical examination findings. He had a "rather benign" physical examination of mild tenderness over the lateral epicondyle. He had some residual paresthesias and decreased ulnar nerve sensation, but much improved compared to the pre-operative state. Dr. Vitello found that the petitioner had reached maximum medical improvement. He agreed that an FCE was reasonable. He was able to work with a 20 pound lifting restriction, pending the FCE. (R.Ex.19)

On August 28, 2015, he underwent the FCE at ATI. He was found to function at the MEDIUM physical demand level. He was able to occasionally lift 60.6 pounds desk to chair; 43.4 pounds above shoulder; 65.6 pounds chair to floor, left arm carry 62 pounds, right arm carry 42 pounds; right desk/chair lift 37.2; left 43.8 and push/pull 106.3. The evaluator noted that the firefighter job is a VERY HEAVY physical demand level under the Dictionary of Occupational Titles, with occasional lifting up to 100 pounds. The evaluator found that the petitioner's abilities fell below that level. (P.Ex.11)

On September 11, 2015, Dr. Fernandez released the petitioner to return to work with a permanent restriction, 40-pound lifting restriction of a right upper extremity, based on the FCE. Dr. Fernandez did not examine the petitioner, but diagnosed him with right elbow lateral epicondylectomy, ulnar nerve release and olecranon bursitis. (P.Ex.2)

On September 24, 2015, Dr. Vitello prepared an Addendum to his September 1, 2015 Section 12 examination report. He reviewed the FCE as well as Dr. Fernandez's release to return to work with permanent restrictions. Dr. Vitello agreed that a 40-pound right upper extremity work restriction was appropriate. In his opinion, such a restriction was temporary. He felt that the petitioner's condition could improve over time. No further treatment or work conditioning was needed. He recommended a repeat functional capacity evaluation in 6 months, which would be 1 year post-operative of the February 27, 2015 right elbow surgery, to reassess the possibility of improved right upper extremity function. If he had improved function, he would have reduced restrictions. (R.Ex.20)

On September 23, 2015, the petitioner emailed Dr. Fernandez and asked about his 40 pound restriction and if there "were any restrictions with regard to activities, sports, etc." The petitioner further wrote: "Prior to my injury, I played a fair amount of golf. Is this something I can attempt in the future?" On September 24, 2015, Dr. Fernandez responded via email and stated that the petitioner "can attempt more than that on an occasional basis, including activities like golf." Dr. Fernandez further wrote: "It's all based on the amount of pain or weakness you have." (P.Ex.2)

The petitioner received no additional treatment from, and had no further contact with, Dr. Fernandez. (P.Ex.2)

On October 16, 2015, the petitioner underwent a vocational assessment by Lisa Helma, Vocamotive, at his attorney's request. He met with her, but did not recall reading her report. The petitioner's attorney did not offer into evidence the Vocamotive report. The petitioner's objections to the respondent's questions about the report were sustained. The petitioner objected to the respondent's offer of the Vocamotive report into evidence on the basis of hearsay; the objection was sustained. (Tr. 72-75, 338)

The petitioner testified that he did not look for a job from 9/11/15 to 12/2/15. (Tr. 75-76)

The petitioner testified that on 12/2/2015 he had a vocational assessment by Edward Steffan of EPS Rehabilitation. From 12/21/15 to 8/18/16, he received job placement services from EPS/Mr. Steffan. He was given weekly job leads by EPS. The job targets included dispatcher, fire equipment sales, home security, fire inspection/installation, medical office, fire technician, customer service and 911 dispatch operator. In July 2016, security monitor and security positions were added as target jobs. The target geographic area was 50 miles or a 60 minute commute. He did not look for many jobs in Chicago because of the travel; it is 30 minutes from Chicago to his home in St. John, Indiana. He applied for jobs on line. He tried to apply in person but many places would not take his resume. He had one interview with Alert Alarm for a part time on call alarm monitor; he was not offered the job. He was paid temporary total disability/maintenance at $798.32 per week from 12/2/15 to 8/18/16, whether he was working on his job search or not. He was paid temporary total disability/maintenance while attending to personal matters and a 2 week vacation in Florida. (Tr. 36, 48, 84-90, Application for Adjustment of Claim) While in Florida, he underwent a course of physical therapy at Pelican Sports & Rehab.

The petitioner testified that Mr. Steffan created his resume'; he had little input. The resume' accurately described his skills and abilities. He provided this resume' when he applied for jobs. The resume' cites his job objective for a position with an employer who can utilize his extensive experience, skills, knowledge and work ethic. He agreed with the skills summary that he is an accurate and efficient employee, competent working with people of diverse backgrounds, has the ability to work independent or as a team member, is responsive and caring, and has a positive and friendly demeanor. He is somewhat knowledgeable about hardware tools and supplies. He used to have an excellent command of emergency medical services and extensive familiarity of medical terminology. He has very little knowledge about fire prevention. (Tr. 80-83, R.Ex.17) He provided the references. He contacted Lou Gianni, Midwest Aerospace, St. John, Indiana about potential job opportunities. He did not contact Chicago Fire Department Battalion Chief Gesiakowski. (Tr. 84)

He testified that he was previously interested in seeking re-training in a 2 year Associates degree for radiology technician. He is no longer seeking re-training. He is discouraged. It seems like no one wants to hire someone his age. By the time he would get out of school, he feels that he would not be employable. (Tr. 57, 103)

From December 21, 2015 to August 12, 2016, the petitioner documented his job search on EPS Job Seeker Forms. (Tr. 37) The Job Seeker Forms show that he followed up on the EPS job leads; he completed applications on line; he submitted applications in person. He did online research on the internet. He searched for employment in fire safety, fire sales, dispatch and security in the Indiana area where he resides. He had a 2 hour interview at Alert Alarm in Merrillville, Indiana, for a dispatcher position. The forms indicate that he will not apply for jobs in which he is asked to give his social security number online. On 7/19/16, he stated that he

would not work in the food industry. On 8/9/16, he stated that he "will not be a security guard" or a security officer. He documented his non-job search activities including funerals, his wife's surgery and doctor visits, getting his taxes done, meeting with his mother's bank and financial adviser, getting a new water heater, making CDs for his attorney on 7/20/16, preparing for his pension hearing, and attending his 7/26/16 pension hearing. On 8/1/16, he looked for a storage unit for 2 hours because he sold his house. On 8/8/16, he underwent 3 hours of physical therapy for his knee and 1.5 hours getting an oil change. On 8/10/16, he underwent 3 hours of physical for his knee and 1.5 hours at the City of Harvey to discuss his vacation and sick time. On 8/11/16, he spent 3 hours getting estimates for work on his house for the closing. He sold his house. On 8/12/16, he underwent 3 hours of physical therapy for his knee. (P.Ex.4)

The petitioner testified that he refused to apply online for any job that requires a social security number. He would not take a job for less than what he currently makes. He is not interested in the Red Cross or crisis jobs. He is not interested in the food industry. (Tr. 91-92) He cannot work at Sears Hardware because he cannot lift lawnmowers and tool chests; he is able to lift 5 gallon paint buckets. (Tr. 97)

He testified that he types a little better than hunt and peck, about 13 words per minute, with his 2 index fingers. Mr. Steffan/EPS recommended that he obtain keyboard and typing training on line. He declined to take the online "powertyping" program. In March and July 2016, Mr. Steffan advised him to increase his typing speed in order to become a 911 dispatcher; he declined it. (Tr. 35-36, 51, 92-94)

He testified that in November 2015, he applied for a line of duty disability pension under the Firefighters Illinois Pension Code. He was examined by 3 doctors who said he could not return to work as a full-duty firefighter. On 7/26/16, he was granted a firefighters duty disability

pension at a hearing. The benefits will begin in September 2016 at 75% of his monthly salary. (Tr. 105-107)

At Arbitration on 8/19/16, the petitioner testified that he is right-arm dominant. He notices right elbow pain, occasional stabbing and finger tingling/numbness. He can no longer trim bushes or do heavy lifting around the house. He no longer golfs because he is afraid of re-injury and more elbow pain. He has a computer and internet service; he uses the computer for social media, Facebook, Google and email. He has no software skills; he has never used Excel or Office. He never asked the respondent or EPS for computer training. He still does home exercises. He has no restrictions on his back or left upper extremity. He is 59 years old. He learned enough about job-seeking skills so that he could find a job on his own. (Tr. 32-36, 51, 61, 64, 70, 71, 92, 104, App. Adjustment of Claim)

Testimony of Jacky Ormsby

On July 18, 2016, the petitioner had a vocational evaluation by telephone with Jacky Ormsby of MedVoc Resources, at his attorney's request. Ms. Ormsby testified that she has a master's degree in rehabilitation counseling; she is a licensed professional counselor and a certified rehabilitation counselor. She has evaluated Workers' Compensation individuals for 20 years.

Ms. Ormsby opined that the petitioner has no transferable skills. He has no computer skills; there was nothing transferable from the Sears Hardware paint mixer job; he was a person of "advanced age" according to the social security administration; he is 59 and people in their 50s have more difficulty finding employment. She felt that the petitioner "would have difficulty finding employment." During job placement, he applied for 500 jobs and received 1 callback,

which, in her opinion, meant he was not employable. He could physically do a dispatcher job; some jobs require experience and fast typing, which he does not have. She opined that there is no stable labor market for him and that he has lost access to a viable stable labor market. (Tr. 100, 125-126, 129, 132-134, 140, 143-144, 152-153)

On cross-examination, Ms. Ormsby testified that she only did a labor market survey for the positions of dispatcher and sprinkler technician. The petitioner was possibly qualified for the dispatcher position at Jack Gray that required high school, 10-pound lifting and prior experience preferred but not required. The dispatcher position at Moraine Valley Community College required high school and a certified fire officer, which he has, but he did not have the required 2-3 years dispatch experience. She admitted that some employers will waive the prior experience requirement for a good candidate. In her opinion, the petitioner's 30 years of experience as a first responder/firefighter may be a transferable skill for a dispatcher. She would not provide an opinion if he could perform retail sales in a hardware store. She testified that he was employable as a front desk clerk if the job met his restrictions. She did not know if he was employable as a retail clerk. (Tr. 156-161)

Testimony of Edward Steffan

Edward Steffan testified that he has a master's degree in rehabilitation counseling, and is a certified rehabilitation counselor, licensed professional counselor and president of EPS Rehabilitation since 1981. His duties at EPS include assisting individuals with disabilities to find employment, producing all the reports and vocational rehabilitation plans and personally handling vocational rehabilitation cases. (Tr. 183,186, R.Ex.9)

Mr. Steffan testified that he performed a vocational evaluation and provided job placement to the petitioner at the respondent's request from 12/2/2015 to 8/18/2016. On December 2, 2015, he performed the initial consultation of the Petitioner at his attorney's office. He interviewed the petitioner about his education and work history. He graduated from high school, took fire science courses at community college, obtained a paramedic certificate and obtained certificates in firefighting, safety and rescue during his employment. He has a computer and a laptop with internet and email. He is familiar with Outlook, Word, Google, Chrome, Facebook and Yahoo. He hunts and pecks to use the keyboard. He has worked at the Harvey Fire Department since January 1985. From 1998 to the accident date, he worked at Sears Hardware as a paint mixer and in retail sales. Mr. Steffan noted that the petitioner was pleasant and cooperative. He said he was interested in an associate's degree in radiology, ultrasound or anything medically related. "He loved medical things." Mr. Steffan recommended a self-directed job search program. He would perform labor market sampling with and without additional training and then would evaluate the National Tea guidelines for his stated retraining interest. (Tr. 198-202)

Mr. Steffan testified that in January 2016, he performed a limited telephonic labor market sampling of positions available to the petitioner within his current abilities and restrictions. There were positions available as fire technician, 911 dispatch operator, fire alarm technician, fire safety sales, fire system inspection and dispatcher at wages from $14.00 to $22.00 per hour. The mean wage for dispatchers was $18.95 to $19.09. In his opinion, the petitioner could seek and secure employment at a wage range of $14.00 to $22.00 per hour. (Tr. 204-206)

Mr. Steffan testified that on 1/20/16, the limited telephonic labor market sampling showed that if the petitioner successfully completed a radiology technician program, he could

earn between $18.00 and $32.00 per hour. In March 2016, Mr. Steffan evaluated the petitioner's claim for retraining in an associate's degree program for radiology technician. He concluded that retraining was not an appropriate program as the cost/benefit under National Tea was not met. In his opinion, the petitioner has sufficient education and skills to obtain employment without additional training; he has 15 years customer service skills at Sears Hardware, as well as general knowledge and education. If he decided to pursue an associate's degree in radiology tech. on his own, he was bright enough to successfully complete it. (Tr. 203-204, 208-210)

Mr. Steffan testified about the job placement services he provided to the petitioner from December 2015 to August 2016. They taught him job-seeking skills. They provided 10-15 job leads each week. The petitioner was also to identify additional potential employers on his own. They prepared his resume', which the petitioner approved and used. They met with the petitioner twice per month to review his job search and job-seeking skills. They advised him to use powertyping.com to increase his typing speed. They established a 60 mile/60 minute geographic area for his job search. They established job targets and the petitioner agreed with the job targets. From December 2015 to June 2016, the job targets included dispatcher, fire technician, fire equipment sales, 911 dispatcher, customer service, and fire safety representative. They recommended customer service targets in the medical field because of his stated goal of retraining in the medical field, so he could learn more about the business and contacts after training. In July and August 2016, the targets were security monitor, customer service, fire equipment sales and fire equipment inspection. (Tr. 211-222, 225, 236-239, R.Ex.17)

Mr. Steffan testified that in July 2016, the petitioner said that he applied for a receptionist position and stated: "I could do it." He said he thought he could do the alarm extinguisher system technician position. He said he was able to be a security monitor, but said that it was

"degrading." He said he had the personality and paint experience for sales and customer service because he was a "people person." He said he didn't like security monitor, customer service, or fire equipment inspector jobs, but he applied anyway. He said wages were low in customer service and he did not want to work in health care. He said he would drive 20-30 miles, or 60 minutes for jobs. The previous target was 60 minutes or 60 miles. He said that during his job search, he did not identify 1 employer for whom he wished to work. Mr. Steffan found that unusual; in 30 years it was rare for someone not to identify a single employer where the injured worker wanted to work. (Tr. 236-239, 243-244, 246-249)

Mr. Steffan testified that during job placement from 12/21/15 to 8/8/16, he recommended that the petitioner improve his typing and keyboarding skills by taking an online powertyping program. The advantage of powertyping is that it is self-paced and can be done at home. It teaches typing and proper keyboard use. In his experience, people get results and increase their typing skills. The petitioner was well qualified to work as a 911 dispatcher because of his experience as a firefighter and a paramedic. However, the baseline typing speed for most employers was 30 words per minute. If the petitioner increased his typing speed, he would have access to 911 and other dispatcher jobs. The petitioner declined to use the powertyping program; he said it was a "waste of time." The Bureau of Labor Market statistics median salary for police, fire and ambulance dispatcher is $22,052.00. Quick Facts shows that 911 dispatchers pay $42,109.00 in Will County, $52,246.00 in Cook County and $51,825 in Chicago. In July 2016, EPS no longer provided 911 dispatcher leads because of the petitioner's lack of keyboard skills. They thought he would be a great candidate and that it was an ideal position for him, but he did not have the keyboarding ability. (Tr. 213, 226-227, 231-242)

Mr. Steffan testified that he evaluated the petitioner's activities during job placement from 12/28/15 to 7/22/16. The petitioner made 205 in person contacts; he inquired in person and delivered a resume 34 times; he followed up in person 11 times; he researched the internet 62 times; he researched newspapers 16 times. He completed 142 online applications. He had 1 interview and delivered his resume'. He had 1 interview and applied in person. EPS generated 453 leads for the petitioner. The petitioner generated 72 leads on his own. The petitioner had 152 (work) days available for job placement from 12/28/15 to 7/22/16. Mr. Steffan concluded that he completed 3.5 vocational activities per day. (Tr. 249-255)

Mr. Steffan testified of all the several hundred prospective employers that the petitioner contacted (450 provided by EPS), the reason the petitioner received only 1 five-minute interview and no callbacks, is that a number of those employers may not have been hiring. Mr. Steffan emphasized that it is the quality, not the quantity, of the job search that matters. (Tr. 271-279)

Mr. Steffan testified that in his opinion, the petitioner is employable and placeable for positions in the labor market within his current skills, education and abilities at wages from $14.00 to $22.00 an hour. There are a large number of positions in the sedentary, light and medium exertion levels that he could access within his 40 pound lifting capacity. There are a large number of occupations that are readily stable and available to the petitioner in the labor market, including retail sales, store manager, security monitor, assembler, clerk, dispatcher, customer service, fire technician and fire safety sales with a wage range of $14.00 - $22.00/hour. In his opinion, there is a reasonably stable labor market for the petitioner. He disagreed with the opinions of Ms. Ormsby. In his opinion, there is a large, available and stable labor market for the petitioner in the sedentary, light and medium categories. (Tr. 223-226, 255-257)

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CONCLUSIONS OF LAW:

In support of his decision with regard to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator makes the following findings and conclusions:

Dr. Blomgren, one of the petitioner's treating physicians, opined that there exists a causal connection between the petitioner's diagnosis of right lateral epicondylitis and cubital tunnel syndrome, the need for surgery and the November 26, 2013 injury he sustained while working for the respondent.

The respondent does not dispute the issue of accident. Furthermore, the arbitrator finds it noteworthy that the respondent failed did not put forth any evidence to dispute the issue of causation.

In fact, in a report dated August 15, 2014, Dr. Vitello, the respondent's Section 12 examining physician and an orthopedic surgeon, wrote, in pertinent part, the following:

> "His diagnosis is right lateral elbow epicondylitis and right elbow cubital tunnel syndrome. In my opinion, these are related to the November 26, 2013, incident at work. The medical records, the history, and his clinical exam appear to coincide and correlate with the development of these two injuries at the time of the fall while at work on November 26, 2013." (R. Ex. 18)

Therefore, the arbitrator finds that the petitioner's current condition of ill-being of his right arm is causally related to the accident of November 26, 2013.

In support of his decision with regard to issue (G) "What were Petitioner's earnings?", the Arbitrator makes the following findings and conclusions:

The petitioner testified that in 2013, he earned $64,280.95 for the City of Harvey Fire Department, which he estimated was $1,300.00/week. He testified that he was on the force for 29 years. He referred to P.Ex.12, which is the City of Harvey Salary Wage Schedule.

There was no testimony regarding overtime work, or whether such work was voluntary or mandatory.

The respondent raised no objection to the admission of P.Ex.12.

The respondent offered into evidence, as R.Ex.5, the Compensation History of the petitioner from 11/26/2012 through 11/26/2013. Such document indicates that the petitioner's regular earnings for this time period were $60,890.19. Deputy Chief Willie Buie testified that R.Ex.5 accurately reflects the petitioner's earnings from 11/26/2012 to 11/26/2013.

The petitioner raised no objection to the admission of R.Ex.5.

The petitioner testified that while he worked as a firefighter in November 2013, he had a side job as a paint mixer at Sears Hardware/Gilbert Brothers. He worked at such side job for 17 years. The petitioner further testified that the City of Harvey Fire Department was aware that he was working as a paint mixer at Sears Hardware. The petitioner testified that in a regular work week, he would work 24 hours as a paint mixer at Sears Hardware and was paid $9.50/hour.

The respondent raised no hearsay or foundation objection to the petitioner's testimony about his side job, that is, his concurrent employment. The respondent presented no evidence to rebut the petitioner's claim of concurrent employment.

The petitioner testified that the adjuster paid him TTD/Maintenance benefits in the amount of $798.32/week.

The arbitrator finds that R.Ex.5 is the best evidence of the petitioner's regular earnings from the respondent ($60,890.19) as it more closely comports with Section 10 of the Act. Deputy Chief Willie Buie testified that R.Ex.5 is accurate. Furthermore, the arbitrator finds that the petitioner earned $228.00/week (= $9.50/hour x 24 hours), or $11,856.00/year, in his concurrent employment at Sears Hardware in the 52-week period preceding the accident.

Therefore, the arbitrator finds that for the 52-week period preceding the accident, the petitioner earned $72,746.19, or an average weekly wage of $1,398.65.

In support of his decision with regard to issue (K) "What temporary benefits are in dispute? TTD and Maintenance", the Arbitrator makes the following findings and conclusions:

Pursuant to Section 8(j) 2 of the Act (820 ILCS 305/8(j) 2 (West 2002)), the respondent is entitled to credit for salary paid to claimant, but only to the extent of its TTD liability. Elgin Bd. of Educ. Sch. Dist. U-46 v. Illinois Workers' Comp. Comm'n, 409 Ill. App. 3d 943, 954, 949 N.E.2d 198, 208 (1st Dist. 2011).

The arbitrator finds that the petitioner was off work due to the accidental injury from 11/27/2013 to 4/20/2014 (20-5/7 weeks.) He returned to work on 4/21/2014. (R.Ex.1, Tr. 20-21) He was paid full regular salary pursuant to PEDA by the respondent from 11/26/13 to 4/21/14 in the amount of $27,176.82. (R.Ex2) The arbitrator awards the petitioner 20-5/7 weeks of temporary total disability benefits at $932.43 per week, or $19,314.36, from 11/27/13 to 4/20/14. The respondent is granted an 8(j) credit in the amount of $19,314.36 for the regular salary continuation/PEDA payments.

The arbitrator finds that the petitioner was off work for 3 work days, September 12, 15, and 18, 2014, when he received related medical care for his right arm. Such medical care consisted of an injection. He was paid his full salary by the respondent. (R.Ex.1, R.Ex.4, Tr. 61) The arbitrator awards the petitioner 3/7 weeks of temporary total disability benefits at a rate of $932.43, or $399.61. The respondent is granted an 8(j) credit in the amount of $399.61 for the regular salary continuation payments.

The arbitrator finds that the petitioner was off work and under medical treatment from 1/14/15 to 9/10/15. On 9/11/15, Dr. Fernandez released to return to work with permanent restrictions and found him to be at maximum medical improvement. The arbitrator awards the petitioner 34-2/7 weeks of temporary total disability at $932.43 per week, or $31,969.29, from 1/14/15 to 9/10/15. The petitioner was paid his full, regular salary by the respondent, pursuant to PEDA from 1/14/15 to 9/10/15. (R.Ex.3, T. 103) The respondent is granted an 8(j) credit in the amount of $31,969.29.

The petitioner testified that from 9/11/15 to 12/1/15 he did not perform a job search. However, the petitioner clearly could not return to work as a firefighter/engineer. He further testified that he could not return to his side job at Sears Hardware because the 40 pound right arm lifting restriction did not allow him to lift items such as a lawn mower or a tool chest.

The arbitrator finds that the petitioner sustained a loss of earning capacity at that time, and that he was entitled to vocational rehabilitation.

A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in earning power and there is evidence rehabilitation will increase his earning capacity. National Tea Co. v. Indus. Comm'n, 454 N.E.2d 672, 73 Ill. Dec. 575 (1983).

Section 8(a) of the Act requires the employer to pay only those maintenance costs and expenses that are incidental to rehabilitation. That means that an employer is obligated to pay maintenance benefits only "while a claimant is engaged in a prescribed vocational rehabilitation program." W.B. Olson, Inc. v. Illinois Workers' Compensation Commission, 981 N.E.2d 25, 366 Ill. Dec. 960 (1st Dist. 2012)

The arbitrator notes that the Appellate Court has construed the statutory term "rehabilitation" broadly to include an injured employee's self-initiated and self-directed job search. Please see Roper Contracting v. Indus. Comm'n, 812 N.E.2d 65, 285 Ill. Dec. 476 (5th Dist. 2004). If a claimant is not engaged in some type of "rehabilitation" (i.e., physical rehabilitation, formal job training, or self-directed job search), the employer's obligation to provide maintenance is not triggered.

Vocational rehabilitation did not begin until 12/2/15. From 12/2/15 to 8/18/16, the petitioner was engaged in job placement and conducted a job search. However, from 9/11/15 to 12/1/15, the petitioner did not perform a self-directed job search, and was not undergoing formal training or physical rehabilitation.

Therefore, the arbitrator denies the petitioner's claim for maintenance benefits from 9/11/15 through 12/1/15.

The arbitrator awards 37-2/7 weeks of maintenance benefits at $932.43 per week, or $34,766.58, for the period 12/2/15 to 8/18/16. The respondent paid the petitioner maintenance/ temporary total disability benefits at $798.32 per week from "Check Date" 11/24/15 to 8/11/16 for a total amount of $32,959.13 (R.Ex.6, p. 3) The respondent is granted a credit in the amount of $32,959.13 for the maintenance/temporary total disability benefits paid.

In support of his decision with regard to issue (N) "Is Respondent due any credit?", the Arbitrator makes the following findings and conclusions:

As shown above, the respondent is entitled to a total 8(j) credit of $51,683.26, and is also entitled to a credit for maintenance/temporary total disability payments in the amount of $32,959.13.

In support of his decision with regard to issue (O) "Mileage Reimbursement pursuant to Section 8(a)", the Arbitrator makes the following findings and conclusions:

Section 8(a) of the Act states, in pertinent part, the following:

> "In addition [to the maintenance benefit], maintenance shall include costs and expenses incidental to the vocational rehabilitation program." (Bracketed words added.)

The petitioner offered into evidence as P.Ex.4, Mileage and Job Logs. The arbitrator admitted the exhibit. This exhibit is comprised of a collection of Job Seeker Forms and 3 memos from the petitioner to petitioner's counsel with mileage updates. The most recent memo is dated July 15, 2016, and indicates total mileage to date of 2,183. (P.Ex.4)

The arbitrator notes that neither the applicable mileage reimbursement rate nor the authoritative source for such rate was offered into evidence.

The petitioner offered into evidence as P.Ex.6, Mileage Logs. The respondent objected. The arbitrator rejected the exhibit. The arbitrator finds that the petitioner laid an insufficient foundation, and that the distances that he claims are not verifiable. With regard to P.Ex.6, the petitioner testified that he would use GPS to accurately write down his mileage when he went out to apply for jobs in his car. He would enter the address of the prospective employer into the GPS and the GPS would tell you how many miles it will take to get there. He would set out for a place whose address he had put in the GPS, and then he would come back. No evidence was provided with regard to the starting point. The petitioner attested that P.Ex.6 provides an accurate accounting of his mileage from December 2015 and August 2016. (Tr. 55-56)

"Case law supports the proposition that information acquired from mainstream Internet sites such as MapQuest and Google Maps is reliable enough to support a request for judicial notice." Peters v. Riggs, 32 N.E.3d 49, 392 Ill. Dec. 49 (4th Dist. 2015) *citing* People v. Clark, 406 Ill. App. 3d 622, 633, 940 N.E.2d 755, 766, 346 Ill. Dec. 386 (2010).

In the case at bar, the petitioner did not offer documents from Google Maps, MapQuest or any other GPS-supported service to verify his mileage.

The arbitrator finds that although the petitioner is entitled to a mileage reimbursement, he failed to prove the amount.

In support of his decision with regard to issue (J) "Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?", the Arbitrator makes the following findings and conclusions:

The petitioner claims unpaid medical bills in the amount of $23,758.86 for reasonable, necessary and related medical services rendered by Athletico Physical Therapy ($13,615.10), ATI Physical Therapy ($1,706.10), Ingalls Memorial Hospital ($0.00), Midwest Orthopaedics at Rush ($332.00), Pelican Sports & Rehab, FL ($0.00) and Gold Coast Surgicenter ($8,105.66). The petitioner prepared a summary of the unpaid bills to which he attached invoices from 5 of the 6 providers. (P.Ex.10)

The respondent objected and claims that with the exception of a $166.00 bill from Midwest Orthopaedics at Rush, all of the other bills have been paid. The respondent offered into evidence a Medical Payment Log as proof of payment. (R.Ex.7) The respondent also offered into evidence R.Ex.7A for the purpose of showing (by comparing patient name/dates of service on R.Ex.7A with the Accelerated/Athletico invoices) that Align Networks, Inc. is the same provider as Accelerated/Athletico.

The petitioner claims that as of 7/7/16, the balance due from Athletico Physical Therapy was $13,615.10. (P.Ex.10) The arbitrator notes that on 7/13/16, the respondent paid the Align Networks, Inc. charges that total $13,615.10, and apparently adjusted such charges, pursuant to Section 8(a) and subject to Section 8.2 of the Act. (R.Ex.7)

The petitioner claims that as of 7/5/16, the balance due from ATI Physical Therapy was $1,706.10. (P.Ex.10) The arbitrator notes that as of 7/13/16, the respondent paid Athletic and

Therapeutic Inst. the bill for $1,706.10, and apparently adjusted this bill, pursuant to Section 8(a) and subject to Section 8.2 of the Act. (R.Ex.7)

The petitioner claims that as of 7/6/16, the balance due from Midwest Ortho at Rush was $332.00. (P.Ex.10) The arbitrator notes that as of 7/13/16, the respondent paid Midwest Orthopaedics at Rush a bill for $166.00, and apparently adjusted this bill, pursuant to Section 8(a) and subject to Section 8.2 of the Act. (R.Ex.7) So, there is an unadjusted balance of $166.00.

The petitioner claims that as of 8/17/16 (there is a fax timestamp on the top of the invoice), the balance due from Gold Coast Surgicenter was $8,105.66 for a surgery performed on 2/27/15. (P.Ex.10) The arbitrator notes that on 9/30/15, the respondent paid Gold Coast Surgicenter the bill for $8,105.66, and apparently adjusted this bill, pursuant to Section 8(a) and subject to Section 8.2 of the Act, to $3,079.22. (R.Ex.7) The arbitrator has no explanation for the discrepancy between the 8/17/16 Gold Coast Surgicenter invoice (P.Ex.10) and the Medical Payment Log. (R.Ex.7)

Therefore, the arbitrator awards the petitioner the amount of $8,271.66 (= $166.00 + $8,105.66) for unpaid medical bills from Midwest Orthopaedics at Rush and Gold Coast Surgicenter, pursuant to Section 8(a) and subject to Section 8.2 of the Act. If the Gold Coast Surgicenter bill for $8,105.66 has already been satisfied, then the respondent will be entitled to a credit.

In support of his decision with regard to issue (G) "What is the nature and extent of the injury?", the Arbitrator makes the following findings and conclusions:

The arbitrator finds that the petitioner sustained a right elbow injury to his dominant arm as a result of the 11/26/2013 work accident when he tripped and fell over a firehose. From

11/26/2013 to 4/21/2014, he was treated with physical therapy, medication and work restrictions under a diagnosis of right elbow lateral epicondylitis and cubital tunnel syndrome. He was off work from 11/27/2013 to 4/20/2014. He was released to return to work without restrictions on 4/21/2014. From 6/24/2014 to January 2015, he was treated with a right elbow steroid injection, PRP injection and physical therapy. He continued to work without restrictions With the exception of the 2-week period in September 2014 when he received the PRP injection, the petitioner continued to work without restrictions. The petitioner has been off work since 1/14/2015. On 2/27/2015, he underwent right elbow surgery that consisted of an ulnar nerve release and a partial lateral epicondylectomy to address his right elbow cubital tunnel syndrome and lateral epicondylitis. From 3/2015 to 6/2015, he received physical therapy. From June 2015 to July 2015, he received work conditioning at Accelerated/Athletico. On 7/17/15, the Accelerated/Athletico physical therapist performed a work conditioning re-evaluation and found that he performed at the HEAVY physical demand level with 100 pounds lifting; he met 73.68% of the firefighter job demand. In July 2015, Dr. Fernandez prescribed a functional capacity evaluation at Accelerated/Athletico. The petitioner decided to have the functional capacity evaluation at ATI instead. On 8/28/15, the ATI functional capacity evaluation indicated that he could perform at the MEDIUM physical demand level, with 60 pounds lifting, 43 pounds overhead lifting and 42 pounds right arm lifting. On 9/11/2015, Dr. Fernandez released the petitioner to return to work with a permanent 40 pound right upper extremity lifting restriction.

The arbitrator recognizes that the petitioner has a permanent 40 pound right upper extremity lifting restriction as a result of the work injury. However, he may be capable of heavier lifting. On 7/17/15, he showed the ability to perform at the HEAVY physical demand level and lifted 100 pounds at Athletico/Accelerated. In August 2015, Dr. Vitello found that the

petitioner's subjective complaints were out of proportion to the objective findings, and that he had a "benign" right elbow examination with residual paresthesia and mild tenderness. On 9/23/2015, Dr. Fernandez wrote the petitioner and stated that he could attempt to lift over 40 pounds on an occasional basis, which includes activities like golf. Dr. Fernandez stated that it depends on the amount of pain and weakness he has.

The arbitrator finds that there is a reasonably stable labor market for the petitioner within his restrictions, education, skills and abilities, in positions of dispatcher, fire equipment sales, fire inspection, customer service, store manager, assembler, clerk, security monitor, retail sales, 911 dispatcher, and fire alarm technician at wages ranging from $14.00 to $22.00 per hour. The arbitrator finds that there are a large number of positions in the labor market in the sedentary, light and medium levels within his 40 pound lifting restriction. If he improved his typing, he would be able to earn up to $42,109.00 per year as a 911 dispatcher in Will County, Illinois. Ms. Ormsby testified that the petitioner was qualified for the dispatcher jobs that she surveyed; no experience was required for one position; experience was required for the other position, but she testified that an employer may waive the experience requirement for a good candidate.

In July 2016, EPS no longer provided 911 dispatcher leads because of the petitioner's lack of keyboard skills. Mr. Steffan thought that the petitioner would be a great candidate and that this would be an ideal position for him, but he did not have the keyboarding ability.

The arbitrator finds that the petitioner is employable. The petitioner has a high school education and some college; he has paramedic training. He held leadership positions as a first responder, firefighter, engineer and vice president of the union. He has 17 years' experience in retail sales at Sears Hardware. He uses a computer and laptop; he uses email and social media. He told Mr. Steffan that he could do the jobs of receptionist, security monitor, customer service

and fire alarm technician. He said that he had the personality and experience for sales and customer service because he is a "people person."

The arbitrator relies on the opinions of Edward Steffan that the petitioner is employable, that there are positions available in the labor market for him and that there is a reasonably stable labor market for him. Mr. Steffan provided job placement to the petitioner for 8 months from December 2015 to August 2016; he met several times with the petitioner; he performed labor market surveys/samplings; he provided weekly job leads for positions available in the labor market within the petitioner's skills, abilities and work restrictions. The arbitrator finds the testimony and opinions of Edward Steffan to be more persuasive than those of Jacky Ormsby. Ms. Ormsby did not meet with the petitioner. She had 1 telephone call with him and performed a labor market survey for only 2 types of positions.

The arbitrator draws an adverse inference from the petitioner's decision not to introduce the vocational evaluation report of Lisa Helma/Vocamotive, who was their initial vocational expert. The petitioner objected to the respondent's questions about the evaluation and objected when the respondent offered such report into evidence. The arbitrator makes the reasonable inference that Ms. Helma's findings must be contrary to those of Ms. Ormsby.

Mr. Steffan testified of all the several hundred prospective employers that the petitioner contacted (of which EPS provided 450 contacts), the reason the petitioner received only 1 five-minute interview and no callbacks is that a number of those employers may not have been hiring. Mr. Steffan emphasized that it is the quality, not the quantity, of the job search that matters. (Tr. 271-279)

The arbitrator finds that the petitioner limited his job search. He declined to complete the online typing and keyboard class to increase his typing speed to become qualified for 911

dispatcher positions. He limited his geographic search to northwest Indiana, 20 to 30 miles from where he lived. He did not apply for jobs in Chicago. He did not contact his own reference, a Chicago Fire Department Battalion Chief. He would not provide his social security number to prospective employers. He would not work in the food industry. He would not be a security guard or security officer. He would not work for the Red Cross or crisis providers. He thought it would be degrading to be a security monitor. He was not interested in health care jobs. He would not accept a job for less than what he was making as a firefighter. For 7 months, from 12/28/2015 to 7/22/2016, he performed only 3.5 vocational activities per work day. He generated only 72 leads on his own. He did not identify a specific employer for whom he wanted to work.

The arbitrator places considerable weight on the fact that the petitioner declined to complete the online typing course, powertyping, which EPS recommended. Completion of such course would have helped him increase his typing speed and would have allowed him to qualify for the position of dispatcher. Edward Steffan found the mean wage for dispatchers to be $18.95 to $19.09.

At Arbitration, the arbitrator had the opportunity to assess the petitioner's presentation and demeanor. The arbitrator finds Kevin Wright to be sharp, articulate and personable. The arbitrator further finds that the email message of September 23, 2015, which the petitioner composed and sent to Dr. Fernandez, is well written and error-free. Although the petitioner's age works against him, his experience works for him. As a result of the accident, Dr. Fernandez restricted the petitioner from lifting more than 40 pounds with his right upper extremity. The arbitrator finds that after Dr. Fernandez discharged the petitioner, no other doctor has imposed additional restrictions on the petitioner, such as standing, walking, sitting or driving restrictions.

Moreover, there is no evidence that the petitioner takes prescription pain medication for any right elbow symptoms.

Based on the foregoing, the arbitrator finds that the petitioner has failed to prove that he is an "odd lot" permanent total.

The arbitrator finds that the petitioner sustained an impairment of earnings under Section 8(d)1 of the Act as a result of the work accident. The arbitrator finds that pursuant to 8(d)1, the petitioner is partially incapacitated from pursuing his usual and customary line of employment as a firefighter/engineer, and as a paint mixer/paint manager at Sears Hardware. As a result of the work accident, he has a 40-pound right upper extremity restriction that prevents him from performing these jobs.

The arbitrator finds that the petitioner would be earning $68,195.66/year as a firefighter/engineer for the respondent as of 2016. (P.Ex.12) The arbitrator did not mark up P.Ex.12; the petitioner submitted this exhibit into evidence in this condition. The arbitrator further finds that, but for the work accident, the petitioner would also be earning $11,856.00/year working in his concurrent employment at Sears Hardware. The petitioner testified that after the accident, he did not return to work for Sears Hardware because his lifting restriction would not allow him to lift a lawn mower or a toolbox. The respondent did not present any evidence to the contrary.

The total amount the petitioner would have been earning, annually, is $68,195.66 + $11,856.00 = $80,051.66, or $1,539.46/week.

The arbitrator finds that the petitioner is capable of earning $19.00/hour as a dispatcher. For a 40-hour workweek, at $19.00/hour, the petitioner would earn $39,520.00/year, or $760.00/week.

So, pursuant to Section 8(d)1, the weekly wage differential would be calculated as follows:

$1,539.46 - $760.00 = $779.46 x ⅔ = $519.64.

Based on the foregoing, the arbitrator finds that as a result of the accident of 11/26/13, the petitioner is entitled to a wage differential in the amount of $519.64/week, which commences on 8/19/2016 carries through to 7/8/2024, the petitioner's 67th birthday, pursuant to Section 8(d)1 of the Act.

Brian T. Cronin
Arbitrator

2-12-2017
Date

STATE OF ILLINOIS)
)
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Evarette Rhaburn,
Petitioner,

vs. No. 16 WC 26068

Panera Bread,
Respondent.

19IWCC0112

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering issues including accident, causation, medical expenses, permanent disability, and temporary disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below.

The Commission affirms the outcome of the Arbitrator's decision insofar as the Commission agrees that Petitioner sustained accidental injury in the course of and arising out of employment. The Commission finds that the mechanism of injury to Petitioner's left ankle differs in certain details from that found by the Arbitrator, as discussed below. Further, the Commission reduces the Section 8(e) permanent partial disability award from 2.5% loss of the use of the left foot to 1.5% loss of use of the left foot.

I. BACKGROUND

A. Accident and Treatment

During the month of August 2016, Petitioner, 18, was working three jobs (two restaurant jobs and one retail job), including at Respondent, Panera Bread. On August 26, 2016, she began her shift at Respondent at 2 p.m. Petitioner was standing, waiting for an order, when the accident occurred about an hour later. A co-worker, Lindsay Cray, was attempting to place a bin of lettuce atop a long cutting board that was resting (not securely) on a food preparation counter near Petitioner. The cutting board tipped over and fell, eventually coming to rest flat on the floor. This cutting board is big -- about 6 feet long and about a foot wide. (Tr. 11-12; RX4).

Petitioner attested that the cutting board struck her on "the outside" of her left ankle. (Tr. 12). Petitioner stated, when the cutting board hit, "At first I didn't feel anything, and then a few seconds later, I just felt a jolting pain all up my leg." (Tr. 13). The co-worker, Ms. Cray, returned the cutting board to the counter, but Petitioner could not help her because "[her] ankle was hurting" at that time. (Tr. 22). Petitioner could not say whether the cutting board bounced off anything before striking her. (Tr. 19). Petitioner immediately reported the incident to two supervisors, but she was not permitted to leave work until 8 p.m.

The next day, August 17, 2016, Petitioner presented to the ER at Vista Medical Center in Waukegan for left ankle injury. As to history of present illness, notations included "cutting board fell on lateral ankle," and "location: left ankle but not leg or not foot." Physical examination of her left ankle disclosed tenderness, swelling, and ecchymosis (bruise). X-ray findings included "avulsion distal fibula." The diagnosis was lateral malleolar fracture, which injury was noted to be minor. At discharge, she was provided with an air cast, crutches, a return-to-work form allowing her to return to work on August 19, 2016 (with restrictions), and instructions to follow up with a general practitioner and an orthopedic surgeon. (PX 1).

On the same day, Petitioner (on her own) presented to Dr. Chandrasekhar Sompalli of Illinois Orthopedic Network. Dr. Sompalli's physical examination disclosed moderate sized effusion and ecchymosis with bruising of the tendon. Dr. Sompalli continued Petitioner's off-work status and prescribed medications. He ordered an MRI of the left ankle. The MRI (done on August 26, 2016) was read as normal, with no evidence of lateral malleolus fracture. (PX 4). On the follow-up visit of September 17, 2016, Dr. Sompalli noted the normal MRI results, rendered an assessment of left ankle sprain, advised that Petitioner could begin weightbearing as tolerated, and released her to return to work. No follow-up visit was scheduled, but Dr. Sompalli did include a prescription for 4 weeks of physical therapy. (PX 4). Petitioner underwent about 11 sessions of physical therapy, and by November 14, 2016, her left ankle condition was deemed resolved and she was discharged from physical therapy. (PX 5).

Petitioner testified that, after the accident, Respondent did not schedule her for any more shifts. She currently works at American Outfitters (the retail job from August 2016). As to her current condition, Petitioner stated that her ankle "just gets sore and uncomfortable" with prolonged standing.

B. Records Review by Respondent's expert

At Respondent's request, Dr. Simon Lee performed a medical records evaluation and assessment on March 8, 2017. (RX 3). He reviewed the ER records and x-rays, the MRI, and Dr. Sompalli's records. The MRI was again noted to reveal no evidence of a fracture. Dr. Lee's diagnosis was left ankle soft tissue contusion. He opined that this diagnosis was consistent with Petitioner's work injury as noted and resulted from her employment. Dr. Lee further opined that the soft tissue contusion would result in no long-term disability or impairment.

C. Still Images from Respondent's Security Video

At hearing, Respondent submitted into evidence two still images taken from security video footage of the incident. (RX 4a and 4b). The timestamps on these two images indicate that they were captured one second apart (the first was taken at 15:38:59; the second at 15:39:00). During cross-examination, Respondent played a minute-long video clip before the Arbitrator and the parties. As the hearing transcript indicates, the video clip began about seven seconds before the moment of the still shots. The Arbitrator made no comment to describe the video after it was played. Petitioner's only comment was "That's so weird." (Tr. 36). No further testimony was elicited from Petitioner, other than her acknowledgment that the video accurately depicted events. Respondent chose not to offer the video into evidence.

At any rate, the first still image depicts the cutting board near the beginning of its descent. (RX 4a). As Petitioner testified, the cutting board was tipped or flipped over when Ms. Cray attempted to place a bin of lettuce on it. The second still image (from one second later) shows the cutting board lying flat on the ground, resting before Ms. Cray's feet, with Ms. Cray still holding on to the bin with her hands. (RX 4b).

The image quality of these exhibits is poor, and Petitioner appears as a shadowy silhouette. It can be discerned that Petitioner is positioned standing somewhat behind Ms. Cray's back, to the right of Ms. Cray. In these still shots, Petitioner appears to have twisted or be twisting her body to her (Petitioner's) left, looking over her left shoulder, as if in response to the sound of the cutting board mishap as it was occurring. Petitioner's left foot is placed on the floor in proximity to Ms. Cray's right foot.

II. DISCUSSION

In finding a compensable accident, the Arbitrator wrote that, while the still images do not show the cutting board striking Petitioner, he "cannot definitely determine the exact path of the board." (Arbitrator's decision at 4). He also noted that her testimony was in large part consistent with the falling cutting board and that the "medical records strongly support her story." (Arbitrator's decision at 4-5).

19IWCC0112

Respondent contends that the Arbitrator's decision is insupportable as a matter of physics, as the still images "conclusively show that the cutting board did not come into contact with Petitioner's left ankle." (Respondent's review brief at 5). Respondent acknowledges that, based on the medical records, Petitioner "likely suffered an injury to her left ankle around the time of the alleged work injury," but was not injured by the cutting board falling on her ankle. (Respondent's brief at 5).

The Commission agrees with Respondent's contention that the cutting board did not come into physical contact with Petitioner's ankle. However, given the objective evidence of injury and other supporting details in the medical records (including Petitioner's recounting of consistent histories to medical services providers regarding a falling cutting board), the Commission finds that Petitioner did suffer a work-related ankle injury that day, albeit via some other mechanism of injury. The photographic evidence suggests that it was Ms. Cray who made physical contact with Petitioner's ankle by stepping backwards onto Petitioner's ankle, or else that Petitioner suffered a twisting injury when she rotated (twisted) her body over her left foot, which was planted on the floor. Petitioner's account at the hearing of the mechanism of injury arose from a reasonable, but mistaken, belief that the sudden "jolting pain" up her leg, which she experienced contemporaneous with the cutting board's fall to the floor, was due to the board striking her.

As for the Arbitrator's award of permanent partial disability reflecting 2.5% loss of use of the left foot, the Commission reduces this award to 1.5% loss of use of the left foot. In this regard, the Commission finds that, of the factors enumerated in Section 8.1b, consideration of the "evidence of disability" warrants this reduction, a reduction that is consistent with the opinion of Dr. Simon Lee. As mentioned above, Dr. Lee stated that Petitioner's soft tissue contusion would result in no long-term disability or impairment. As well, the medical records all document the minor nature of the injury and extent of recovery.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on July 10, 2017 is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $220.00/week for 2.505 weeks, because the injury sustained caused 1.5% loss of the left foot, as provided in Section 8(e) of the Act.

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

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

19IWCC0112

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 7,000.00 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 15 2019

Joshua D. Luskin

o-12/19/18
jdl-ac
68

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RHABURN, EVARETTE
Employee/Petitioner

Case# **16WC026068**

PANERA BREAD
Employer/Respondent

19IWCC0112

On 7/10/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.13% 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:

5755 COSTA IVONE LLC
JORDAN BROWEN
6847 W CERMAK RD
BERWYN, IL 60402

2284 COZZI & GOGGIN-WARD
KATRINA ROBINSON
27201 BELLA VISTA PKWY #410
WARRENVILLE, IL 60555

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Evarette Rhaburn
Employee/Petitioner

v.

Panera Bread
Employer/Respondent

Case # **16** WC **26068**

Consolidated cases: **N/A**

19IWCC0112

An *Application for Adjustment 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 J. Friedman**, Arbitrator of the Commission, in the city of **Waukegan**, on **June 22, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 16, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$13,424.70** (based upon concurrent employment); the average weekly wage was **$274.66**.

On the date of accident, Petitioner was **18** 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 **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

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

ORDER

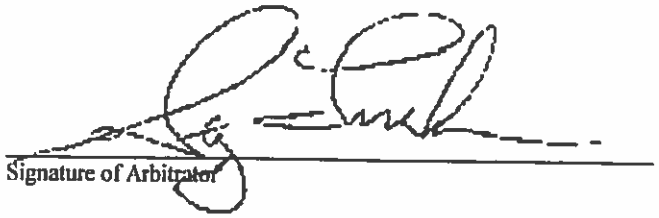
Respondent shall pay Petitioner temporary total disability benefits of $220.00/week for 4 4/7 weeks, commencing August 17, 2016 through September 17, 2016, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$240.70** to **Illinois Orthopedic Network**, **$1,389.41** to **Metro Health Solutions**, **$2,336.00** to **Molecular Imaging**, **$2,490.50** to **Sports & Family Chiropractic**, and **$151.71** to **IHFS** as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $220.00/week for 4.175 weeks, because the injuries sustained caused the 2.5% loss of the Left Foot, 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

July 7, 2017
Date

Statement of Facts

Petitioner Evarette Rhaburn testified that in August, 2016 she was employed by American Eagle Outfitters and Respondent Panera Bread. On August 16, 2016, she worked at American Eagle Outfitters in the morning and began work for Respondent at 2:00 PM. Petitioner testified that about an hour into her shift, a co employee, Lindsey Cray placed a box of lettuce on a cutting board and the cutting board tipped over and fell to the floor striking her on the left ankle bone on the outside of her foot. Petitioner testified that she was not working on the cutting board. She was standing waiting for an order. She testified she was to the left at the side of Lindsey Cray. She did not know if the cutting board hit the floor or her ankle first, and testified that the board did not remain in contact with her ankle once it came to rest on the floor.

Respondent admitted two still photos taken from a surveillance video. The photos are of not very good quality. At 15:38:59, the cutting board is falling from the counter. Lindsey Cray is holding the box. Petitioner is behind and to her left with her left side towards the falling cutting board. The floor of the aisle is 8 panels wide (RX 4A). At 15:39:00, the cutting board is on the ground. It landed two panels from the counter and is about 2 panels wide. There are at least two floor panels from the cutting board to the Petitioner. Petitioner's position appears similar to RX 4A (RX 4B).

Petitioner testified that a few seconds after the cutting board fell, she felt a jolting pain up her leg. Petitioner testified she did not know if the cutting board hit any other part of her foot. She did not know if it hit the floor before it hit her. Petitioner testified that she reported the accident to two supervisors, Nicole Karnes and Rafat. She testified that she asked to go to the emergency room but she was not allowed to go. She worked until 8:00 PM. She testified that she went to Vista the next day.

The records of Vista Medical Center were admitted as Petitioner's Exhibit 1. Petitioner was seen August 17, 2016 at 3:46 PM. The history provided was that a cutting board fell on the lateral ankle, not leg or foot. Symptoms are pain, swelling and loss of mobility. The degree is minimal. Examination noted tenderness, swelling, and ecchymosis with normal range of motion, pulses and sensation. X-ray notes avulsion of the distal fibula of indeterminate age. The diagnosis was lateral malleolar fracture. Petitioner was given a return to work note allowing her to return to work on August 19, 2016 with activity restrictions. Instructions included follow up with an orthopedist within 1-3 days (PX 1). Petitioner testified she was given an air cast.

Petitioner sought further treatment with Dr. Sompalli at Illinois Orthopedic Network at 712 N. Dearborn in Chicago on August 18, 2016. Petitioner reported left ankle pain. Petitioner provided a history that a cutting board fell on top of the outside of her left ankle. Physical examination revealed moderate sized effusion and ecchymosis with bruising of the tendon. Dr. Sompalli ordered an MRI of the left ankle. He prescribed Mobic, Protonix, and tramadol, and recommended Petitioner continue to wear the cast and be non weight bearing. He continued her off work and scheduled follow up in two weeks (PX 2). The MRI performed on August 26, 2016 was read as unremarkable with no evidence of lateral malleolus fracture (PX 4). On September 19, 2016, Petitioner reported 3/10 pain. Dr. Sompalli noted the normal MRI, without abnormalities. He diagnosed a left ankle sprain. He instructed Petitioner to begin weight bearing as tolerated. He released Petitioner to return to work. He indicated she should complete four weeks of therapy. No follow up was scheduled (PX 2).

Petitioner completed eleven sessions of physical therapy at Sports and Family Chiropractic from October 3, 2016 to November 14, 2016. Petitioner noted continued improvement with treatment. On November 14, 2016, Dr. Sloden states the patient's left ankle condition is now resolved. She has been given the OK to work without

restrictions. His examination noted normal range of motion with only mild tenderness on inversion. She had decreased muscle weakness and decreased edema. She was discharged (PX 5).

Dr. Simon Lee performed a medical record evaluation and assessment at Respondent's request on March 8, 2017 (RX 3). He reviewed the emergency room records and x-rays, the MRI, and Dr. Sompalli's records. Dr. Lee diagnosed a left ankle contusion. He noted that the MRI did not reveal evidence of a fracture. Dr. Lee stated his diagnosis is consistent with the work injury as noted and is a direct result of her employment. Dr. Lee further opined that the soft tissue contusion would result in no long-term disability or impairment (RX 3).

Petitioner testified that she did not return to work at Respondent. She testified that she continued to work at American Eagle Outfitters. She has had no further treatment since November 14, 2016. She takes no medication. Petitioner testified to occasional soreness in her left ankle when standing for long periods. She testified that when she tries to run as she did before the injury, she experiences pain and discomfort in her left ankle.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that she suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury occurs "in the course of" employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury. If the injury occurred as Petitioner testified, it would be arising out of and in the course of her employment with Respondent. The cutting board fell during Petitioner's employment at a place where she was performing her employment duties. The injury from the falling cutting board originated from a risk connected with or incidental to her employment. Respondent's dispute is that, based upon the evidence presented, the injury did not occur, in that the cutting board did not strike Petitioner.

Respondent relies in large part on the photos admitted. These show Petitioner's position as the cutting board begins to fall from the counter and one second later with the board on the floor. While these do not show the cutting board striking the Petitioner, the Arbitrator cannot definitely determine the exact path of the board. The video from which these still images were taken was not offered into evidence by Respondent, nor were any witnesses presented. While Respondent claims that these images and Petitioner's distance from the counter and cutting board after the fall, coupled with Petitioner's choice of treatment remote from her home contemporaneous with her obtaining legal representation only days after the claimed accident, raises an inference that Petitioner's motivation and credibility should be challenged, the Arbitrator's observation of Petitioner's testimony and review of the corroborating medical records compel a contrary result.

The Petitioner's testimony was in large part consistent with the photos offered. The cutting board did fall as she described. She was in the vicinity of the falling cutting board and the individuals about whom she testified were present. Her testimony that she reported the incident that day went unrebutted. The Arbitrator noted no embellishment of the incident by Petitioner.

The medical records strongly support her story. She sought treatment the day after on August 17, 2016. The initial treatment was at Vista Medical Center in Waukegan, the local hospital. The history provided was that a cutting board fell on the lateral ankle. Examination noted tenderness, swelling, and ecchymosis. X-ray notes avulsion of the distal fibula and the diagnosis was lateral malleolar fracture. Petitioner was instructed to follow up with an orthopedist within 1-3 days and not return to work until August 19.

The Arbitrator notes that the bills of Vista Medical Center were paid by IHFS, indicating the claim was not accepted by Workers Compensation. Petitioner choice to obtain legal counsel and medical treatment thereafter in Chicago could equally have been spurred by that. Dr. Sompalli's physical examination revealed moderate sized effusion and ecchymosis with bruising of the tendon. Dr. Sompalli ordered an MRI. When the MRI was found to be normal, he diagnosed an ankle sprain, released Petitioner to return to work and ordered 4 weeks of physical therapy. Petitioner reported improvement throughout the course of therapy and the condition was found to be resolved with a discharge from care and return to unrestricted work. Nothing in the course of her care or her reporting of symptoms would create an inference of embellishment of her claim.

Based upon the unrebutted testimony, not clearly refuted by the photos, the consistent medical history and findings by all providers of effusion and ecchymosis, The Arbitrator finds Petitioner's testimony of accident credible and persuasive.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent on August 16, 2016.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that her current condition of ill-being is causally related to the workplace injury. Good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. Petitioner sought care the day after the accident with findings of edema and ecchymosis. She treated for consistent symptoms in her left ankle through her release on November 14, 2016. No evidence of prior injury or treatment to Petitioner's left ankle was offered. Petitioner denied any prior left ankle or foot condition at Vista and again at Sports and Family Chiropractic. Further, Dr. Lee opined that his diagnosis is consistent with the work injury as noted and is a direct result of her employment.

Based upon the record as a whole and the Arbitrator's finding with respect to Accident, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that her condition of ill being in the left ankle is causally connected to the accidental injury sustained on August 16, 2016.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, Petitioner would be entitled to reasonable and necessary treatment for her condition of ill being to the left foot and ankle. Petitioner's testimony and the medical records admitted as PX 1, 2, 4 and 5 document the treatment received

for the condition of ill being in the left foot and ankle. The Arbitrator finds that this treatment was reasonable and necessary.

Petitioner admitted bills for this treatment in Exhibits 1-5. The Arbitrator finds the charges are reasonable for the services rendered. The bills are:

Vista Medical Center (PX 1)	$2,230.03
Illinois Orthopedic Network (PX 2)	$240.70
Metro Health Solutions (PX 3)	$1,389.41
Molecular Imaging (PX 4)	$2,336.00
Sports & Family Chiropractic (PX 5)	$2,490.50

Petitioner also admitted PX 6 which documented that the Vista Medical Center bill was paid by IHFS. The payment was $151.71. Since this bill has been paid, the provider has been satisfied and the IHFS lien is the only outstanding charge recoverable for these services.

Based upon the record as a whole and the Arbitrator's finding with respect to Accident and Causal Connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $240.70 to Illinois Orthopedic Network, $1,389.41 to Metro Health Solutions, $2,336.00 to Molecular Imaging, $2,490.50 to Sports & Family Chiropractic, and $151.71 to IHFS as provided in Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, Petitioner would be entitled to temporary total disability for periods of lost time attributed to the condition of ill being in her left foot and ankle. Petitioner was seen at Vista Medical Center on August 17, 2016 and advised to see an orthopedist and not return to work until August 19, 2016. On August 18, 2016, Petitioner saw Dr. Sompalli and was disabled through his release to return to work on September 17, 2016. Petitioner was unable to work for this period.

Based upon the record as a whole and the Arbitrator's finding with respect to Accident and Causal Connection, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for 4 4/7 weeks, commencing August 17, 2016 through September 17, 2016, as provided in Section 8(b) of the Act.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

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 report of Dr. Lee, while discussing impairment is not based upon a physical examination and is not based upon the AMA Guidelines. 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 retail clerk and in food service at the time of the accident and that she is able to return to work in her prior capacity as a result of said injury. The Arbitrator notes that Petitioner testified that she notices symptoms when she stands for long periods and that her employment does require her to be on her feet. The Arbitrator also notes that Petitioner is a student and her current employment does not necessarily represent her choice of career. Because of these factors, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 18 years old at the time of the accident. While Petitioner is a younger individual who would be expected to have a longer work life, the nature of her injury as a contusion or sprain does not create any inference that she will have any long term residuals of this minor injury. Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner has been released to unrestricted work. The Arbitrator also notes that Petitioner is a student and her current employment does not necessarily represent her choice of career. Her low current earnings at the time of the injury do not reflect any likelihood of a reduction in future earning capacity. Because of these factors, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner presented to Vista Medical Center with pain, swelling and ecchymosis of the ankle. She was initially diagnosed with a lateral malleolar fracture. The subsequent MRI was normal and Dr. Sompalli diagnosed a left ankle sprain. Petitioner underwent conservative treatment with physical therapy and noted improvement. On November 14, 2016, Dr. Sloden states the patient's left ankle condition is now resolved. She has been given the OK to work without restrictions. His examination noted normal range of motion with only mild tenderness on inversion. She had decreased muscle weakness and decreased edema. This is consistent with the evaluating opinion of Dr. Lee in his record review stating the soft tissue contusion would result in no long-term disability or impairment. The medical records all document the minor nature of the injury, and the extent of the recovery. Because of these factors, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 2.5% loss of use of Left Foot pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LeRoy Hughes,
Petitioner,

vs. No. 12 WC 30467

Proviso Township District 209,
Respondent.

19IWCC0113

DECISION AND OPINION ON REVIEW

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

Petitioner claims that work-related repetitive trauma caused bilateral carpal tunnel syndrome which manifested on July 26, 2012. He testified that he has been employed as a custodian for Respondent since 2005. For ten years, Petitioner worked as a night custodian at Proviso West High School where he was assigned to clean the commons area, cafeteria, art wing, band rooms and ROTC wing. His duties included wet mopping, which, in the school's kitchen, required considerable force and the frequent use of scrub pads, because the floor had a lot of grease and spills on it. The floor in the school's "clay room" was also difficult to clean.

At Proviso West, Petitioner started each shift by filling a mop bucket with water, which he would then push throughout the school. He changed that water 3-4 times per night. The mop he used was large and weighed 20 lbs. when wet. Petitioner testified he spent 75% of his time at Proviso West wet mopping floors.

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Between March 2011 and July 2012, Petitioner noticed his wrists began to hurt when he performed his duties. Prior to July 2012, Petitioner had seen hand surgeon Dr. Michael Bednar, who had diagnosed him with carpal tunnel syndrome. However, on those prior occasions, Petitioner had not discussed his work activities with that doctor.

Dr. Bednar testified via evidence deposition that on July 10, 2012, Petitioner returned to him with complaints of numbness and tingling in the fingers of his left hand. Tests confirmed that Petitioner had left carpal tunnel syndrome, and on July 24, 2012 Dr. Bednar recommended Petitioner undergo a left carpal tunnel release. On that date, Petitioner also told Dr. Bednar that he worked as a custodian, mopping floors for over 50% of his day. Dr. Bednar noted Petitioner's job appeared to require repetitive use of his hands, but he requested a copy of Petitioner's written job description before making that determination. After Dr. Bednar reviewed Petitioner's job description, he dictated a letter on July 26, 2012 in which he gave his opinion for the first time that Petitioner's left hand carpal tunnel syndrome was causally related to his work duties.

On June 5, 2013, Dr. Bednar performed a left carpal tunnel release. Petitioner subsequently reported good relief of his symptoms and that his numbness was gone. Petitioner continued to have right-hand symptoms, and when conservative treatment for the right hand failed, Dr. Bednar performed a right carpal tunnel release on Petitioner on October 16, 2013. One month later, Petitioner reported complete relief of his wrist symptoms. On November 6, 2013, Dr. Bednar released Petitioner to work with no restrictions.

Dr. Bednar testified that the work activities which contributed to Petitioner's carpal tunnel syndrome were his grabbing and repetitive grasping of the mop, and moving his hands back and forth. Dr. Bednar opined that mopping with a heavy mop was repetitive and forceful enough to potentially cause carpal tunnel syndrome, and that if Petitioner wet mopped for more than 50 percent of his work day, that activity would at least aggravate his carpal tunnel syndrome.

Witness Ronald Pearson testified on behalf of Respondent. In 2012, he was the night foreman and Petitioner's supervisor at Proviso West. He was familiar with Petitioner's duties, which, besides wet mopping, included: dust mopping; cleaning handrails and stair stringers; dusting countertops, windowsills and furniture; washing lockers and interior windows, and cleaning erasers. Mr. Pearson testified that the wet mopping Petitioner performed at that time was staggered throughout the night and only took up about 30% of Petitioner's shift.

Respondent also presented the deposition testimony of hand surgeon Dr. Michael Vender, who conducted a records review and two Section 12 examinations of Petitioner: on October 24, 2012 and on March 26, 2014. Dr. Vender agreed Petitioner had carpal tunnel syndrome, but did not believe it was causally related to his work activities because they were not forceful or repetitive enough. Dr. Vender believed Petitioner's exposure to "forceful use" was very limited, and that he performed a variety of different movements with his hands. Dr. Vender opined that the care and treatment Petitioner received for his carpal tunnel syndrome had been appropriate.

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On June 20, 2013, Dr. Vender reviewed additional records and then opined that it would be appropriate for Petitioner to undergo wrist surgery, although such surgery would not be related to his work activities. On March 26, 2014, Dr. Vender conducted his second Section 12 examination on Petitioner. He then opined that both of Petitioner's carpal tunnel release surgeries had been appropriate, but were not related to his work activities because the force of those activities was variable and limited.

The Commission finds Dr. Bednar's opinions regarding causation more persuasive than Dr. Vender's. Dr. Bednar explained how Petitioner's repetitive grasping a mop and moving it back and forth for more than 50% of his work day, at a minimum, aggravated Petitioner's carpal tunnel syndrome. Petitioner testified he spent 75% of his shift at Proviso West performing wet mopping, and Dr. Bednar confirmed that Petitioner told him he wet mopped for over 50% of his day. Also, Petitioner testified that considerable force was required to mop the school's kitchen and clay room. Accordingly, the Commission vacates the Arbitrator's decision and finds Petitioner proved an accident which manifested on July 26, 2012 as a result of his repetitive work activities.

The Commission finds Petitioner's bilateral carpal tunnel syndrome was causally related to his work activities at Respondent through November 5, 2013 at which time his condition resolved. Further, the Commission finds Petitioner's medical care and treatment to his hands and wrists through November 5, 2013, the date he attained maximum medical improvement, to have been reasonable, necessary and causally related to his work activities.

Section 8.1b of the WC Act requires the Commission consider five factors enumerated therein when determining the amount of permanent partial disability to be awarded. The Commission finds as follows:

(i) ***Disability Impairment Rating:*** Dr. Vender was the only physician to provide an AMA Impairment Rating of Petitioner's hand and wrist injuries. Dr. Vender determined Petitioner's impairment for his carpal tunnel syndrome to be 2% of his right upper extremity, and 3% of his left upper extremity. The Commission gives this factor *some weight.*

(ii) ***Employee's occupation:*** Petitioner works as a school custodian; that job requires him to lift heavy objects and use force to wet mop. The Commission gives this factor *moderate weight.*

(iii)***Employee's age:*** At the time of his accident, Petitioner was 39 years old. He likely had over 25 years left in his working career. The Commission gives this factor *some weight.*

(iv)***Future earning capacity:*** Petitioner provided no testimony that his earnings changed following his July 26, 2012 work injuries, or how it might be affected going forward. The Commission gives this factor *no weight.*

(v) ***Evidence of disability corroborated by the treating records:*** Following Petitioner's carpal tunnel surgeries, he reported his symptoms were greatly diminished and he was able to return to his prior full-time work at Respondent. *The Commission gives this factor great weight.*

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After consideration of these five factors, the Commission finds Petitioner has proven a 10% loss of use his left hand and 10% loss of use of his right hand, pursuant to §8(e)9 of the Act.

The Commission affirms and adopts the Arbitrator's decision in Petitioner's companion claims, 15 WC 4685 and 15 WC 4686, which were tried with this one. Separate Commission Decisions will be entered regarding those two claims.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 9, 2017, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner 9 weeks of temporary total disability benefits, from June 5, 2013 to July 16, 2013, and from October 16, 2013 to November 5, 2013.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the outstanding reasonable and necessary medical expenses incurred in treating his bilateral carpal tunnel syndrome between July 26, 2012 and November 5, 2013 as provided by §8(a) and §8.2 of the Act. Respondent is entitled to a credit under §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $621.18 per week for a period of 38 weeks, as provided in §8(e)6 of the Act, for the reason that Petitioner's right carpal tunnel syndrome caused the 10 percent disability to the right hand (19 weeks), and his left carpal tunnel syndrome caused the 10 percent disability to the left hand (19 weeks).

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 15 2019

o-12/19/18
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HUGHES, LeROY
Employee/Petitioner

Case# **12WC030467**

15WC004685
15WC004686

PROVISO TOWNSHIP DISTRICT 209
Employer/Respondent

19IWCC0113

On 8/9/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.14% 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:

0009 ANESI OZMON RODIN NOVAK ET AL
JENNIFER J C KELLY
161 N CLARK ST SUITE 2100
CHICAGO, IL 60601

1120 BRADY CONNOLLY & MASUDA PC
DANIEL J CODY
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

19IWCC0113

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

Leroy Hughes
Employee/Petitioner

v.

Proviso Township District 209
Employer/Respondent

Case # **12** WC **30467**

Consolidated cases: **15 WC 4685 and 4686**

An *Application for Adjustment 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 24, June 28 and July 21, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

On this date, Petitioner ***did 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 **$53,835.60**; the average weekly wage was **$1,035.30**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **0** dependent children.

ORDER

Due to the Arbitrator's findings on the issues of accident and causation, all other issues are rendered moot.

Compensation is hereby denied.

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

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

David A. Kane
Signature of Arbitrator

August 8, 2017
Date

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEROY HUGHES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 12 WC 30467
	)	
	)	19IWCC0113
PROVISO TOWNSHIP DISTRICT 209	)	
	)	
Respondent.	)	

In support of his Decision, the Arbitrator notes the following:

STATEMENT OF FACTS

Leroy Hughes testified that he began working as a custodian for Proviso Township District #209 in September of 2005. He testified that for approximately 10 years he was a night custodian at Proviso Township West but testified in 2014 he transferred to Proviso Math & Science Academy as a day custodian. Pg. 19-20. He also testified that approximately 6 to 8 weeks before trial he transferred back to Proviso West as a day custodian. Pg. 69.

He testified that he worked from 4:00 p.m. to 12:00 p.m. during the school year and during the summers would work 7:00 a.m. to 3:30 or 4:00 p.m. when school was not in session. Pg. 20. He testified that he was responsible for the common area, cafeteria, art wing, band rooms, the ROTC wing which had auto shops and the main office for about two years. He testified that the Commons was a big area where students would gather outside the cafeteria area. Pg. 21.

He testified that his job duties included setting up and a lot of mopping. He was responsible for the classrooms for the art wing which had a lot of stuff on the floors that would also be tracked out into the hallway. He also would set up and break down chairs and tables for any functions that were needed and rearrange tables and chairs as needed for the different activities at the school. Pg. 23-24. He testified that the commons and the hallways were a terrazzo floor which was a hard tile like marble. The cafeteria kitchen had a painted vinyl floor that he indicated was hard to mop and he would spray bleach to clean it and used a scrub pad on his mop for the kitchen. Pg. 24-27. He testified that the first thing he did in the morning would prepare his mop bucket which he indicated he would push around all night to the different areas. He would change his water approximately three to four times per night. He testified that the mop bucket when filled weighed about 45 lbs. and also that a wet mop weighed about 20 lbs. Pg. 28-30. He testified that 75% of his time was spent mopping. He also testified that he would vacuum, shine glass, clean windows, breaking up and setting down tables and chairs and depending on the time of year would wax floors. Pg. 30. The petitioner testified that when mopping he would maintain a firm grip with both hands and in some parts would require a lot of force. Pg. 33.

The petitioner testified that in 2010 or 2011 he began experiencing right-hand pain in his fingers and hands. He saw Dr. Miller who eventually referred the petitioner to Dr. Bednar. Pg. 34-35. He admitted that in August of 2010 he was referred by Dr. Miller to a rheumatologist but claimed it was only due to pain in his fingers and not any other body parts. Pg. 36. He testified that he did not have any conversation with Dr. Miller as to the relationship of his work to his hand complaints. Pg. 37.

He began seeing Dr. Bednar who recommended wrist splits which helped. By July of 2012 he testified that his wrist was hurting and that he couldn't turn keys and Dr. Bednar recommended a left carpal tunnel release. At that time he also gave Dr. Bednar a job description and they discussed the relationship of the symptoms to his work. Pg. 38-39, 42.

On June 15, 2013 the petitioner underwent a left carpal tunnel release which did improve his symptoms. Shortly thereafter the right hand started to have the same symptoms and he underwent a right carpal tunnel release on October 16, 2013. Pg. 44-45. He testified that he continues to have pain some times and every other day is different. Pg. 46.

The petitioner then testified that on May 20, 2014 he reported to Dr. Miller for left elbow pain. He admitted there was no specific incident and Dr. Miller referred the petitioner to Dr. Schiffman. Pg. 47. The petitioner saw Dr. Bednar on June 3, 2014 and was prescribed elbow pads.

The petitioner testified that at the end of 2014 he transferred to the Math & Science Academy as a day custodian and his hours were 8:30 a.m. to 5:00 p.m. Tuesday through Saturday. Pg. 48. He testified that one of his first assignments was waxing the floors. He testified that he did not strip the floors, that the other custodians did that. His responsibility was waxing the floors which was done with a mop and bucket similar to

mopping a floor. Pg. 50-52. He claimed that his elbow started hurting and his pinky started hurting. Pg. 53. The medical records actually show that he began having elbow pain reports in June 2014 for his transfer to the Map and Science Academy.

The petitioner testified he returned back to Dr. Bednar in January of 2015 and said he didn't know what was causing the symptoms. He also saw Dr. Miller who again referred him to Dr. Schiffman and Dr. Schiffman took the petitioner off of work for three weeks. Pg. 54-56. The petitioner testified that his pain was relieved when he was not working. The petitioner testified that he went back to work and was working full duty again when he saw Dr. Schiffman on July 31, 2015 who allowed him to continue with activities as tolerated. Pg. 57-58.

The petitioner testified that while school was not in session they would do deeper cleaning. He also testified that the work at the Math & Science Academy allowed him to use elevators. He did, however, testify that the work was similar at both schools. Pg. 60-61.

The petitioner testified that he would have left elbow pain down his arm to the index and ring fingers and that when he saw Dr. Schiffman in October and on January 4, 2016 Dr. Schiffman was recommending surgery but there were no new symptoms. Pg. 63-65. He last saw Dr. Schiffman on April 11, 2016. Pg. 66.

The petitioner testified he hadn't had surgery because he was nervous and he might get surgery in the future but was nervous about it currently. He made no mention of why he was nervous for this surgery but was not for the prior two carpal tunnel surgeries. Pg. 67.

The petitioner testified that he was diagnosed with borderline diabetes that he thought occurred in 2014. He sees Dr. Miller and takes

one pill a day for that but he claimed on-direct that it hadn't caused him to lose time from his work. Pg. 68. He continues to have symptoms with his elbow and was to return to Dr. Schiffman when he was ready for surgery. He claims that he is not as steady and would tend to drop things with his arm. Pg. 69-70.

On cross-examination the petitioner testified that he couldn't remember that he had previously fallen and broken his right hand when he was a child or that he had problems with both of his arms in 1994 after falling off a loading dock at work. Pg. 74-75. The petitioner further denied any memory in December of 1997 when he was treated for pain going down his right arm (pg. 76) nor did he remember in April of 1998 complaining of both of his hands and feet getting numb. Pg. 79. He further denied any memory of telling those doctors that he was frustrated that no one could diagnosis him. He further denied any memory in 1999 complaining that all of his joints hurt all of the time and being diagnosed with joint pain of unknown origin. Pg. 79. He further did not recall in 2001 going to the emergency room at Loyola because of right wrist pain with no known trauma. Pg. 79. He admitted that he began working for Proviso in 2005 and therefore he testified that all of these things would have had to occur before he began at Proviso. Pg. 80. The petitioner further denied any memory of being treated by Dr. Miller in 2008 for left arm weakness and pain. Pg. 80-81. The petitioner further denied memory of being diagnosed with borderline diabetes in August of 2010 despite his earlier testimony that he was not diagnosed until 2014. Pg. 82-83.

The petitioner did remember being referred to Dr. Ostrowski at Loyola by Dr. Miller back in 2010 which he understood to be a rheumatologist. This was for joint pains throughout the body including his wrist and fingers

for a year and a half. He further does not remember being diagnosed with generalized arthrology and joint pain or being recommended exercises for that. Pg. 83-84. The petitioner indicated he didn't know if the time he was seeing Dr. Miller in December of 2010 for numbness in his fingers and all the other joint pains were about the same time he was diagnosed with borderline diabetes. Pg. 85.

The petitioner admitted executing respondent's Exhibit No. 1 alleging a date of loss of June of 2014 and further testified that he had a lump on his elbow but it was not related to trauma. Pg. 88-89. The petitioner further admitted to executing Exhibit No. 2 which was another Application for Adjustment of Claim but thought it was for repetitive trauma to both arms on January 8, 2015 for carpal tunnel.

The petitioner testified while working for Proviso Township High School his shift was 4:00 p.m. to midnight with a 30-minute lunch. Pg. 96. He further indicated that the daily checklist marked as Respondent's Exhibit No. 4 was a list of job assignments some of which he had to complete and that was true in 2011. Pg. 97. The petitioner testified that it would take him approximately two minutes to wash a little window and five minutes to wash the larger windows. Pg. 99. He further testified that there were two doors with one window each for small windows. He further testified that the classrooms with larger windows had four or five each and he had to do 12 classrooms like that. There were approximately 18 classrooms in total but only 12 had the large windows. The petitioner also admitted that he would clean graffiti as he would go along with a spray bottle and mop bucket but the total time would be approximately an hour cleaning graffiti. Pg. 106-107. Upon questioning from the arbitrator the petitioner admitted that he would change what he was doing as he went continuously doing different

functions during the shift. Pg. 108. He specifically admitted that he was not consistently doing one function in each classroom but several functions including windows, graffiti, mopping, cleaning out sinks and "just all kinds of functions." Pg. 109. He again admitted on cross-examination that his day was very varied as he went from classroom to classroom with all the different functions he had to do. Pg. 110-111. The petitioner further testified that he would have to dust each of the 18 classrooms and that would take about 10 minutes for one classroom. Pg. 111-112. He further admitted he would have to dust the office which took about five minutes and there were eight offices that he had to cover. Pg. 112. The petitioner further admitted that he would have dust mop each of the 18 classrooms and that it would take approximately 10 minutes to dust mop one classroom. He further dust mopped the corridors which included four or five and that would take 15 to 20 minutes to dust mop a corridor. Pg. 113-114. The petitioner also testified that he had to wet mop the bathrooms but nothing else because there were bathroom attendants unless the bathroom attendant was off. Pg. 115-116. He also testified that he would empty the garbage cans in each of the classrooms and it would take approximately three minutes per classroom and a second for each of the offices that he did. Pg. 116-117. He also would have to take out the garbage twice a night. He claimed that to go out to the dumpster he would have to do that twice a night and that he was able to do that within five seconds. Pg. 117-119. After extensive questioning he admitted that the second time he would have to go out would take about a minute. Pg. 121. He further testified that he had to wash chalkboards which took about two minutes but claimed only 2 of the 18 classrooms that he had to clean had chalkboards.

After the petitioner transferred to the Math & Science Academy he continued to complain of pains in his hands and wrists. He denied knowledge of going back to Dr. Bednar saying that the surgery had failed and further did recall Dr. Bednar indicating he could not explain the petitioner's symptoms. Pg. 125-126. The petitioner further again denied missing any time related to his diabetes but admits filing an Application for Adjustment of Claim for an injury of August of 2016 involving his leg. He admitted that he had a hematoma that got infected but denied being told that his diabetes was out of control. Pg. 128.

The petitioner further testified that filling up his mop and getting things ready to prepare for the shift would take approximately three minutes and further that he would have to replace his mop water three or four times in a shift. Pg. 136-137.

The petitioner testified that while working at the Math & Science Academy it had elevators which made it easier but it was still demanding work. He testified that he didn't have classrooms like at West and had to do a little of breakdowns, mopping the cafeteria, breaking the cafeteria down and setting it back up and they had a lot of programs. Pg. 140-141. He further testified that he would have to vacuum each office which would take about two minutes because they are small and he did eight of them. Pg. 141-142. He further had to vacuum the floor or rugs in front of the doors and it would take about five minutes to vacuum them but he only had one. He testified that he would have to set up or break down about once a week that would take 15 or 20 minutes. Pg. 144.

On re-direct the petitioner denied similar symptoms to his bilateral wrists before he began working for Proviso Township and the same was true for his left elbow. Pg. 148.

The petitioner testified that when he signed the Applications for Adjustment of Claim his counsel had not even filled them out. Pg. 155. His counsel specifically admitted that her office would frequently ask the petitioners to sign blank documents. Pg. 158. The petitioner further testified that he would be going through wiping down desks and stuff and that when he was through with the room he would mop it and that the mop would be traveling with him through the course of his shift. Pg. 162-163. He further testified that one of his tasks was degreasing the kitchen floor which included spraying bleach and mopping it. He claimed that that took 2-1/2 hours each night. He further claimed it would take 25 minutes to mop the teachers' cafeteria and that he would spend 30 to 45 minutes mopping the student cafeteria and getting up spills. Pg. 164-166. He further testified that it would take about 45 minutes to mop the student common area. Pg. 166. Upon further questioning from the arbitrator the petitioner again indicated that during the course of his rounds he would do a whole variety of functions including the mopping. Pg. 167. He further testified that to mop the large hallways it would take an hour and longer in the winters. In addition to that he testified that he had to do mopping in all of the classrooms. Pg. 169. On re-direct the petitioner changed his testimony to indicate that the 18 rooms included both classrooms and offices with only 12 having vinyl floors that he had to mop every day. Pg. 173. The petitioner testified that cleaning the graffiti would include pressure on his hands and arms. Pg. 175. He again reiterated that he did not do classrooms at the Math & Science Academy after 2014. Pg. 176. Most of his time at the Math & Science Academy was setting up things, mopping, delivering paper, delivering stuff to classrooms and then in the summertime would wax and scrub floors. He testified at Proviso West he had to mop

four bathrooms. He later changed that to six and it would take 10 minutes to do the larger ones of which he had four and two small ones which would take five minutes. Pg. 177-178. The petitioner testified that his only treatment for diabetes is one Metformin a day and he received no treatment for his diabetes while in the hospital for the hematoma.

The respondent presented the testimony of Ronald Pearson. He testified that he was the night foreman in 2012 when the petitioner alleged his carpal tunnel syndrome. T 6/28 Pg. 4. He said that he supervised the petitioner for approximately two years before this condition allegedly developed due to his work. Pg. 5. At that time of his supervision he was overseeing Proviso East and Proviso West and would spend about a half day at each of the schools during the shift when the petitioner worked. Pg. 27. He oversaw approximately 25 custodians but the petitioner's assigned area was right close to his office and therefore he saw the petitioner much more than he did some of the other custodians that were further away in the building. Pg. 29, 52. He testified that they would have a 15 minute meeting each day either at the beginning of the day or right after lunch depending on what building he started his day. He would also then see the petitioner a total of about 20 minutes throughout the day. Pg. 53.

He testified that he was familiar with the job duties required of the petitioner and that the three different job descriptions and duty lists that were introduced were accurate descriptions of the petitioner's responsibilities. Pg. 89. He walked through each of those responsibilities to highlight the varied nature of the petitioner's job. Ultimately, Mr. Pearson testified that the petitioner would likely spend up to 30% of his day involved in wet mopping. Pg. 23. He did testify that the petitioner's assignment did not include the school cafeteria at Proviso West. It did include the cafeteria

kitchen as well as one entrance and the hallway sometimes referred to as the Commons. Pg. 31. He also had several classrooms. Mr. Pearson testified that the day staff would do ongoing cleaning throughout the day so he was not cleaning up all the messes that had been created by the students during the day. Pg. 32. He admitted that the kitchen floor would have residue and grease and that included wet mopping but no dust mopping and that the floor might require more force than other floors. Pg. 34.

He testified that the courtyard cleaning, corridors, classrooms, and the stairs could include mopping but it would depend on basically spot mopping. The petitioner was responsible for a bathroom and the washroom did require mopping each day. The other floors did not. Pg. 39-41, 70. He further testified to multiple tasks the petitioner performed with his hands that were not wet mopping. Pg. 41-47.

Mr. Pearson testified that when school was on break that one of the projects that they may do is waxing and cleaning of the hallways which was done basically three times a year. The petitioner would have been assigned to a group of three to five individuals and one or two of those would be doing the waxing of the floor at any one time. He testified that that was not the petitioner's primary responsibility and it would not be one continuous project but would be done throughout the break. Pg. 64-68.

The respondent also submitted the testimony of Ronald Anderson. He was the building and project manager at the Proviso Math & Science Academy and had been for 10 years. Pg. 73. That was where his office was located although he did also oversee special projects at Proviso East and West High School. He testified that he was the direct supervisor of the petitioner when the petitioner worked there. He thought the dates were

2015 through the beginning of 2017. Pg. 73. He reviewed the job description marked as Respondent's Exhibit 8 and testified that it was consistent with the petitioner's job duties although the petitioner was not involved in the athletic requirements because there was no athletic facility at the Math & Science Academy. He further testified that the assistance with the ground crew for snow removal and lawn care and exterior maintenance was only occasionally. Mr. Anderson identified each task and noted that there was very little wet mopping involved. Pg. 75-79. He further indicated that the petitioner was supposed to use the Zamboni machine every day but didn't always. Pg 96. He described the use of the Zamboni machine as a self-propelled powered mopping machine which replaced the majority of the mopping that was required. Pg 95. He indicated that a user would stand behind the machine with his arms extended and allow the machine to work. In addition to the use of a Zamboni machine the petitioner would have to occasionally spot mop where needed if there was a spill. Pg. 79-80. He testified that the petitioner was not using the floor buffer in the 2015/2016 break. Pg. 83. There were other assignments ongoing at that time including waxing floors. Pg. 84-85.

On cross examination, Mr. Anderson testified that there was a receiving clerk that assists in providing communicating assignments to the petitioner. Mr. Anderson would provide them to the receiving clerk who would note them on the petitioner's time card. Pg. 89. He further testified that the first item on the job list is cleaning and maintaining classrooms, corridors and stairs which would be the primary job duties. This included occasional mopping or spot mopping. Pg. 92. He further testified that the petitioner would have been involved in waxing the floors over Christmas break but they would have only work six days over two weeks because of

the Christmas and New Years holidays for which they get two days each week. Pg. 84, 98.

The petitioner also testified in rebuttal following the close of Respondent's case. He testified that a stripper solution would be spread on the floors and allowed to break up the wax and then a handheld scrub machine was used which is a brush placed on the bottom of a scrubbing machine which he would then move from side to side until the wax is removed and then new wax is spread with a wet mop followed by a dry mop. He testified that only certain areas were stripped during winter break. He testified that he performed the similar task while at Proviso West. Pg. 102, 105. He testified that Proviso West likely got a Zamboni for the mopping but not until 2013. He then speculated that West "probably couldn't use it at West because the guy in the A Building probably got it in the fieldhouse or the athletic department." Pg. 106. He then admitted that there was some old ones that was broke down all the time so he hardly ever used it. Pg. 107. The petitioner further testified that sweeping and mopping was everything that he did at Proviso Math & Science. Pg. 108. He further testified that the student cafeteria was one of the sections he would maintain with breakdowns or set-ups and spot mopping to clean up spills. Pg. 109. The petitioner further testified that video was from November 25, 2015 and during that time period he was asked by Ron Anderson to help clean the boiler room with the boiler guy. Pg. 111.

The petitioner also submitted the deposition testimony of Dr. Michael Bednar. Dr. Bednar testified that he was a board-certified hand surgeon practicing at the Loyola University Medical Center, Hines VA Hospital and Shriners Hospital for Children. Pg. 6. Dr. Bednar first started treating the petitioner on March 15, 2011 and reported a 7-month history of developing

pain in his wrist. Dr. Bednar reviewed the EMG and felt the petitioner had carpal tunnel syndrome which was worse on the right than the left. Dr. Bednar relied on the patient database sheet that was filled out by the patient for the past medical history. Pg. 8. Splints were prescribed and at that the follow-up a month later had helped improved symptoms. Pg. 10. The petitioner then returned on July 19, 2012 with increased symptoms and a repeat EMG and splinting was again recommended. Pg. 12. The EMG reported increased symptoms on the left side and left carpal tunnel release was recommended. Pg. 13. On the visit of July 24, 2012 the petitioner told Dr. Bednar that he spent the majority of his job mopping which was more than 50% of the day. He also did vacuuming and wiping objects and Dr. Bednar felt that that appeared to be a job that involved repetitive use of the hand but he requested a job description. Dr. Bednar testified that jobs that are both high force and high repetition are likely to be jobs that aggravate carpal tunnel syndrome. He described jobs such as a jackhammering, working in a meat processing plant and those types of things. Pg. 14-15.

On July 26, 2012 Dr. Bednar wrote a note based on his review of the job description which he admitted did not state the percent of time that the petitioner was doing various activites. Dr. Bednar noted that the petitioner would do dusting, mopping, cleaning corridors, mopping and cleaning classrooms, wet mopping, cleaning bathrooms and vacuuming. He described it as a lot of the types of activities and the petitioner said it was frequent mopping and vacuuming that he did most of the time. Pg. 16. Dr. Bednar felt that the most significant activity was that more than half of his time was spent wet mopping where you would have something heavy and repetitively grabbing it and moving it through a variety of motions. Dr. Bednar admitted that he hadn't seen the mop and wasn't able to answer

whether a custodian in a school setting would be different. Based on what the petitioner had indicated and the job description Dr. Bednar felt that a carpal tunnel syndrome was causally related to repetitive work activities. Pg. 17-18. Dr. Bednar specifically offered the petitioner the opportunity of proceeding under his group insurance but the petitioner did not want to do that. Pg. 19. On June 5, 2013 the petitioner decided to undergo the carpal tunnel surgery under his group insurance. Dr. Bednar noted a moderate amount of flattening of the nerve and swelling around the tendons which was what would be expected for someone such as the petitioner. Pg. 20. At the first follow-up visit the petitioner reported good relief of his symptoms. Pg. 21. As of June 18, 2013 the petitioner was allowed no use of the left arm and was to return in four weeks to consider an injection to the right hand. Pg. 23. This was administered on July 11, 2013. Dr. Bednar testified that the bilateral carpal tunnel syndrome was causally connected to the petitioner's work activity previously described. Pg. 24. The petitioner underwent right carpal tunnel release on October 16, 2013 and there were the same findings. Pg. 26. By the time the petitioner saw Dr. Bednar on November 5, 2013 he had complete relief of his symptoms. Pg. 27-28. He was told to wear splints as needed and follow up as needed. The petitioner was allowed full duty work with no restrictions as of that date. Pg. 29.

On February 4, 2014 the petitioner went back to Dr. Bednar and indicated that in November he had begun doing heavy work removing wax from a gym floor and developed heaviness of the hands. The examination was essentially normal and the plan was for new wrist splints. He was asked to return if the symptoms worsened. Pg. 30. When the petitioner returned back to Dr. Bednar on June 3, 2014 he was now reporting

problems with his left elbow that he claimed began five weeks earlier. It was at the tip of the olecranon and Dr. Bednar diagnosed olecranon bursitis and he was prescribed a pad to protect the elbow. Pg. 30.

He then returned back to Dr. Bednar on June 24, 2014 and was reporting pain in both hands for a couple weeks and was reporting numbness over the dorsum or back of his hand rather than on the palm side. The examination was normal and Dr. Bednar advised the petitioner just to watch it. That was his last visit with the petitioner. Pg. 31.

Dr. Bednar testified that the post-operative complications included symptoms that the petitioner did not have. He further testified that only a couple of percent maybe up to 5% of patients actually have recurrence of carpal tunnel syndrome. Dr. Bednar indicated he did not see a lot of patients who have that. Those patients typically are renal dialysis patients or chronic renal failure which did not apply to the petitioner. Pg. 32-33. Dr. Bednar further admitted that individuals with increased body mass index such as Mr. Hughes are pre-disposed to carpal tunnel syndrome. Despite that, Dr. Bednar felt that the work activities at least aggravated the carpal tunnel syndrome. Pg. 34. Dr. Bednar indicated he could not testify that the petitioner's ongoing work activities would cause any future problems. Pg. 36. Upon pressing he testified that it was more likely not than yes. Pg. 36. Dr. Bednar further indicated that the petitioner made no complaints of decreased strength. Pg. 37. On cross-examination Dr. Bednar couldn't explain why the patient information form which he admitted would be part of the medical file was not produced via subpoena to the respondent. Dr. Bednar testified on cross-examination that it was the gripping of the mop handle that he believed contributed to the carpal tunnel but he admitted he did not know if there were different motions for each hand. Pg. 45. Dr.

Bednar admitted that he was not an ergonomics expert and therefore couldn't testify what specific motions he felt would contribute despite his opinion to that. Pg. 46. He felt that moving a heavy mop was repetitive enough with enough high force and high repetition to cause it. Dr. Bednar admitted that he was basing his opinions simply on what the petitioner told him. Pg. 46. Dr. Bednar again admitted he could not tell the specific motions of the hands as he was mopping. Dr. Bednar admitted that he did not testify that dusting caused his carpal tunnel syndrome or that it was the same motions as wet mopping. He said the same regarding emptying trash or vacuuming. Pg. 47. Further, Dr. Bednar admitted that he had no idea whether or not the petitioner being right-handed or left-handed would have any impact on his opinion. Pg. 48. He admitted that there a lot of reasons that would cause the compression of the media nerve as it passes through the carpal tunnel and this included obesity. Pg. 48-49. Dr. Bednar further admitted that the reason that people using a jackhammer or in a meat processing plant develop carpal tunnel is that they stand in the same place and do the same job all day every day. Pg. 50. He testified that a variety of work activities is one way to reduce the likelihood of carpal tunnel. Pg. 51. Dr. Bednar admitted that the petitioner's report of numbness on the top of his hand would have nothing to do with carpal tunnel. Pg. 51. Dr. Bednar further testified that diabetes is a known risk factor for development of carpal tunnel because it can have an effect on all of the nervous system in the body. He testified that the EMG did not show polyneuropathy but compressive neuropathy but he didn't know the impact of the numbness that the petitioner reported in his medical records dating back to 1998 and what impact that had on the job contributing. Pg. 52. He restated that the only history he had of the petitioner is what the petitioner

reported to him. Pg. 53. Dr. Bednar admitted that if he had complaints of numbness before working in his current job then that numbness would not be related to the petitioner's position at Proviso. Pg. 55-56. He based his opinion on the relationship of the job on the progressive nature of the petitioner's symptoms but admitted that regardless of cause, carpal tunnel can progress and that it would not be unusual at all. Pg. 56. Dr. Bednar noted that the petitioner had good relief on July 11, 2013 and when he saw the patient again on November 5, 2013 Dr. Bednar noted that the petitioner had had complete relief. Pg. 58-59.

The petitioner also submitted the deposition testimony of Dr. Kenneth Schiffman. Dr. Schiffman testified that he is a board-certified orthopedic surgeon with a specialty in upper extremities currently working at Loyola University Medical Center. Prior to that, he spent 24 years at Hinsdale Orthopedics. Pg. 6-7, 41.

Over a Ghere objection for failure to disclose office notes prior to the deposition testimony, Dr. Schiffman testified that he saw the patient on January 26th and February 5th of 2015. Pg. 8-9. On January 26, 2015 the petitioner reported bilateral elbow and wrist pain. He claimed the elbow pain began in December and the wrist pain more recent. There was tenderness reported at the dorsal aspect of both wrists and at the lateral epicondyle of the left elbow. Based on that the petitioner was diagnosed with bilateral lateral epicondylitis and bilateral wrist pain. Pg. 10-11. Dr. Schiffman testified that that was an inflammation of the tendon attachment to the bone of the elbow and is not primarily a nerve problem. Pg. 12. When the petitioner returned on February 16, 2015 the elbow pain was very much diminished and he was allowed to go back to work. Again over a Ghere objection Dr. Schiffman testified that on February 16, 2015 he felt

that the lateral epicondylitis was related to the petitioner's work. He felt that the condition is typically caused or provoked by gripping tasks. Pg. 15.

The petitioner returned back to Dr. Schiffman on March 2, 2015 for intermittent numbness and tingling in both hands that occurred more often when the elbows were in a flexed position. The examination found a Tinel sign at the cubital tunnel on the right and a positive elbow flexion test. Based on the right elbow testing, Dr. Schiffman diagnosed bilateral cubital tunnel. Pg. 15-16. Dr. Schiffman admitted that cubital tunnel is not always related to some sort of work activity. He felt that the petitioner frequently performed tasks with elbows in a flexed position which could provoke or aggravate the condition. He stated that the specific activity doesn't matter as much as the position of the elbow. Pg. 18. The petitioner informed Dr. Schiffman that the elbow pain would be primarily during work when he was having to move objects and lift things which would be consistent with causing or aggravating cubital tunnel. An EMG was performed which showed no clear evidence of ulnar nerve compression which indicated that the condition was probably not severe. Pg. 19-20. When Dr. Schiffman saw the petitioner on July 31, 2015 after the EMG he changed his diagnosis to bilateral medial epicondylitis. Dr. Schiffman testified that it was not unusual to see symptoms consistent with epicondylitis and cubital tunnel. Pg. 21. Dr. Schiffman saw the petitioner in October and the hand exam was normal for both hands and there was no indication that an elbow exam was even done. Pg. 22-23. Dr. Schiffman explained that the reason for that was that the primary complaint was numbness and tingling affecting his hands. Repeat EMG's confirmed that he was not suffering from recurrent carpal tunnel syndrome. Dr. Schiffman felt that the symptoms

were due to ulnar nerve compression or irritation at his elbows and the assessment was now ulnar neuropathy. Pg. 24-25.

When he saw the petitioner on January 4, 2016 the petitioner was complaining of flexion of the elbows in a bent position such as when he was holding his phone or driving his vehicle. Now the petitioner's symptoms were on the left side with a positive elbow flexion and a subluxation of the ulnar nerve. This is not necessarily a cause but could be related to the irritation of the ulnar nerve. Pg. 26-27. As of January 4, 2016 the new diagnosis was now bilateral cubital tunnel syndrome and surgery to decompress and transpose the nerve was recommended. Pg. 28. Dr. Schiffman testified that the numbness and tingling primarily to the small and ring fingers could be related to ulnar nerve compression. The findings on the January 25th exam now showed both right and left complaints and the assessment was now bilateral cubital tunnel syndrome. Pg. 31. Despite the petitioner's request, Dr. Schiffman declined a cortisone injection because it would not expect to help him and could possibly harm the nerve. If the diagnosis was epicondylitis then an injection could help the symptoms for some period of time. Pg. 34-35. Prior to his testimony, Dr. Schiffman last saw the petitioner on April 11, 2016 and he was allowed to continue work and was told to contact the doctor when he was ready to proceed with surgery. Pg. 36. At the time of his deposition, Dr. Schiffman was now believing that the lateral epicondylitis had resolved and that the ongoing condition was bilateral cubital tunnel. Pg. 37. Dr. Schiffman felt that the bilateral lateral epicondylitis was caused by the sustained gripping and lifting which was part of his job. Pg. 37. He testified that the work activities aggravated the condition but that it was hard to identify a cause for cubital tunnel syndrome. He felt that activities that required either

repetitive or sustained elbow flexion or having the elbow in a bent position would typically provoke or worsen the condition and Dr. Schiffman did not see any other cause for his elbow symptoms, Pg. 39.

On cross-examination Dr. Schiffman admitted that a history was an important part of formulating his opinions and that he did not review any histories provided by any of the other providers in this case. Pg. 45. He admitted that the person's general health condition can contribute to feelings of discomfort and numbness and Dr. Schiffman admitted that he was not aware that in the year prior to December of 2015 the petitioner had reported back pain, stomach pain, chest pain, bilateral arm pain and bilateral hand pain or headaches. Pg. 47. He admitted that the diagnosis of the olecranon bursitis made by Dr. Bednar when the petitioner first started making elbow complaints in June of 2014 was not consistent with his own diagnoses. He admitted that there were three different conditions all related to the elbow that had been diagnosed since June of 2014 and that all of those diagnoses were for different conditions with different symptoms and different mechanisms of causation. Pg. 48. He admitted that Dr. Bednar had first diagnosed lateral epicondylitis and Dr. Schiffman agreed with that diagnosis in January of 2015. He further admitted that by March of 2015 the diagnosis had changed to bilateral cubital tunnel. He further admitted that by July of 2015 he was now diagnosing bilateral medial epicondylitis and that that was yet a fourth condition of the petitioner. Dr. Schiffman admitted that the reported symptoms were moving all over which is the basis for each of his diagnoses. He further admitted that the two EMG's that the petitioner had showed no problem with his ulnar nerve. Pg. 50. The diagnosis was based simply on the signs and symptoms reported by the petitioner. Pg. 51. He further admitted that

the current diagnosis was bilateral cubital tunnel which could be aggravated by elbow flexion but also could pop up in the general population with no reason at all. Pg. 51-52. Dr. Schiffman was unaware that Dr. Miller had found nothing wrong with the petitioner's elbows in June of 2015 and that when he saw the petitioner on October 16, 2015 the petitioner was only reporting bilateral hand pain and numbness and that when he saw the patient in October of 2015 there was no record of any elbow complaints at the time. Dr. Schiffman admitted that had there been any arm complaints those would have been recorded because that was part of his job in recording the history. Pg. 53. He further admitted that the petitioner's reports of numbness and tingling in the entire hand could not be explained by cubital tunnel syndrome nor would the petitioner's bilateral complaints of pain and numbness in the wrists. He further admitted that the most recent EMG was simply consistent with treated carpal tunnel syndrome. Pg. 54. Dr. Schiffman admitted that he was not aware that a couple of the petitioner's medications that he was on could cause numbness and weakness in the hands and he was aware that the Meloxicam that the petitioner was taking could cause joint and muscle pain. Pg. 56.

Dr. Schiffman admitted that the repetitive elbow flexion that might aggravate the cubital tunnel syndrome would appear within a day or two of the activity. He admitted that even while resting if the elbow was held in a flexed position this could aggravate the syndrome and provoke symptoms. Pg. 57. Dr. Schiffman testified that the mopping, cleaning the floors, lifting and moving desks where the elbow is in a flexed position would aggravate the symptoms. Dr. Schiffman, however, admitted that he had no idea how much time the petitioner spent mopping, if there was a difference between dry mopping or wet mopping and what dominant hand the petitioner was

and what impact that may have on his work activities. He admitted that when mopping one arm is generally extended and Dr. Schiffman did not know which arm the petitioner would generally favor in that situation and that therefore it would not explain a bilateral syndrome. Pg. 59-60. Dr. Schiffman further admitted that anywhere the petitioner was flexing his elbow whether it be at work, at home or in the car, it could aggravate his symptoms. When Dr. Schiffman discusses aggravation, he does not mean it is changing the underlying cubital tunnel syndrome but is simply a symptom. Again he admitted that this was true whether he is sitting at home watching T.V. with his elbow flexed or mopping at work it could possibly increase the symptoms but not change the underlying cubital tunnel syndrome. Pg. 61-62. Further, Dr. Schiffman admitted that he did not have any explanation for the numbness and tingling that the petitioner was reporting in October of 2015 because his symptoms were not localized. Pg. 63.

Dr. Schiffman testified that waxing of the floors would have involved elbow flexion and was consistent with the onset of the elbow symptoms described. Pg. 77. When asked to describe what was involved with waxing of the floors for the petitioner, Dr. Schiffman testified that he was using a buffing machine but admitted he had no specific idea of what the petitioner did but still felt it was aggravating the symptoms. Pg. 80.

Dr. Schiffman admitted he had no idea what the petitioner was doing when he was waxing the floors but was still willing to say that that activity aggravated the symptoms. He was unable to say to what degree the elbows would be flexed but guesstimated 30° to 45° or more when using a buffer. Pg. 80-81. He stated that any flexion could be enough to aggravate cubital tunnel but that would be expected in moderate cases. Pg. 82. Dr.

Schiffman went on to testify that the EMG ruled our carpal tunnel syndrome and therefore supported his diagnosis of cubital tunnel syndrome with the signs and symptoms presented but admitted that the signs and symptoms of the previous medial epicondylitis and the signs and symptoms of the lateral epicondylitis were different. Although he had previously testified that there were objective findings he did retract that in re-cross indicating that there were physical findings but not necessarily objective. Pg. 84.

The respondent also submitted the testimony of Dr. Michael Vender. Dr. Vender is a board-certified orthopedic surgeon having completed a fellowship in hand and upper extremity surgery and treats patients with hand and upper extremity disorders. Page 5-6. Dr. Vender first examined the petitioner on October 24, 2012 where he reported symptoms in June and July 2012 of the right side and then later developed symptoms in the left side. Page 10. The petitioner reported standing 5'11" and weighing 251 pounds and was right-hand dominant. Page 10. Following the examination and discussing with the petitioner the history he felt the petitioner had left carpal tunnel syndrome that was not related to his work. He did not feel the petitioner was engaged in any force combined with duration. He noted that intermittent forceful motion was not significant in causing carpal tunnel syndrome. He felt that when you're doing different things with different use patterns of the hand that precludes the concept of repetitiveness because one is not doing the same thing over and over again. Page 13. Also his exposure to forceful use was very limited. He testified that in probably at least half of the cases of carpal tunnel there is no potential cause but simply are idiopathic. Major risk factors do include obesity, smoking, diabetes and hyperthyroidism. Additionally rheumatoid arthritis could cause or contribute to carpal tunnel but less frequently. Work is also a potential

factor. Of these, the petitioner did have increased body mass index and was obese. Page 16.

Dr. Vender also indicated that an EMG would not rule in or out whether diabetes is contributing and compressive pathology is used to show that pathology is localized in the area and does not state the cause of that. Page 17. The EMG did rule out diabetic polyneuropathy but it doesn't indicate whether diabetes was contributing to the compressive neuropathy. Page 18. He did agree that surgery was appropriate at that time. Page 21.

Dr. Vender next saw the petitioner March 26, 2014. At that point the petitioner had undergone bilateral carpal tunnel release with improvement in his preoperative symptoms. Dr. Vender did not dispute the need for those surgeries. Page 21-23. Dr. Vender did indicate that wet mopping does have some repetition and some force and the amount of time and the duration of each time that he did it would be a factor. None of the other activities of the petitioner would contribute to carpal tunnel syndrome. The fact that the petitioner had limited exposure and was variable in doing other types of activities is important and his job would not be a contributing factor. Page 25-26. Dr. Vender did perform an AMA impairment rating pursuant to the 6th Edition and felt the petitioner had 3% impairment of the upper extremity on the left and 2% of the upper extremity on the right. Page 27.

Dr. Vender admitted that pushing a mop back and forth would require some force which is one of the factors. If an activity is very forceful then you would want to see that the majority of the time of work. If it's extremely forceful that it would really involve less time. There is no cut off. Medium force would require much more repetition. Page 37-38. Dr. Vender further indicated that a return back to the prior job would not cause a recurrence of

carpal tunnel because the surgery changed the anatomy. Page 44. Dr. Vender eliminated much of the activities as causative factors simply because of the intermittent nature of things such as moving furniture or emptying a trash bag. Wet mopping if it was really very forceful then at least over 50% of the workday would be required to consider the contributing factor. It's probably not an issue unless he's doing it 80% of the workday. Page 47. Mopping itself and pushing it on the floor would not be forceful enough. It would require leaning into it and using some force. Page 47-48.

The respondent also submitted the testimony of Dr. Prasant Atluri. He is board certified in orthopedic surgery with an added certificate of added qualifications in surgery of the hand. His practice only treats problems involving the upper extremity. Page 5-7. He first saw the patient on January 27, 2016 at that time Mr. Hughes was describing problems with both elbows with onset in June 2014. He reported developing a knot on the posterior aspect of left elbow and that the entire left hand had gone numb. No specific injury was reported. Page 10. Dr. Atluri noted that the petitioner had previously been diagnosed with olecranon bursitis which could be described as a knot. That condition could cause irritation of other structures in the elbow. The most common cause of olecranon bursitis is direct trauma and the second most common cause is just idiopathic and possibly underlying bone spurs. The next most common cause is prolonged immobilization such as after shoulder surgery. Page 11-12. Dr. Atluri testified that the report of his entire hand going numb by the petitioner crosses multiple distributions of nerve innervation suggesting a problem with multiple nerves or a circulation problem but is atypical with a single isolated nerve abnormality. Page 13. The fact that the symptom was

originally one-sided and became bilateral suggested that it was progressive as one would see with diabetes. The swelling and inflammation could have contributed to developing other symptoms but the most common cause of bilateral cubital tunnel syndrome is idiopathic meaning there is no precipitating event or other factor causing it. Page 14. During the exam the petitioner admitted that he had borderline diabetes and hypertension and discussed his carpal tunnel syndrome and releases. The petitioner claimed a new onset of hand numbness in mid-2014. Page 15. Dr. Atluri noted that the petitioner failed to reveal any medications he was on the Comprehensive Health Information Form that was provided as part of the examination. Page 16. He further failed to disclose any medications when this was discussed directly with Dr. Atluri. Page 78.

Dr. Atluri noted that the examination was basically normal and he had a negative Wartenberg sign which is specifically for ulnar issues. The petitioner also had a normal Froment sign. Dr. Atluri did find an unstable ulnar nerve which subluxed anteriorly when flexed and a positive Tinel at the cubital tunnel and positive cubital tunnel compression test. He noted that that was typical or normal in a certain percentage of the population and that individuals with that instability have a higher incidence of ulnar neuritis. Page 22-23. On the left side the petitioner again had normal Wartenberg and Froment findings suggesting no motor involvement of the ulnar nerve. Page 25. There was tenderness in the tip of the olecranon and distal triceps. He further had an unstable ulnar nerve on the left and a positive Tinel on the cubital tunnel and positive digital compression test over the cubital tunnel. Page 26.

Dr. Atluri testified that the most common causes of numbness in the hands can be mechanical factors such as compression of a nerve or a

pinched nerve or hormonal problems such as diabetes. Other systemic medical problems can also cause hand numbness. Some medications can further cause hand numbness. Page 28. X-rays were taken which showed bilateral small bone spurs and mild degenerative changes. A bone spur in the location found is associated with olceranon bursitis and the petitioner also had a little fracture of the bone spur which could explain some of the tenderness at the posterior elbow of the right side. Page 30. Dr. Atluri noted that the EMG failed to find anything related to the ulnar nerve. Page 31. The abnormality for the median nerve was consistent with treated carpal tunnel syndrome. Page 32. Dr. Atluri testified that when the nerve test doesn't match the presentation clinically then it suggests some underlying condition as opposed to simple compressive neuropathy. Page 33.

Dr. Atluri testified that the lateral epicondylitis that was diagnosed and the ulnar neuropathy are two completely different diagnoses with completely different structures in the elbow. One is a tendon problem in one is a nerve problem. Page 33-35. Multiple nerve tests did not show any actual damage to the ulnar nerve so Dr. Atluri knew that he did not have ulnar neuropathy but he could have had an ulnar neuritis but that's on the opposite side of the elbow from lateral epicondylitis. Page 35-36. There was no evidence of any lateral epicondylitis in the petitioner. The diagnosis was bilateral ulnar nerve instability which was congenital and possible cubital tunnel syndrome. Page 36. Dr. Atluri was concerned that the actual cause of symptoms had not really been identified. The history of prior musculoskeletal problems and bilateral nature of the symptoms as well as the distribution suggested an underlying systemic condition. With the history of diabetes probably contributing to some extent and the instability probably a contributing factor but neither explained all of the symptoms.

Page 37-38. The symptoms suggested that it was progressive which could be explained by diabetes. Dr. Atluri noted that diabetes affects every organ system in the body and specifically the nerves. It does so by decreasing the blood supply to the nerves causing deterioration and also damage to the nerve from having high blood sugars which results in a stocking glove distribution. The doctor noted that this could happen even if the diabetes is under control because the system is never truly normal. It generally means that a certain blood sugar level was maintained but normal people have daily fluctuations will which a diabetic patient will not have even if the blood sugars are below a certain level. Page 39 – 40.

Dr. Atluri noted that the ulnar nerve instability had nothing to do with the work activities. Page 42. Job-related cubital tunnel syndrome requires prolonged hyper flexion of the elbow or forceful pushing and pulling of the elbow for a long duration of time. The petitioner's job activities did involve some forceful use of the upper extremities but the activities were relatively varied and he does a lot of different things. Even though there was exposure to heavy, forceful use it didn't meet the standard of prolonged, forceful hyperflexion or frequent, forceful pushing and pulling of the upper extremities for a long duration of time. Page 43. Dr. Atluri further pointed out that the distribution of symptoms didn't even really match cubital tunnel syndrome exactly or any type of activity related condition. It was more suggestive of the systemic condition which suggests that the condition was not work related. Page 43 – 44. Dr. Atluri specifically testified that wet mopping would not be the kind of forceful pushing and pulling that would lead to the development or aggravation of cubital tunnel syndrome. Page 47. Treatment of the petitioner could include splinting but that would not be

expected to relieve all of the symptoms because they are not all associated with that nerve distribution. Page 49-50.

Dr. Atluri testified that the most common complaint of cubital tunnel is numbness and tingling involving the ulnar aspect of the forearm extending to the hand involving the small finger and ring finger and the dorsal part of the hand of the ulnar side. There are also commonly reports of pain to the posterior medial aspect of the elbow radiating to the ulnar forearm. Page 59. Dr. Atluri agreed that some individuals with carpal tunnel can be made symptomatic based on work activities. The position of the elbow is one of three primary factors but the activity is important to consider because forceful activities with elbows hyperflexed increase the likelihood of pressure on the ulnar nerve. The classic activity is using a jackhammer where the elbows are hyper flexed and the individual is gripping the handle and subject to vibration. Page 61. Dr. Atluri admitted that moving furniture, lifting and moving desks, emptying trash into the dumpster and mopping involve elbow flexion but ongoing performance of that type of work would not cause persistence or worsening of cubital tunnel syndrome. Page 62-63. Further, none of those activities involved prolonged hyperflexion of the elbows which is a requirement for development of cubital tunnel syndrome arising out of work activities. Page 79. Dr. Atluri noted the distinction between an activity causing the condition or an activity feeling symptoms. He noted that sleeping is a common time for symptoms to exhibit themselves but that doesn't mean that sleeping caused the issue. He again noted that the standard was hyperflexion meaening over 120-125°. Page 64. Dr. Atluri admitted that a negative EMG is not conclusive that cubital tunnel syndrome does not exist. Page 68. Dr. Atluri noted that it would be very unusual to do both surgeries at once if the petitioner proceeded with

cubital tunnel surgery, especially when there are doubts about the extent of his symptoms that may resolve with surgery. Page 75 – 76.

The respondent also admitted the medical records of Loyola Medical Center. They note that on August 24, 2016 the petitioner was admitted for hematoma to his leg. During this admission it was noted that the blood sugars were "extremely high" at 182 (RE 19 - page 132).

The respondent further admitted the surveillance video of the petitioner showing him doing regular work activity with no apparent pain behavior. (RE 20).

The respondent admitted the medical records of Maywood Family Practice. (RE 15). These records show that the petitioner fell and broke his right hand as a child and had problems with both of his arms in 1994 after falling off a loading dock at work. (3/8/94 DOS). The medical records further show that the petitioner had radiating right arm pain in December 1997 and had hands and feet getting numb on April 27, 1998. That date of service noted that the petitioner was frustrated that no one could explain why his joints hurt all the time. The record further noted that on February 17, 1999 the petitioner had complaints of joint pains throughout his body including his arms. The diagnosis was joint pain of unknown origin. The medical record also noted that on April 6, 2001 he was treated in the emergency room for right wrist pain with no known trauma. By April 12, 2006 the medical records were noting possible diabetes. The medical record noted that on July 9, 2007 the petitioner had elevated glucose and on November 11, 2008 was treated for left arm pain and possible early radiculopathy. On August 26, 2010 the petitioner saw his rheumatologist on the referral from Dr. Miller, his family doctor who noted borderline diabetes

and joint pains for over a year and a half. The assessment was generalized arthralgias.

CONCLUSIONS

A claimant bears the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of the employment. Illinois Bell Telephone Co. v. Industrial Comm'n, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989).

With respect to Issue C – Did an accident occur that arose out of and in the course of petitioner's employment by respondent? the Arbitrator finds as follows:

The evidence showed that the petitioner was in a job that required many varied activities throughout the day. At three different times the petitioner himself testified to that. Although the petitioner tried to emphasize wet mopping as a major activity, if you were to believe the petitioner's time that he spent wet mopping and the time that he devoted to his other activities his shift would last approximately 15 hours. Obviously that cannot be accurate. Although the petitioner did have to wet mop some areas he would only spot mop most of the areas that were covered during his shift. He would do so throughout the course of the evening and did not have any extensive length of time where the petitioner would be wet mopping. His supervisor testified that at most the petitioner would involve wet mopping only 30% of his day. This simply is not the type of excessive activity that would lead to carpal tunnel syndrome. Dr. Bednar testified that it would require at least 50% of the day and Dr. Vender testified that it would be 50% to 80% of the day. Under either scenario, the petitioner simply didn't do as much wet mopping as would be required to have his job be

considered a contributing factor to the development of his carpal tunnel syndrome. The ongoing complaints of numbness in the hands is much more suggestive of a systemic issue such as diabetes rather than a recurring carpal tunnel syndrome which all of the doctors testified is extremely unlikely. This is especially true when considering that throughout the petitioner's adult life he has had multiple complaints of joint pains including his arms and hands long before he ever even started working for the respondent. Dr. Vender specifically noted that the lack of neuropathy found on the EMG does not mean that diabetes was not the cause of the compressive pathology but instead simply refers to a particular area of the nerve where damage exists.

The arbitrator notes that the petitioner did have diabetes and the medical evidence supports that it had been going on roughly the same time that the petitioner was reporting multiple arthralgias. Further, despite the petitioner claiming that it was under control, the medical supports that he had severely elevated blood sugars at different times in his treatment. Additionally, Dr. Atluri noted that even controlled diabetes still has an impact on the multiple systems of the body including the nerves and could easily be the explanation of the multiple arthralgias that the petitioner presented. The fact that the petitioner had four different diagnoses of his elbow complaints suggest that his pain was more general in scope and migratory suggesting a systemic cause rather than a specific activity leading to repetitive trauma.

The overwhelming evidence suggests that the petitioner has an idiopathic health condition which has led to his multiple joint complaints including the development of the carpal tunnel syndrome and his elbow complaints and that there is no competent evidence that his job aggravated

those conditions. Dr. Schiffman specifically looked at use of a floor buffer as a possible cause for the petitioner's multiple different elbow complaints that he had. The petitioner, however, testified that he never actually used the floor buffer but instead concentrated on wet mopping which was after his carpal tunnel releases had already occurred and there is no medical evidence to suggest that had anything to do with his elbow condition.

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

LeRoy Hughes,
Petitioner,

vs. No. 15 WC 04685

Proviso Township District 209,
Respondent.

19IWCC0114

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as stated above, the Decision of the Arbitrator filed August 9, 2017, is hereby affirmed and adopted.

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

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

19IWCC0114

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 15 2019

o-12/19/18
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

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

HUGHES, LeROY
Employee/Petitioner

Case# **15WC004685**

15WC004686
12WC030467

PROVISO TOWNSHIP DISTRICT 209
Employer/Respondent

19IWCC0114

On 8/9/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.14% 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:

0009 ANESI OZMON RODIN NOVAK ET AL
JENNIFER J C KELLY
161 N CLARK ST SUITE 2100
CHICAGO, IL 60601

1120 BRADY CONNOLLY & MASUDA PC
DANIEL J CODY
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 19(b)

19IWCC0114

Leroy Hughes
Employee/Petitioner

v.

Proviso Township District 209
Employer/Respondent

Case # **15** WC **4685**

Consolidated cases: **15WC4686 and 12WC30467**

An *Application for Adjustment 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 24, June 28 and July 21, 2017**. After reviewing all of 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 8, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$57,327.60**; the average weekly wage was **$1,102.45**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **0** dependent children.

ORDER

All findings of fact and conclusions of law are rendered in the Decision in 15 WC 4686.

However, the Arbitrator notes that no benefits were awarded in this case.

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

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

David A. Kane
Signature of Arbitrator

August 8, 2017
Date

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

19IWCC0114

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEROY HUGHES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 15 WC 4685
	)	
	)	
PROVISO TOWNSHIP DISTRICT 209	)	
	)	
Respondent.	)	

In support of his Decision, the Arbitrator notes the following:

The arbitrator notes that all findings of fact and conclusions of law are rendered in the Decision in 15 WC 4686.

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

LeRoy Hughes,
Petitioner,

vs. No. 15 WC 04686

19IWCC0115

Proviso Township District 209,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as stated above, the Decision of the Arbitrator filed August 9, 2017, is hereby affirmed and adopted.

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

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

19IWCC0115

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 15 2019

o-12/19/18
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

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

HUGHES, LeROY
Employee/Petitioner

Case# **15WC004686**

15WC004685
12WC030467

PROVISO TOWNSHIP DISTRICT 209
Employer/Respondent

19IWCC0115

On 8/9/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.14% 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:

0009 ANESI OZMON RODIN NOVAK ET AL
JENNIFER K C KELLY
161 N CLARK ST SUITE 2100
CHICAGO, IL 60601

1120 BRADY CONNOLLY & MASUDA PC
DANIEL J CODY
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 19(b)

19IWCC0115

Leroy Hughes
Employee/Petitioner

v.

Proviso Township District 209
Employer/Respondent

Case # **15** WC **4686**

Consolidated cases: **15WC4685 and 12WC30467**

An *Application for Adjustment 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 24, June 28 and July 21, 2017**. After reviewing all of 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 _____

19IWCC0115

FINDINGS

On **May 20, 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 **$57,327.60**; the average weekly wage was **$1,102.45**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **0** dependent children.

ORDER

Due to the Arbitrator's findings on the issues of accident and causation, all other issues are rendered moot.

Compensation is hereby denied.

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

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

David A. Kane
Signature of Arbitrator

August 8, 2017
Date

AUG 9 - 2017

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEROY HUGHES,

Petitioner,

vs. No. 15 WC 4686

19IWCC0115

PROVISO TOWNSHIP DISTRICT 209

Respondent.

In support of his Decision, the Arbitrator notes the following:

STATEMENT OF FACTS

Leroy Hughes testified that he began working as a custodian for Proviso Township District #209 in September of 2005. He testified that for approximately 10 years he was a night custodian at Proviso Township West but testified in 2014 he transferred to Proviso Math & Science Academy as a day custodian. Pg. 19-20. He also testified that approximately 6 to 8 weeks before trial he transferred back to Proviso West as a day custodian. Pg. 69.

He testified that he worked from 4:00 p.m. to 12:00 p.m. during the school year and during the summers would work 7:00 a.m. to 3:30 or 4:00 p.m. when school was not in session. Pg. 20. He testified that he was responsible for the common area, cafeteria, art wing, band rooms, the ROTC wing which had auto shops and the main office for about two years. He testified that the Commons was a big area where students would gather outside the cafeteria area. Pg. 21.

He testified that his job duties included setting up and a lot of mopping. He was responsible for the classrooms for the art wing which had a lot of stuff on the floors that would also be tracked out into the hallway. He also would set up and break down chairs and tables for any functions that were needed and rearrange tables and chairs as needed for the different activities at the school. Pg. 23-24. He testified that the commons and the hallways were a terrazzo floor which was a hard tile like marble. The cafeteria kitchen had a painted vinyl floor that he indicated was hard to mop and he would spray bleach to clean it and used a scrub pad on his mop for the kitchen. Pg. 24-27. He testified that the first thing he did in the morning would prepare his mop bucket which he indicated he would push around all night to the different areas. He would change his water approximately three to four times per night. He testified that the mop bucket when filled weighed about 45 lbs. and also that a wet mop weighed about 20 lbs. Pg. 28-30. He testified that 75% of his time was spent mopping. He also testified that he would vacuum, shine glass, clean windows, breaking up and setting down tables and chairs and depending on the time of year would wax floors. Pg. 30. The petitioner testified that when mopping he would maintain a firm grip with both hands and in some parts would require a lot of force. Pg. 33.

The petitioner testified that in 2010 or 2011 he began experiencing right-hand pain in his fingers and hands. He saw Dr. Miller who eventually referred the petitioner to Dr. Bednar. Pg. 34-35. He admitted that in August of 2010 he was referred by Dr. Miller to a rheumatologist but claimed it was only due to pain in his fingers and not any other body parts. Pg. 36. He testified that he did not have any conversation with Dr. Miller as to the relationship of his work to his hand complaints. Pg. 37.

He began seeing Dr. Bednar who recommended wrist splits which helped. By July of 2012 he testified that his wrist was hurting and that he couldn't turn keys and Dr. Bednar recommended a left carpal tunnel release. At that time he also gave Dr. Bednar a job description and they discussed the relationship of the symptoms to his work. Pg. 38-39, 42.

On June 15, 2013 the petitioner underwent a left carpal tunnel release which did improve his symptoms. Shortly thereafter the right hand started to have the same symptoms and he underwent a right carpal tunnel release on October 16, 2013. Pg. 44-45. He testified that he continues to have pain some times and every other day is different. Pg. 46.

The petitioner then testified that on May 20, 2014 he reported to Dr. Miller for left elbow pain. He admitted there was no specific incident and Dr. Miller referred the petitioner to Dr. Schiffman. Pg. 47. The petitioner saw Dr. Bednar on June 3, 2014 and was prescribed elbow pads.

The petitioner testified that at the end of 2014 he transferred to the Math & Science Academy as a day custodian and his hours were 8:30 a.m. to 5:00 p.m. Tuesday through Saturday. Pg. 48. He testified that one of his first assignments was waxing the floors. He testified that he did not strip the floors, that the other custodians did that. His responsibility was waxing the floors which was done with a mop and bucket similar to

mopping a floor. Pg. 50-52. He claimed that his elbow started hurting and his pinky started hurting. Pg. 53. The medical records actually show that he began having elbow pain reports in June 2014 for his transfer to the Map and Science Academy.

The petitioner testified he returned back to Dr. Bednar in January of 2015 and said he didn't know what was causing the symptoms. He also saw Dr. Miller who again referred him to Dr. Schiffman and Dr. Schiffman took the petitioner off of work for three weeks. Pg. 54-56. The petitioner testified that his pain was relieved when he was not working. The petitioner testified that he went back to work and was working full duty again when he saw Dr. Schiffman on July 31, 2015 who allowed him to continue with activities as tolerated. Pg. 57-58.

The petitioner testified that while school was not in session they would do deeper cleaning. He also testified that the work at the Math & Science Academy allowed him to use elevators. He did, however, testify that the work was similar at both schools. Pg. 60-61.

The petitioner testified that he would have left elbow pain down his arm to the index and ring fingers and that when he saw Dr. Schiffman in October and on January 4, 2016 Dr. Schiffman was recommending surgery but there were no new symptoms. Pg. 63-65. He last saw Dr. Schiffman on April 11, 2016. Pg. 66.

The petitioner testified he hadn't had surgery because he was nervous and he might get surgery in the future but was nervous about it currently. He made no mention of why he was nervous for this surgery but was not for the prior two carpal tunnel surgeries. Pg. 67.

The petitioner testified that he was diagnosed with borderline diabetes that he thought occurred in 2014. He sees Dr. Miller and takes

one pill a day for that but he claimed on-direct that it hadn't caused him to lose time from his work. Pg. 68. He continues to have symptoms with his elbow and was to return to Dr. Schiffman when he was ready for surgery. He claims that he is not as steady and would tend to drop things with his arm. Pg. 69-70.

On cross-examination the petitioner testified that he couldn't remember that he had previously fallen and broken his right hand when he was a child or that he had problems with both of his arms in 1994 after falling off a loading dock at work. Pg. 74-75. The petitioner further denied any memory in December of 1997 when he was treated for pain going down his right arm (pg. 76) nor did he remember in April of 1998 complaining of both of his hands and feet getting numb. Pg. 79. He further denied any memory of telling those doctors that he was frustrated that no one could diagnosis him. He further denied any memory in 1999 complaining that all of his joints hurt all of the time and being diagnosed with joint pain of unknown origin. Pg. 79. He further did not recall in 2001 going to the emergency room at Loyola because of right wrist pain with no known trauma. Pg. 79. He admitted that he began working for Proviso in 2005 and therefore he testified that all of these things would have had to occur before he began at Proviso. Pg. 80. The petitioner further denied any memory of being treated by Dr. Miller in 2008 for left arm weakness and pain. Pg. 80-81. The petitioner further denied memory of being diagnosed with borderline diabetes in August of 2010 despite his earlier testimony that he was not diagnosed until 2014. Pg. 82-83.

The petitioner did remember being referred to Dr. Ostrowski at Loyola by Dr. Miller back in 2010 which he understood to be a rheumatologist. This was for joint pains throughout the body including his wrist and fingers

for a year and a half. He further does not remember being diagnosed with generalized arthrology and joint pain or being recommended exercises for that. Pg. 83-84. The petitioner indicated he didn't know if the time he was seeing Dr. Miller in December of 2010 for numbness in his fingers and all the other joint pains were about the same time he was diagnosed with borderline diabetes. Pg. 85.

The petitioner admitted executing respondent's Exhibit No. 1 alleging a date of loss of June of 2014 and further testified that he had a lump on his elbow but it was not related to trauma. Pg. 88-89. The petitioner further admitted to executing Exhibit No. 2 which was another Application for Adjustment of Claim but thought it was for repetitive trauma to both arms on January 8, 2015 for carpal tunnel.

The petitioner testified while working for Proviso Township High School his shift was 4:00 p.m. to midnight with a 30-minute lunch. Pg. 96. He further indicated that the daily checklist marked as Respondent's Exhibit No. 4 was a list of job assignments some of which he had to complete and that was true in 2011. Pg. 97. The petitioner testified that it would take him approximately two minutes to wash a little window and five minutes to wash the larger windows. Pg. 99. He further testified that there were two doors with one window each for small windows. He further testified that the classrooms with larger windows had four or five each and he had to do 12 classrooms like that. There were approximately 18 classrooms in total but only 12 had the large windows. The petitioner also admitted that he would clean graffiti as he would go along with a spray bottle and mop bucket but the total time would be approximately an hour cleaning graffiti. Pg. 106-107. Upon questioning from the arbitrator the petitioner admitted that he would change what he was doing as he went continuously doing different

functions during the shift. Pg. 108. He specifically admitted that he was not consistently doing one function in each classroom but several functions including windows, graffiti, mopping, cleaning out sinks and "just all kinds of functions." Pg. 109. He again admitted on cross-examination that his day was very varied as he went from classroom to classroom with all the different functions he had to do. Pg. 110-111. The petitioner further testified that he would have to dust each of the 18 classrooms and that would take about 10 minutes for one classroom. Pg. 111-112. He further admitted he would have to dust the office which took about five minutes and there were eight offices that he had to cover. Pg. 112. The petitioner further admitted that he would have dust mop each of the 18 classrooms and that it would take approximately 10 minutes to dust mop one classroom. He further dust mopped the corridors which included four or five and that would take 15 to 20 minutes to dust mop a corridor. Pg. 113-114. The petitioner also testified that he had to wet mop the bathrooms but nothing else because there were bathroom attendants unless the bathroom attendant was off. Pg. 115-116. He also testified that he would empty the garbage cans in each of the classrooms and it would take approximately three minutes per classroom and a second for each of the offices that he did. Pg. 116-117. He also would have to take out the garbage twice a night. He claimed that to go out to the dumpster he would have to do that twice a night and that he was able to do that within five seconds. Pg. 117-119. After extensive questioning he admitted that the second time he would have to go out would take about a minute. Pg. 121. He further testified that he had to wash chalkboards which took about two minutes but claimed only 2 of the 18 classrooms that he had to clean had chalkboards.

After the petitioner transferred to the Math & Science Academy he continued to complain of pains in his hands and wrists. He denied knowledge of going back to Dr. Bednar saying that the surgery had failed and further did recall Dr. Bednar indicating he could not explain the petitioner's symptoms. Pg. 125-126. The petitioner further again denied missing any time related to his diabetes but admits filing an Application for Adjustment of Claim for an injury of August of 2016 involving his leg. He admitted that he had a hematoma that got infected but denied being told that his diabetes was out of control. Pg. 128.

The petitioner further testified that filling up his mop and getting things ready to prepare for the shift would take approximately three minutes and further that he would have to replace his mop water three or four times in a shift. Pg. 136-137.

The petitioner testified that while working at the Math & Science Academy it had elevators which made it easier but it was still demanding work. He testified that he didn't have classrooms like at West and had to do a little of breakdowns, mopping the cafeteria, breaking the cafeteria down and setting it back up and they had a lot of programs. Pg. 140-141. He further testified that he would have to vacuum each office which would take about two minutes because they are small and he did eight of them. Pg. 141-142. He further had to vacuum the floor or rugs in front of the doors and it would take about five minutes to vacuum them but he only had one. He testified that he would have to set up or break down about once a week that would take 15 or 20 minutes. Pg. 144.

On re-direct the petitioner denied similar symptoms to his bilateral wrists before he began working for Proviso Township and the same was true for his left elbow. Pg. 148.

The petitioner testified that when he signed the Applications for Adjustment of Claim his counsel had not even filled them out. Pg. 155. His counsel specifically admitted that her office would frequently ask the petitioners to sign blank documents. Pg. 158. The petitioner further testified that he would be going through wiping down desks and stuff and that when he was through with the room he would mop it and that the mop would be traveling with him through the course of his shift. Pg. 162-163. He further testified that one of his tasks was degreasing the kitchen floor which included spraying bleach and mopping it. He claimed that that took 2-1/2 hours each night. He further claimed it would take 25 minutes to mop the teachers' cafeteria and that he would spend 30 to 45 minutes mopping the student cafeteria and getting up spills. Pg. 164-166. He further testified that it would take about 45 minutes to mop the student common area. Pg. 166. Upon further questioning from the arbitrator the petitioner again indicated that during the course of his rounds he would do a whole variety of functions including the mopping. Pg. 167. He further testified that to mop the large hallways it would take an hour and longer in the winters. In addition to that he testified that he had to do mopping in all of the classrooms. Pg. 169. On re-direct the petitioner changed his testimony to indicate that the 18 rooms included both classrooms and offices with only 12 having vinyl floors that he had to mop every day. Pg. 173. The petitioner testified that cleaning the graffiti would include pressure on his hands and arms. Pg. 175. He again reiterated that he did not do classrooms at the Math & Science Academy after 2014. Pg. 176. Most of his time at the Math & Science Academy was setting up things, mopping, delivering paper, delivering stuff to classrooms and then in the summertime would wax and scrub floors. He testified at Proviso West he had to mop

four bathrooms. He later changed that to six and it would take 10 minutes to do the larger ones of which he had four and two small ones which would take five minutes. Pg. 177-178. The petitioner testified that his only treatment for diabetes is one Metformin a day and he received no treatment for his diabetes while in the hospital for the hematoma.

The respondent presented the testimony of Ronald Pearson. He testified that he was the night foreman in 2012 when the petitioner alleged his carpal tunnel syndrome. T 6/28 Pg. 4. He said that he supervised the petitioner for approximately two years before this condition allegedly developed due to his work. Pg. 5. At that time of his supervision he was overseeing Proviso East and Proviso West and would spend about a half day at each of the schools during the shift when the petitioner worked. Pg. 27. He oversaw approximately 25 custodians but the petitioner's assigned area was right close to his office and therefore he saw the petitioner much more than he did some of the other custodians that were further away in the building. Pg. 29, 52. He testified that they would have a 15 minute meeting each day either at the beginning of the day or right after lunch depending on what building he started his day. He would also then see the petitioner a total of about 20 minutes throughout the day. Pg. 53.

He testified that he was familiar with the job duties required of the petitioner and that the three different job descriptions and duty lists that were introduced were accurate descriptions of the petitioner's responsibilities. Pg. 89. He walked through each of those responsibilities to highlight the varied nature of the petitioner's job. Ultimately, Mr. Pearson testified that the petitioner would likely spend up to 30% of his day involved in wet mopping. Pg. 23. He did testify that the petitioner's assignment did not include the school cafeteria at Proviso West. It did include the cafeteria

kitchen as well as one entrance and the hallway sometimes referred to as the Commons. Pg. 31. He also had several classrooms. Mr. Pearson testified that the day staff would do ongoing cleaning throughout the day so he was not cleaning up all the messes that had been created by the students during the day. Pg. 32. He admitted that the kitchen floor would have residue and grease and that included wet mopping but no dust mopping and that the floor might require more force than other floors. Pg. 34.

He testified that the courtyard cleaning, corridors, classrooms, and the stairs could include mopping but it would depend on basically spot mopping. The petitioner was responsible for a bathroom and the washroom did require mopping each day. The other floors did not. Pg. 39-41, 70. He further testified to multiple tasks the petitioner performed with his hands that were not wet mopping. Pg. 41-47.

Mr. Pearson testified that when school was on break that one of the projects that they may do is waxing and cleaning of the hallways which was done basically three times a year. The petitioner would have been assigned to a group of three to five individuals and one or two of those would be doing the waxing of the floor at any one time. He testified that that was not the petitioner's primary responsibility and it would not be one continuous project but would be done throughout the break. Pg. 64-68.

The respondent also submitted the testimony of Ronald Anderson. He was the building and project manager at the Proviso Math & Science Academy and had been for 10 years. Pg. 73. That was where his office was located although he did also oversee special projects at Proviso East and West High School. He testified that he was the direct supervisor of the petitioner when the petitioner worked there. He thought the dates were

2015 through the beginning of 2017. Pg. 73. He reviewed the job description marked as Respondent's Exhibit 8 and testified that it was consistent with the petitioner's job duties although the petitioner was not involved in the athletic requirements because there was no athletic facility at the Math & Science Academy. He further testified that the assistance with the ground crew for snow removal and lawn care and exterior maintenance was only occasionally. Mr. Anderson identified each task and noted that there was very little wet mopping involved. Pg. 75-79. He further indicated that the petitioner was supposed to use the Zamboni machine every day but didn't always. Pg 96. He described the use of the Zamboni machine as a self-propelled powered mopping machine which replaced the majority of the mopping that was required. Pg 95. He indicated that a user would stand behind the machine with his arms extended and allow the machine to work. In addition to the use of a Zamboni machine the petitioner would have to occasionally spot mop where needed if there was a spill. Pg. 79-80. He testified that the petitioner was not using the floor buffer in the 2015/2016 break. Pg. 83. There were other assignments ongoing at that time including waxing floors. Pg. 84-85.

On cross examination, Mr. Anderson testified that there was a receiving clerk that assists in providing communicating assignments to the petitioner. Mr. Anderson would provide them to the receiving clerk who would note them on the petitioner's time card. Pg. 89. He further testified that the first item on the job list is cleaning and maintaining classrooms, corridors and stairs which would be the primary job duties. This included occasional mopping or spot mopping. Pg. 92. He further testified that the petitioner would have been involved in waxing the floors over Christmas break but they would have only work six days over two weeks because of

the Christmas and New Years holidays for which they get two days each week. Pg. 84, 98.

The petitioner also testified in rebuttal following the close of Respondent's case. He testified that a stripper solution would be spread on the floors and allowed to break up the wax and then a handheld scrub machine was used which is a brush placed on the bottom of a scrubbing machine which he would then move from side to side until the wax is removed and then new wax is spread with a wet mop followed by a dry mop. He testified that only certain areas were stripped during winter break. He testified that he performed the similar task while at Proviso West. Pg. 102, 105. He testified that Proviso West likely got a Zamboni for the mopping but not until 2013. He then speculated that West "probably couldn't use it at West because the guy in the A Building probably got it in the fieldhouse or the athletic department." Pg. 106. He then admitted that there was some old ones that was broke down all the time so he hardly ever used it. Pg. 107. The petitioner further testified that sweeping and mopping was everything that he did at Proviso Math & Science. Pg. 108. He further testified that the student cafeteria was one of the sections he would maintain with breakdowns or set-ups and spot mopping to clean up spills. Pg. 109. The petitioner further testified that video was from November 25, 2015 and during that time period he was asked by Ron Anderson to help clean the boiler room with the boiler guy. Pg. 111.

The petitioner also submitted the deposition testimony of Dr. Michael Bednar. Dr. Bednar testified that he was a board-certified hand surgeon practicing at the Loyola University Medical Center, Hines VA Hospital and Shriners Hospital for Children. Pg. 6. Dr. Bednar first started treating the petitioner on March 15, 2011 and reported a 7-month history of developing

pain in his wrist. Dr. Bednar reviewed the EMG and felt the petitioner had carpal tunnel syndrome which was worse on the right than the left. Dr. Bednar relied on the patient database sheet that was filled out by the patient for the past medical history. Pg. 8. Splints were prescribed and at that the follow-up a month later had helped improved symptoms. Pg. 10. The petitioner then returned on July 19, 2012 with increased symptoms and a repeat EMG and splinting was again recommended. Pg. 12. The EMG reported increased symptoms on the left side and left carpal tunnel release was recommended. Pg. 13. On the visit of July 24, 2012 the petitioner told Dr. Bednar that he spent the majority of his job mopping which was more than 50% of the day. He also did vacuuming and wiping objects and Dr. Bednar felt that that appeared to be a job that involved repetitive use of the hand but he requested a job description. Dr. Bednar testified that jobs that are both high force and high repetition are likely to be jobs that aggravate carpal tunnel syndrome. He described jobs such as a jackhammering, working in a meat processing plant and those types of things. Pg. 14-15.

On July 26, 2012 Dr. Bednar wrote a note based on his review of the job description which he admitted did not state the percent of time that the petitioner was doing various activites. Dr. Bednar noted that the petitioner would do dusting, mopping, cleaning corridors, mopping and cleaning classrooms, wet mopping, cleaning bathrooms and vacuuming. He described it as a lot of the types of activities and the petitioner said it was frequent mopping and vacuuming that he did most of the time. Pg. 16. Dr. Bednar felt that the most significant activity was that more than half of his time was spent wet mopping where you would have something heavy and repetitively grabbing it and moving it through a variety of motions. Dr. Bednar admitted that he hadn't seen the mop and wasn't able to answer

whether a custodian in a school setting would be different. Based on what the petitioner had indicated and the job description Dr. Bednar felt that a carpal tunnel syndrome was causally related to repetitive work activities. Pg. 17-18. Dr. Bednar specifically offered the petitioner the opportunity of proceeding under his group insurance but the petitioner did not want to do that. Pg. 19. On June 5, 2013 the petitioner decided to undergo the carpal tunnel surgery under his group insurance. Dr. Bednar noted a moderate amount of flattening of the nerve and swelling around the tendons which was what would be expected for someone such as the petitioner. Pg. 20. At the first follow-up visit the petitioner reported good relief of his symptoms. Pg. 21. As of June 18, 2013 the petitioner was allowed no use of the left arm and was to return in four weeks to consider an injection to the right hand. Pg. 23. This was administered on July 11, 2013. Dr. Bednar testified that the bilateral carpal tunnel syndrome was causally connected to the petitioner's work activity previously described. Pg. 24. The petitioner underwent right carpal tunnel release on October 16, 2013 and there were the same findings. Pg. 26. By the time the petitioner saw Dr. Bednar on November 5, 2013 he had complete relief of his symptoms. Pg. 27-28. He was told to wear splints as needed and follow up as needed. The petitioner was allowed full duty work with no restrictions as of that date. Pg. 29.

On February 4, 2014 the petitioner went back to Dr. Bednar and indicated that in November he had begun doing heavy work removing wax from a gym floor and developed heaviness of the hands. The examination was essentially normal and the plan was for new wrist splints. He was asked to return if the symptoms worsened. Pg. 30. When the petitioner returned back to Dr. Bednar on June 3, 2014 he was now reporting

problems with his left elbow that he claimed began five weeks earlier. It was at the tip of the olecranon and Dr. Bednar diagnosed olecranon bursitis and he was prescribed a pad to protect the elbow. Pg. 30.

He then returned back to Dr. Bednar on June 24, 2014 and was reporting pain in both hands for a couple weeks and was reporting numbness over the dorsum or back of his hand rather than on the palm side. The examination was normal and Dr. Bednar advised the petitioner just to watch it. That was his last visit with the petitioner. Pg. 31.

Dr. Bednar testified that the post-operative complications included symptoms that the petitioner did not have. He further testified that only a couple of percent maybe up to 5% of patients actually have recurrence of carpal tunnel syndrome. Dr. Bednar indicated he did not see a lot of patients who have that. Those patients typically are renal dialysis patients or chronic renal failure which did not apply to the petitioner. Pg. 32-33. Dr. Bednar further admitted that individuals with increased body mass index such as Mr. Hughes are pre-disposed to carpal tunnel syndrome. Despite that, Dr. Bednar felt that the work activities at least aggravated the carpal tunnel syndrome. Pg. 34. Dr. Bednar indicated he could not testify that the petitioner's ongoing work activities would cause any future problems. Pg. 36. Upon pressing he testified that it was more likely not than yes. Pg. 36. Dr. Bednar further indicated that the petitioner made no complaints of decreased strength. Pg. 37. On cross-examination Dr. Bednar couldn't explain why the patient information form which he admitted would be part of the medical file was not produced via subpoena to the respondent. Dr. Bednar testified on cross-examination that it was the gripping of the mop handle that he believed contributed to the carpal tunnel but he admitted he did not know if there were different motions for each hand. Pg. 45. Dr.

Bednar admitted that he was not an ergonomics expert and therefore couldn't testify what specific motions he felt would contribute despite his opinion to that. Pg. 46. He felt that moving a heavy mop was repetitive enough with enough high force and high repetition to cause it. Dr. Bednar admitted that he was basing his opinions simply on what the petitioner told him. Pg. 46. Dr. Bednar again admitted he could not tell the specific motions of the hands as he was mopping. Dr. Bednar admitted that he did not testify that dusting caused his carpal tunnel syndrome or that it was the same motions as wet mopping. He said the same regarding emptying trash or vacuuming. Pg. 47. Further, Dr. Bednar admitted that he had no idea whether or not the petitioner being right-handed or left-handed would have any impact on his opinion. Pg. 48. He admitted that there a lot of reasons that would cause the compression of the media nerve as it passes through the carpal tunnel and this included obesity. Pg. 48-49. Dr. Bednar further admitted that the reason that people using a jackhammer or in a meat processing plant develop carpal tunnel is that they stand in the same place and do the same job all day every day. Pg. 50. He testified that a variety of work activities is one way to reduce the likelihood of carpal tunnel. Pg. 51. Dr. Bednar admitted that the petitioner's report of numbness on the top of his hand would have nothing to do with carpal tunnel. Pg. 51. Dr. Bednar further testified that diabetes is a known risk factor for development of carpal tunnel because it can have an effect on all of the nervous system in the body. He testified that the EMG did not show polyneuropathy but compressive neuropathy but he didn't know the impact of the numbness that the petitioner reported in his medical records dating back to 1998 and what impact that had on the job contributing. Pg. 52. He restated that the only history he had of the petitioner is what the petitioner

reported to him. Pg. 53. Dr. Bednar admitted that if he had complaints of numbness before working in his current job then that numbness would not be related to the petitioner's position at Proviso. Pg. 55-56. He based his opinion on the relationship of the job on the progressive nature of the petitioner's symptoms but admitted that regardless of cause, carpal tunnel can progress and that it would not be unusual at all. Pg. 56. Dr. Bednar noted that the petitioner had good relief on July 11, 2013 and when he saw the patient again on November 5, 2013 Dr. Bednar noted that the petitioner had had complete relief. Pg. 58-59.

The petitioner also submitted the deposition testimony of Dr. Kenneth Schiffman. Dr. Schiffman testified that he is a board-certified orthopedic surgeon with a specialty in upper extremities currently working at Loyola University Medical Center. Prior to that, he spent 24 years at Hinsdale Orthopedics. Pg. 6-7, 41.

Over a Ghere objection for failure to disclose office notes prior to the deposition testimony, Dr. Schiffman testified that he saw the patient on January 26th and February 5th of 2015. Pg. 8-9. On January 26, 2015 the petitioner reported bilateral elbow and wrist pain. He claimed the elbow pain began in December and the wrist pain more recent. There was tenderness reported at the dorsal aspect of both wrists and at the lateral epicondyle of the left elbow. Based on that the petitioner was diagnosed with bilateral lateral epicondylitis and bilateral wrist pain. Pg. 10-11. Dr. Schiffman testified that that was an inflammation of the tendon attachment to the bone of the elbow and is not primarily a nerve problem. Pg. 12. When the petitioner returned on February 16, 2015 the elbow pain was very much diminished and he was allowed to go back to work. Again over a Ghere objection Dr. Schiffman testified that on February 16, 2015 he felt

that the lateral epicondylitis was related to the petitioner's work. He felt that the condition is typically caused or provoked by gripping tasks. Pg. 15.

The petitioner returned back to Dr. Schiffman on March 2, 2015 for intermittent numbness and tingling in both hands that occurred more often when the elbows were in a flexed position. The examination found a Tinel sign at the cubital tunnel on the right and a positive elbow flexion test. Based on the right elbow testing, Dr. Schiffman diagnosed bilateral cubital tunnel. Pg. 15-16. Dr. Schiffman admitted that cubital tunnel is not always related to some sort of work activity. He felt that the petitioner frequently performed tasks with elbows in a flexed position which could provoke or aggravate the condition. He stated that the specific activity doesn't matter as much as the position of the elbow. Pg. 18. The petitioner informed Dr. Schiffman that the elbow pain would be primarily during work when he was having to move objects and lift things which would be consistent with causing or aggravating cubital tunnel. An EMG was performed which showed no clear evidence of ulnar nerve compression which indicated that the condition was probably not severe. Pg. 19-20. When Dr. Schiffman saw the petitioner on July 31, 2015 after the EMG he changed his diagnosis to bilateral medial epicondylitis. Dr. Schiffman testified that it was not unusual to see symptoms consistent with epicondylitis and cubital tunnel. Pg. 21. Dr. Schiffman saw the petitioner in October and the hand exam was normal for both hands and there was no indication that an elbow exam was even done. Pg. 22-23. Dr. Schiffman explained that the reason for that was that the primary complaint was numbness and tingling affecting his hands. Repeat EMG's confirmed that he was not suffering from recurrent carpal tunnel syndrome. Dr. Schiffman felt that the symptoms

were due to ulnar nerve compression or irritation at his elbows and the assessment was now ulnar neuropathy. Pg. 24-25.

When he saw the petitioner on January 4, 2016 the petitioner was complaining of flexion of the elbows in a bent position such as when he was holding his phone or driving his vehicle. Now the petitioner's symptoms were on the left side with a positive elbow flexion and a subluxation of the ulnar nerve. This is not necessarily a cause but could be related to the irritation of the ulnar nerve. Pg. 26-27. As of January 4, 2016 the new diagnosis was now bilateral cubital tunnel syndrome and surgery to decompress and transpose the nerve was recommended. Pg. 28. Dr. Schiffman testified that the numbness and tingling primarily to the small and ring fingers could be related to ulnar nerve compression. The findings on the January 25th exam now showed both right and left complaints and the assessment was now bilateral cubital tunnel syndrome. Pg. 31. Despite the petitioner's request, Dr. Schiffman declined a cortisone injection because it would not expect to help him and could possibly harm the nerve. If the diagnosis was epicondylitis then an injection could help the symptoms for some period of time. Pg. 34-35. Prior to his testimony, Dr. Schiffman last saw the petitioner on April 11, 2016 and he was allowed to continue work and was told to contact the doctor when he was ready to proceed with surgery. Pg. 36. At the time of his deposition, Dr. Schiffman was now believing that the lateral epicondylitis had resolved and that the ongoing condition was bilateral cubital tunnel. Pg. 37. Dr. Schiffman felt that the bilateral lateral epicondylitis was caused by the sustained gripping and lifting which was part of his job. Pg. 37. He testified that the work activities aggravated the condition but that it was hard to identify a cause for cubital tunnel syndrome. He felt that activities that required either

repetitive or sustained elbow flexion or having the elbow in a bent position would typically provoke or worsen the condition and Dr. Schiffman did not see any other cause for his elbow symptoms. Pg. 39.

On cross-examination Dr. Schiffman admitted that a history was an important part of formulating his opinions and that he did not review any histories provided by any of the other providers in this case. Pg. 45. He admitted that the person's general health condition can contribute to feelings of discomfort and numbness and Dr. Schiffman admitted that he was not aware that in the year prior to December of 2015 the petitioner had reported back pain, stomach pain, chest pain, bilateral arm pain and bilateral hand pain or headaches. Pg. 47. He admitted that the diagnosis of the olecranon bursitis made by Dr. Bednar when the petitioner first started making elbow complaints in June of 2014 was not consistent with his own diagnoses. He admitted that there were three different conditions all related to the elbow that had been diagnosed since June of 2014 and that all of those diagnoses were for different conditions with different symptoms and different mechanisms of causation. Pg. 48. He admitted that Dr. Bednar had first diagnosed lateral epicondylitis and Dr. Schiffman agreed with that diagnosis in January of 2015. He further admitted that by March of 2015 the diagnosis had changed to bilateral cubital tunnel. He further admitted that by July of 2015 he was now diagnosing bilateral medial epicondylitis and that that was yet a fourth condition of the petitioner. Dr. Schiffman admitted that the reported symptoms were moving all over which is the basis for each of his diagnoses. He further admitted that the two EMG's that the petitioner had showed no problem with his ulnar nerve. Pg. 50. The diagnosis was based simply on the signs and symptoms reported by the petitioner. Pg. 51. He further admitted that

the current diagnosis was bilateral cubital tunnel which could be aggravated by elbow flexion but also could pop up in the general population with no reason at all. Pg. 51-52. Dr. Schiffman was unaware that Dr. Miller had found nothing wrong with the petitioner's elbows in June of 2015 and that when he saw the petitioner on October 16, 2015 the petitioner was only reporting bilateral hand pain and numbness and that when he saw the patient in October of 2015 there was no record of any elbow complaints at the time. Dr. Schiffman admitted that had there been any arm complaints those would have been recorded because that was part of his job in recording the history. Pg. 53. He further admitted that the petitioner's reports of numbness and tingling in the entire hand could not be explained by cubital tunnel syndrome nor would the petitioner's bilateral complaints of pain and numbness in the wrists. He further admitted that the most recent EMG was simply consistent with treated carpal tunnel syndrome. Pg. 54. Dr. Schiffman admitted that he was not aware that a couple of the petitioner's medications that he was on could cause numbness and weakness in the hands and he was aware that the Meloxicam that the petitioner was taking could cause joint and muscle pain. Pg. 56.

Dr. Schiffman admitted that the repetitive elbow flexion that might aggravate the cubital tunnel syndrome would appear within a day or two of the activity. He admitted that even while resting if the elbow was held in a flexed position this could aggravate the syndrome and provoke symptoms. Pg. 57. Dr. Schiffman testified that the mopping, cleaning the floors, lifting and moving desks where the elbow is in a flexed position would aggravate the symptoms. Dr. Schiffman, however, admitted that he had no idea how much time the petitioner spent mopping, if there was a difference between dry mopping or wet mopping and what dominant hand the petitioner was

and what impact that may have on his work activities. He admitted that when mopping one arm is generally extended and Dr. Schiffman did not know which arm the petitioner would generally favor in that situation and that therefore it would not explain a bilateral syndrome. Pg. 59-60. Dr. Schiffman further admitted that anywhere the petitioner was flexing his elbow whether it be at work, at home or in the car, it could aggravate his symptoms. When Dr. Schiffman discusses aggravation, he does not mean it is changing the underlying cubital tunnel syndrome but is simply a symptom. Again he admitted that this was true whether he is sitting at home watching T.V. with his elbow flexed or mopping at work it could possibly increase the symptoms but not change the underlying cubital tunnel syndrome. Pg. 61-62. Further, Dr. Schiffman admitted that he did not have any explanation for the numbness and tingling that the petitioner was reporting in October of 2015 because his symptoms were not localized. Pg. 63.

Dr. Schiffman testified that waxing of the floors would have involved elbow flexion and was consistent with the onset of the elbow symptoms described. Pg. 77. When asked to describe what was involved with waxing of the floors for the petitioner, Dr. Schiffman testified that he was using a buffing machine but admitted he had no specific idea of what the petitioner did but still felt it was aggravating the symptoms. Pg. 80.

Dr. Schiffman admitted he had no idea what the petitioner was doing when he was waxing the floors but was still willing to say that that activity aggravated the symptoms. He was unable to say to what degree the elbows would be flexed but guesstimated 30° to 45° or more when using a buffer. Pg. 80-81. He stated that any flexion could be enough to aggravate cubital tunnel but that would be expected in moderate cases. Pg. 82. Dr.

Schiffman went on to testify that the EMG ruled our carpal tunnel syndrome and therefore supported his diagnosis of cubital tunnel syndrome with the signs and symptoms presented but admitted that the signs and symptoms of the previous medial epicondylitis and the signs and symptoms of the lateral epicondylitis were different. Although he had previously testified that there were objective findings he did retract that in re-cross indicating that there were physical findings but not necessarily objective. Pg. 84.

The respondent also submitted the testimony of Dr. Michael Vender. Dr. Vender is a board-certified orthopedic surgeon having completed a fellowship in hand and upper extremity surgery and treats patients with hand and upper extremity disorders. Page 5-6. Dr. Vender first examined the petitioner on October 24, 2012 where he reported symptoms in June and July 2012 of the right side and then later developed symptoms in the left side. Page 10. The petitioner reported standing 5'11" and weighing 251 pounds and was right-hand dominant. Page 10. Following the examination and discussing with the petitioner the history he felt the petitioner had left carpal tunnel syndrome that was not related to his work. He did not feel the petitioner was engaged in any force combined with duration. He noted that intermittent forceful motion was not significant in causing carpal tunnel syndrome. He felt that when you're doing different things with different use patterns of the hand that precludes the concept of repetitiveness because one is not doing the same thing over and over again. Page 13. Also his exposure to forceful use was very limited. He testified that in probably at least half of the cases of carpal tunnel there is no potential cause but simply are idiopathic. Major risk factors do include obesity, smoking, diabetes and hyperthyroidism. Additionally rheumatoid arthritis could cause or contribute to carpal tunnel but less frequently. Work is also a potential

factor. Of these, the petitioner did have increased body mass index and was obese. Page 16.

Dr. Vender also indicated that an EMG would not rule in or out whether diabetes is contributing and compressive pathology is used to show that pathology is localized in the area and does not state the cause of that. Page 17. The EMG did rule out diabetic polyneuropathy but it doesn't indicate whether diabetes was contributing to the compressive neuropathy. Page 18. He did agree that surgery was appropriate at that time. Page 21.

Dr. Vender next saw the petitioner March 26, 2014. At that point the petitioner had undergone bilateral carpal tunnel release with improvement in his preoperative symptoms. Dr. Vender did not dispute the need for those surgeries. Page 21-23. Dr. Vender did indicate that wet mopping does have some repetition and some force and the amount of time and the duration of each time that he did it would be a factor. None of the other activities of the petitioner would contribute to carpal tunnel syndrome. The fact that the petitioner had limited exposure and was variable in doing other types of activities is important and his job would not be a contributing factor. Page 25-26. Dr. Vender did perform an AMA impairment rating pursuant to the 6th Edition and felt the petitioner had 3% impairment of the upper extremity on the left and 2% of the upper extremity on the right. Page 27.

Dr. Vender admitted that pushing a mop back and forth would require some force which is one of the factors. If an activity is very forceful then you would want to see that the majority of the time of work. If it's extremely forceful that it would really involve less time. There is no cut off. Medium force would require much more repetition. Page 37-38. Dr. Vender further indicated that a return back to the prior job would not cause a recurrence of

carpal tunnel because the surgery changed the anatomy. Page 44. Dr. Vender eliminated much of the activities as causative factors simply because of the intermittent nature of things such as moving furniture or emptying a trash bag. Wet mopping if it was really very forceful then at least over 50% of the workday would be required to consider the contributing factor. It's probably not an issue unless he's doing it 80% of the workday. Page 47. Mopping itself and pushing it on the floor would not be forceful enough. It would require leaning into it and using some force. Page 47-48.

The respondent also submitted the testimony of Dr. Prasant Atluri. He is board certified in orthopedic surgery with an added certificate of added qualifications in surgery of the hand. His practice only treats problems involving the upper extremity. Page 5-7. He first saw the patient on January 27, 2016 at that time Mr. Hughes was describing problems with both elbows with onset in June 2014. He reported developing a knot on the posterior aspect of left elbow and that the entire left hand had gone numb. No specific injury was reported. Page 10. Dr. Atluri noted that the petitioner had previously been diagnosed with olecranon bursitis which could be described as a knot. That condition could cause irritation of other structures in the elbow. The most common cause of olecranon bursitis is direct trauma and the second most common cause is just idiopathic and possibly underlying bone spurs. The next most common cause is prolonged immobilization such as after shoulder surgery. Page 11-12. Dr. Atluri testified that the report of his entire hand going numb by the petitioner crosses multiple distributions of nerve innervation suggesting a problem with multiple nerves or a circulation problem but is atypical with a single isolated nerve abnormality. Page 13. The fact that the symptom was

originally one-sided and became bilateral suggested that it was progressive as one would see with diabetes. The swelling and inflammation could have contributed to developing other symptoms but the most common cause of bilateral cubital tunnel syndrome is idiopathic meaning there is no precipitating event or other factor causing it. Page 14. During the exam the petitioner admitted that he had borderline diabetes and hypertension and discussed his carpal tunnel syndrome and releases. The petitioner claimed a new onset of hand numbness in mid-2014. Page 15. Dr. Atluri noted that the petitioner failed to reveal any medications he was on the Comprehensive Health Information Form that was provided as part of the examination. Page 16. He further failed to disclose any medications when this was discussed directly with Dr. Atluri. Page 78.

Dr. Atluri noted that the examination was basically normal and he had a negative Wartenberg sign which is specifically for ulnar issues. The petitioner also had a normal Froment sign. Dr. Atluri did find an unstable ulnar nerve which subluxed anteriorly when flexed and a positive Tinel at the cubital tunnel and positive cubital tunnel compression test. He noted that that was typical or normal in a certain percentage of the population and that individuals with that instability have a higher incidence of ulnar neuritis. Page 22-23. On the left side the petitioner again had normal Wartenberg and Froment findings suggesting no motor involvement of the ulnar nerve. Page 25. There was tenderness in the tip of the olecranon and distal triceps. He further had an unstable ulnar nerve on the left and a positive Tinel on the cubital tunnel and positive digital compression test over the cubital tunnel. Page 26.

Dr. Atluri testified that the most common causes of numbness in the hands can be mechanical factors such as compression of a nerve or a

pinched nerve or hormonal problems such as diabetes. Other systemic medical problems can also cause hand numbness. Some medications can further cause hand numbness. Page 28. X-rays were taken which showed bilateral small bone spurs and mild degenerative changes. A bone spur in the location found is associated with olceranon bursitis and the petitioner also had a little fracture of the bone spur which could explain some of the tenderness at the posterior elbow of the right side. Page 30. Dr. Atluri noted that the EMG failed to find anything related to the ulnar nerve. Page 31. The abnormality for the median nerve was consistent with treated carpal tunnel syndrome. Page 32. Dr. Atluri testified that when the nerve test doesn't match the presentation clinically then it suggests some underlying condition as opposed to simple compressive neuropathy. Page 33.

Dr. Atluri testified that the lateral epicondylitis that was diagnosed and the ulnar neuropathy are two completely different diagnoses with completely different structures in the elbow. One is a tendon problem in one is a nerve problem. Page 33-35. Multiple nerve tests did not show any actual damage to the ulnar nerve so Dr. Atluri knew that he did not have ulnar neuropathy but he could have had an ulnar neuritis but that's on the opposite side of the elbow from lateral epicondylitis. Page 35-36. There was no evidence of any lateral epicondylitis in the petitioner. The diagnosis was bilateral ulnar nerve instability which was congenital and possible cubital tunnel syndrome. Page 36. Dr. Atluri was concerned that the actual cause of symptoms had not really been identified. The history of prior musculoskeletal problems and bilateral nature of the symptoms as well as the distribution suggested an underlying systemic condition. With the history of diabetes probably contributing to some extent and the instability probably a contributing factor but neither explained all of the symptoms.

Page 37-38. The symptoms suggested that it was progressive which could be explained by diabetes. Dr. Atluri noted that diabetes affects every organ system in the body and specifically the nerves. It does so by decreasing the blood supply to the nerves causing deterioration and also damage to the nerve from having high blood sugars which results in a stocking glove distribution. The doctor noted that this could happen even if the diabetes is under control because the system is never truly normal. It generally means that a certain blood sugar level was maintained but normal people have daily fluctuations will which a diabetic patient will not have even if the blood sugars are below a certain level. Page 39 – 40.

Dr. Atluri noted that the ulnar nerve instability had nothing to do with the work activities. Page 42. Job-related cubital tunnel syndrome requires prolonged hyper flexion of the elbow or forceful pushing and pulling of the elbow for a long duration of time. The petitioner's job activities did involve some forceful use of the upper extremities but the activities were relatively varied and he does a lot of different things. Even though there was exposure to heavy, forceful use it didn't meet the standard of prolonged, forceful hyperflexion or frequent, forceful pushing and pulling of the upper extremities for a long duration of time. Page 43. Dr. Atluri further pointed out that the distribution of symptoms didn't even really match cubital tunnel syndrome exactly or any type of activity related condition. It was more suggestive of the systemic condition which suggests that the condition was not work related. Page 43 – 44. Dr. Atluri specifically testified that wet mopping would not be the kind of forceful pushing and pulling that would lead to the development or aggravation of cubital tunnel syndrome. Page 47. Treatment of the petitioner could include splinting but that would not be

expected to relieve all of the symptoms because they are not all associated with that nerve distribution. Page 49-50.

Dr. Atluri testified that the most common complaint of cubital tunnel is numbness and tingling involving the ulnar aspect of the forearm extending to the hand involving the small finger and ring finger and the dorsal part of the hand of the ulnar side. There are also commonly reports of pain to the posterior medial aspect of the elbow radiating to the ulnar forearm. Page 59. Dr. Atluri agreed that some individuals with carpal tunnel can be made symptomatic based on work activities. The position of the elbow is one of three primary factors but the activity is important to consider because forceful activities with elbows hyperflexed increase the likelihood of pressure on the ulnar nerve. The classic activity is using a jackhammer where the elbows are hyper flexed and the individual is gripping the handle and subject to vibration. Page 61. Dr. Atluri admitted that moving furniture, lifting and moving desks, emptying trash into the dumpster and mopping involve elbow flexion but ongoing performance of that type of work would not cause persistence or worsening of cubital tunnel syndrome. Page 62-63. Further, none of those activities involved prolonged hyperflexion of the elbows which is a requirement for development of cubital tunnel syndrome arising out of work activities. Page 79. Dr. Atluri noted the distinction between an activity causing the condition or an activity feeling symptoms. He noted that sleeping is a common time for symptoms to exhibit themselves but that doesn't mean that sleeping caused the issue. He again noted that the standard was hyperflexion meaening over 120-125°. Page 64. Dr. Atluri admitted that a negative EMG is not conclusive that cubital tunnel syndrome does not exist. Page 68. Dr. Atluri noted that it would be very unusual to do both surgeries at once if the petitioner proceeded with

cubital tunnel surgery, especially when there are doubts about the extent of his symptoms that may resolve with surgery. Page 75 – 76.

The respondent also admitted the medical records of Loyola Medical Center. They note that on August 24, 2016 the petitioner was admitted for hematoma to his leg. During this admission it was noted that the blood sugars were "extremely high" at 182 (RE 19 - page 132).

The respondent further admitted the surveillance video of the petitioner showing him doing regular work activity with no apparent pain behavior. (RE 20).

The respondent admitted the medical records of Maywood Family Practice. (RE 15). These records show that the petitioner fell and broke his right hand as a child and had problems with both of his arms in 1994 after falling off a loading dock at work. (3/8/94 DOS). The medical records further show that the petitioner had radiating right arm pain in December 1997 and had hands and feet getting numb on April 27, 1998. That date of service noted that the petitioner was frustrated that no one could explain why his joints hurt all the time. The record further noted that on February 17, 1999 the petitioner had complaints of joint pains throughout his body including his arms. The diagnosis was joint pain of unknown origin. The medical record also noted that on April 6, 2001 he was treated in the emergency room for right wrist pain with no known trauma. By April 12, 2006 the medical records were noting possible diabetes. The medical record noted that on July 9, 2007 the petitioner had elevated glucose and on November 11, 2008 was treated for left arm pain and possible early radiculopathy. On August 26, 2010 the petitioner saw his rheumatologist on the referral from Dr. Miller, his family doctor who noted borderline diabetes

and joint pains for over a year and a half. The assessment was generalized arthralgias.

CONCLUSIONS

A claimant bears the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of the employment. Illinois Bell Telephone Co. v. Industrial Comm'n, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989).

With respect to Issue C – Did an accident occur that arose out of and in the course of petitioner's employment by respondent? the Arbitrator finds as follows:

The evidence showed that the petitioner was in a job that required many varied activities throughout the day. At three different times the petitioner himself testified to that. Although the petitioner tried to emphasize wet mopping as a major activity, if you were to believe the petitioner's time that he spent wet mopping and the time that he devoted to his other activities his shift would last approximately 15 hours. Obviously that cannot be accurate. Although the petitioner did have to wet mop some areas he would only spot mop most of the areas that were covered during his shift. He would do so throughout the course of the evening and did not have any extensive length of time where the petitioner would be wet mopping. His supervisor testified that at most the petitioner would involve wet mopping only 30% of his day. This simply is not the type of excessive activity that would lead to carpal tunnel syndrome. Dr. Bednar testified that it would require at least 50% of the day and Dr. Vender testified that it would be 50% to 80% of the day. Under either scenario, the petitioner simply didn't do as much wet mopping as would be required to have his job be

considered a contributing factor to the development of his carpal tunnel syndrome. The ongoing complaints of numbness in the hands is much more suggestive of a systemic issue such as diabetes rather than a recurring carpal tunnel syndrome which all of the doctors testified is extremely unlikely. This is especially true when considering that throughout the petitioner's adult life he has had multiple complaints of joint pains including his arms and hands long before he ever even started working for the respondent. Dr. Vender specifically noted that the lack of neuropathy found on the EMG does not mean that diabetes was not the cause of the compressive pathology but instead simply refers to a particular area of the nerve where damage exists.

The arbitrator notes that the petitioner did have diabetes and the medical evidence supports that it had been going on roughly the same time that the petitioner was reporting multiple arthralgias. Further, despite the petitioner claiming that it was under control, the medical supports that he had severely elevated blood sugars at different times in his treatment. Additionally, Dr. Atluri noted that even controlled diabetes still has an impact on the multiple systems of the body including the nerves and could easily be the explanation of the multiple arthralgias that the petitioner presented. The fact that the petitioner had four different diagnoses of his elbow complaints suggest that his pain was more general in scope and migratory suggesting a systemic cause rather than a specific activity leading to repetitive trauma.

The overwhelming evidence suggests that the petitioner has an idiopathic health condition which has led to his multiple joint complaints including the development of the carpal tunnel syndrome and his elbow complaints and that there is no competent evidence that his job aggravated

those conditions. Dr. Schiffman specifically looked at use of a floor buffer as a possible cause for the petitioner's multiple different elbow complaints that he had. The petitioner, however, testified that he never actually used the floor buffer but instead concentrated on wet mopping which was after his carpal tunnel releases had already occurred and there is no medical evidence to suggest that had anything to do with his elbow condition.

As the Arbitrator has found that Petitioner failed to prove both accident and causation, all other issues are rendered moot.

Therefore, Compensation 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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TERRY DOTSON,

Petitioner,

vs. NO: 17 WC 4792

WALMART, INC.,

19IWCC0116

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 causation, medical expenses, 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).

We affirm the Arbitrator's causation opinions but strike the mechanism of injury described by the Arbitrator on page five at the end of the first paragraph because it is unsupported by the transcript. We affirm the award of prospective medical treatment for the cervical spine and the denial of additional treatment for any left shoulder condition after the July 19, 2017 examination by Respondent's examining physician, Dr. Cohen, whose opinion we find most persuasive on this issue. We find that at this time and with the evidence before us it seems more likely than not that Petitioner's continued symptoms are related to her cervical condition and not a separate left shoulder condition. We also affirm the denial of causation regarding the left thumb.

However, we award an additional 31 weeks of temporary total disability (TTD) from August 3, 2017 to March 7, 2018. On August 3, 2017, Petitioner was taken off work by Dr. Murtaza and Brittany Macleod, P.A., for left C7 radiculopathy. Petitioner underwent treatment including a cervical MRI, electromyelogram with Dr. Dixon, and pain management treatment including epidural steroid injections with Dr. Chunduri who also kept Petitioner off work. On February 6, 2018, Petitioner underwent a Functional Capacity Evaluation. On March 7, 2018, Petitioner was released at maximum medical improvement by Dr. Wiesman and Brittany Macleod, P.A., to permanent light duty (17 pound) work restrictions, which Respondent would have been able to

19IWCC0116

accommodate. The parties stipulated that Petitioner's average weekly wage was $391.59 in the year preceding the injury. Based on this, Petitioner's temporary total disability rate is $261.06 per week. Petitioner is entitled to TTD for 9-3/7 weeks from September 29, 2016 through December 3, 2016 and 31 additional weeks from August 3, 2017 to March 7, 2018. Respondent is entitled to a credit of $2,461.44 for TTD benefits already paid.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $261.06 per week for a period of 40-3/7 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 receive credit of $2,461.44 for temporary total disability benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical expenses as outlined in the attached decision for treatment 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 for prospective cervical treatment as recommended by Dr. Chunduri under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $8,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 19 2019

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

SE/
O: 12/19/18
49

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

DOTSON, TERRY
Employee/Petitioner

Case# **17WC004792**

WALMART INC
Employer/Respondent

19IWCC0116

On 7/20/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD H VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

0560 WIEDNER & McAULIFFE LTD
MARY C SABATINO
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

19IWCC0116

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)

Terry Dotson,
Employee/Petitioner

v.

Walmart Inc.,
Employer/Respondent

Case # **17 WC 04792**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **5/23/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

F. [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, **9/24/16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $20,362.68; the average weekly wage was $391.59.

On the date of accident, Petitioner was 45 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 $2,461.44 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:

Petitioner sustained a work-related injury to the cervical spine and therefore prospective medical in the form of further workup for the related diagnosis of cervical radiculitis is ordered. Petitioner reached MMI for any left shoulder condition as of the IME with Dr. Cohen on July 19, 2017, and the surgery recommended by Dr. Sompalli is expressly denied. The left thumb condition is denied and is not work-related. Petitioner is entitled to no TTD benefits following December 3, 2016, and the prescription medication charges by Midwest Specialty Pharmacy are expressly denied and are unreasonable and unnecessary.

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

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

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

Robert M. Harris

Signature of Arbitrator Dated July 20, 2018

JUL 20 2018

ICArbDec19(b)

Terry Dotson v. Walmart Inc.
17 WC 04792

MEMORANDUM OF DECISION OF ARBITRATOR

STATEMENT OF FACTS

Petitioner in this case is a 45-year-old female stocker for Walmart who alleges an accident on September 24, 2016. The Arbitrator notes that accident is not in dispute. Petitioner reported that she was lifting a heavy pancake box on September 24, 2016, trying to put it in a bin, when she felt a pain in her left shoulder (T.11). She testified that the pain started on the top of her left shoulder and shot down into her hand (T.12). She also reported feeling some pain in the left side of her neck (T.12).

Petitioner initially presented to Dr. Michael Collins at Hinsdale Orthopedic on October 11, 2016 (PX3). She presented complaining of left shoulder pain from her injury on September 24, 2016. Dr. Collins noted the pain was not well localized and seemed to be diffuse about the shoulder. X-rays reviewed that day showed a well-aligned shoulder. Dr. Collins did not see any significant arthritis. He did note a Type III acromion (PX3). Petitioner was diagnosed with a rotator cuff injury and recommended for an MRI of the left shoulder. An MRI study taken on November 11, 2016 documents that there was no full thickness rotator cuff tendon tear. Petitioner was diagnosed with mild supraspinatus and infraspinatus tendinosis. Additionally, mild acromioclavicular joint degenerative changes were noted (PX3).

Petitioner then came under the care of Dr. Sompalli at Illinois Orthopedic Network on February 10, 2017 (PX4). Petitioner's chief complaint that day was left shoulder pain. On exam, Petitioner's left shoulder was negative for instability. Dr. Sompalli acknowledged the MRI of the left shoulder revealed no discrete tears of the labrum or rotator cuff. He diagnosed her with left shoulder pain, inflammation, and impingement syndrome. He ordered a course of physical therapy. (PX4)

When Petitioner followed up with Dr. Sompalli on March 6, 2017, she reported no relief with physical therapy and anti-inflammatories. Dr. Sompalli injected the left shoulder that day and advised Petitioner to continue with physical therapy (PX4).

On May 6, 2017, Dr. Sompalli ordered another MRI of the left shoulder. That study took place on May 10, 2017. The study revealed an intact rotator cuff, an intact biceps tendon and an unremarkable labrum. The only thing noted was a prominent downward curving of the anterior acromion.

On May 20, 2017, Dr. Sompalli saw petitioner in follow up. He noted the same thing the radiologist did, that petitioner had no tearing. Instead, he focused on petitioner's Type III acromion stating, "This is what I think is causing her pain, I told her, because Type III acromions are definitely impingement syndrome 80% of the time, so the fact that she is continuing to have pain, downward sloping, hooked acromion is not going to improve with therapy. She needs surgery." (PX4)

On July 19, 2017, petitioner was seen for an independent medical examination with Dr. James Cohen. At the beginning of the physical examination, Dr. Cohen demonstrated for petitioner a Spurling so that she could watch and then perform this test herself. Dr. Cohen had petitioner turn her head to the left and then tilt her head back, and he noted a marked reproduction of her symptoms. Specifically, she complained of severe pain into her left trapezial area and into her shoulder with a throbbing sensation down her arm with increased tingling to her fingers. When he had her perform it on the right side, there were no right-sided symptoms produced. Based on his examination, Dr. Cohen believed petitioner's primary diagnosis was left cervical radiculitis. The basis for his diagnosis was that her physical exam showed a markedly positive left Spurling test, and only minimal guarding with range of motion. He was adamant that the findings seen were not representative of impingement syndrome. Instead, he felt her clinical picture fit more clearly with a cervical radiculitis. He based that opinion not just on the isolated Spurling test but also hypesthesia in her left trapezial and scapular region (RX1). Dr. Cohen stated he would clearly recommend against the surgery recommended by Dr. Sompalli as that type of treatment would be reasonable for left shoulder impingement syndrome but with her markedly positive Spurling test that reproduced her symptoms as well as her other findings, he recommended against it. Instead, he recommended a workup for cervical radiculitis. Dr. Sompalli also recommended against the proposed distal clavicle resection, as petitioner did not have any significant tenderness or significant findings at the AC joint.

On August 3, 2017, petitioner began treating with Dr. Murtaza also at Illinois Orthopedic Network, but for her cervical spine pain (PX4). At that time, given her diagnosis of left C7

radiculopathy an MRI of the cervical spine was ordered. That cervical spine MRI took place on August 10, 2017. The study revealed the most significant finding at C5-6 where there was a moderate severe left foraminal narrowing due to the left disc osteophyte complex. There was also mild central stenosis along the left aspect of the canal (PX4).

At a follow-up visit with Dr. Chunduri at Illinois Orthopedic Network for petitioner's cervical spine, Dr. Chunduri confirmed that petitioner's Spurling compression test was positive down the left upper extremity. Petitioner was diagnosed with C5-C6 disc herniation with left radiculitis. The plan was for petitioner to undergo an epidural steroid injection at C5-C6. That injection took place on August 5, 2017.

On September 21, 2017, given petitioner's cervical injection, Dr. Chunduri noted, "She states her left upper extremity symptoms have resolved." However, she still continued to have pain in her neck, worse on the left side. The recommendation was that petitioner undergo a second injection to address the remainder of her neck pain (PX4).

On December 20, 2017, a year over petitioner's alleged accident date, she presented for the first time to Dr. Irvin Wiseman complaining of left thumb pain (PX 4). The doctor recorded that she had injured her neck and shoulder and "she states that ever since then she has had decompensating injuries where she has been favoring her neck and shoulder so she has been relying more on the wrist and hand and has developed inflammation and pain through the flexor tendon of the left thumb." An injection and physical therapy was ordered (PX4)

Deposition of Dr. Sompalli on January 18, 2018:

The deposition of Petitioner's treating physician, Dr. Sompalli, was held on January 18, 2018 (PX11). Dr. Sompalli testified we are all born with an acromion bone in three different variations, with three being a very hooked curve. He noted that those people are at a higher risk of getting impingement syndrome (PX11, p.11). Dr. Sompalli's opinion was that petitioner had a predilection to have impingement syndrome with the type of acromion she had, but that the accident "certainly contributed to the impingement syndrome coming to light earlier than it would have probably."

(PX11, p.12). Dr. Sompalli confusingly testified that the accident accelerated the impingement syndrome (PX11, p.13). When Dr. Sompalli was asked by petitioner's attorney whether he was aware that the petitioner was also having cervical pain, he noted, "I know she had neck pain and was treating with a neck surgeon, but I was not involved in that at all." (PX11, p.15). Petitioner's attorney then asked Dr. Sompalli whether he had access to those notes (because the treating cervical physician was in the same practice as Dr. Sompalli), but he stated that he did not review those notes (PX11, p.15). He was not even aware that she had undergone an EMG study (PX11, p.16).

In his deposition testimony, Dr. Sompalli discussed his disagreement with Dr. Cohen's IME. Dr. Sompalli confusingly testified, "Her Type III acromion, which she was born with, has a high propensity to develop impingement syndrome over a lifetime, especially after an injury, and this is concurrent by all her orthopedic surgeries. So, I do believe that her impingement syndrome from the Type III acromion was due to the work injury." (PX11, p.19). It was Dr. Sompalli's opinion that Petitioner had two separate issues – one in the neck and one in the shoulder (PX11, p.20).

Despite Dr. Sompalli taking issue with the fact that Dr. Cohen had not diagnosed Petitioner with instability, Dr. Sompalli acknowledged that at a visit in his office on February 10, 2017, no instability had been diagnosed (PX11, p.25-26). Dr. Sompalli also acknowledged that the type of acromion a person is born with is purely a person's genetic makeup (PX11, p.28). He acknowledged that a Type III acromion could not be caused by an injury unless a person had a significant fracture in the inner aspect of the acromion, which wd do not have here (PX11, p.28-29). Dr. Sompalli also acknowledged that regardless of any work accident, Petitioner may have required injections and eventually surgery to treat her congenital Type III acromion (PX11, p.30-31). Dr. Sompalli noted at one point that it was meaningless that Dr. Chunduri had noted that Petitioner's left upper extremity symptoms were resolving with cervical injections. When asked whether Dr. Sompalli would feel more comfortable about his causation opinion had he actually had an opportunity to review the entirety of Petitioner's medical care, to include her cervical spine treatment, he unequivocally answered no. Stating, "No, because I was finding symptoms of impingement syndrome of her left shoulder which had nothing to do with her neck." (PX11, p.35). Dr. Sompalli also acknowledged that impingement can develop absent any type of overhead activity just based on the shape of the acromion. In fact, he stated, "Yes, it can happen like that because even in activities of daily living at some point, you are going to have to lift your arm up and that can irritate it." (PX11, p.40).

Dr. Sompalli also appeared confused as to Petitioner's exact mechanism of injury. In support of his causation opinion, he referred to Figlioni's study in support of the concept that impingement can be aggravated by a trauma. In this case, Dr. Sompalli indicated Petitioner's lifting of a heavy weight overhead would have been sufficient trauma to cause an aggravation of the impingement (PX11, p.40-41). When asked what the weight of the pancake box that she lifted overhead was, he stated, "I don't know. She said it was heavy, repetitive, heavy pancake mix. I don't remember what the weight was, to be honest with." When asked how often she lifted it, he stated, "multiple times. Because she said it was on the bottom of whatever tray she was pushing, cart... I would say more than four, five times... in the span of a few minutes." (PX11, p.41-42). The Arbitrator notes Petitioner never testified that she was lifting a pancake box overhead. Instead, Petitioner was lifting the pancake box from approximately a foot off the floor and as she was lifting it from the rocket cart to put into a bin, she felt a sharp pain in her left shoulder. Therefore, it is unclear where Dr. Sompalli obtained his understanding of the mechanism of injury in this case.

Deposition of Dr. Cohen on February 14, 2018:

Both parties had the opportunity to depose Dr. James Cohen on February 14, 2018 (RX 2). Dr. Cohen is a University of Illinois trained orthopedic surgeon, who is currently the site director of the University of Illinois residency program at Weiss Hospital, chief of the section of orthopedics, and a member of Illinois Bone & Joint Institute. Dr. Cohen has been board certified in orthopedic surgery since 1988 and devotes 35% of his practice to performing shoulder surgery.

Dr. Cohen explained that the very first physical examination he performed on Petitioner, after taking her history, was to perform a Spurling's test for her (RX2, p.9). Dr. Cohen explained the reason he starts off with that test is because very frequently neck problems masquerade as shoulder problems. Dr. Cohen explained that the exact symptoms Petitioner complained of when he was doing her Spurling test were the exact type of symptoms she complained of in her history. In other words, the Spurling test created a marked reproduction of symptoms (RX2, p.11). Dr. Cohen also explained that after testing for symptoms that may be stemming from the neck, he also went on to perform a complete shoulder workup of petitioner (RX2, p.13). Dr. Cohen explained that while Petitioner had

a minimally positive Hawkins test and some guarding which could be consistent with impingement, he did not believe she had the diagnosis of impingement syndrome in her left shoulder. Dr. Cohen explained, "Because what I'm looking at, you know, was the gorilla in the room? When I did the neck exam, you know, the Spurling test, boom, major symptoms not even moving her shoulder. Examining her shoulder, she did have symptoms and guarding, but of the two, which one fit better with her symptoms was the neck." (RX2, p.17-18).

Dr. Cohen explained that he sees a number of shoulder patients, as an expert in the shoulder, but often sees this interplay between the cervical spine and shoulder and therefore has become quite good at diagnosing the distinction between the two. Dr. Cohen's testimony was especially compelling because he had anecdotal evidence of the exact same thing in his own personal life where following a surgery he had intense shoulder pain, but when he went to perform a Spurling test on himself, he noticed that the pain was emanating from his neck (RX2, p.18). Dr. Cohen explained that when he reviewed Dr. Sompalli's records, he did not see that Dr. Sompalli had examined the neck as well as the shoulders (RX2, p.19).

When Dr. Cohen had examined Petitioner, she had not yet been worked up for the cervical spine, which was his recommendation. However, at the time of the deposition, Petitioner had undergone the cervical spine MRI, and therefore Dr. Cohen was handed a copy of the report and asked to review the same. Dr. Cohen read the report and testified, "Most significant finding at C5-C6 where there is a moderate/severe left foraminal narrowing due to left disc osteophyte complex... this finding, which obviously I did not have at the time, correlates completely with what my exam showed." (RX2, p.22).

Dr. Cohen was asked whether he agreed with Dr. Sompalli who was recommending a subacromial decompression and distal clavicle resection and Dr. Cohen replied he would not recommend that based upon his examination of her (RX2, p.24).

When asked whether he agreed with Dr. Sompalli that there may be two separate issues going on in this particular case, one in the shoulder and one in the neck, Dr. Cohen responded, "Anything is possible. And I talked about how she may have had some secondary shoulder symptoms because she didn't know. I'm telling you when you have a lot of pain in your shoulder you don't want to move it unless you really know. But as far as having two different injuries, it doesn't make a lot of sense.

It's just not a logical thought process... I mean anything is possible, but in the diagnosis and determining a diagnosis of a patient, you usually want to account for one thing that will give you the whole picture. Sometimes people can have two different injuries. But someone with – did she injure her neck and the shoulder at the same second? I don't think so." Dr. Cohen explained that in medicine, you typically look for the one diagnosis that will explain all of the symptoms, and he gave the example of a person with pain in their low back that goes into their buttocks area, and into their thigh, down into their leg, into their ankle and then into their toes. The diagnosis would be sciatica, or a pinched nerve in the back, not a back problem, a hip problem, a thigh problem, a leg problem, and some type of neuropathy that is causing tingling in the toes (RX2, p.26).

Dr. Cohen also explained that he did not believe based on Petitioner's description of her relief following the shoulder injection, or lack thereof, that the diagnostic injections further supported that Petitioner had a shoulder problem (see RX2, p.27-28).

Petitioner's Testimony Regarding Return to Work:

Petitioner was asked by her attorney whether she recalled getting a note from Dr. Collins at Hinsdale Orthopedics on November 14 of 2017 [sic – should be 2016], with regard to restrictions for work of approximately 10 pounds. Petitioner testified she did recall getting that note. Her attorney then asked whether she turned that note in to Walmart, which Petitioner testified she turned in, in person (T.21-22). Petitioner was then asked whether she recalled getting any letters from Walmart regarding the availability of work. Petitioner answered she did not. Petitioner was then given a copy of Respondent's Exhibit 12 which is a letter made out to Petitioner and dated December 9, 2016. The letter outlines that Petitioner had not yet contacted the store to return to work but that they were offering her a position beginning December 17, 2016. Petitioner denied ever receiving this letter. Petitioner also testified no one at Walmart ever told her of the proposed work schedule starting December 10, 2016 (T.23).

The following exchange took place between Petitioner and her attorney:

Q. After you gave Walmart a copy of this November 14 note from Dr. Collins, did you have occasion to speak to anyone from Walmart?

A. I spoke to Carol.

Q. You spoke to Carol?
A. Yes.

Q. Was it in person or by phone?
A. By phone.

Q. Do you recall when that was?
A. Don't remember.

Q. Would it have been – just using the November 14 of '16 note as a frame of reference, about how long after that note would you have spoken to Carol?
A. Probably like in the middle of December.

Q. And you said that was by telephone?
A. Yeah.

Q. And did you make the call, or did you receive the call?
A. I made the call.

Q. Was there anyone else on the telephone line besides you and Carol?
A. No...

Q. And you had a conversation with Carol?
A. Yes.

Q. And what did you say?
A. The document that I had gave to her.

Q. You asked her about the doctor's note?
A. Yes...

Q. What did you ask regarding that note?
A. I don't remember.

Q. What was the conversation regarding the note?
A. Did they have light-duty work for me.

Q. So, you asked her that?
A. Yeah.

Q. Do you recall what her answer was?
A. No.

(T.25-26).

Petitioner's attorney then asked Petitioner whether at any point from when Petitioner allegedly gave the November 14 note to Walmart through the telephone conversation to now, anyone from Walmart told her they have light duty for her; she responded no.

Petitioner's attorney also asked Petitioner whether any other conversations had taken place with Walmart regarding work since the middle of December 2016. Petitioner stated, "Don't remember." (T.29). Petitioner stated she did not recall any additional contact with Walmart. She was explicitly asked whether she physically went to the store at any point to which she responded, "No." (T.29).

On cross-examination, Respondent's attorney sought to clarify what Petitioner was referring to when she discussed her attempts to return to work. The Arbitrator notes Petitioner was particularly evasive during this line of questioning.

Q. Okay. Just going back to Dr. Collins at Hinsdale Orthopedics. So, he sees you in November of 2016 and gives you that work release to go back with a 10-pound lifting restriction to Walmart; is that right?
A. I don't know.

Q. This is what your attorney was asking you about, that you had gotten a release to return in some capacity back in November of 2016; does that sound right to you?
A. I believe so.

(T.40).

Q. Okay. So, is your testimony that you took the note from Dr. Collins, and you walked it in to the Hodgkins store where you worked, and you gave it to Carol in personnel?
A. Yeah.

Q. Okay. And so that would have been in November of 2016, right?
A. I believe so.

Q. Okay. And when you took it to her, you brought it with the intention of returning to light-duty work; is that what your testimony is?
A. I don't know. The dates [sic] is like throwing me off. It's throwing me off. It's hard to keep up.

Q. Okay. But you remember distinctly bringing in the work restriction to Walmart; is that your testimony?
A. I believe so.

Q. Okay. And then you never returned to work in any capacity for Walmart; is that your testimony?
A. No, I never returned to work.

(T.41).

Petitioner went on to testify that she had asked Walmart for a job and they told her no. Petitioner also testified that following dropping off the work note to Walmart and asking for employment, she followed up with a phone call to Carol in personnel, who advised her that there was no light-duty work (T.42). However, when asked to place the timeframe for the call in either November or the beginning of December, Petitioner's response again was, "I don't remember." (T.42).

Then the following exchange took place between Respondent's counsel and Petitioner:

Q. After stopping by the store once and a follow-up phone call once, your testimony is that you stopped trying to return to work at Walmart; is that right?
A. No.

Q. Okay. So, did you try a few more times to return to work?
A. I don't remember. I can't remember all these dates and all this stuff.

(T.43).

Respondent's counsel next questioned Petitioner about the letter that was sent from Walmart in December of 2016. Petitioner testified that she was at the mailing address where the letter was addressed, in Chicago, Illinois.

Petitioner testified that as part of orientation, she did understand the three no-show/no-call policy, wherein if a person fails to show up to work and not call three times, then Walmart considers that a "voluntary termination" (T.46).

Petitioner acknowledged that prior to her work accident, the store would post her work schedule for the following week or an employee could scan her badge and have her work schedule show up for the following week. That is how she knew when she was scheduled to work. However,

Petitioner testified that even when she allegedly stopped by the store in November or December of 2016, she never scanned her badge to see if she was put on the work schedule (T.51).

On re-direct, the Arbitrator questioned Petitioner, given her inconsistencies surrounding her attempts to return to work. At one point, Petitioner's attorney questioned Petitioner about a conversation she had allegedly had with Carol in personnel on December 22 of 2016, and whether following that conversation, Petitioner realized she had been terminated. Petitioner responded, "No, I never knew I was fired." (T.54). The Arbitrator then asked Petitioner, "Okay. So, when did you find out that you were fired?" Petitioner answered, "I had called the store. I don't know exact [sic] date it was." Petitioner could not recall what date or year that conversation had allegedly taken place (T.54). When the Arbitrator asked Petitioner why she had called Walmart that day to talk to them, she responded that she had called to inquire what her job was, because no one had ever gotten in contact with her (T.55). Petitioner then alluded to some papers that she had received advising her that she had been terminated (T.55).

The Arbitrator notes that pages 58-63 of the transcript document Petitioner's confusing testimony regarding whether she knew she was fired or not. Petitioner alleges receiving the exit interview documenting her termination for three no-calls, no-shows, but denied ever receiving a job offer to the exact same address two weeks prior. At one point Petitioner testified she understood she was fired when she was on the phone with someone named Davina at the Walmart store, when she voluntarily called in to seek employment, but then indicates she had no idea she was fired until she received the letter in the mail, months, weeks, or possibly days after the phone call.

Testimony of Walmart Personnel Manager, Carol Piane:

Respondent called to the stand the Walmart personnel manager who had been working during Petitioner's accident, Carol Piane. Piane testified was the personnel coordinator for Walmart and had been working at the Hodgkins Walmart store in that particular position for about 16 years (T.64). As personnel coordinator, her tasks include all personnel duties such as leave of absence, payroll, and day-to-day people issues (T.65). Piane also testified that when a person has a work injury, she helps with the temporary alternative duty assignments, which is placing a person back to work who returns

with a doctor's note needing an accommodation. Piane testified that Walmart is able to accommodate any restriction outside of bed rest (T.66). Piane also testified that an accommodation can last indefinitely with a doctor's restriction, and that Respondent does not have a particular timeframe for how long they will accommodate a person's restrictions. Piane testified she had known Petitioner since she began working there in 2015.

Piane had been in the courtroom during Petitioner's testimony and had an opportunity to hear her during direct examination. Piane testified she did remember a phone call with Petitioner that occurred in October of 2016. Piane had contacted Petitioner because she wanted an update, as she knew that she was getting an MRI of her left shoulder with her doctor (T.68). Piane testified she was looking for an update in regard to the MRI, a sort of "wellness check." Piane knew that the call had happened in October of 2016 because she is required to check in with a person on leave of absence approximately four weeks after he or she applies.

When asked how Piane became aware that Petitioner had been released with some type of restriction relative to the left shoulder, Piane explained that the insurance adjuster for Walmart, who is not located at the store, contacted her indicating that she had a new work restriction from her doctor (T.69). Piane explained that once she learned of Petitioner's work restriction, she prepared a letter marked as Respondent's Exhibit 12, dated December 9, 2016, notifying Petitioner that her leave was ending and attaching a work schedule of work that would be within her restrictions. Piane testified she is the one who prepared the letter and sent the letter to petitioner on December 9, 2016, indicating that her work was slated to begin on December 17, 2016.

Piane was asked whether she remembered Petitioner stopping by the store and handing a work restriction note from her doctor to her. Piane stated that never happened (T.71-72). Piane testified had Petitioner stopped in with a restriction, she would have found a job for her within those restrictions and put her on the schedule right away. Piane also stated that as personnel coordinator she would have an obligation to keep a copy of that work restriction and place it in her Workers' Compensation folder, but there was no such restriction in the folder (T.72).

Piane was also asked whether she recalled Petitioner stopping by the store in December of 2016, as Petitioner had testified to on direct (T.72-73). Piane stated no, she did not recall Petitioner

stopping in, nor did she recall having a conversation with her in December of 2016 (T.73). Piane was asked, "You heard her testimony today that you and she had a conversation wherein she asked you about light-duty work and you said you didn't have any. Did that conversation in your memory take place?" Piane's answer was, "No." (T.73).

Piane also explained Walmart's attendance policy; namely, the no-show/no-call policy that for every day you were on the schedule and do not come in, it counts as one absence occurrence. If an employee does not use the associate information line to call in for a day she is scheduled, that counts as a no-call/no-show which is an additional three absences and those are tracked to nine, at which point it is grounds for termination (T.73). Piane explained Respondent's Exhibit 15, a document tracking the days that Petitioner would have been on the schedule and was absent. RX 15 documents the fact that Petitioner was a no-call/no-show on December 17, December 19 and December 20, 2016. Piane also described Respondent's Exhibit 11 which is an automatically generated exit interview once a voluntary termination is triggered based upon these absences (T.75).

Piane was specifically asked by respondent's counsel, "Carol, if Ms. Dotson had not been terminated for this, could Walmart be accommodating her restrictions currently of a 10-pound lifting restriction for the left shoulder?" Piane answered, "Yes."

CONCLUSIONS OF LAW

As to the disputed Issue F, Whether Petitioner's current condition of ill being is causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator finds and concludes Petitioner's condition of ill-being relative to the left shoulder was short lived and temporary, and accordingly Petitioner's appropriate diagnosis is that of cervical radiculitis. Additionally, the Arbitrator specifically finds and concludes Petitioner's left thumb condition is not work-related.

The Arbitrator finds and concludes the testimony of Dr. Cohen to be more credible than that of Dr. Sompalli, based upon Dr. Cohen's explanation of why Petitioner's pain complaints are most likely stemming from the cervical spine as opposed to the left shoulder. Dr. Sompalli acknowledged Petitioner has an impingement syndrome from her genetic predisposition to the same, and his testimony regarding why that may have been aggravated by a trauma at work is not compelling nor persuasive. That is because, initially, Dr. Sompalli's understanding of the mechanism of injury is simply inaccurate. Specifically, Dr. Sompalli references specific studies and research indicating that trauma in the form of **overhead lifting** can lead to an aggravation of impingement, but Petitioner's own history of the accident is that she was lifting something from one foot off the ground into a bin next to a rocket cart. It is therefore obvious that there was no overhead lifting involved in this injury whatsoever, thus, Dr. Sompalli's opinion referencing and relying upon an erroneous mechanism of injury has no basis in fact and therefore carries no weight. Additionally, there is very specific testimony about the physical examinations that took place and whether Petitioner's diagnosis was appropriately that of impingement or instead cervical radiculitis. The Arbitrator finds Dr. Cohen's explanation of why her condition is cervical radiculitis is more well-reasoned and thorough than that of Dr. Sompalli.

The Arbitrator finds and concludes that it is patently implausible that merely lifting a pancake box from a rocket cart into a bin would simultaneously cause two injuries to the body -- one to the cervical spine and one to the shoulder. Instead, Dr. Cohen reasonably and credibly explained that the diagnosis of cervical radiculitis explains Petitioner's symptoms going into the shoulder, to include tingling down into the hand. Dr. Sompalli illogically proffers to the Commission the rationale that Petitioner suffered two distinct injuries with the same single mechanism of injury, and that the same should be treated completely differently. Additionally, Dr. Cohen had the benefit of reviewing all of Petitioner's treatment records and, as a result, is in a superior, more informed and more advantageous position to render causation opinions. Dr. Sompalli, somewhat in a cavalier and disingenuous manner, testified he does not need to review the cervical spine records as those are solely independent of his treatment for the shoulder. However, he clearly misses the point, which is that a good physician has all of the available information and evidence to treat the patient. Dr. Sompalli did not even take the time to review cervical spine records that were within the very same practice and would have been readily available to him on one shared system at Illinois Orthopedic Network. The failure to obtain ad review relevant medical information weakens the foundation of his opinions and does not reflect well on his overall credibility.

Dr. Cohen's diagnosis of cervical radiculitis reasonably contemplates the pain in Petitioner's shoulder that she is experiencing, and Dr. Cohen was able to perfectly reproduce that with one Spurling's test. Dr. Sompalli, in contrast, does not even appear to have attempted a Spurling's test, which Dr. Cohen explained is a necessity in any shoulder exam, as cervical symptoms can often masquerade as a shoulder problem.

Based on the above, the Arbitrator finds it would be inappropriate and medically unreasonable and unnecessary to perform the shoulder surgery as proposed by Dr. Sompalli. **Therefore, the claim for authorization for shoulder surgery is denied,** but the Arbitrator does find it is reasonable and appropriate for Petitioner to continue to have a cervical spine workup to determine the appropriate treatment for the work-related cervical radiculitis.

Relating to Petitioner's left thumb complaints, the Arbitrator notes the record reflects that Petitioner's left thumb pain began over a year after her accident and accordingly does not indicate a causal connection to the accidental injury. Additionally, and very significant, the Arbitrator notes no physician offered an opinion the left thumb complaints and condition were related to the accident at work. **Therefore, the Arbitrator finds and concludes Petitioner has failed to prove her left thumb condition is causally related to the accidental injury.**

As to disputed Issue J, Whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The Arbitrator finds and concludes all treatment to the left shoulder following Petitioner's IME with Dr. Cohen on July 19, 2017 is denied because such treatment was unreasonable and unnecessary, as Petitioner's appropriate and correct diagnosis is cervical radiculitis. However, the Arbitrator finds the cervical workup performed by Dr. Chunduri was reasonable and necessary. As Petitioner's left thumb condition has no causal connection to the accidental injury, any and all treatment incurred to the left thumb is accordingly denied.

Relating to the prescription medication Dr. Sompalli continued to prescribe, the Arbitrator finds and concludes such is unreasonable and unnecessary, based upon the utilization review reports contained within Respondent's Exhibits 5 through 10, and further based upon Petitioner's own testimony on pages 20, 31 and 57 of the trial transcript during trial, wherein Petitioner repeatedly testified that the pain medication she was taking was in no way helping her. Therefore, payment for the prescription medication prescribed by Dr. Sompalli is denied. The Arbitrator further finds and concludes the ongoing prescription medication that Dr. Sompalli continued to prescribe (despite the fact that Petitioner acknowledged these prescriptions were not working) **the charges by Midwest Specialty Pharmacy are excessive, to put it mildly.** The Arbitrator highlights that a balance of $22,000.00 for prescription medication, which could be obtained from Walmart for approximately $4.00 per month, is indefensible. RX 16 is a Walmart prescription printout that adequately documents the charges at which what most patients can and do obtain their prescriptions, and what should therefore be considered reasonable.

As to disputed Issue K, Whether Petitioner is entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

As noted above, the left shoulder surgery proposed by Dr. Sompalli is denied. However, Petitioner is entitled to an ongoing workup of the cervical spine until such time Petitioner has reached maximum medical improvement for her compensable diagnosis of cervical radiculitis. The Arbitrator emphasizes again Dr. Sompalli's rationale to perform shoulder surgery does not make sense nor is it reasonable and necessary. Dr. Sompalli has an erroneous understanding of Petitioner's mechanism of injury and his explanation for why surgery was warranted is not persuasive. Conversely, Dr. Cohen, is a recognized expert who has been performing shoulder surgeries for over 35 years and is in charge of the residency program at University of Illinois, and the Arbitrator places reliance, weight and credibility on his well-reasoned opinions. Dr. Cohen did not dispute Petitioner was in pain and was experiencing shoulder symptoms, but he more persuasively and logically explained that those shoulder symptoms were stemming from a cervical radiculitis problem, which he confirmed was correlated with the cervical spine MRI that took place after his IME. Accordingly, the Arbitrator finds that only the cervical spine condition is related to the accident in this case and therefore only treatment for the diagnosis of cervical radiculitis is authorized and ordered.

As to disputed Issue L, What temporary benefits are in dispute, the Arbitrator finds and concludes as follows:

Petitioner is not entitled to any additional TTD benefits after December 3, 2016, as Petitioner refused work that was within her restrictions, despite Respondent's ability to accommodate said restrictions indefinitely. The Arbitrator was influenced by Petitioner's lack of credibility regarding her testimony on the issue of her alleged attempts to return to work. At one point, Petitioner's testimony was so difficult to follow that the Arbitrator himself had to question Petitioner, and even then, was left with a more confusing answer. Conversely, Piane was a compelling witness during trial, and she was the personnel coordinator who had been in her position for approximately 16 years. Piane answered carefully and credibly regarding Petitioner's failure to attempt to return to work, and on the other hand her repeated attempts to follow protocol and alert Petitioner to the job that the store had for Petitioner within her restrictions.

Additionally, Respondent's Exhibits 11, 12, 13, 14 and 15, all are careful documentation of Petitioner's failed attempts to return to work or even bother to call in. Further, Petitioner had no specific dates as to when these alleged phone calls or stop-ins to the store may have occurred, and she could not even offer consistent testimony as to whether she knew she was fired. On one hand, she indicated that she had learned of being terminated when she herself had call in to the store, but in the next breath, she indicated that she had no idea she was terminated until she had received paperwork from the store. Then, she changed her story and stated that paperwork had come after some phantom phone call she had allegedly made the month before. And all the while, Petitioner could give no specifics as to when these days or stop-ins to the store may have taken place. This lacks credibility.

In contrast, Piane testified she remembered specifically that she had spoken with Petitioner in October of 2016, when she had called her, as that would have correlated with the 30 days after her initial request for a leave of absence. Paine stated she remembered the conversation, and that she also remembered when Claims Management Incorporated contacted Piane in November of 2016 to advise her of Petitioner's work restriction from Dr. Collins, who had released her with a 10-pound lifting restriction. Piane then followed Walmart protocol and found a job for Petitioner within those restrictions and then sent Petitioner formal paperwork indicating what her work schedule would be.

Additionally, Paine even allotted a week to allow the letter to arrive to Petitioner before putting her on the schedule beginning December 17, 2016.

In self-serving testimony, Petitioner indicated she never received any mail from the Walmart store about what her schedule would be. This is despite the fact that the address on the letter dated December 9, 2016 matched perfectly the address of the exit interview that was sent to Petitioner from the same store to the same address on December 22, 2016. Petitioner indicated she did receive the exit interview, but she never received the light duty job offer beforehand. The Arbitrator notes he found Petitioner's testimony in this regard inconsistent, contradictory and lacking credibility. Additionally, again indicating a lack of credibility, Petitioner alleged she had spoken with Piane in either November or December of 2016 (she did not remember) and that Piane had told her point blank that they had no light-duty work for her. Piane obviously did not remember that call, as the Arbitrator does not believe any such call took place.

A Respondent has an obligation to accommodate a worker with a light-duty restriction or issue TTD if they cannot, but a Respondent is not required to attempt these efforts without limit. Walmart's accommodation policy is that they can accommodate any work restriction outside of bed rest. Had Petitioner not been voluntarily terminated for not calling and not showing, this work accommodation would have been provided to her; accordingly, the Arbitrator finds and concludes Petitioner is not entitled to any TTD benefits following December 3, 2016, as she voluntarily removed herself from the workplace and refused work within her restrictions. That is squarely within one of the exceptions specifically outlined by the Court in *Interstate Scaffolding*, and therefore while the Arbitrator does not concern himself with the reasons behind a termination for cause until Petitioner reaches maximum medical improvement, the Supreme Court has also explicitly held that TTD benefits are not due and owing when a Petitioner refuses work within her restrictions, which is exactly what Petitioner did in this case. Accordingly, no TTD benefits are due and owing at this time.

Robert M. Harris

Robert M. Harris, Arbitrator

Dated: July 20, 2018.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SCOTT MERCIL,

Petitioner,

vs.

NO: 12 WC 27793

CITY OF BATAVIA,

Respondent.

19IWCC0117

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 collateral and judicial estoppel, causation, 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.

The Arbitrator in arriving at his decision denied Respondent's ability to contest the issue of causal relationship relying on two doctrines of preclusion: 1) collateral estoppel; and 2) judicial estoppel. The Commission finds neither doctrine applicable.

Collateral Estoppel

The elements which must be shown for the application of collateral estoppel are well established.

> Collateral estoppel may be asserted when: (1) the issued decided in the prior adjudication is identical to the issue in the current action; (2) the issue was "necessarily determined" in the prior adjudication; (3) the party against whom the estoppel is asserted was a party or in privity with a party in the prior action; (4) the party had a full and fair opportunity to contest the issue in the prior

> adjudication; and (5) the prior adjudication must have resulted in a final judgment on the merits. [Citations omitted]. *City of Chicago v. Illinois Workers' Compensation Commission*, 2013 IL App (1st) 121507WC, ¶ 51.

The purpose of collateral estoppel is to bar issues from re-litigation where a final prior judgment was rendered.

Here, Petitioner testified he received an in the line of duty disability pension for the accident subjection to litigation before the Illinois Workers' Compensation Commission. T. 35. Such is the sum total of the evidence relating to Petitioner's pension. Without the final judgment, the Commission is unable to determine what, if any, issues were litigated with subsequent determinations made in the prior adjudication. For the Commission to apply the doctrine of collateral estoppel, it would be forced to engage in speculation as to the final judgement rendered by the pension board which it is unwilling to do.

Judicial Estoppel

Judicial estoppel is an equitable remedy to be utilized in limited circumstances requiring clear and convincing evidence. *Seymour v. Collins*, 2015 IL 118432.

> This court has identified five prerequisites as "generally required" before a court may invoke the doctrine of judicial estoppel. The party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefits from it. [Citations omitted]. *Id.* at ¶ 37.

Further, "the purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from 'deliberately changing positions' according to the exigencies of the moment. [Citation omitted]." *Id.* at ¶ 36.

The application of the doctrine is discretionary, and the Commission declines to invoke such an extraordinary remedy in the case at hand. Even if this Commission were so inclined, Petitioner has failed to establish the necessary requirements for the application of judicial estoppel as Respondent's positions were entirely consistent in both proceedings.

Petitioner sustained an injury while performing his duties for Respondent wherein he was bitten by a dog. T. 13. Respondent stipulated to the occurrence of the accident. Arb. Ex. 1. Petitioner subsequently filed a third-party cause of action against the owner of the dog, (*Mercil v. Muhlbradt* 12 L 322), and pursuant to Section 5(b) of the Act, Respondent filed its Petition to Intervene. PX10. See *Sjoberg v. Joseph T. Ryerson & Sons, Inc.*, 8 Ill. App. 2d 414, 417, 132 N.E.2d 56 (1956) ("It will thus be seen that the statute expressly provides that the employer may, at any time after such third party action is brought by the employee, join in said action upon his motion, so that all orders of court, after hearing and judgment, shall be made for his protection"). In said Petition, Respondent alleged payment of certain benefits made pursuant to the Act, and further alleged as follows in Paragraph 10 of its Petition: "The final amount of the Workers'

Compensation lien or subrogation interests has yet to be determined as Scott Mercil continues receiving medical treatment to cure or relieve him of the injuries inflicted by the Defendant's dog on August 6, 2010, and the final and permanent extent of Scott Mercil's injury is not yet determined." PX10.

A settlement was subsequently reached between all parties, and an agreed order was entered on April 17, 2014 memorializing the parameters for payment of the settlement proceeds as well as the reimbursement to Respondent pursuant to Section 5(b) of the Act. PX11. The agreed order specifically indicates Respondent may or may not pay additional monies to Petitioner on account of his undisputed accident. PX11, ¶¶ 13, 14.

Thereafter, a hearing was conducted on August 11, 2017 before the arbitrator wherein one of the issues in dispute was causation. Respondent argued and continues to argue Petitioner's current condition of ill-being and need for permanent restrictions is due to Petitioner's underlying degenerative condition which was neither caused nor aggravated by his accident of August 6, 2010. Such argument is wholly consistent with the facts alleged by Respondent in its Petition to Intervene as well as the subsequent agreed order entered on April 17, 2014.

Respondent paid certain sums for the uncontested work injury for which it is entitled to reimbursement pursuant to Section 5(b) of the Act. The full measure of Respondent's potential liability had not been determined as of the filing of its Petition to Intervene and/or the agreed order regarding settlement. As such, Respondent preserved its statutory rights pursuant to Section 5(b) of the Act, if and when, such liability was determined. Judicial estoppel is simply inapplicable.

Causal Relationship

Although the Commission disagrees with the Arbitrator's application of the doctrines of collateral and judicial estoppel, it affirms and adopts the Arbitrator's findings as to causal connection and the nature and extent of Petitioner's injury.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 27, 2017, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 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 45% loss of use of the person as a whole (loss of trade).

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.

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district,

19IWCC0117

body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 19 2019

L. Elizabeth Coppoletti

LEC/mck

O: 12.19.18

43

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MERCIL, SCOTT M
Employee/Petitioner

Case# **12WC027793**

CITY OF BATAVIA
Employer/Respondent

19IWCC0117

On 9/27/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.17% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0787 MEYERS & FLOWERS LLC
RYAN THERIAULT
3 N 2ND ST SUITE 300
ST CHARLES, IL 60174

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT NEWMAN
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60606

19IWCC0117

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Scott M. Mercil
Employee/Petitioner

v.

City of Batavia
Employer/Respondent

Case # **12** WC **27793**

Consolidated cases: ___

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Geneva**, on **08/11/17**. By stipulation, the parties agree:

On the date of accident, **08/06/2010**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**81,443.70**, and the average weekly wage was $**1,566.23**.

At the time of injury, Petitioner was **33** years of age, ***single*** with **0** dependent children.

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

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

After reviewing all of the evidence presented, the Arbitrator hereby makes the following findings regarding the issues of causation and the nature and extent of the injury below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Although the Respondent has alleged causation is at issue, the Arbitrator finds this matter to be one of nature and extent as the Respondent's arguments on causation are barred by the doctrines of both collateral and judicial estoppel, as Respondent was a party to Petitioner's underlying third party claim from which Respondent is asserting its right to recovery under Section 5(b) of the Act. (PX 10 and PX 11). See *McCulla v. Industrial Commission, 232 Ill.App.3d 517* and *Department of Transportation v. Coe, 112 Ill. App.3d 506.* Notwithstanding the above, the Arbitrator further finds a causal connection between the August 6, 2010 work accident and the Petitioner's injuries and permanent restrictions based on the credible medical opinions of the numerous physicians involved in this case, as detailed below.

The Petitioner was employed by the City of Batavia Police Department, first as a Patrol Officer and later promoted to Sergeant. (Tr. 12) On August 6, 2010, the Petitioner sustained a dog bite injury to the area of left wrist in the course of his employment as a Police Officer. (Tr. 13) He reported the incident to his supervisor within minutes of the work accident. (Tr. 13, PX. 13) That same day, he sought medical care at Tyler Medical Clinic and was diagnosed with a left wrist injury. (PX. 5) The Petitioner next came under the care of Dr. Howard Freedberg, an orthopedic surgeon. Dr Freedberg performed surgery on August 27, 2012, consisting of a debridement of the triangular fibro cartilage complex tear, removal of loose bodies, microfracture of the lunate and an open flexor carpi ulnaris tenolysis with repair. (PX. 1) The Petitioner continued to experience pain and problems with the left hand and wrist after surgery. He next came under the care of Dr. John Fernandez, an upper extremity orthopedic surgeon at Midwest Orthopedics at Rush for evaluation. Dr. Fernandez recommended further surgical intervention which was performed on March 24, 2014, consisting of a wrist arthroscopy and ulnar shortening osteotomy. (PX. 3) The Petitioner has retained hardware post-surgery. (Tr. 24) On October 9, 2014, Dr. Fernandez ordered "permanent light duty restrictions under five-ten pounds with regards to force and repetition and certainly not capable of returning to work as a police officer engaging in at risk activities, particularly use or maintenance of his weapon." (PX. 7) Dr. Fernandez also advised that Petitioner probably will require future surgery, including a radioscapholunate fusion or proximal row carpectomy." (PX. 7) Respondent's Section 12 examiner, Dr. Michael Vender, saw Petitioner on multiple occasions and did not disagree with Dr. Fernandez's causal connection opinion, need or reasonableness of the two surgeries, permanent restrictions or future surgery probability. (RX. 2). Unable to return to work as a Police Officer for the Respondent, Petitioner applied for a line of duty disability pension, which was awarded and determined to be directly related to the August 6, 2010 work accident. (Tr. 19-20) As part of the pension process, Petitioner was examined by Dr. Leon Benson and Dr. Brian Murphy, both of whom agree that Petitioner cannot return to work as a Police Officer due to permanent restrictions related to the August 6, 2010 work accident. (PX. 6 and PX 8). Petitioner is not currently employed and has not been since October of 2014. (Tr. 35) Respondent's vocational expert, Edward Minnich, confirmed that Petitioner cannot return to work as a Police Officer. (Tr. 57) Minnich also confirmed Petitioner's ten-pound lifting restriction and inability to use a firearm on a permanent basis. (Tr. 57) The Arbitrator has reviewed the opinions of Dr. Bryan Neal offered by the Respondent and finds them to be outweighed as to all issues, including causation and Petitioner's work abilities, when compared to the credible opinions of the six other orthopedic surgeons in this case, which include: three treating physicians, one section 12 examiner, and 2 pension examiners.

The Petitioner testified credibly that he cannot work as a police officer due to his permanent restrictions.

As such, the Arbitrator finds that Petitioner has suffered permanent partial disability to the extent of 45% person as a whole pursuant to Section 8(d)(2) of the Act, as he has permanently lost access to his trade and his ability to be a Police Officer.

ORDER

Respondent shall pay Petitioner the sum of **$669.64**/week for a further period of **225** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused **loss of use of the person as whole to the extent of 45% (loss of trade).**

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

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

Signature of Arbitrator

9/25/17
Date

SEP 27 2017

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICK REESE,

Petitioner,

vs.

NO: 14 WC 7259

TRI-COUNTY COAL, LLC,

19IWCC0118

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 occupational disease, exposure, causal connection, evidentiary issues, and permanent partial disability (PPD), and being advised of the facts and applicable law, modifies, in part, and affirms, in part, 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.

At the outset, the parties agree that the Arbitrator's Decision contains the following factual errors:

1. The Petitioner notes that the Arbitrator's primary reason for the denial of the existence of CWP was the number of b-readings that found no pleural abnormalities consistent with CWP. The parties agree that CWP is a parenchymal disease, not a pleural disease.

2. The Arbitrator noted that the NIOSH x-rays taken on August 27, 2002 and September 15, 2005 were each read by two different interpreters. The Petitioner notes that the 2002 x-ray was read by two b-readers, and the 2005 x-ray was read by three b-readers. The parties agree that the third b-reader, that was left out of the Arbitrator's Decision, read the 2005 x-ray as positive for CWP.

3. The Arbitrator erred in noting that the October 17, 2013 chest x-ray was taken at Smith Radiology located in Pennsylvania. The parties agree that the x-ray was not performed

19IWCC0118

in Pennsylvania.

The Commission reviewed the record in its entirety including the above claimed errors. The Commission strikes the above-referenced errors from the record. After striking the errors, the Commission finds sufficient evidence to support, in part, the Arbitrator's Decision.

The Commission agrees with the Arbitrator that the Petitioner failed to prove that he has coal workers' pneumoconiosis (CWP) or asthma as a result of his employment with Respondent. However, the Commission finds that Petitioner established that his emphysema arose out of and in the course of his employment with the Respondent and that said condition is causally related to his work duties. The Commission, therefore, finds that Petitioner sustained 10% loss of use of the person as a whole as a result of his emphysema.

Unlike Petitioner's claim for CWP and asthma, there is no disagreement as to the diagnosis of emphysema. Petitioner underwent a CT scan of the chest on January 7, 2016 that revealed, among other findings, mild pulmonary emphysema. The diagnosis of emphysema was confirmed by numerous tests thereafter. Respondent acknowledges, in his Statement of Exceptions, that "[w]hile these x-ray findings may be sufficient to establish the presence of emphysema, there is no evidence in the record that these findings of emphysema are related to Petitioner's coal mine employment. No physician offered any testimony that Petitioner suffered from emphysema related to his coal mine employment." The evidence supports that Petitioner suffers from emphysema.

The claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. *Anderson v. Industrial Comm'n*, 321 Ill. App. 3d 463, 467, 748 N.E.2d 339, 254 Ill. Dec. 893 (2001). Whether an employee suffers from an occupational disease and whether there is a causal connection between the disease and the employment are questions of fact. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597, 840 N.E.2d 300, 298 Ill. Dec. 530 (2005); *Anderson*, 321 Ill. App. 3d at 467. It is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009).

While there is no opinion as to whether the emphysema was caused by Petitioner's work history, the evidence supports that Petitioner has a lengthy history working in and around the coal mine. His testimony regarding his exposure to hazardous fumes is unrebutted. Absent an opinion to the contrary, the Commission finds that Petitioner's emphysema is a result of his work in and around the coal mine and that his emphysema is causally related to his job duties.

As to the nature and extent of Petitioner's injury, the Arbitrator found the issue of permanent partial disability moot. The Commission having found accident and causal connection relative to emphysema, and taking into consideration the following five factors listed under Section 8.1(b) of the Act, awards Petitioner ten-percent (10%) loss of use of the person as a whole:

(i) Impairment Rating: The Commission gives no weight to this factor noting that Dr. Castle found Petitioner had no impairment relative to his asthma. Dr. Castle did not offer an opinion regarding Petitioner's emphysema.

19IWCC0118

(ii) Occupation of Injured Employee: The Commission gives no weight to this factor. Petitioner worked in the coal mine and has since retired. He is no longer exposed to the hazards of his occupation.

(iii) Petitioner's Age: Petitioner was 57 years old on the accident date. The Commission gives little weight to this factor noting that Petitioner was working up until his retirement. There is little evidence in the record that Petitioner's age had any effect on the level of permanent partial disability.

(iv) Petitioner's Future Earning Capacity: There is no evidence in the record as to reduced earning capacity. Therefore, the Commission gives no weight to this factor.

(v) Evidence of Disability: The Commission gives this factor significant weight as evidence of disability was corroborated by the medical records. The records confirm that Petitioner has emphysema. Petitioner testified that he will get hoarse when he talks a lot and he will get tired when he breathes a lot. He also tires easier and coughs more.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 5, 2018, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $559.57 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 10% loss 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 $28,100.00. 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 19 2019

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 2/5/19
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REESE, RICK
Employee/Petitioner

Case# **14WC007259**

TRI-COUNTY COAL LLC
Employer/Respondent

19IWCC0118

On 6/5/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

RICK REESE,
Employee/Petitioner

v.

TRI-COUNTY COAL, LLC.,
Employer/Respondent

Case # 14 WC 7259

Consolidated cases: _____

19IWCC0118

An *Application for Adjustment 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 **4/24/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/21/13**, 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.

In the year preceding the injury, Petitioner earned **$48.496.24**; the average weekly wage was **$932.62**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupational disease that arose out of and in the course of his employment by respondent on 6/21/13. The petitioner's claim for compensation is denied.

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

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

Kaureen H Pulia

Signature of Arbitrator

5/22/18
Date

JUN 5 - 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 57 year old coal miner, alleges he sustained an occupational disease that arose out of and in the course of his employment by respondent on 6/21/13. Petitioner alleges he inhaled coal mine dust including, but not limited to, coal dust, rock dust, fumes & vapors for a period in excess of 32 years. He alleged that the parts of his body affected were lungs, heart, pulmonary system, and respiratory tracts. Petitioner alleged the nature of his injury as shortness of breath and exercise intolerance. Petitioner initially alleged an accident date of 7/9/13, and at trial amended his date of accident to 6/21/13, which was the last date of employment for respondent.

Petitioner worked in the coal mines for 32 years, 11 of those years underground. Petitioner testified that he was exposed to silica dust, roof bolting glue fumes, diesel fumes, and smoke from coal fires at times. Petitioner also worked on diesel equipment. Petitioner last worked in the mines on 6/21/13. Petitioner left the mine because he had enough, and wanted to retire.

Petitioner started in the mines in 1979 with Freeman. He started in the plant where they washed coal and loaded it on the train. He did this for 3-4 months before he started running heavy equipment. These duties included a lot of pushing dirt, digging ditches, loading coal on semis, and watering down the coal. Petitioner also testified that he worked above ground, mostly in the pit, which is where there was exposure to coal dust. From 1992 to 2002 he worked in the strip mine. There he would run heavy equipment.

In 2002 he went to the Crown 2 mine. It was an underground mine. This was the first time petitioner worked underground. Petitioner watered roads, ran the road grater, rock dusted, shoveled on the belt, and shoveled coal that fell off belt back onto the belt. He testified that shoveling coal created a lot of dust.

In 2003 he went to Crown 3 and continued to do outby work. Petitioner worked her until he retired. He testified that he the same thing. He built stoppings to control air. He also took glue and plastered them to the ceilings. He set props for support of the roof. Petitioner also testified that for the last year and half he worked he ran supplies into the face of the mine that included glue, bolts and plates. He also ran the diesel tractor to pull the supplies to all areas of the mine. Petitioner testified that he was definitely exposed to roof bolting fumes performing this task.

Petitioner testified that from 1979-2012 he performed all jobs in the strip mines. Petitioner testified that while at Freeman in the 1980's they put fly ash in the pits at the strip mines. He testified that for every load of fly ash that came from the power plant the plant would take a load of coal. Petitioner testified that in the winter

he would go in the old pit and start pushing fly ash off every day, and this activity caused a lot of dust. He stated that he was constantly exposed to fly ash.

Petitioner stated that he started having breathing problems at work towards the end of his career. He stated that he especially had trouble going up 22 steps. He testified that he started coughing a bit. Petitioner testified that after he noticed these breathing problems they got a little worse until he left the mine. He stated that he would get hoarse and tired, and that getting away from the exposure helped.

Petitioner started smoking in college in 1975, and stopped in 2002.

Petitioner testified that in 2015 he was diagnosed with colon cancer that metastasized to the bladder. He had surgery that took out part of his colon and bladder. Petitioner's colon cancer then metastasized to his lungs, and he is currently undergoing chemotherapy for cancer in his lungs.

Petitioner testified that he got a "30 and out" pension. He currently receives this pension from the United Mine Workers. Petitioner has a full retirement pension. Petitioner has not looked for work since he retired, but did perform some contract work, before retiring for good.

Currently, petitioner watches TV, does puzzles, runs errands, walks, and goes to doctor appointments. Petitioner loves to travel, and goes to Tampa to see his son and for cancer treatment at Moffitt.

On 9/9/02 Dr. William McGraw, a B-Reader, interpreted a chest x-ray dated 8/27/02 for NIOSH, and was of the opinion that it was completely negative. On 10/11/02 this same chest x-ray was reviewed for NIOSH by an unidentified B-Reader who only noted calcified granules and nodes. On 10/2/05 Dr. Akshay Sood, a B-Reader, reviewed a chest x-ray performed 9/15/05 for NIOSH with a film quality of 2. Dr. Sood's impression was no pleural abnormalities consistent with pneumoconiosis, small opacities, primary s, secondary s, mid and lower zones bilaterally, profusion 0/1, and cg. On 11/27/05 and unknown B-Reader reviewed a chest x-ray dated 9/15/05 for NIOSH with a film quality of 1. The impression was no pleural abnormalities consistent with pneumoconiosis, small opacities, primary s, secondary t, mid and lower zones bilaterally, profusion 0/1, and cg.

On 10/17/13 petitioner underwent a chest x-ray at Smith Radiology. On 10/28/13 Dr. Henry Smith, D.O., a B-Reader, interpreted this x-ray. His impression was simple coal worker's pneumoconiosis with small opacities, primary p, secondary p, upper mid and lower zones bilaterally, profusion 1/1. Film quality was 1. He noted thickened interlobar fissures, and old granulomatous calcifications in the right hilus, including calcified mildly enlarged right hilar lymph nodes and peripheral granuloma, possibly related to histoplasmosis.

On 12/24/13 Dr. Michael Alexander, a B-Reader interpreted the chest x-ray performed 10/17/13. He noted normal lung volumes, small round opacities present bilaterally consistent with pneumoconiosis, no areas of coalescence or large opacities, two 5mm calcified granulomas in the right upper zone, no chest wall pleural thickening or pleural calcifications, and enlarged calcified right hilar lymph nodes. The film quality was 1. Dr. Alexander's impression was coal worker's pneumoconiosis category p/p, 1/0, cg, hi; and calcified granulomatous complex in the right lung. However, on his Radiographic Interpretation sheet, that he signed, Dr. Alexander noted that there were no pleural abnormalities consistent with pneumoconiosis.

On 1/15/14 petitioner underwent a black lung evaluation by Dr. Glennon Paul at Central Illinois Allergy and Respiratory Service, Ltd., at the request of his attorney. Dr. Paul noted that petitioner had worked in the coal mines for approximately 36 years, with 9 years in the underground mine, and then 27 years in open mining. Dr. Paul noted that petitioner worked in the mines from 1976 until he retired in 2013. Petitioner denied any shortness of breath , but did report that he coughs and wheezes when he gets an upper respiratory tract infection. Petitioner gave a history of being a smoker of 27 pack years in the past, quitting in 2013. A chest examination revealed normal inspiratory and expiratory effort; no chest wall deformities; no dullness to percussion; and auscultation without wheezes or rales. Pulmonary function tests revealed a normal pulmonary function at the baseline with positive Methacholine stimulation test. Chest x-rays revealed fibronodular lesions throughout both lung fields. Dr. Paul's impression was coal worker's pneumoconiosis and asthma.

On 3/4/14 petitioner's Application for Adjustment of Claim was filed. He alleged an accident on 7/9/13, that was changed instanter at trial to 6/21/13. He alleged an occupational disease due to inhalation of coal mine dust including but not limited to coal dust, rock dust, fumes, and vapors for a period in excess of 32 years. He identified the date of accident as the last date of employment with respondent.

On 4/28/15 Dr. Christopher Meyer, a radiologist and a B-Reader interpreted PA and lateral x-rays of petitioner's chest taken 10/17/13. The film quality was identified as 2 because it was a copy of the film. Dr. Meyer noted that the lungs were well expanded without small round, small irregular, or large opacities. He noted a calcified granuloma in the right upper zone, and that densely calcified right hilar lymph nodes were present. Dr. Meyer's impression was no radiographic findings of coal workers' pneumoconiosis, and sequelae of prior granulomatous disease. After completing his interpretation, Dr. Meyer reviewed narrative summaries and B-reading forms provided by Dr. Henry K. Smith D.O. and Dr. Michael S. Alexander, in reference to this examination. He disagreed with their reported findings of primary opacities of size "p" with profusion major category 1. He indicated that the lungs were clear. He noted a normal examination with no findings of coal workers' pneumoconiosis.

On 1/17/18 Dr. Meyer interpreted a digitized PA chest x-ray of petitioner taken 9/15/05. He indicated that the film quality was 2 due to underexposure, poor contrast, and mottle. His findings were that petitioner's lungs were well expanded without small rounded, small irregular or large opacities. He noted that subtle increased bronchovascular markings were seen at the bases, and calcified granuloma were seen in the right upper zone with densely calcified right hilar lymph nodes. Dr. Meyers's impression was no radiographic findings of coal workers' pneumoconiosis, and sequelae of prior granulamatous disease.

Dr. Meyer noted that he also reviewed prior NIOSH-CWHSP B-readings regarding petitioner's chest x-rays dated 8/27/02 and 9/15/05. He was of the opinion that the two B-Readers read these films as negative for pneumoconiosis. He also noted that the two B-Readers that interpreted the 9/15/05 x-rays interpreted the chest x-rays as negative with a few small irregular opacities as the bases and one NIOSH B-Reader interpreted the chest x-ray as positive, profusion 1/0 with small opacities size "p" in all lung zones. Dr. Meyer felt the failure of the B-Reader to account for mottle lead to the reader's misinterpretation of "p" opacities.

On 1/17/18 Dr. Meyer also interpreted a digitized PA chest x-ray of petitioner taken 8/27/02. He indicated that the film quality was a 1. His findings were that petitioner's lungs were well expanded without small rounded, small irregular, or large opacities, and a calcified granuloma in the right upper zone with densely calcified right hilar lymph nodes. His impression was no radiographic findings of coal workers' pneumoconiosis, and sequelae of prior granulamatous disease.

On 5/18/15 Dr. Selby performed a Challenge Test on petitioner and interpreted it as inducible bronchospasm after the 3rd dose of Methacholine.

On 6/14/16 Dr. James Castle reviewed medical data on petitioner provided by respondent. These records were from Dr Dohner, McDonough District Hospital, Dr. Bansal, Progressive Wellness, Orthopaedic Center, Apex PT, Premiere PT, Dr. Henry Smith, Dr. Michael Alexander, Dr. Glennon Paul, Dr. Christopher Meyer, Dr. Jeff Selby, and a chest film dated 10/17/13 from Central Illinois Allergy and Respiratory. With respect to this chest film, Dr. Castle was of the opinion that there were no parenchymal abnormalities consistent with pneumoconiosis, but there was evidence of granulomatous disease with calcified granulomas.

In addition to his record review Dr. Castle interpreted chest x-rays dated 10/17/13 on 6/14/16. Dr. Castle rated the film quality at 1. He saw no parenchymal or pleural abnormalities consistent with pneumoconiosis. He identified an abnormality of cg, as well as calcified granulomas and hilar nodules. Dr. Castle was of the opinion that calcified granuloma is a common finding that typically indicates it has been infected with some type of fungus or possibly tuberculosis.

After reviewing the medical records, Dr. Castle opined that petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. Dr. Castle was of the opinion that petitioner certainly worked in or around the underground mining industry for a sufficient enough time to have possibly developed coal workers' pneumoconiosis if he were a susceptible host. He noted that petitioner worked in the mines for 36 years and last worked in the mines in 2013. He also noted that petitioner had a 27 pack year smoking history that was a significant enough tobacco history to have caused him to develop COPD, i.e., chronic bronchitis/emphysema, and/or lung cancer, and/or atherosclerotic cardiovascular disease, if he were a susceptible host. Dr. Castle was of the opinion that petitioner did not have a personal history of asthma, nor did he have a family history of asthma. However, he noted that petitioner did have a history of cough and wheezing associated with upper respiratory infections. He noted that petitioner had a fall in the FEV of 32% in the study by Dr. Paul and a fall in the FEV of 29% in the study by Dr. Selby. Dr. Castle opined that petitioner did not demonstrate consistent physical findings indicating the presence of an interstitial pulmonary process, or have a consistent finding of rales, crackles, or crepitations.

Dr. Castle was of the opinion that the physiologic study done by Dr. Paul cannot be adequately validated. He was also of the opinion that the prebronchodilar study was entirely normal showing no obstruction, with no evidence of restriction or diffusion abnormality. He was of the opinion that petitioner had a normal pulmonary function based upon the best efforts that were reviewed. He noted that the methacholine challenge test by Dr. Selby indicated bronchial hyperreactivity, an entirely normal ventilatory function, and petitioner did not demonstrate any pulmonary impairment from any cause. Dr. Castle opined that petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure.

On 8/12/16 the evidence deposition of Dr. Meyer was taken on behalf of respondent. Dr. Meyer had been certified in radiology since 1992, and B-Reader since 1999. He currently reads between 200 and 250 chest x-rays a week. Dr. Meyer was a full professor in radiology at University Hospital in Cincinnati, OH. Dr. Meyer is on the ACR Pneumoconiosis Task Force which is engaged in redesigning the course, the exam, and submitting cases for training module and exam. Dr. Meyer testified that silicosis and coal mine workers' pneumoconiosis are characteristically described by small round opacities, whereas, diseases that cause pulmonary fibrosis, like asbestos would be described by small linear or small irregular opacities. Dr. Meyer testified that small particles like silica and coal are an upper zone predominant process. He testified that one of the most important parts of the B-reading training and examination is making a distinction between a 0/1 and 1/0 film.

On cross examination, Dr. Meyer commented on a chest x-ray dated 2/20/14. He noted that it was within the normal limits of being able to identify abnormalities in the lung parenchyma, but was not a perfect quality.

He testified that it was a quality of 3 , which would be the next quality before unreadable. He noted that it did contain some abnormalities, and did not rule out the possibility that the person could still have coal workers' pneumoconiosis pathologically. With respect to a digital film dated 4/10/13, Dr. Meyer noted that it did not have mottle. He was further of the opinion that a negative B-reading does not rule out the possibility that pathological coal macules could be found on a biopsy or autopsy. Dr. Meyer was of the opinion that when looking at x-rays for abnormalities related to coal miners' pneumoconiosis the nodules are smaller and a little less distinct than those with silicosis, where the nodules have a tendency to be a little larger and more distinct. He noted that the distribution are the same. Dr. Meyer agreed that all long time coal miners are going to come out with some dust deposit trapped in their lungs, however, the majority of those will not have changes in their lungs that qualify for coal workers' pneumoconiosis. Dr. Meyer was of the opinion that the manifestations of pneumoconiosis are based on the body's ability to clear that dust. He was further of the opinion that you cannot have coal workers' pneumoconiosis without having a tissue reaction to the coal dust. Dr. Meyer was of the opinion that you can have mixed dust exposure such as coal dust and silica, that can result in macules, and this can result in more toxicity in the lung tissue. Dr. Meyer was of the opinion that coal workers' pneumoconiosis can progress in some coal miners by an existing macule becoming larger, by additional macules, the macules coalescing. Dr. Meyer did not agree that after coal workers' pneumoconiosis appeared radiographically or pathologically and became more significant, that it would begin to manifest itself in pulmonary or clinical abnormalities. Dr. Meyer agreed that pneumoconiosis could develop at any time in a coalminer's career, and not show up radiographically until a month or so after he left the mine. Dr. Meyer noted that coal workers' pneumoconiosis abnormalities can be found in the mid and lower lung zones, and very rarely in the upper zones. Dr. Meyer agreed that there are studies that show that at autopsy as much as 50% of coal miners are found to have abnormalities of coal worker's pneumoconiosis when they might not have been apparent radiographically during their life.

On redirect examination Dr. Meyer was of the opinion that simple pneumoconiosis typically won't progress once exposure ceases. Dr. Meyer opined that petitioner did not have either progressive massive fibrosis or cor pulmonea, and did not have any evidence of bulla or hyperinflation. Dr. Meyer opined that when he interpreted petitioner's films he did not see any opacities. Dr. Meyer was of the opinion that if a non B-Reader says an x-ray shows pneumoconiosis, you do not know if that interpretation technically meets the criteria that the ILO has established for that diagnosis. He was further of the opinion that if that non B-Reader did not indicate what opacity type was present, whether round or irregular, then that case would need to be re-evaluated to understand whether it met the threshold for pneumoconiosis, and then whether it actually met the criteria for the type of exposure.

On 9/6/16 the evidence deposition of Dr. Glennon Paul, was taken on behalf of petitioner. He testified that he specializes in allergy and pulmonary diseases. He is board certified in allergy, immunology and asthma. Dr. Paul performs and reads chest x-rays; performs pulmonary function tests; and has treated coal miners for coal mine induced lung disease since the 1970s. He is not a B-reader, but stated that he was familiar with the NIOSH standards, and has read 100 chest x-rays a week for 35 years. Dr. Paul is the medical director at St. John's respiratory therapy, and clinical assistant professor of medicine at SIU Medical School. He is also the senior physician at Central Illinois Allergy and Respiratory Clinic.

Dr. Paul has also examined coal miners for federal black lung claims as well as state black lung claims. Dr. Paul noted that when he examined petitioner he had no signs of asthma, but his pulmonary function test was compatible with reactive airway disease or asthma. Dr. Paul opined that petitioner has coal workers' pneumoconiosis caused by coal dust. He further opined that petitioner has asthma caused by the inhalation of coal dust. He was of the opinion that petitioner's smoking history could have temporarily worsened petitioner's asthma, but was not a cause of petitioner's asthma. Dr. Paul opined that roof bolting glue fumes inhaled over a long period of time, coal dust, diesel fumes, and adhesives above ground, are things in the coal mine that cause asthma. Dr. Paul opined that petitioner could not have any further exposure to the coal mine without endangering his health. He opined that petitioner is totally precluded from working as a coal miner. Dr. Paul opined that petitioner has clinically and physiologically significant pulmonary impairment caused by coal dust inhalation and the coal mine environment, based on his pulmonary function testing and methacholine challenge. Dr. Paul opined that due to the retained dust in the coal miner's lungs and the exposure it entails, coal miners lung disease can be latent and progressive. Dr. Paul was of the opinion that when petitioner is not having an exacerbation of his asthma he can perform heavy manual labor. However, when he is having an exacerbation his ability to perform heavy manual labor could be reduce from 90% to 0%.

Dr. Paul opined that in order to have coal worker's pneumoconiosis you must have a tissue reaction (scarring or fibrosis) in addition to coal mine dust deposited in the lungs. He further opined that scarring of coal workers' pneumoconiosis cannot perform the functions of a normal healthy lung tissue. Dr. Paul was of the opinion that if you have coal workers' pneumoconiosis you have some impairment in the function of the lung at the site of the scarring whether or not it can be measured by spirometry. He was further of the opinion that one can have injury or disease in the lung and shortness of breath despite having normal pulmonary function test results. Dr. Paul was of the opinion that in order to know whether or not a specific exposure caused impairment of a miner's lungs, you would have to have serial pulmonary function test, pretests, and post-tests. Dr. Paul testified that while pulmonary function tests will tell you the type of abnormality (obstructive or restrictive) and

how severe it is, it will not tell you the etiology of it. He was of opinion that emphysema, if significant enough to cause a measurable defect, will be obstructive, and scarring of coal worker's pneumoconiosis can be either obstructive, restrictive, or both. Dr. Paul was of the opinion that a person with coal workers' pneumoconiosis that is radiographically significant can also have no shortness of breath, normal pulmonary function tests, normal blood gases, and normal physical examination of the chest.

Dr. Paul was of the opinion that if a coal worker has coal workers' pneumoconiosis and ends his exposure to coal mine dust it can still progress, usually gradually, and there is no way to stop it. Dr. Paul was of the opinion that exposure to coal dust, silica, diesel fumes, fumes from other petroleum products, smoke and fumes from sulfur coal fires, fumes from electrical cable fires, fumes from roof bolting process glue, and welding fumes can injure the lungs. Dr. Paul was of the opinion that obstructive lung disease is multi-factorial in origin. He believed that inhalation of coal mine dust can result in shortness of breath, a chronic cough, emphysema, and chronic bronchitis. He was also of the opinion that there are exposures in the coal mine that can result in occupational asthma, and aggravate emphysema, asthma and chronic bronchitis. Dr. Paul was of the opinion that if one inhales anything dusty, such as coal dust, it can make chronic bronchitis worse and a progressive disease. He was further of the opinion that one can have chronic bronchitis with normal pulmonary testing, blood gas testing, and physical examination. Dr. Paul was of the opinion that the development of coal worker's pneumoconiosis in coal workers vary and can take some 40 years and others 2 years.

Dr. Paul was of the opinion that CT scans have approximately 100 times more radiation exposure than x-rays, and can be adjusted or programmed to emphasize certain types of diseases that one may be looking for. He was of the opinion that a negative x-ray cannot rule out the existence of coal workers' pneumoconiosis.

On cross examination Dr. Paul testified that petitioner was not his patient, and he only saw him one time at the request of his attorney. He confirmed that when he saw petitioner he had no significant shortness of breath, was not taking an medications, and did not provide a past history of taking any breathing or asthma medications in the past. Dr. Paul testified that he did not review any of petitioner's treatment records. He also testified that petitioner never told him he had difficulty performing his duties at the mine. Dr. Paul testified that with regard to the spirometry performed on petitioner, his pre-bronchiodilator, forced vital capacity, forced expiratory volume in one second, total lung capacity, and diffusion capacity were normal. Dr. Paul did not know the date of the chest x-ray he reviewed, but was of the opinion that coal dust was present, and all lung zones were involved. He did not know what the profusion for the film was.

On 6/8/17 the evidence deposition of Dr. James Castle was taken on behalf of respondent. Dr. Castle is board certified in internal medicine with a subspecialty in pulmonary disease. Dr. Castle is a pulmonologist and

a B-Reader since 1985. Dr. Castle has been certified in pulmonary disease since 1941. His practice was limited to pulmonary disease and chest disease, that would encompass critical care medicine, and later include sleep medicine. Dr. Castle did have some coal miners in his practice that had coal miners' pneumoconiosis, but not a great number. Dr. Castle, after reviewing Dr. Paul's records did not consider a cough an objective determinant of pulmonary impairment, given that Dr. Paul believed petitioner had no evidence of cor pulmonale or progressive fibrosis. He believed it would extremely unlikely that petitioner would develop either progressive massive fibrosis or cor pulmonale, based not only on the records he reviewed, but also the fact of petitioner's physiologic function and his age. He agreed with the position of the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working in currently permissible exposure levels until they reach retirement age, and believed this position was consistent with the position of the Mine Safety and Health Administration regarding individuals who have been diagnosed with x-ray evidence of pneumoconiosis.

Dr. Castle opined that petitioner was capable of working heavy manual labor from a respiratory standpoint. He further opined that petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. Dr. Castle was of the opinion that petitioner did not have a personal or family history of asthma, but had a history of cough or wheezing associated with upper respiratory infections. He was also of the opinion that petitioner did not demonstrate consistent physical findings indicating the presence of an interstitial pulmonary process, nor did he have a consistent finding of rales, crackles or crepitations. Dr. Castle was of the opinion that the prebronchodilator study performed by Dr. Paul was entirely normal and showed no obstruction, and there was no evidence of restrictions or diffuse abnormality. He also noted that petitioner had normal pulmonary function based on the best efforts that were reviewed. Dr. Castle was of the opinion that the methacholine challenge test performed by Dr. Selby was indicative of bronchial hyperreactivity, and noted that petitioner had entirely normal ventilatory function and did not demonstrate any pulmonary impairment from any cause, and there were no arterial blood gas studies in the data set he reviewed.

On cross examination, Dr. Castle agreed that when a person has shortness of breath, cough and wheeze, an upper respiratory tract infection can be a trigger for asthma. He was also of the opinion that people with a significant upper respiratory infection can have symptoms and not have asthma. Dr. Castle testified that he did not physically examine petitioner. Dr. Castle agreed that there are exposures in a coal mine other than coal dust that can cause or aggravate asthma such as fumes from roof bolting, diesel fumes, and fumes from other emissions, particularly those that might have TDI. Dr. Castle agreed that if petitioner was determined to have had exposure to diesel fumes and roof bolting fumes and possibly fumes from other adhesives, that caused him

to wheeze, cough, have shortness of breath and tightness in the chest, that made it difficult or impossible to work in that area, it would be possible that petitioner's asthma could have been caused in part, or aggravated in part and made worse by those exposures, if he were being treated with anti-inflammatory therapy and continued to have problems despite therapy. Dr. Castle agreed that when a coal miner leaves the coal mine after decades of exposure it is true they never really do clear all of the coal mine dust that they have inhaled and the tissue next to the coal mine dust would have exposure to coal mine dust for the rest of the man's life. Dr. Castle testified that he quit seeing patients in 2003. Dr. Castle testified that he does 5-6 independent medical examinations a year. Dr. Castle was of the opinion that there are exposures anywhere, including a coal mine, that precipitate or briefly cause an exacerbation of asthma. Dr. Castle was of the opinion that coal work is not known as a cause of asthma or worsening agent of asthma over time, but that diesel fumes have been known to do that with significant exposure. Dr. Castle noted that if a person has occupational asthma or reactive airways, then he would expect to see some potential variability in their pulmonary function and symptoms over time. Dr. Castle agreed that having pulmonary function tests within the normal range does not mean the lungs are free from any lung damage, injury or disease.

Dr. Castle was of the opinion that chronic bronchitis requires the presence of sputum production over a finite period of two years, and that chronic bronchitis can lead to obstructive lung disease. He did not believe there is a continuum of chronic bronchitis into emphysema, but one can have a combination of both, or one without the other. Dr. Castle was of the opinion that chronic bronchitis does not necessarily always originate in the lung itself. He was further of the opinion that in order to make a diagnosis of chronic pulmonary emphysema there has to be a demonstration of functional abnormality related to that. He agreed that a person with emphysema has an impairment in the function of their lungs at the site of the damage inasmuch as it cannot perform the same function as a normal healthy lung tissue. Dr. Castle agreed that the conclusion of NIOSH, the Department of Labor, and American Thoracic Society have stated that obstructive lung diseases, be they emphysema, chronic bronchitis or just plain COPD, can be multifactorial in etiology, and the result of impairment from all the contributors can be additive.

On redirect examination, Dr. Castle was of the opinion that the only trigger petitioner related to Dr. Paul for his respiratory complaint was an upper respiratory tract infection. Dr. Castle testified that in all the medical he reviewed he never saw petitioner being restricted for asthma, and in fact never saw the mention of asthma. Dr. Castle was of the opinion, based on the objective testing that he reviewed on petitioner, that there was no evidence of any permanent pulmonary impairment as a consequence of his asthma. He was also of the opinion that in the review of petitioner's medical there was no pathological evidence of pneumoconiosis.

Petitioner offered into evidence the medical records from Springfield Clinic from 7/10/15 through 6/9/17. Petitioner had a history of sigmoid colon carcinoma with direct urinary bladder invasion diagnosed in October of 2015 after a surgical resection and chemoradiation. During this period petitioner's respiratory exams revealed no shortness of breath, productive cough or chest pain. When the petitioner had a port in his chest his lungs were clear with a few wheezes that cleared when coughing.

A chest x-ray performed 12/21/15 revealed an oval 2.5 cm right lower lung nodule that may be representative of metastatic disease.

On 1/7/16 petitioner underwent a CT of the chest. The impression was new left upper lobe pulmonary nodule and enlarging lingular pulmonary nodule since 9/1/15, that was concerning for pulmonary metastatic disease. Also noted was mild pulmonary emphysema, and scattered linear areas of pulmonary parenchymal scarring in the lower lobes bilaterally.

On 4/15/16 petitioner underwent a CT/PET scan. The impression included low level hypermetabolism corresponding to a 4 mm left upper lobe pulmonary nodule morphologically unchanged from 1/7/16, but morphologically and metabolically new since 9/1/15. Also noted was mild pulmonary emphysema, predominantly paraseptal within the apices, and calcified granulomata.

On 7/20/16 petitioner underwent a CT/PET scan. Postinflammatory calcifications, as well as reidentification of morphologically stable-non FDG avid bilateral pulmonary nodules. Several calcified granuloma were noted.

On 6/5/17 petitioner underwent PET/CT Skull to thigh examination. A recent CT showed enlarging pulmonary nodules. Hypermetabolic pulmonary nodules were noted that included the two enlarging pulmonary nodules on the recent CT, and additional pulmonary nodules that were new or interval enlargement when compared to prior scans. Some nodules did not demonstrate abnormal hypermetabolism, but were below the size resolution of PET. Also noted was pulmonary emphysema and catheter granulomata. The impression included pulmonary metastatic disease.

On 6/7/17 petitioner presented for results of the tests on 6/5/17. A physical examination revealed that his chest was clear to auscultation bilaterally with no adventitious sounds.

On 8/3/17 petitioner was examined and his lungs were clear to auscultation, and his respirations were non-labored.

On 8/10/17 petitioner underwent a PET/CT from the skull to the thigh. His lung nodules were determined to be most compatible with enlarging metastatic disease. Some small nodules with interval increase in size below the detection level of the PT such as the 4 mm nodule in the right lower lobe was suspicious for additional sites of neoplasm, and the calcified right upper lobe nodule was compatible with healed granulomatous disease. There were also a few scattered paraseptal emphysematous changes. There were no hypermetabolic lymphadenopathy identified within the hila, axillae or mediastitum. Also noted were large calcified right hilar adenopathy compatible with healed granulomatous disease. His physical examination of his respiratory system revealed that his respirations were non-labored with symmetrical chest wall expansion. Petitioner had no shortness of breath, no cough, no sputum production, no hemoptysis, and no wheezing.

On 8/10/17 petitioner also underwent a CT guided biopsy of a left lower lung nodule. The final diagnosis was metastatic colorectal adenocarcinoma. His respirations were non-labored, and there was symmetrical chest wall expansion.

On 11/7/17 petitioner underwent a review of symptoms and his chest was clear to auscultation, bilaterally with no adventitious sounds. On 9/25/17, 10/9/17, 10/23/17, 11/20/17, 12/4/17, 1/8/18, 1/22/18,and 2/12/18 petitioner underwent a review of his symptoms and his lungs were clear bilaterally; on 8/2/17 a review of symptoms showed no shortness of breath, no cough, no sputum production, no hemoplysis, and no wheezing. On 3/12/18 a review of symptoms revealed no shortness of breath, productive cough, or chest pain.

On 4/9/18 petitioner underwent a CT of the chest. The impression included pulmonary metastases, unchanged since 6/5/17.

Respondent offered into evidence the medical records of Orthopedic Center of Illinois. Petitioner treated for right C6 radiculopathy and right shoulder impingement syndrome. After an FCE on 5/19/08 petitioner was found capable of working at the medium physical demand level, and given permanent restrictions of no pushing or pulling greater than 50 pounds and no overhead looking. Petitioner was also seen for a left lower leg and ankle injury on 2/1/10.

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

Petitioner claims he sustained an occupational disease that arose out of and in the course of his employment be respondent. Respondent denies that petitioner sustained an occupation disease that arose out of and in the course of his employment by respondent.

Petitioner was a coal miner for 32 years, with 11 of those underground. He was exposed to silica dust, roof bolting glue fumes, diesel fumes, and smoke from coal fires at times. He also testified that he worked on diesel equipment. Petitioner retired on 6/2/13 at his own discretion, after deciding he had had enough.

In support of whether or not petitioner has radiographic evidence of coal workers' pneumoconiosis the petitioner offered the opinions of Dr. Smith and Dr. Alexander. The respondent offered the opinions of Dr. Meyer and Dr. Castle. Petitioner also offered into evidence radiographic evidence of petitioner's lungs dated 8/27/02 and 9/15/05, interpreted by two different interpreters for each date for NIOSH. All interpreters of these chest x-rays were B-Readers.

The chest x-rays dated 8/27/02 were reviewed by B-Readers for NIOSH, as well as Dr. Meyer. With respect to the x-rays performed 8/27/02, two B-Readers interpreted these x-rays on behalf of NIOSH. Dr. McGraw was of the opinion it was completely negative, and the other B-Reader only noted calcified granules and nodes. These x-rays were also interpreted by Dr. Meyer. His impression was no radiographic findings of coal workers' pneumoconiosis, and sequelae of prior granulamatous disease.

With respect to the x-rays performed 9/15/05, two B-Readers interpreted these x-rays on behalf of NIOSH. Dr. Sood's impression was no pleural abnormalities consistent with pneumoconiosis, small opacities, primary s, secondary s, mid and lower zones bilaterally, profusion 0/1, and cg, and the other B-Reader's impression was no pleural abnormalities consistent with pneumoconiosis, small opacities, primary s, secondary t, mid and lower zones bilaterally, profusion 0/1, and cg. Dr. Meyer also reviewed these x-rays. His impression was also no radiographic finding of coal workers' pneumoconiosis, and sequelae of prior granulamatous disease.

Based on the readings of the x-rays dated 8/27/02 and 9/15/05, the arbitrator finds none of the B-Readers who reviewed these x-rays noted any pleural abnormalities consistent with pneumoconiosis.

The next chest x-rays taken that were interpreted by both petitioner's and respondent's experts were the chest x-rays taken at Smith Radiology on 10/17/13. These x-rays were performed by Dr. Smith and interpreted by Dr. Smith, and Dr. Alexander for petitioner, and Dr. Meyer and Dr. Castle for respondent. Drs. Smith, Alexander, Meyer and Castle are all B-Readers. Dr. Smith's impression was simple coal workers'

pneumoconiosis with small opacities, primary p, secondary p, upper mid and lower zones bilaterally, profusion 1/1. Dr. Alexander's impression was coal workers' pneumoconiosis, p/p, 1/0, cg, hi, and calcified granulomatous complex in the right lung. However, the arbitrator finds it significant that on the Radiographic Interpretation sheet he signed, Dr. Alexander noted that there were no pleural abnormalities consistent with pneumoconiosis. Dr. Meyer's impression was no radiographic findings of coal workers' pneumoconiosis, and sequelae of prior granulomatous disease. Dr. Castle was of the opinion that the film showed no parenchymal abnormalities consistent with pneumoconiosis, but did find evidence of granulomatous disease with calcified granulomas.

The final doctor offering an opinion on whether or not petitioner has coal workers' pneumoconiosis was Dr. Paul, on behalf of petitioner. Dr. Paul is not a B-Reader. He examined petitioner on 1/15/14. He took chest x-rays. His impression was fibronodular lesions throughout both lung fields. Based on these results his impression was coal workers' pneumoconiosis.

Based on the above, the arbitrator finds the opinions of the B-Readers from NIOSH, as well as Dr. Meyer and Dr. Castle, as it pertains to whether not petitioner has evidence of coal workers' pneumoconiosis, more persuasive and consistent than those of Dr. Smith and Dr. Alexander. The arbitrator finds the impressions of Dr. Alexander less than persuasive given the fact that his impression of coal workers' pneumoconiosis was inconsistent with his own findings on his Radiographic Interpretation report given that Dr. Alexander indicated in response to "3A" on the report that there were not any pleural abnormalities consistent with pneumoconiosis. The arbitrator finds the opinions of Dr. Meyer the most persuasive of the B-Readers given that he is not only certified in B-reading, but is also on the ACR Pneumoconiosis Task Force which is engaged in redesigning the course, the exam and submitting cases for training module and exam. The arbitrator also finds the opinions of Dr. Castle more persuasive then those of Dr. Smith and Dr. Alexander based on the fact that Dr. Castle is a pulmonologist and has been a B-Reader since 1985, has been certified in pulmonary disease since 1941, and like Dr. Meyer and Dr. Alexander on his Radiographic Interpretations sheet, found no pleural abnormalities consistent with pneumoconiosis.

The arbitrator finds Dr. Paul the least qualified expert to make a determination of radiographic coal workers' pneumoconiosis given the fact that he is not a certified B-Reader. The arbitrator also finds it significant that when Dr. Paul was questioned about his findings after reviewing the petitioner's chest x-rays he could not even recall the date of the x-ray, and did not know what the profusion for the film was. The arbitrator also questions whether or not Dr. Paul technically meets the criteria that the ILO has established for determining the diagnosis of pneumoconiosis given that he is not a certified B-Reader.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner failed to prove by a preponderance of the credible evidence that he has evidence of radiographic coal workers' pneumoconiosis.

The petitioner also claims he suffers from asthma, and his asthma was caused in part, or aggravated in part by his exposure as a coal miner. In support of this claim the petitioner relies on the opinions of Dr. Paul. Dr. Paul performed a black lung evaluation of petitioner on 1/15/14. Petitioner denied any shortness of breath, but stated that he coughs and wheezes when he gets an upper respiratory tract infection. He also did not relate any other triggers for pulmonary problems. A chest examination performed by Dr. Paul revealed normal inspiratory and expiratory effort; no chest wall deformities; no dullness to percussion; and auscultation without wheezes or rales. Additionally, petitioner's pulmonary function tests evealed a normal pulmonary function at the baseline with positive methacholine stimulation test. Based on these results, Dr. Paul was of the opinion that petitioner's pulmonary function test was compatible with reactive airway disease or asthma. He was of the opinion that petitioner's asthma was caused by inhalation of coal dust, roof bolting glue fumes, diesel fumes, and adhesives above ground, despite any documented history by petitioner in his medical records that these exposures were triggers for any pulmonary problems. Dr. Paul was of the opinion that petitioner's 27 year history of smoking could have temporarily worsened his asthma, but was not the cause of his asthma. Dr. Paul was also of the opinion that while pulmonary function tests will tell you the type of abnormality, be it obstructive or restrictive, and how severe, it is, it will not tell you the etiology of it. Given that opinion, the arbitrator questions how Dr. Paul can opine that the etiology of petitioner's pulmonary function test abnormality was his work activities. The arbitrator also finds it significant that when petitioner presented to Dr. Paul he had no significant shortness of breath, was not taking any medications, did not provide a past history of taking any breathing or asthma medications in the past, did not have any history or diagnosis of asthma, never told him that he had difficulty performing his duties in the mine, and never related that his work duties in the mine were a trigger for any pulmonary problems that he had.

The arbitrator notes that Dr. Castle did not physically examine petitioner, but after reviewing Dr. Paul's records did not consider a cough an objective determinant of pulmonary impairment given that Dr. Paul believed petitioner had no evidence of cor pulmonale or progressive fibrosis. Dr. Castle opined that petitioner did not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. He also noted that petitioner did not have a personal or family history of asthma, and only had a history of cough or wheezing associated with upper respiratory infections, which the arbitrator notes was not listed in any of the treatment records petitioner offered into evidence. He was also of the opinion that petitioner did not demonstrate consistent physical findings indicating the presence of an interstitial pulmonary process.

Dr. Castle was of the opinion that the methacholine challenge test performed by Dr. Selby was indicative of bronchial hyperreactivity. Despite this finding, he was also of the opinion that petitioner had an entirely normal ventilatory function and did not demonstrate any pulmonary impairment from any cause. Dr. Castle was also of the opinion that petitioner had a 27 year history of smoking that could cause him to develop asthma, COPD or emphysema.

Although petitioner testified that near the time he retired in 2013 he coughed a little bit and still does, petitioner failed to offer into evidence any credible medical records from that time frame to support this claim. The arbitrator also finds it significant that the medical records offered into evidence by the petitioner for the period 7/10/15 through 3/12/18 clearly show that during this period, other than when he had a port in his chest, related to his cancer, reviews of his respiratory system consistently reveal that he had no shortness of breath; had no productive cough; his lungs were clear to auscultation; his respirations were non-labored with chest wall expansion; and he had no sputum production, no hemopysis, and no wheezing. The arbitrator finds it significant that none of petitioner's records from the Springfield Clinic offered into evidence include any diagnosis or treatment for asthma, nor do they include any records from around the time he retired, until now to support his claims that he coughed then, and coughs more now than he ever did. The arbitrator also gives lesser weight to the opinions of Dr. Paul, given the fact that he admitted he did not review any records of petitioner that showed petitioner had a history of asthma, or was on any medications for asthma.

Based on the above, as well as the credible record, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he has asthma that was caused in part, or aggravated in part, by his work as a coal miner.

Lastly, the petitioner claims that he has emphysema caused in part, or aggravated in part, by his work as a coal miner. Petitioner claims he underwent a CT of his chest at Springfield Clinic that noted mild pulmonary emphysema, that could have been presented to Dr. Castle prior to his report on 6/4/16. The petitioner admits that Dr. Paul did not diagnose emphysema when he examined petitioner on 1/15/14. However, the arbitrator finds it significant petitioner does not identify the date on which this CT scan was taken, the results of that CT scan, and when this evidence was available prior to 6/4/16. The arbitrator, having had an opportunity to review the treating records petitioner offered into evidence from Springfield Clinic from 7/10/15 through 6/9/17, notes the first evidence of any CT scan of petitioner's chest in these records was on 1/7/16, which was six months after Dr. Castle issued his report. Given this evidence, the arbitrator finds neither Dr. Paul nor Dr. Castle could have reviewed a CT scan of petitioner's chest from Springfield Clinic prior to 1/7/16. Notwithstanding this evidence, the arbitrator finds no credible evidence or opinions by any healthcare providers to support a finding that

petitioner' diagnosis of emphysema was caused in part, or aggravated in part, by his work as a coal miner. The arbitrator also finds it significant that in addition to petitioner's coal mining history, petitioner also had a 27 year history of smoking cigarettes, followed by the use of vape cigarettes that could have caused or contributed to his diagnosis of emphysema.

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 occupational disease that arose out of and in the course of his employment by respondent on 6/21/13.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an occupational disease that arose out of and in the course of his employment by respondent on 6/21/13, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARISOL ZUMBA,

Petitioner,

vs.

NO: 17 WC 15654
17 WC 19067

LABOR NETWORK,

Respondent.

19IWCC0119

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 prospective medical 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission modifies the Arbitrator's decision and finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Ronald Silver. The Commission is not persuaded by Dr. Maday's opinion that Petitioner suffers from posterolateral hamstring pain and IT band syndrome. His opinion is directly contradicted by the MRI, which was positive for a right medial meniscus tear. Conversely, Dr. Silver noted that his examination findings revealed swelling of the knee with medial joint line tenderness. Petitioner also had a positive McMurray's test and limited range of motion. Mostly importantly, however, is the fact that Dr. Silver's examination findings were corroborated by the MRI finding of a torn medial meniscus. Accordingly, the

19IWCC0119

Commission finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Silver.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 3, 2018, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $333.33 per week for a period of 43-6/7 weeks (June 14, 2017 to April 16, 2018), 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 authorize and approve prospective medical treatment as recommended by Dr. Ronald Silver.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the following reasonable and necessary medical expenses, subject to the fee schedule: 1) LaClinica, only the expenses associated with Dr. Rushani's initial examination and re-examinations and the therapeutic exercise (PX 3); 2) American Diagnostic MRI, right knee MRI, 5/23/17, $1,950.00 (PX 4); and 3) Northshore Orthopedic (Dr. Silver – Office visits of June 8 and August 3, 2017, PX 5), $646.00. See the attached arbitrator's decision for additional analysis.

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 $10,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 19 2019

MJB/tdm
d: 2/11/19
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

ZUMBA, MARISOL
Employee/Petitioner

Case# **17WC015654**

17WC019067

LABOR NETWORK
Employer/Respondent

19IWCC0119

On 5/3/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.99% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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
VICTOR HERRERA
ONE E WACKER DR 38TH FL
CHICAGO, IL 60601

5001 GAIDO & FINTZEN
MALLORY ZIMET
30 N LASALLE ST SUITE 3010
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
19(B)/8(A)

Marisol Zumba
Employee/Petitioner

v.

Labor Network
Employer/Respondent

Case # 17 WC 15654

Consolidated cases: 17 WC 19067

19IWCC0119

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **April 16, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 11, 2017**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

For the reasons stated in the attached decision, the Arbitrator finds Petitioner's average weekly wage to be $500.00.

On the date of accident, Petitioner was **34** 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 $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $. See the decision in 17 WC 19067.

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

ORDER

Respondent shall pay Petitioner the Fullerton MRI bill of $1,475.00 (right knee MRI, 3/24/17, PX 2), subject to the fee schedule.

For the reasons set forth in the attached decision, the Arbitrator declines to award temporary partial disability benefits.

See the decision in the companion case, 17 WC 19067, for the Arbitrator's findings as to other issues, including temporary total disability and prospective 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.

Molly C Mason

5/3/18

MAY 3 - 2018

Marisol Zumba v. Labor Network, Inc.
17 WC 15654 and 17 WC 19067 (consolidated)

Summary of Disputed Issues

The parties agree Petitioner, a cleaner based at Cloverhill Bakery, sustained accidents on March 11, 2017 and April 15, 2017, while working for Respondent, a staffing agency. They also agree Petitioner provided Respondent with timely notice of these accidents. Arb Exh 1-2. The disputed issues include causal connection, average weekly wage, medical expenses, temporary partial disability, temporary total disability and prospective care. Petitioner seeks an award of right knee surgery, as recommended by Dr. Silver, her treating orthopedic surgeon. Respondent's examiner, Dr. Maday, disagreed with Dr. Silver's diagnosis of a meniscal tear and recommendation of knee surgery. Based on his examination findings, he opined that Petitioner has iliotibial band disorder requiring therapy and injections. He saw no need for surgery.

Arbitrator's Findings of Fact Relative to Both Cases

Petitioner testified through a Spanish-speaking interpreter.

Petitioner testified she worked for Respondent, a staffing agency, throughout the year 2016. Initially, she indicated Respondent paid her at the rate of $11.10 per hour. She then testified Respondent typically raised her pay by $.10 per hour each year. In 2016, she worked between 43 and 45 hours per week and netted about $440 per week. Overtime was not optional. Most of her co-workers worked 12-hour days. Respondent allowed her to work shorter days due to her seniority and the fact she has children.

Petitioner testified that, as of March 11, 2017, she worked for Respondent as a cleaner. She was based at Cloverhill Bakery, which is now known as Arysta. This business is in Chicago. Her shift that day ended at 3 PM. At some point between 2 PM and 2:20 or 2:30 PM, she was pulling a cart that was packed with bottles of chemicals. There was a lot of water and flour on the floor. One of the wheels on the cart went down into a drain hole. The cart began to turn over. The weight of the cart pulled on her right arm and body. She turned and fell onto her outstretched hands, letting go of the cart in the process. A male individual helped her lift the cart. She told him she felt something in her right knee. She informed her manager, C. Hernandez, of the accident and indicated she was experiencing right knee pain. She went to an office and applied an anesthetic gel to the knee. She also notified Claudio, who was one of three supervisors, of the accident. An incident report was completed. She was asked if she could resume working but she had to leave to tend to her children.

Petitioner testified she reported to work the following day, a Sunday, although her right knee pain had increased. She had to wring out industrial mops that day. This activity caused her pain to worsen. She told a supervisor she would not be in the following day, due to her injury. She asked to be sent to Respondent's doctor.

Petitioner testified that Respondent sent her to Physicians Immediate Care. The records from this facility (PX 1) reflect Petitioner saw Dr. Zautcke on March 14, 2017 due to a "new WC" injury. The doctor recorded a history of the accident. He indicated that Petitioner's right leg was "force[d] up" and her knee "started hurting posteriorly." He also noted that Petitioner described her pain as "now

traveling anteriorly and down right lower leg." He indicated she was deriving little benefit from a knee sleeve. He noted she denied any past right knee problems.

Dr. Zautcke described Petitioner as having a significant limp. On right knee examination, he noted mild tenderness along the posterior lateral joint line, no effusion and negative anterior and posterior drawer testing. He prescribed a knee orthosis and pain medication. He prescribed a right knee MRI and ice applications. He released Petitioner to work with use of the brace and no kneeling, squatting, twisting or climbing. He directed Petitioner to return in one week. PX 1.

Petitioner testified that, from this point forward, Respondent did not respect the doctor's restrictions. She continued performing her regular cleaning and mopping duties.

Petitioner returned to Physicians Immediate Care on March 22, 2017 and saw a different physician, Dr. Epner. The doctor noted a complaint of pain "on the back of the knee with radiation to the calf." He also indicated that the swelling was diminished but that Petitioner was experiencing pain with standing or walking. He described Petitioner as having a mild limp favoring her right leg. On right knee examination, he noted mild tenderness of the lateral joint line and tenderness of the popliteal fossa. He described McMurray's and drawer testing as negative. He indicated Petitioner was awaiting the MRI. He released Petitioner to work with no squatting or climbing and avoidance of prolonged kneeling or twisting. PX 1.

The right knee MRI, performed without contrast on March 24, 2017, showed attenuated anterior cruciate ligament fibers, sheath and notch synovitis, slightly thick medial patellar plica, a small effusion, no chondromalacia and no meniscal tearing. PX 1-2.

Petitioner returned to Physicians Immediate Care on March 29, 2017 and saw Abigail Robinson, a certified physician's assistant. Robinson noted that Petitioner had been "working full duty except for heavy lifting." She also noted that Petitioner was deriving some benefit from the knee sleeve but was experiencing pain in the posterior aspect of the knee, into the calf, and the medial aspect of the knee, "which feels like it goes through the knee from the back." She indicated that Petitioner's calf cramping was at its worst when she mopped. She described Petitioner as having a mild limp favoring her right leg. On right knee examination, she noted mild tenderness of the medial joint line, tenderness of the popliteal fossa, no effusion, painful valgus stress testing with no weakness and negative McMurray's and drawer testing. She reviewed the MRI results with Petitioner and prescribed physical therapy three times per week for four weeks. She continued the previous work restrictions. PX 1.

Petitioner returned to Physicians Immediate Care on April 5, 2017 and saw a different provider, Dr. Orkishewska. The doctor described Petitioner's overall condition as "unchanged." She noted that Petitioner would be starting therapy the following day. On right knee examination, she noted mild tenderness of the medial joint line and a trace medial knee effusion. She described Petitioner's gait as normal. She discontinued the Naproxen, based on Petitioner's report of little benefit, and started Petitioner on Provil. She directed Petitioner to start therapy. She released Petitioner to work with no climbing and no prolonged kneeling or twisting. PX 1.

Petitioner saw Dr. Orkishewska again on April 12, 2017, with the doctor noting intermittent pain, "worse with bending the knee, twisting and applying pressure on it" and "some tingling in the back lateral calf." She also indicated that Petitioner was "still [experiencing] cramps in ankle/foot that radiate upward toward thigh." She also noted that Petitioner complained her restrictions were not being

followed and she was performing her regular duties. She described Petitioner as "a bit agitated." On right knee examination, she noted a "rather normal" range of motion but pain anteriorly and laterally. She removed Petitioner's brace and noted no swelling. She described McMurray's and drawer testing as negative. She dispensed Mobic and directed Petitioner to continue therapy. She imposed restrictions of no kneeling, squatting or climbing. PX 1.

Petitioner testified she told a female physician at Physicians Immediate Care that Respondent was not honoring her restrictions. The doctor told her that her pain was psychological and would go away.

Petitioner underwent an initial physical therapy evaluation on April 13, 2017. The evaluating therapist noted that, on March 11, 2017, Petitioner was "pulling a heavy cart that got stuck and trying to prevent it from overturning she twisted her R knee." She indicated that Petitioner complained of posterior right knee pain and "tension in right calf muscles." On examination, she noted tenderness at the posterior insertion of the anterior cruciate ligament and "tenderness with moderate tension over lateral gastrocnemius" as well as quadriceps tension. PX 1.

Petitioner testified that, on April 15, 2017, Respondent directed her to clean a cafeteria and bathrooms used by 500 employees. She swept a locker room area, collected all the garbage and dumped a heavy bag of garbage into a container. She turned, took about 20 steps and felt as if a ligament had torn inside her right knee. She reported this injury to supervisor Daniel Martinez the same day. She testified that Martinez did not put the report concerning this injury together with the report concerning the original injury. She went to human resources, where an employee applied "dry ice" to her knee and Martinez applied a spray to her knee. She did not finish her shift that day. She went to the clinic instead but was told she would have to wait 4 ½ hours for a doctor. She left without being seen because she had to tend to her children.

Petitioner saw a different physician, Dr. Menon, at Physicians Immediate Care on April 16, 2017. The doctor noted that Petitioner "presents prior to her scheduled f/u appointment." He indicated Petitioner complained of worsening right knee pain. He noted "swelling/tenderness on medial aspect of R knee." He continued the restrictions and directed Petitioner to wear the brace and continue therapy. PX 1.

On April 18, 2017, Daniel Longyne, P.T. [hereafter "Longyne"] noted that Petitioner "had more pain last Saturday" and complained of pain "more in anterior and medial right knee." PX 1.

On April 20, 2017, Longyne noted that Petitioner complained of pain "above the knee joint mainly in the quads." PX 1.

On April 25, 2017, Longyne noted that Petitioner "continues to c/o posterior R lower leg and medial knee" that increased with prolonged standing and walking. He also indicated that end range flexion was "still guarded as compression of popliteal space replicates pain." PX 1.

Petitioner continued attending therapy thereafter, through May 9, 2017, with Longyne noting varying complaints. The last note reflects that Petitioner complained of only mild pain around the right kneecap but reported "more discomfort present in lower leg to ankle." PX 1.

Dr. Menon of Physicians Immediate Care found Petitioner to be at maximum medical improvement "with no residual disability" on May 9, 2017. He noted that Petitioner had attended eight therapy sessions to date. He described Petitioner as having "declined further treatment." He indicated that Petitioner "still has some discomfort on superior aspect of knee" but "felt improvement." He released Petitioner to full duty. PX 1.

Petitioner testified that, when she last saw a doctor at Physicians Immediate Care, she reported she was experiencing pain in her left knee and back as well as her right knee. [No left knee or back complaints are documented in the available Physician Immediate Care records. PX 3.] As of that visit, her right knee was swollen and she felt "internal pain," as if something had torn. The pain went down to her heel. She was also experiencing numbness in her right foot. She was having difficulty driving for 20 to 30 minutes.

Petitioner testified she sought treatment at La Clinica after being discharged from care at Physicians Immediate Care. While completing a questionnaire at La Clinica, she asked whether her pain could be psychological. A male individual told her this was not possible, since her pain was "so strong." She asked for a more thorough examination.

The records from La Clinica (PX 3) do not contain any patient questionnaire. They do contain a pain drawing, on which the right knee is circled. They reflect Petitioner saw a chiropractor, Dr. Rushani, on May 16, 2017, with the note of that date referencing an "evaluation" that is also not in evidence. Dr. Rushani noted a diagnosis of right knee sprain and a "condition date" of March 11, 2017. He referenced the March 25, 2017 right knee MRI results. He indicated he referred Petitioner for a consultation and second opinion. He did not note any specific complaints or examination findings. He released Petitioner to light duty with no bending/squatting, minimal walking and stair usage and rest breaks as needed.

Petitioner saw Dr. Rushani again on May 17 and 18, 2017, with the doctor noting right knee tenderness and providing treatment consisting of therapy, E-stimulation and hot packs. PX 3.

On May 22, 2017, Dr. Rushani recorded a history of an initial work accident of March 2, 2017 and a subsequent aggravation while Petitioner was taking out garbage at work. He noted that the right knee MRI was performed before the aggravation. He further noted that, according to Petitioner, Respondent did not honor the clinic's work restrictions. He indicated that Petitioner had not been able to keep her appointment with Dr. Silver and that the appointment had been rescheduled. He also noted that the right knee MRI needed to be repeated "since patient had worsening of condition and felt a snap after second work incident." He wrote a prescription for the MRI, indicating he wanted Dr. Kuritza to review the images. PX 3.

The repeat right knee MRI, performed on May 23, 2017, showed normal alignment, no fractures or dislocations and horizontal tearing of the medial meniscus involving the posterior horn, extending into the inferior articulating surface. Dr. Kuritza, the interpreting radiologist, described the lateral meniscus, along with the collateral and cruciate ligaments, as intact. PX 4.

Petitioner first saw Dr. Silver, an orthopedic surgeon, on June 8, 2017. Dr. Silver recorded a history of the initial work accident, indicating Petitioner twisted her right knee after a cart she had been pulling struck a hole and started falling over. He noted that Petitioner had no right knee problems and was performing full duty prior to this accident. He indicated Petitioner "was placed on restrictions but they were ignored for over one month and her knee worsened." On right knee examination, he noted a

mild effusion, significant soft tissue swelling, medial joint line tenderness, positive McMurray testing, limited flexion due to pain. He described the ligaments as stable and the patellofemoral joint as benign.

Dr. Silver indicated he obtained standing AP, lateral and skyline right knee X-rays. He described the films as "within normal limits." He indicated he "reviewed two MRI scans." He described these scans as "demonstrating an effusion as well as tearing of [the] medial meniscus." He attributed the meniscal tearing to the twisting injury Petitioner described. He recommended a right knee arthroscopy. He prescribed Norco, Ultram, Meloxicam and Protonix, as well as Terocin patches. He prescribed therapy and imposed restrictions of no climbing, crawling or kneeling. He indicated Petitioner should be off work if these restrictions could not be accommodated. PX 5.

Petitioner continued seeing Dr. Rushani and undergoing therapy at La Clinica after her initial visit to Dr. Silver. PX 3.

A June 14, 2017 toxicology report from Vision Laboratories showed results that were inconsistent with the prescribed Tramadol and Hydrocodone. PX 5, Silver Dep Exh 2.

Petitioner testified she was still working as of her initial visit to Dr. Silver, despite being in pain. Dr. Silver asked if she wanted to be off work but she said "no" because she needed the income. Dr. Silver imposed work restrictions. She was still subject to these restrictions as of June 13, 2017, at which point Respondent fired her. She did not quit working. She has two children to take care of.

Petitioner testified that the doctors at Physicians Immediate Care told her she had inflammation in her knee. Dr. Silver was the first doctor to tell her she had a torn meniscus.

Petitioner's current counsel substituted into the first case on July 13, 2017. PX 7.

Petitioner returned to Dr. Silver on August 3, 2017. On re-examination, the doctor again noted an effusion, medial joint line tenderness, positive McMurray's testing and a limited range of motion secondary to pain. The doctor again recommended a right knee arthroscopy and meniscal repair. He continued the topical Voltaren and prescribed Mobic. He indicated he weaned Petitioner to a lower dose of Norco, for higher levels of pain, and Ultram for lower levels, supplemented by Lidocaine. He continued the previous work restrictions. PX 5, Silver Dep Exh 2.

Dr. Rushani re-examined Petitioner at La Clinica on August 15, 2017. In his note of that date, Dr. Rushani indicated that Petitioner was still experiencing 3/10 right knee pain that affected her walking. He also noted that Petitioner reported having gained 30 pounds since the accident, with this factor also affecting her walking ability. He noted additional complaints of "burning pain along the right lower leg from the knee. . . upward toward the outside of the leg on the right" and "pain along the lower part of the right quad primarily above the knee cap." Petitioner indicated she was not working and not able to return to restricted work at the facility where she had previously worked.

On re-examination, Dr. Rushani noted pain "along the proximal tendon of the quadriceps proximally 0.5 inch above the patella," pain "along the lateral aspect of the right knee" and "increased pain with the vastus lateralis and along the IT band." He described McMurray's testing as positive on the right and negative on the left. He noted 4+/5 strength in the right lower leg versus 5/5 in the left.

Dr. Rushani stated that Petitioner's complaints of right knee pain along the lateral surface "appeared to be due to increased restrictions and adhesions along the right iliotibial band and proximal quad tendon above the patella." He also noted pain along the medial aspect of the knee primarily through the vastus medialis obliquus on the right side. He described the left lower leg as "within normal range." PX 3.

At Respondent's request, Dr. Maday of Midland Orthopedic Associates examined Petitioner on September 6, 2017. In his report of that date, Dr. Maday indicated that an individual named "Lucy" acted as a translator throughout Petitioner's visit. He recorded an account of the work accident, noting that Petitioner was pulling a cart loaded with forty gallon-sized bottles of chemicals on March 11, 2017 when a wheel got caught in a floor drain lacking a cover. He indicated Petitioner twisted her right knee and "felt pain in the front of her knee" when she tried to keep the contents of the cart from falling.

Dr. Maday indicated that Petitioner also described a second injury occurring on April 15, 2017. He indicated Petitioner described feeling a "snap" in her right knee "in a different portion of her knee" while trying to throw a large bag of garbage. He stated that Petitioner "noted swelling after the second injury and had more pain."

Dr. Maday noted that Petitioner made multiple visits to Physicians Immediate Care after the accident but that he only had the records pertaining to the last visit of May 9, 2017. He indicated this note contained a summary of the previous visits and the MRI results of March 24, 2017.

Dr. Maday indicated he also reviewed certain records from Drs. Rushani and Silver, as well as the repeat MRI report of May 23, 2017. He stated that, when Dr. Rushani first evaluated Petitioner on May 16, 2017, "there was mention made that [Petitioner] had previously been discharged from care from her physician due to a refusal to undergo an injection in the affected area." [The Arbitrator notes this information is not included in the records Petitioner offered into evidence, except to the extent that Dr. Menon of Physicians Immediate Care indicated Petitioner "declined" additional treatment.]

Dr. Maday noted that Petitioner "has continued to take Hydrocodone and two other medicines" per Dr. Silver but was still having pain with pins and needles "primarily behind her knee and over the lateral aspect of her knee." He also noted that Petitioner reported having gained 30 pounds since the accident because she "could not run" and was having difficulty performing activities as quickly as she had beforehand. He indicated that Petitioner pointed to the posterior portion and lateral aspect of her knee as the areas of pain and "denied any significant pain over the medial aspect of her knee."

On examination, Dr. Maday noted no effusion, no quadriceps atrophy, no tenderness over the quadriceps tendon or patellar tendon, exquisite tenderness over the lateral hamstrings, no medial or lateral joint line tenderness, exquisite tenderness over the iliotibial [IT] band, negative flexion McMurray's, negative Lachman's, negative drawer testing and no opening with varus or valgus stressing.

Dr. Maday indicated he had Petitioner step up on an approximately 9-inch step. He noted that when Petitioner stepped up, "she had more pain on the lateral aspect of her knee in the area of the IT band and no medial tenderness. He described Petitioner as having a "similar response with a partial squat." He noted that Petitioner denied any locking, catching or giving out.

Dr. Maday opined that Petitioner's diagnosis relative to the first accident "appears to be right knee IT band with posterolateral hamstring pain." He found that the second accident exacerbated the

symptoms resulting from the first accident. He indicated his examination did not support the diagnosis of a meniscal tear. He saw no necessity for topical Voltaren or Teracin patches, noting that Petitioner derived no significant improvement from these medications. He recommended that Petitioner undergo an injection into the area of the IT band followed by two to three weeks of therapy to the affected area. He indicated this therapy should be administered by a physical therapist, not a chiropractor. He felt Petitioner "would have difficulty with squatting, kneeling or climbing" but should be able to resume working following the injection and therapy. Based on his examination findings, he saw no need for arthroscopic surgery. He described Meloxicam as effective but saw no need for Norco or Ultram. He also saw no need for Protonix, since Petitioner did not provide a history of gastrointestinal issues. Maday Dep Exh 2.

On September 13, 2017, Petitioner filed an Amended Application in 17 WC 19067 alleging she injured her left knee and back as well as her right knee on April 15, 2017. PX 8. [Petitioner did not testify to these additional injuries.]

On September 19, 2017, Dr. Silver re-examined Petitioner, again noting a persistent effusion, medial joint line tenderness, positive McMurray's testing and pain with more than 100 degrees of flexion. Dr. Silver again recommended a right knee arthroscopy. He found Petitioner to be temporarily totally disabled. He prescribed topical Voltaren, Lidocaine and Terocin as well as Mobic, noting he weaned Petitioner completely from Hydrocodone.

A September 22, 2017 toxicology report from Vision Laboratories showed results that were inconsistent with Hydrocodone usage but consistent with Tramadol use.

Petitioner continued seeing Dr. Rushani and undergoing therapy at La Clinica until mid-October 2017. In his re-examination note of October 17, 2017, Dr. Rushani referenced Dr. Maday's examination and treatment recommendations. He indicated Petitioner was "apprehensive" that the injections Dr. Maday recommended would not be beneficial and was awaiting approval of the right knee surgery Dr. Silver recommended. He also noted that Petitioner reported having had some difficulty with Dr. Maday's examination, in terms of the interpreter and the scheduling of the appointment. [Petitioner did not testify to these difficulties]. On re-examination, he noted tenderness to palpation over the lateral IP [sic] band and over the medial tibial ridge and lower distal portion of the vastus medialis. He described McMurray's testing as positive on the right. He diagnosed a right medial meniscus tear. He released Petitioner from formal therapy and recommended she perform home exercises. PX 3.

On November 2, 2017, Dr. Silver's examination findings were unchanged. He indicated he had weaned Petitioner to a low dose of Norco 2.5 mg for higher levels of pain and Ultram for lower levels of pain. He also prescribed Terocin patches, Lidocaine and Diclofenac. He continued to keep Petitioner off work.

On November 10, 2017, Dr. Silver sent a report to Petitioner's counsel, responding to Dr. Maday's opinions and recommendations. He reiterated that, in his view, Petitioner has a torn meniscus due to the work injury and needs surgery. He indicated that Dr. Maday's diagnosis of iliotibial band syndrome "completely contradicts" the MRI and "all other findings" in Petitioner's knee. He described iliotibial band syndrome as "an overuse syndrome" that does not occur based on a single accident. He stated he never noted any symptoms or signs of iliotibial band syndrome when he examined Petitioner. With respect to medication, he noted that Petitioner had been "weaned to a low dose of Hydrocodone for pain and Ultram for lower levels of pain." He indicated he needed to use medication to treat

Petitioner due to the delay in authorizing the surgery he feels she needs. He stated that Petitioner "will be permanently disabled lacking appropriate arthroscopic care." PX 5.

Dr. Silver saw Petitioner again on December 14, 2017. His examination findings were essentially unchanged. He indicated Petitioner "will have permanent disability lacking arthroscopic surgery." He continued the medications and kept Petitioner off work. PX 5, Silver Dep Exh 2.

Dr. Silver testified by way of evidence deposition on February 16, 2018. PX 6. Dr. Silver testified he is board certified in orthopedic surgery. He limits his practice to orthopedic surgery of the shoulder and knee. PX 6, p. 5.

Dr. Silver testified he first saw Petitioner on June 8, 2017. Petitioner provided a history of the March 2017 work accident, involving the cart, and denied any previous knee problems or treatment. PX 6, p. 7. On initial right knee examination, he noted a mild effusion, medial joint line tenderness and positive McMurray's testing. Her motion was limited and her ligaments were stable. PX 6, p. 8. He obtained X-rays and reviewed the images of the two previous MRIs. He disagreed with the radiologist's reading of the first MRI but agreed with the second radiologist, who interpreted the May 23, 2017 repeat MRI as showing a meniscal tear. PX 6, p. 9. He diagnosed a torn medial meniscus due to the March 11, 2017 work accident. PX 6, p. 9. He recommended a right knee arthroscopy along with some medication for pain and swelling. PX 6, p. 10. He released Petitioner to work with no climbing, crawling or kneeling. PX 6, p. 10. Petitioner returned on August 3, 2017. His examination findings that day were the same. He was simply awaiting authorization of the arthroscopy. He continued the previous work restrictions. PX 6, pp. 10-11. He took Petitioner off work at the next visit, on September 19, 2017, because her symptoms had worsened. PX 6, p. 11. He last saw Petitioner on December 14, 2017, at which point "everything was the same." PX 6, p. 12.

Dr. Silver testified he has seen "thousands upon thousands" of medial meniscus tears during his career. PX 6, p. 12. He has reviewed Dr. Maday's examination report. He agrees with Dr. Maday's opinion that the second accident, of April 15, 2017, exacerbated the symptoms caused by the March 11, 2017 accident. He does not agree, however, with Dr. Maday's diagnosis of iliotibial band syndrome and hamstring pain. PX 6, p. 13. Iliotibial band syndrome is caused by repetitive motion, such as running. It does not result from a single traumatic event. PX 6, p. 14. Additionally, all of Petitioner's symptoms were "consistently on the inside of her knee where the meniscus was torn, which is completely different than an iliotibial band syndrome where they are on the outside of the knee." Moreover, Dr. Maday's diagnosis "ignores the MRI scan of a torn medial meniscus." Each time he (Dr. Silver) saw Petitioner, her symptoms were the same. He has "no idea" where Dr. Maday's diagnosis came from. PX 6, p. 15.

Dr. Silver testified he agrees with Dr. Maday that Petitioner has difficulty with squatting, kneeling and climbing but he attributes this difficulty to the torn meniscus. PX 6, p. 16.

Dr. Silver testified the treatment to date has been reasonable, necessary and related to the work accidents. PX 6, p. 18. He continues to believe Petitioner requires arthroscopic right knee surgery. PX 6, p. 18. He also believes Petitioner cannot work due to the pain, stiffness and swelling she is experiencing. PX 6, p. 18.

Under cross-examination, Dr. Silver acknowledged he reviewed no additional records in rendering his opinions. Petitioner complained of "clicking" at the first visit. He noted "clicking" on examination that day. PX 6, p. 19. Petitioner was upset and reported that Respondent was not

honoring her restrictions. PX 6, p. 20. He believes Petitioner had already been taking Hydrocodone but urine testing performed that day showed she was not taking this medication. Hydrocodone leaves the system in less than 24 hours. PX 6, p. 21. He prescribes Norco, "but a much lesser dosage than Hydrocodone." PX 6, p. 21. Petitioner had been prescribed 10 milligrams but he reduced this to 2.5 to try to avoid addiction. PX 6, pp. 21-22. Petitioner was only supposed to take the Norco "as needed." PX 6, p. 22. He prescribed surgery the first time he saw Petitioner. Conservative measures had failed but, when the meniscus is torn, "the only treatment is arthroscopic surgery." The meniscus is not capable of healing itself. PX 6, p. 22. Initially, the doctors were not sure of the diagnosis so they prescribed therapy. He never prescribed therapy. [He then changed this answer and indicated he did continue with physical therapy. PX 6, p. 23.] He wanted to "maximize strength and motion preoperatively because that helps [the] recovery go quicker postoperatively." PX 6, p. 24. He does not know how a chiropractor's therapy would differ from that of a physical therapist. PX 6, p. 24. He never noted complaints of pain in the iliotibial band or hamstring area. PX 6, p. 24. He has not seen Petitioner since December 14, 2017. He does not know whether Petitioner is scheduled to return to him. PX 6, p. 24. Petitioner would recover fully within four to five months of the arthroscopy he is recommending. It takes a laborer or athlete a longer time to fully recover than it takes an office worker. PX 6, p. 25. Petitioner would undergo physical therapy postoperatively. PX 6, p. 25. He does not believe Petitioner could currently perform office work due to the pain she is experiencing. PX 6, p. 25. With a torn meniscus, a person can experience pain while sitting, standing or squatting. PX 6, p. 25. Petitioner can walk but it will be painful. PX 6, p. 26. Gaining 30 pounds in a four-month period would not put significant additional pressure on the knee. PX 6, p. 26.

On redirect, Dr. Silver testified the medial joint line tenderness he consistently noted is indicative of a medial meniscus tear. PX 6, p. 26.

Dr. Maday testified by way of evidence deposition on April 11, 2018. Dr. Maday testified he is board certified in orthopedic surgery and orthopedic sports medicine. RX 1, p. 5. He has been associated with Midland Orthopedics since 1992. RX 1, p. 6.

Dr. Maday testified he examined Petitioner on September 6, 2017. He has a "vague" recollection of this examination. RX 1, pp. 6-7. He identified Maday Dep Exhibit 2 as an accurate copy of his examination report. RX 1, p. 7. He reviewed records from Physicians Immediate Care, Dr. Rushani, Dr. Silver and a therapy facility in connection with his examination. He believes he also reviewed the MRI images. RX 1, pp. 7-8. According to the radiologist, the first MRI demonstrated an attenuated anterior cruciate ligament, a medial patellar plica and a small effusion. It was "negative for meniscal tear." RX 1, p. 8. According to the radiologist, the second MRI showed a horizontal medial meniscal tear involving the posterior horn. RX 1, pp. 8-9.

Dr. Maday testified that, when he reviewed the images for both MRIs, he noted "some increased signal in the posterior horn of the medial meniscus." With respect to the second MRI, there was "one image that showed the horizontal signal close to the inferior articular surface" but "it did not appear to completely articulate with the inferior articular surface." RX 1, p. 9.

Dr. Maday testified that Petitioner provided a history of twisting her right knee on March 11, 2017 and feeling pain in the front part of that knee while trying to keep the contents of a cart from falling. Petitioner also told him that she felt a "snap" in a different portion of the same knee on April 15, 2017, while trying to throw a full garbage bag. Petitioner indicated she "noted swelling after the second injury with more pain." RX 1, pp. 10-11.

Dr. Maday testified that, when he examined Petitioner, he noted no effusion, a normal range of motion, exquisite tenderness over the lateral hamstrings and the iliotibial band, no medial or lateral joint line tenderness and negative McMurray's and Lachman's testing. RX 1, pp. 11-12. Tenderness over the medial or lateral joint line is "usually significant for either meniscus or articular cartilage injury to either the medial or lateral meniscus or the cartilage surrounding the meniscus." A physician uses McMurray's testing, which involves flexing and twisting the knee, to check for meniscal tearing. Petitioner's results were negative since she experienced no pain with this maneuver. RX 1, p. 13. Lachman's testing, which checks for anterior cruciate ligament tearing, was also negative. RX 1, p. 13. At his request, Petitioner stepped up onto a step with each leg. When she stepped up with the right leg, she had pain over the lateral aspect of the knee in the area of the iliotibial band. RX 1, p. 14.

Dr. Maday testified that, based on his examination and records review, he diagnosed posterolateral hamstring pain and iliotibial, or IT, band pain. The iliotibial band is muscle and tendon that runs down the side of the leg all the way from the hip. Petitioner had pain over the portion of the band that is right at the knee. She also had pain on the hamstrings, closer to the knee. RX 1, p. 15. There were no objective findings to support his diagnoses. He based these diagnoses on Petitioner's self-reported pain. The conditions he diagnosed can stem from the kind of traumatic injuries Petitioner described to him. RX 1, p. 15. When he asked Petitioner to point to the area of her leg where she was having pain, she pointed to the outside part of the knee. If her meniscus was torn, she would have pointed to the inside part of the knee. RX 1, p. 16. The second MRI was consistent with a medial meniscus tear, according to the radiologist, but if Petitioner really had such a tear, she would be experiencing pain on the inside, or medial, portion of the knee. RX 1, pp. 16-17. She may have an asymptomatic medial meniscal tear or, "more likely, she has no meniscal tear and just has increased signal in the meniscus without a tear." RX 1, p. 17. There are different degrees of signal change within an MRI. You can have a signal within the meniscus but if the signal does not reach all way to the top or bottom it is not indicative of a tear. On both MRIs, Petitioner had a signal that "came close to the bottom" but it did not appear to reach the bottom surface. RX 1, pp. 17-18.

Dr. Maday testified he believes Petitioner's hamstring and iliotibial conditions stem from the work accidents. He recommends therapy and possibly injections. The therapy notes he reviewed showed Petitioner underwent heat and cold treatments and performed independent exercises. He does not think this treatment was effective. For the conditions he diagnosed, Petitioner requires "hand on" measures such as ultrasound and stretching or deep massage to the affected areas. RX 1, pp. 18-19. He does not find Petitioner to be a candidate for surgery. RX 1, p. 19. It is not necessarily unusual that Petitioner had no objective findings such as swelling. RX 1, p. 20. Petitioner's complaints were consistent and caused him to believe she has the pain she described. RX 1, p. 20. A meniscal tear can sometimes heal without surgery. Treatment needs can vary, depending on the type and location of the tear. Tears that are displaced or causing immediate mechanical symptoms will not heal. Other tears can be in an area where they have healing potential. For such tears, doctors recommend modification of activities and sometimes therapy.

Dr. Maday testified he does not know the meniscal tear that Dr. Silver sees but he does know that Petitioner had no pain in that area when he examined her. Furthermore, Petitioner had no findings indicative of a tear and her MRIs do not appear to show a tear that articulates with the inferior articular surface. Thus, Petitioner does not meet the standard criteria for recommending surgery. RX 1, p. 22.

Dr. Maday testified that, initially, it was reasonable for Petitioner to take Voltaren. However, after she showed no improvement, this medication should not have been continued. RX 1, p. 22. He saw no indication for Norco, a narcotic pain medication that is "very highly addictive." RX 1, p. 23. Along similar lines, Ultram was also not indicated. Like Norco, it is very highly addictive. RX 1, p. 23. He does not believe in using narcotics for management of long term pain. Narcotics can mask pain but "they won't really treat it." RX 1, p. 23. He does not believe Petitioner's pain warranted narcotics. He does not believe the Terocin patches that were prescribed gave Petitioner significant relief. RX 1, p. 24. Based on his records review, Petitioner did not show improvement with treatment. RX 1, p. 24. He assumes Petitioner would be at maximum medical improvement after undergoing the treatment he recommends. RX 1, p. 25. He hopes Petitioner would be able to resume full duty at that point. RX 1, p. 25.

Under cross-examination, Dr. Maday testified the Physicians Immediate Care note he reviewed was the last note, of May 9, 2017. That note contained a summary of the previous office visits. RX 1, p. 26. He reviewed various notes from Dr. Rushani and Dr. Silver's notes of June 8 and August 3, 2017. RX 1, p. 28. His history reflects Petitioner never had medial pain. The interpreter he used to obtain Petitioner's history was born in Mexico and is bilingual. RX 1, p. 29. He is not aware of any medical records documenting medial knee pain or medial joint line tenderness. RX 1, p. 29. He then reviewed several Physicians Immediate Care notes from March and April 2017, which document mild medial joint line tenderness. RX 1, pp. 31-34. Petitioner's complaints of pain are subjective in nature. RX 1, p. 34. He is aware that Dr. Silver documented positive McMurray's testing on June 8, 2017, September 19, 2017 and November 2, 2017. RX 1, pp. 34-35, 38. He then reviewed Dr. Rushani's note of July 3, 2017, which also documents positive McMurray's testing. RX 1, pp. 35-36. McMurray's testing can be subjective or objective. Positive testing produces a "palpable pop" which "anybody should note." Dr. Rushani did not say whether he noted a pop. He also did not say whether the results were referable to the medial or lateral joint line. RX 1, p. 36. He reviewed records from Physicians Immediate Care indicating Petitioner reported some improvement secondary to therapy. RX 1, p. 39. He is not aware of Petitioner having mechanical symptoms, such as locking or catching of the knee. RX 1, p. 41. Tenderness to palpation along the posterior medial joint line can be indicative of a medial meniscus tear. RX 1, pp. 41-42. The posterior horn of the medial meniscus is the back part of the meniscus. The meniscus is divided into three parts: front, middle and back. RX 1, p. 42. A tear to the posterior horn of the medial meniscus can sometimes affect weight bearing and could result in an impaired gait. RX 1, p. 42. The popliteal fossa is the soft part in the back of the knee. A tear of the posterior horn of the medial meniscus does not result in tenderness of the popliteal fossa. RX 1, pp. 42-43.

On redirect, Dr. Maday testified that none of the records he reviewed under cross-examination caused him to change his MRI interpretation or opinions concerning Petitioner's diagnoses and treatment needs. RX 1, pp. 44-45.

Under re-cross, Dr. Maday testified that it is possible, hypothetically, for an individual to have both iliotibial band pain and a meniscal tear. RX 1, pp. 44-46.

In addition to Dr. Maday's evidence deposition, Respondent offered into evidence a two-page Employee Wage Statement summarizing Petitioner's weekly hours and earnings from March 17, 2016 through June 22, 2017. The Arbitrator notes that, in many weeks, 40 hours are designated as "regular" while additional hours are designated as "overtime" but, in some weeks, hours exceeding 40 are designated as "regular." For example, in the second week of 2017, Petitioner's 48 hours are designated as "regular" and her additional 9.75 hours are designated as "overtime." Neither party offered any

explanation of this methodology. This document reflects Petitioner worked varying amounts of overtime (ranging from 1.75 to 16 hours per week) in many weeks and fewer than 40 hours per week in twelve weeks during the year preceding the second accident.

Petitioner testified the Voltaren cream, Norco and patches that Dr. Silver prescribed helped temporarily. She cannot recall the doctor prescribing Ultram. She took various medications and cannot remember the names of all of them.

Petitioner testified she continues to experience right knee pain. Two weeks before the hearing, she drove for a period of 20 to 30 minutes and felt the same symptoms in her leg. She is aware that Dr. Maday has recommended more therapy and injections. She believes injections would help only temporarily because "the tear is there." She cannot recall when she last saw Dr. Silver. Dr. Silver took her off work and prescribed surgery.

Petitioner testified that, since being terminated on June 13, 2017, she has received no weekly benefits other than those recommended by the Arbitrator. She has not received medical bills but knows the MRI bill has not been paid.

Under cross-examination, Petitioner testified she first underwent treatment on a Monday. She went to Physicians Immediate Care that day. She worked the previous day, a Sunday. Her pain increased that day. She is not currently working. The cart she was pushing on March 11, 2017 was loaded with bottles. When the cart tipped, the weight of it "pulled" her, causing her to shift her weight to her right leg. Her right knee did not strike the ground.

Petitioner acknowledged she sometimes asked Respondent for reduced work hours before the March 11, 2017 accident. She was able to do this because of her seniority. After her first son was born, she asked to work shorter hours and was assigned to a shift that began at 5 AM and ended at 3 PM. During this shift, she was afforded an unpaid 30-minute break. She typically worked more hours on Saturdays, when she had access to child care. She averaged about 42 to 45 hours per week. Between March 2016 and March 2017, she took paid vacation time as well as days when she had appointments involving her sons. Respondent did not pay her for the days she took off to attend appointments with her sons. She stopped seeing Dr. Silver because of what Dr. Maday said. She has no pending appointments to return to Dr. Silver because Respondent has not approved a return visit. She currently uses over the counter medication, including Extra Strength Tylenol and "Icy Hot" ointment. She took a cab to the Commission to attend the hearing.

On redirect, Petitioner testified that Dr. Silver has recommended surgery since her first visit to him. If the surgery is approved, she will follow up with Dr. Silver.

Arbitrator's Credibility Assessment

Petitioner came across as a hard-working individual who wants to improve so she can return to the workplace. Respondent's examiner, Dr. Maday, took her pain complaints seriously and noted no symptom magnification.

Arbitrator's Conclusions of Law Relative to Both Cases

<u>Did Petitioner establish causal connection?</u>

The Arbitrator finds that Petitioner established condition as to a right leg condition of ill-being that remained unstable as of the hearing. Drs. Silver and Maday disagree as to Petitioner's diagnosis but agree on causation and the need for additional care. There is no indication Petitioner had right leg problems before the initial accident of March 11, 2017. Petitioner was able to perform various cleaning duties and work overtime prior to that accident. RX 2. The records and reports in evidence do not mention any pre-existing right leg problems or any new right leg injuries after the second accident of April 15, 2017.

The Arbitrator finds that Petitioner failed to establish causation as to any left leg or back condition. Petitioner did not testify to any left leg or back complaints.

What is Petitioner's average weekly wage?

Petitioner claims earnings of $26,000 and an average weekly wage of $500.00 in both cases while Respondent claims an average weekly wage of $460.44 in 17 WC 15654 and $459.53 in 17 WC 19067. Arb Exh 1-2. The parties did not provide any Section 10 analysis or otherwise explain how they arrived at these figures.

Petitioner offered no wage-related documents. As noted previously, Respondent offered a two-page print-out of Petitioner's weekly "regular" and "overtime" hours and earnings from mid-March 2016 through mid-June 2017. This print-out does not show the exact days on which Petitioner worked. Petitioner acknowledged being off work at times during the year before the first accident due to vacations (for which she received pay) and other commitments. There are some weeks prior to mid-April 2017 during which Petitioner worked fewer than 40 hours but no weeks during which she worked zero hours. It appears she received a raise in July 2016. Prior to this, she was paid $11.00 per hour. Afterward, she was paid $11.10 per hour. RX 2.

Petitioner testified she considered the overtime she performed to be required rather than voluntary. No Respondent witness contradicted this testimony. RX 2 shows that Petitioner often worked hours Respondent designated as "overtime," albeit in varying amounts.

The Arbitrator considers Petitioner's overtime earnings to be earnings for the hours exceeding 40 per week. The Arbitrator includes these earnings, albeit at the straight time rate, in her average weekly wage calculation, based on Petitioner's credible, unrebutted testimony that, when she worked more than 40 hours per week, it was because she was required to do so. She had more bargaining power than others, due to her seniority, but there is no evidence indicating she could avoid overtime altogether. She sometimes worked fewer than 40 hours per week but she explained she was not paid for time she took off to attend appointments with her children.

In the first case, 17 WC 15654, the Arbitrator uses the weekly hours and earnings between the check dated March 17, 2016 and the check dated March 2, 2017 (comprising 52 weeks) in calculating Petitioner's average weekly wage. The Arbitrator designates hours exceeding 40 per week as overtime. During this period, Petitioner worked 1,984.50 regular hours and 248 overtime hours, for a total of 2,232.50 hours. 2,232.50 multiplied by the initial, pre-raise hourly rate of $11.00 equals $24,557.50. The Arbitrator divides $24,557.50 by 49 weeks ("weeks and parts thereof") to arrive at $501.17. This figure exceeds Petitioner's claimed average weekly wage of $500.00. Petitioner is bound by this claim pursuant to Walker v. Industrial Commission, 345 Ill.App.3d 1084 (4th Dist. 2004). The Arbitrator thus

finds Petitioner's average weekly wage to be $500.00 in 17 WC 15654. Applying the same methodology and reasoning, but using the weekly hours and earnings between the check dated April 21, 2016 and the check dated April 6, 2017, the Arbitrator also finds an average weekly wage of $500.00 in 17 WC 19067. This wage gives rise to a temporary total disability rate of $333.33.

Is Petitioner entitled to temporary partial disability benefits?

Petitioner claims temporary partial disability benefits from March 11, 2017, the date of the first accident, through June 12, 2017, the day before she was terminated. Arb Exh 1-2. Respondent disputes Petitioner's entitlement to such benefits.

Section 8(a) provides that an employee is entitled to temporary partial disability benefits when he "is working light duty on a part-time basis or full-time basis and earns less than he would be earning if employed in the full capacity of the job or jobs." While the doctors at Physicians Immediate Care imposed various restrictions during the period in question, Petitioner testified Respondent did not honor the restrictions and she thus continued performing her regular duties. Petitioner did not claim she was given fewer hours or paid at a lower hourly rate. While it could be argued Petitioner worked slightly less overtime during the period in question, her earnings did not diminish significantly. She exceeded 40 hours per week in many weeks after March 11, 2017. There is no evidence indicating her restrictions were the cause of her working fewer than 40 hours or less overtime during the remaining weeks.

The Arbitrator finds that Petitioner failed to establish entitlement to temporary partial disability benefits in both cases.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims she was temporarily totally disabled from June 13, 2017 (the date of her termination) through the hearing of April 16, 2018. Respondent disputes this claim. Arb Exh 1-2. In the second case, 17 WC 19067, the parties agree Respondent paid $6,425.57 in temporary total disability benefits. Arb Exh 1.

The Arbitrator has previously found that, regardless of diagnosis, Petitioner established causation as to a right leg condition that remained unstable and required treatment as of the hearing. Respondent's examiner, Dr. Maday, conceded Petitioner would have difficulty performing basic activities such as kneeling and climbing absent more care. He never stated with certainty that Petitioner would be capable of full duty following the care. He simply testified he "hoped" this would be true. The Arbitrator finds it reasonable for Petitioner to pursue surgery rather than the care recommended by Dr. Maday since the conservative care she underwent at Physicians Immediate Care and La Clinica did not alleviate her symptoms. The Arbitrator finds that Petitioner was temporarily totally disabled from June 14, 2017 (the day after the termination) through the hearing of April 16, 2018. The Arbitrator awards temporary total disability benefits at the weekly rate of $333.33 in the second case, 17 WC 19067. Respondent is entitled to credit for its $6,425.57 payment.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims unpaid medical expenses from four providers: Fullerton MRI (PX 2), La Clinica (PX 3), American Diagnostic MRI (PX 4) and NorthShore Orthopedic (Dr. Silver) (PX 5). Respondent disputes liability for these expenses. Arb Exh 1-2.

The Arbitrator initially addresses the two MRI bills. The Arbitrator awards the first MRI bill (Fullerton Kimball Medical Center, 3/24/17, $1,475.00, PX 2) in 17 WC 15654, subject to the fee schedule. A doctor associated with Physicians Immediate Care, a facility of Respondent's choice, prescribed this MRI not long after the first accident. PX 1. The Arbitrator awards the second MRI bill (American Diagnostic MRI, 5/23/17, $1,950.00, PX 4), subject to the fee schedule, in 17 WC 19067. Dr. Rushani, a chiropractor of Petitioner's choice, recommended the second MRI, based on Petitioner's statement that she felt her right knee "snap" at the time of the second accident, on April 15, 2017. PX 3. While Respondent's examiner, Dr. Maday, disagreed with Dr. Silver's diagnosis and saw no need for the medication and therapy Petitioner underwent after she came under Dr. Silver's care, he never implied that the second MRI was unreasonable or unnecessary. In fact, he relied on both MRIs in formulating his opinions.

The Arbitrator also awards the NorthShore Orthopedic bill of $646.00, representing the charges associated with Petitioner's June 8, 2017 and August 3, 2017 visits to Dr. Silver (PX 3), subject to the fee schedule. Petitioner did not offer into evidence any bill including the charges for the remaining visits. The Arbitrator awards this bill in 17 WC 19067 since Petitioner did not consult Dr. Silver until after the second accident. While the Arbitrator is not, at this time, awarding the right knee surgery that Dr. Silver recommends, the Arbitrator finds it reasonable for Petitioner to have consulted an orthopedic surgeon, given her persistent complaints. Respondent's examiner, Dr. Maday, took issue with Dr. Silver's diagnosis but did not characterize the office visits as unreasonable or unnecessary.

The Arbitrator turns to the claimed unpaid charges from La Clinica. Those charges total $15,440.00, based on the December 13, 2017 bill in PX 3. The charges relate to chiropractic care and therapy rendered between May 16, 2017 and October 17, 2017. Of the $15,440.00, the Arbitrator awards only those charges associated with Dr. Rushani's initial examination of May 16, 2017, Dr. Rushani's subsequent re-examinations and the therapeutic exercises. The Arbitrator awards these charges in the second case, subject to the fee schedule. The Arbitrator awards the charges relating to therapeutic exercises because the La Clinica records (PX 3) document hamstring and quadriceps stretches as well as general conditioning via treadmill usage. The Arbitrator finds no valid evidentiary basis for awarding the remaining charges, which relate to passive and sometimes "unattended" modalities such as hot packs, ultrasound and E-stimulation to the right knee. It is not clear to the Arbitrator why Dr. Rushani addressed only the right knee since he noted complaints in other parts of the right leg when he examined Petitioner. PX 3. Moreover, he continued to provide passive care over a five-month period, despite Petitioner reporting no lasting improvement.

Much was made of Petitioner's medication needs but Petitioner did not offer any medication-related bill into evidence.

Is Petitioner entitled to prospective care?

The Arbitrator admits to a degree of frustration. She met with the attorneys in this case on at least two occasions prior to the hearing but did not learn that the dispute was as to diagnosis until midway through the trial. Had she learned this earlier, during a pre-trial, she would have recommended

a "tiebreaker" examination, to be conducted by a board certified orthopedic surgeon who performs knee and lower extremity surgery.

Assuming a "tiebreaker" examination is not an agreeable option, the Arbitrator, at this time, finds it appropriate for Petitioner to undergo the iliotibial band/hamstring specialized therapy and injections recommended by Dr. Maday. Respondent maintains the Arbitrator has no basis for awarding these measures, since Petitioner seeks knee surgery, but this is disingenuous, since Respondent simultaneously claims any temporary total disability award should be limited time-wise to the duration of the treatment Dr. Maday recommends. While Dr. Silver testified that Petitioner did not exhibit symptoms of iliotibial band syndrome at any of her five visits to him, Dr. Rushani noted complaints of iliotibial band and quadriceps pain when he re-examined Petitioner on August 15, 2017, less than two weeks after Dr. Silver's office visit of August 3, 2017 and only three weeks before Dr. Maday's Section 12 examination. Dr. Rushani also noted tenderness to palpation over the IT band when he re-examined Petitioner on October 17, 2017. The Arbitrator recognizes that Dr. Rushani is a chiropractor and not a board certified orthopedic surgeon. Regardless, his specific findings and his comment, on August 15, 2017, that Petitioner's right knee pain seemed to be due to iliotibial band adhesions lend support to Dr. Maday's conclusions. Ironically, Dr. Silver expressed no awareness of Dr. Rushani's re-examination findings, although Dr. Rushani was providing the therapy he prescribed.

Additionally, while the various physicians and therapists who treated Petitioner at Physicians Immediate Care sometimes noted medial right knee pain, consistent with meniscal tearing, they also noted right foot, ankle and thigh complaints, both before and after the second accident. Petitioner does not claim to be suffering exclusively from knee pain. She testified to experiencing right foot numbness after driving for 20 or 30 minutes.

Finally, it is apparent from Dr. Maday's detailed report and testimony that he spent time with Petitioner, while relying on a bilingual individual to interpret, in an effort to determine the exact nature of her complaints. There is no evidence indicating Dr. Silver had Petitioner perform the same maneuvers, i.e., stepping up onto a step and partially squatting, to pinpoint the location of Petitioner's pain.

The Arbitrator clarifies she is not excluding a subsequent recommendation, or award, of the right knee arthroscopy Petitioner seeks. Dr. Maday conceded it is possible for an individual to have both a meniscal tear and iliotibial band syndrome, although he did not believe this to be true for Petitioner. He also conceded the MRIs showed signal changes that are, to some degree, consistent with meniscal pathology, albeit possibly not complete tearing. Petitioner's accidents involved different mechanisms of injury. It is possible she has more than one right leg/knee condition of ill-being.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

ZUMBA, MARISOL
Employee/Petitioner

Case# **17WC019067**

17WC015654

LABOR NETWORK
Employer/Respondent

19IWCC0119

On 5/3/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.99% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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
VICTOR HERRERA
ONE E WACKER DR 38TH FL
CHICAGO, IL 60601

5001 GAIDO & FINTZEN
MALLORY ZIMET
30 N LASALLE ST SUITE 3010
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
19(B)/8(A)

Marisol Zumba
Employee/Petitioner

v.

Labor Network
Employer/Respondent

Case # 17 WC 19067

Consolidated cases: 17 WC 15654

19IWCC0119

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **April 16, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0119

FINDINGS

On the date of accident, **April 15, 2017**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

For the reasons set forth in the attached decision, the Arbitrator finds Petitioner's average weekly wage to be **$500.00.**

On the date of accident, Petitioner was **34** 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 **$6,425.57** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$6,425.57**.

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

ORDER

For the reasons set forth in the attached decision, the Arbitrator declines to award temporary partial disability benefits.

The Arbitrator awards temporary total disability benefits at the rate of $333.33 per week from June 14, 2017 (the day after Petitioner's termination) through April 16, 2018, a period of 43 6/7 weeks, with Respondent receiving credit for its stipulated payment of $6,425.57.

Respondent shall pay Petitioner the following reasonable and necessary medical expenses, subject to the fee schedule: 1) La Clinica, only the expenses associated with Dr. Rushani's initial examination and re-examinations and the therapeutic exercise (PX 3); 2) American Diagnostic MRI, right knee MRI, 5/23/17, $1,950.00 (PX 4); and 3) Northshore Orthopedic (Dr. Silver – office visits of June 8 and August 3, 2017, PX 5), $646.00. See the attached decision for additional analysis.

With respect to Petitioner's claim for prospective care, the Arbitrator recommends the parties select a "tiebreaker" orthopedic surgeon who specializes in knee and lower extremity conditions. If the parties decline to follow this recommendation, the Arbitrator awards the specialized therapy and injections recommended by Dr. Maday. By this decision, the Arbitrator does not intend to preclude a subsequent award of the right knee surgery recommended by Dr. Silver. See the attached decision for additional analysis.

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

5/3/18
Date

ICArbDec19(b)

MAY 3 - 2018

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

Illinois Workers' Compensation Commission, Insurance Compliance Division,
Employee/Petitioner

Case # 09 INC 00357

19IWCC0120

v.

Brian N. Marshall, Individually and as Marshall Electric and Communications Inc.,
Employer/Respondent.

DECISION AND OPINION REGARDING INSURANCE COMPLIANCE

Petitioner, Illinois Workers' Compensation Commission, Insurance Compliance Division, brings this action, by and through the office of the Illinois Attorney General, against the above captioned Respondent, alleging violations of Section 4(a) of the Illinois Workers' Compensation Act (the Act). Proper and timely notice was provided by personal service to Respondent (see PX 2)). An insurance compliance hearing on the merits was held before Commissioner Stephen Mathis in Urbana on December 12, 2018. Respondent did not appear. After considering the entire record and being advised of the facts and law, the Commission finds that Respondent knowingly and willfully violated Section 4(a) of the Act and shall pay a penalty of $500.00 per day for 902 days, plus the amount of unpaid premiums for workers' compensation insurance of $11,112.64, plus the sum of $5,770.45 which represents the payout from the Injured Workers' Benefit Fund (the Fund). (PX 4, 11).

Petitioner alleges that Respondent knowingly and willfully lacked workers' compensation insurance coverage for a period of 902 days from April 14, 2004 to October 3, 2006. This period encompassed the date upon which Bryce Hallowell, an employee of Respondent sustained a work related injury to his right hand. Mr. Hallowell filed a workers' compensation case against Respondent, *Bryce Hallowell v. Marshall Electric and Communication Co.*, 08 WC 03721. This case was tried before Arbitrator William R. Gallagher on March 12, 2015 and it was determined that Respondent owed permanent partial disability benefits of $277.20/week for 20.5 weeks for 10% of the right hand and also that Respondent was liable for medical expenses. Respondent did not appear at the trial.(PX 10). The Injured Workers' Benefit Fund ultimately paid out $5,770.45. (PX 11).

On December 12, 2018, Respondent did not appear for the insurance compliance hearing. Petitioner called Michael Cummins, a compliance investigator for the Commission as a witness. Mr. Cummins testified that he became aware of Respondent Brian Marshall and Marshall Electric and Communication when a workers' compensation claim was made against Respondent and the Injured Workers' Benefit Fund was named. Mr. Cummins testified that a Notice of Non-Compliance was sent out indicating that Respondent was not insured as required by the Act from April 14, 2004 to October 3, 2006.(PX1). Mr. Cummins confirmed that Marshall Electric was automatically subject to the provisions of Section 3(2) of the Act as it conducted "electrical work". Mr. Cummins performed a search on the National Council on Compensation Insurance database and determined that the Respondent was out of compliance with the Act and failed to carry insurance from April 14, 2004 to October 3, 2006. (PX 3).

Mr. Cummins testified that he calculated the fines and penalties that Respondent owed and that based upon the 902 days of non-compliance multiplied by the $500.00 a day penalty for a total non-compliance amount of $451,000.00. Mr. Cummins also testified that the Commission was seeking the recovery of unpaid premiums or the amount the company would have been paying in premiums if they had insurance. This amount was a daily rate of $12.32 multiplied by the non-compliance period of 902 days resulting in a total of $11,112.64. In addition the Fund was compelled to pay out an award to Petitioner Bryce Hallowell of $5,770.45 Mr. Cummins testified that the Commission was seeking recovery of all of these amounts for a total of $467,883.09.[1] (PX 4,11).

Mr. Cummins continued his investigation to determine whether Respondent was self-insured under the Act and received a certification from Maria Saerli-Dehlin of the Commission's Office of Self-Insurance Administration indicating there was no certificate of approval to self-insurance issued by the Commission. (PX 6) Mr. Cummins also obtained relevant records from the Illinois Secretary of State's Office (PX 7) and the Illinois Department of Revenue. (PX 8)

The Commission concludes that Respondent knowingly and willfully violated the insurance requirements of Section 4(a) of the Act. Respondent did not appear to provide any defense for the fact that he operated his business for 902 days without the mandated coverage. The Commission hereby assesses a penalty of $500.00 per day for 902 days equaling $451,000.00. In addition, Respondent is liable to pay the amount of the IWBF payout ($5,770.45) and the amount of unpaid premiums ($11,112.64) for a total of $467,883.09.

[1] The IWCC posted the exact amount paid by the fund on the IWCC website as $5,770.45. (PX 11). The amount originally calculated was $5,395.00 and the discrepancy in numbers was not detected until after trial.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent Brian N, Marshall, individually and as Marshall Electric and Communications, Inc. pay to the Illinois Workers' Compensation Commission the sum of $467,883.09 pursuant to Section 4(d) of the Act.

DATED:

FEB 2 1 2019

SM/msb
d-2/21/19
44

Stephen J. Mathis

Deborah L. Simpson

David L. Gore

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

Donna Rudcki,

Petitioner,

vs. NO. 15WC 00664

Potash Brothers Supermarket, Inc.

19IWCC0121

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 29, 2018 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.

19IWCC0121

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.

FEB 2 1 2019

DATED:
SJM/sj
o-1/24/19
44

Stephen J. Mathis

David L. Gore

DISSENT

I respectfully dissent from the Decision of the majority. The Commission affirmed and adopted the Decision of the Arbitrator, issued pursuant to Section 19(b), in which he found that Petitioner proved a compensable accident on November 28, 2014, which caused a condition of ill-being of her cervical spine. The Arbitrator awarded Petitioner 176&3/7 weeks of temporary total disability benefits (to the date of arbitration), $57,950.85 in current medical expenses, and ordered Respondent to authorize and pay for prospective treatment recommended by Dr. Singh. I would have found that Petitioner did not sustain her burden of proving she sustained any work-related accident and denied compensation.

Petitioner worked for Respondent as a deli clerk. She alleged an accident on November 28, 2014 in which she pulled on a "damaged" sliding door and felt pain in her left shoulder, neck, and left arm. Petitioner began treating for the alleged injury on December 2, 2014. According to the notes of Dr. Alvarez, she complained of left-shoulder pain beginning Saturday while she was cutting deli meat. She went to an Emergency Department on December 14, 2014 at which time she reported shoulder/neck/arm pain to heavy working over Thanksgiving. She denied trauma. She then saw Dr. Fox, her primary care physician and associate of Dr. Alvarez, on both December 17, 2014 and December 23, 2014 at which times she again attributed her shoulder pain to heavy work she performed over Thanksgiving. Petitioner did not report any acute accident until January 8, 2015, when she reported the alleged accident while sliding a door.

19IWCC0121

During her testimony at Arbitration, Petitioner acknowledged that she did not report the accident to Respondent until after she consulted a lawyer.

In my opinion, Petitioner had serious credibility issues. Not only did she initially deny an acute accident and did not report an accident until she saw a lawyer, she also denied any prior work-related injuries despite the fact that she had prior Workers' Compensation claims. In addition, she categorically denied ever being an inpatient at Sundance Methadone Clinic or that she received treatment to wean off OxyContin. However, in treatment notes Dr. Fox noted that she was taking Hydrocodone since at least 2010 and on October 22, 2013, Dr. Fox noted that Petitioner was starting at Sundance Methadone Clinic the next day and wrote: "great, that she is trying to detox from narcotics." He also recommended she call the detox program at St. John's Hospital. Thereafter, she reported the progress of her detoxification treatment with Dr. Fox.

Because of the inconsistencies between Petitioner's testimony and the medical records, I find her not to be a credible witness. Therefore, I would have found that Petitioner did not sustain her burden of proving she sustained a work-related accident on November 28, 2014 and denied compensation. Therefore, I respectfully dissent from the majority opinion.

Deborah L. Simpson

Deborah L. Simpson

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

RUDCKI, DONNA
Employee/Petitioner

Case# **15WC000664**

POTASH BROTHERS SUPERMARKET INC
Employer/Respondent

19IWCC0121

On 5/29/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1067 ANKIN LAW OFFICE LLC
JILL WAGNER
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
BRIAN J HINDMAN
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS) 19IWCC0121
)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)

Donna Rudcki
Employee/Petitioner

v.

Potash Brothers Supermarket, Inc.
Employer/Respondent

Case # **15** WC **00664**

Consolidated cases: -------

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **April 16, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **November 28, 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 $ **13,520.00** ; the average weekly wage was $ **260.00** .

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $ 57,950.85 , as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $ 16,458.07 to Elmwood Park Same Day Surgery , $ 2,928.31 to Athletico Physical Therapy , $3,600.00 to Windy City Anesthesia, $826.00 to Midwest Orthopaedics at Rush, $19,024.79 to Metro Health Solutions, $11,686.83 to Prescription Partners, $2,794.00 to Harris & Harris as collection for Advocate Illinois Masonic, $79.35 to University Pathologists, P.C., $88.00 to Wellington Radiologist Group, S.C., and $ 465.60 to Advocate Medical Group , as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services of $ 57,950.85 , 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 $ 220.00 /week for 176 3/7 weeks, commencing November 28, 2014 through April 16, 2018 , as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 28, 2014 through April 16, 2018 , 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.

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

05.29.18
Date

ICArbDec19(b)

MAY 29 2018

STATEMENT OF FACTS

The Petitioner, Donna Rudcki (hereinafter referred to as the "Petitioner"), is a 59 year old woman who works for the Respondent, Potash Brothers Supermarket, Inc. (hereinafter referred to as the "Respondent"), as a deli clerk. Transcript of Arbitration, hereinafter referred to as "R." at 8. She testified that in that position she worked behind the deli counter slicing meats, serving food out of the hot and cold cases for customers, and general customer service needs. *Id.*

She testified that on November 28, 2014, she was opening a deli food case door when she hurt her neck and left shoulder. R. at 10-13. More specifically, while she was working at the deli counter, a customer requested food out of the hot food case. R. at 10. She testified that this particular case had sliding glass doors that opened left to right. *Id.* On this date, one of the doors was damaged and it had duct tape adhesive and WD-40 sprayed in the tracks causing it to be difficult to open. R. at 10-11. She was grabbing and pulling the door trying to pull it open when she felt a pop and pain in her left shoulder shooting up to her neck. R. at 11-13. Since it was the Friday after Thanksgiving, no supervisors were working on that day. R. at 13. She went home shortly after the incident and reported the injury to Peter, the deli manager, and Dave Kaplan, the store manager, by the following Monday. R. at 13-14 and 41. The Respondent later called her back into the store to discuss the accident with Jeff, the store manager. R. at 15. She and Jeff sat down and discussed exactly what happened on November 28, 2014 and filled out an injury report. *Id.*

On December 2, 2014, she presented to her primary care physician, Dr. Steven Fox at Advocate Medical Group with complaints of neck, upper back, and left shoulder pain. Pet. Ex. #3. The history from that visit states that "she works in a deli cutting up meat/turkey she started to have pain late [S]aturday." Pet. Ex. #3 p. 12. Dr. Fox diagnosed her with a muscle strain,

ordered pain medications, and put her on light duty restrictions of no lifting over 5-7 pounds, which her job requires, so he took her off of work for 2-3 days. Pet. Ex. #3 p. 13.

Her pain became so severe on December 14, 2014 that she presented to the emergency room at Advocate Illinois Masonic Medical Center. Pet. Ex. #2. The history from that visit states she had complaints of left arm and back pain "while working during [T]hanksgiving break." Pet. Ex. #2 p. 17. Further, in her intake form she was quoted as saying, "I worked [T]hanksgiving and it started when I got home after work." Pet. Ex. #2 p. 46. She was diagnosed with sprains, taken off of work, and recommended to follow up with Dr. Steven Fox. Pet. Ex. #2.

She presented to Dr. Fox again on December 17, 2014 with persistent pain and burning in left arm and numbness in her left second digit. Pet. Ex. #3. The history from that visit indicates that she "thinks it occurred due to heavy lifting around [T]hanksgiving." Pet. Ex. #3 p. 6. Dr. Fox diagnosed her with a back spasm and shoulder pain but said "given her lack of insurance [I] will try a therapeutic trial of prednisone and gabapentin as no funding for MRI or EMG/NCV." Pet. Ex. #3 p. 7. On December 23, 2014, she presented again to Dr. Fox with continued pain and numbness in the 2nd and 3rd digits on her left hand. Pet. Ex. #3. The history indicates "she thinks there was a pop or pain while working that may have been the inciting event." Pet. Ex. #3 p. 3. Dr. Fox diagnosed her with shoulder pain and noted that there were features of possible C6 radicular pain and took her off of work. Pet. Ex. #3. He said that she needed further testing but had no insurance and could not afford it. Pet. Ex. #3.

The Petitioner then sought a second opinion with Elmwood Park Same Day Surgery Center on January 8, 2015. Pet. Ex. #4. On that date, she saw Dr. Arpan Patel who gave a history of "while working at a deli counter in a grocery store, she was sliding a glass sliding door

on a hot case when the glass sliding door became stuck. Patient jerked on the door which resulted in significant, severe left shoulder pain." Pet. Ex. #4 p.3. Dr. Patel diagnosed her with work related cervical radiculopathy and ordered a cervical MRI, pain medications, physical therapy, and off work restrictions. Pet. Ex. #4. The Petitioner had the MRI on January 9, 2015 and it revealed a 8-9 mm large subligamentous posterior disk herniation with an extruded nucleus pulposus with significant left sided spinal stenosis and left lateral recess and neuroforaminal narrowing at the C6-7 level, a 3-4 mm posterior and right sided disk herniation with mildly extruded nucleus pulposus with right sided spinal stenosis and right lateral recess narrowing at the C5-6 level, and a 2-3 mm broad based subligamentous posterior and right sided disk herniation with mildly extruded nucleus pulposus with spinal stenosis and right lateral recess narrowing at the C4-5 level. Pet. Ex. #4. On January 15, 2015, Dr. Patel reviewed the MRI and confirmed the multiple herniations resulting in cervical radiculopathy. Pet. Ex. #4. He recommended a series of C6-7 epidural steroid injections and continued pain medications, physical therapy, and off work restrictions. Pet. Ex. #4. The Petitioner completed a course of physical therapy at Athletico from January 12, 2015 through February 20, 2015. Pet. Ex. #5. The Petitioner had two epidural injections on January 20, 2015 and February 10, 2015. Pet. Ex. #4. The Petitioner testified that the first injection temporarily helped her pain but the second injection did not provide any relief. R. at 21-22. Dr. Patel then referred her to a surgical spine specialist on February 24, 2015. Pet. Ex. #4.

The Petitioner presented to Dr. Kern Singh at Midwest Orthopaedics at Rush on March 2, 2015 with continued complaints of neck pain. Pet. Ex. #6. He indicated that on "November 28, 2014, she was walking by a set of sliding doors, when she pulled the door open, she felt immediate neck pain with left upper extremity radiating pain." Pet. Ex. #6. Dr. Singh reviewed

the MRI and diagnosed her with a work related herniated disc at C6-7. Pet. Ex. #6. He opined that she had failed conservative care and recommended an anterior cervical discectomy and fusion at C6-7 and continued her off work restrictions. Pet. Ex. #6.

The Respondent then arranged an Independent Medical Examination with Dr. Steven Mather at DuPage Medical Group Orthopaedics on May 4, 2015. Resp. Ex. #1. The Petitioner gave Dr. Mather a history that on "November 28, 2014, she was opening a hot food case, pulling heavy sliding doors left to right. The doors were duct taped and the patient yanked the door and felt pain in her neck and left shoulder and left upper arm." Resp. Ex. #1. Under the record review section, Dr. Mather indicates that she went to Advocate Medical Group and "notified employer on January 5, 2015. The injury was that she was trying to open a deli case sliding door." Resp. Ex. #1. Dr. Mather testified that he was referring to an employer injury note in referencing the employer notification. Resp. Ex. #1 p. 26. Dr. Mather diagnosed her with a left C6-7 herniated disk, opined that her treatment had been reasonable and necessary, and agreed that she required an anterior cervical discectomy and fusion. Resp. Ex. #1. However, he opined that he was not sure if it was a work related injury because his review of the medical records did not indicate a consistent work injury. Resp. Ex. #1. He admitted that she did not have any neck or arm symptoms prior to November 28, 2014 and requested more records to make a final determination regarding causation. Resp. Ex. #1.

Dr. Mather received additional records and completed an addendum on August 2, 2015. Resp. Ex. #1. After reviewing these records, specifically the Illinois Masonic records from December 14, 2014, he opined that her herniated disc occurred spontaneously and was not caused by work. Resp. Ex. #1. His opinion was based on his determination that her histories

were not consistent, pointing to the fact that they varied and included "working a lot," "possibly a popping sensation," and "possibly overuse injury." Resp. Ex. #1.

The Petitioner presented again to Dr. Singh on June 29, 2015 and he continued to recommend surgery and her off work restrictions. Pet. Ex. #6. In response to Dr. Mather's opinion that the Petitioner's herniation occurred spontaneously, Dr. Singh said, "The word spontaneous kind of loses context in that all disk herniations arise spontaneously. The question is can a simple activity result in disk herniation? And the answer is yes." Pet. Ex. #6 p. 23. He further explained that the simple activity of opening a door is enough to cause a herniation, as it did for the Petitioner. Pet. Ex. #6 p. 25.

The Petitioner continued to see Dr. Patel and Dr. Amit Mehta at Elmwood Park Same Day Surgery on a monthly basis throughout the beginning of 2018 with continued complaints of pain pending surgery. Pet. Ex. #4. Dr. Patel and Dr. Mehta continued to order pain medications and off work restrictions. Pet. Ex. #4. At the end of 2017, Dr. Mehta recommended another pain injection to relieve some of the Petitioner's pain, but it was never authorized. Pet. Ex. #4.

On cross examination, the Petitioner testified that she never had any serious injuries with the Respondent before the injury on November 28, 2014. R. at 31-32. She testified that she may have had minor injuries before but nothing severe. *Id.* The Respondent introduced a previous First Report of Injury dated February 24, 2014 where "she was picking up a 40 lbs wheel of cheese when she pulled a muscle in her lower back on the right side." Resp. Ex. #2. She testified that for that incident, she hurt her low back, but that she never hurt her back in relation to this accident. R. at 39-40. He also questioned her about whether she ever attended the Sundance Methadone Clinic in February or March of 2014, to which the Petitioner testified she had not. R. at 36. The Respondent produced no evidence proving she ever attended this clinic.

The Petitioner testified that she knows her injury was the result of trying to open the hot food case on November 28, 2014. R. at 28. As of the date of trial, she still had pain in her neck going down the left arm with numbness in her fingers. R. at 28. She testified that her whole life has changed since this injury and she can no longer perform daily chores such as cleaning, laundry, or grocery shopping without pain. R. at 29. She testified that if the Arbitrator awarded the recommended surgery, she would get the treatment right away. R. at 29-30.

CONCLUSIONS OF LAW

C. WITH REGARD TO ITEM (C), WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the accident arose out of and in the course and scope of the Petitioner's employment with the Respondent. In order to obtain compensation under the Act, a claimant must show by a preponderance of the evidence that she has suffered a disabling injury arising out of and in the course of her employment. Both elements must be present at the time of the claimant's injury in order to justify compensation. *IL Bell Telephone Co. v. Indust. Comm'n.*, 131 Ill.2d 478, 483 (1989). Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, are generally deemed to have been received "in the course" of the employment. *Caterpillar Tractor Co. v. Indust. Comm'n.*, 129 Ill.2d 52, 57 (1989). The "arising out of" component refers to the origin of cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Id.* at 58.

Here, both elements have been met. The Petitioner testified that on November 28, 2014, she was opening a deli case door when she hurt her neck and left shoulder. R. at 10-13. While

she was working at the deli counter, a customer requested food out of the hot food case. R. at 10. She testified that this particular case had sliding glass doors that opened left to right. *Id.* On this date, one of the doors was damaged and it had duct tape adhesive and WD-40 sprayed in the tracks causing it to be difficult to open. R. at 10-11. She was grabbing and pulling the door trying to yank it open when she felt a pop and pain in her left shoulder shooting up to her neck. R. at 11-13. She went home shortly after the incident and reported the injury to Peter, the deli manager, and Dave Kaplan, the store manager, by the following Monday. R. at 13-14 and 41. The Respondent later called her back into the store to discuss the accident with Jeff, the store manager. R. at 15. She and Jeff sat down and discussed exactly what happened on November 28, 2014 and filled out an injury report. *Id.*

The Respondent produced no witnesses or evidence to refute the fact that notice was given to three different supervisors. Further, its own Independent Medical Examiner, Dr. Steven Mather, admitted the fact that he reviewed an injury report from January 5, 2015 with an injury of trying to open a deli case sliding door. Resp. Ex. #1. Despite this, the Respondent has denied the claim based on Dr. Mather's opinion that the Petitioner's records show inconsistent histories. Resp. Ex. #1. However, Dr. Mather ignored the fact that all of the histories point to work and when taken together, prove that she sustained an injury in the course and scope of her employment.

In looking at the specific histories given to the providers, she first presented to her primary care physician, Dr. Steven Fox at Advocate Medical Group on December 2, 2014. Pet. Ex. #3. Dr. Fox's history from that date states, "She works in a deli cutting up meat / turkey, started to have pain late Saturday. It starts on the left side of her neck, travels to upper back and left shoulder." Pet. Ex. #3 p. 11. This history is consistent and corroborated by her testimony.

She did work in the deli department for the Respondent cutting up meat and testified that she had pain that Friday, but finished her shift and went home in pain. R. at 11. This history does not indicate that the cause of her pain was from cutting up meat, it simply states she works in a deli cutting up meat, which it accurate.

She next presented to Advocate Illinois Masonic Medical Center on December 14, 2014 because her pain became severe. Pet. Ex. #2. The history from that visit is taken directly from the Petitioner and quotes her as saying, "I worked [T]hanksgiving and it started when I got home after work." Pet. Ex. #2 at p. 46. Shortly thereafter on December 17, 2014, she went back to Dr. Fox with a history that states she "thinks it occurred due to heavy lifting around Thanksgiving…pain in neck." Pet. Ex. #3 p. 6. The last date of service with Dr. Fox on December 23, 2014 states, "Pain started after the week of Thanksgiving when she was working daily. She thinks there was a pop or pain while working that may have been the inciting event." Pet. Ex. #3 p. 3. Taking these histories together, this is exactly what she testified to.

Next, she presented to Dr. Arpan Patel at Elmwood Park Same Day Surgery Center on January 8, 2015. Pet. Ex. #6. His history states, "Patient states on November 28, 2014 while working at a deli counter in a grocery store, she was sliding a glass sliding door on a hot case when the glass sliding door became stuck. Patient jerked on the door which resulted in significant, severe left shoulder pain." Pet. Ex. #6 p. 3. After treating her for a few months, Dr. Patel referred her to Dr. Kern Singh for a surgical evaluation. Pet. Ex. #6. On Dr. Singh's first visit with the Petitioner, his history states, "She reports on November 28, 2014, she was walking by a set of sliding doors, when she pulled the door open, she felt immediate neck pain with left upper extremity radiating pain." Pet. Ex. #6. These histories are consistent with each other and with her testimony of the accident. R. at 10.

Dr. Mather saw the Petitioner on May 4, 2015. Resp. Ex. #1. The history given to him was "on November 28, 2014, she was opening a hot food case, pulling heavy sliding doors left to right. The doors were duct taped and the patient yanked the door and felt pain in her neck and left shoulder and upper arm." Resp. Ex. #1. Dr. Mather agreed with her treating physicians' diagnosis of a herniated disc and the need for surgery as recommended by Dr. Singh, but was unable to determine if her condition was related to work. Resp. Ex. #1. After reviewing additional records, he opined that because they did not all specifically state "closing a sliding door from left to right" that her injury was not the result of a work accident. Resp. Ex. #1.

Dr. Mather is ignoring the fact that even though all of the histories do not have the exact same wording as to how the accident occurred, they all indicate an injury at work on November 28, 2014. Further, the histories were explained in her testimony and were not in fact inconsistencies but a chronology of what happened. First, she testified that the door was hard to open and she had to lift and pull it away from the duct tape, which accounts for the history of December 14, 2014. Next, she testified that when the door finally did open she felt a pop in her shoulder accounting for the history on December 23, 2014. Taken together, these histories do not contradict each other, but instead they support her undisputed and credible testimony that she hurt herself at work. Since her injury occurred at the deli for the Respondent while she was performing her work duties, the injury occurred in the course of her employment

As to the second element, opening the glass case to get food for a customer is a risk incidental to her employment. The Petitioner testified that as a deli counter clerk she is responsible for getting people food from the deli and serving the customer. R. at 8. Because opening this hot food door was a risk incidental to her work with the Respondent, it arose out of

her employment. As such, the Petitioner has shown by a preponderance of the evidence that her injury arose out of and occurred in the course and scope of her employment.

E. WITH REGARD TO ITEM (E), WHETHER TIMELY NOTICE OF THE ACCIDENT WAS GIVEN TO RESPONDENT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner gave timely notice of the accident to the Respondent. The Petitioner testified that she injured her left shoulder and neck opening a hot food case while attempting to get food for a customer. R. at 10-11. While yanking to try and get the door open, she felt a pop and pain in her left shoulder up to her neck. *Id.* She testified that because it was the Friday after Thanksgiving, no supervisors were working on that date. R. at 13. The injury happened towards the end of her shift, so she went home in pain. *Id.* She later told Peter, the deli manager, and Dave Kaplan, a store manager, by the following Monday about the injury. R. at 13-14 and 41. Peter directed her to see a store manager. R. at 14. Shortly thereafter, she met with Jeff, the store manager, to go over the accident and fill out an injury report. R. at 15. The Respondent's expert, Dr. Mather, reviewed the injury report in completing his Independent Medical Examination report. Resp. Ex. #1. The history listed was "trying to open a deli case sliding door." Resp. Ex. #1.

The accident occurred on November 28, 2014 and notice was properly given to the Respondent by December 1, 2014. The Respondent produced no evidence disputing the fact that it received notice of this injury. As such, the Arbitrator finds that timely notice of the accident was given to the Respondent.

F. WITH REGARD TO ITEM (F), WHETHER THE PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE WORK ACCIDENT, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to her work accident. A causal connection between work duties and a condition of ill-being may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident, and inability to perform the same duties following that date. *Pulliam Masonry v. Industrial Comm'n.*, 77 Ill.2d 469, 471 (1979).

The Petitioner injured her neck at work on November 28, 2014. The Petitioner testified that on November 28, 2014, she was opening a deli food case door when she hurt her neck and left shoulder. R. at 10-13. She was grabbing and pulling the door trying to yank it open when she felt a pop and pain in her left shoulder shooting up to her neck. R. at 11-13.

On December 2, 2014, she presented to her primary care physician, Dr. Steven Fox at Advocate Medical Group with complaints of neck, upper back, and left shoulder pain. Pet. Ex. #3. Dr. Fox diagnosed her with a muscle strain, ordered pain medications, and took her off of work for 2-3 days. Pet. Ex. #3. Her pain became so severe on December 14, 2014 that she presented to the emergency room at Advocate Illinois Masonic Medical Center. Pet. Ex. #2. She was diagnosed with sprains, taken off of work, and recommended to follow up with her doctor. Pet. Ex. #2. She presented to Dr. Fox again on December 17, 2014 with persistent pain and burning in left arm and numbness in her left second digit. Pet. Ex. #3. Dr. Fox diagnosed her with shoulder pain and noted that there were features of possible C6 radicular pain and took her off of work. Pet. Ex. #3.

The Petitioner then sought a second opinion with Elmwood Park Same Day Surgery Center on January 8, 2015. Pet. Ex. #4. Dr. Arpan Patel diagnosed her with work related

cervical radiculopathy and ordered a cervical MRI, pain medications, physical therapy, and off work restrictions. Pet. Ex. #4. The Petitioner had the MRI on January 9, 2015 and it revealed a 8-9 mm large subligamentous posterior disk herniation with an extruded nucleus pulposus with significant left sided spinal stenosis and left lateral recess and neuroforaminal narrowing at the C6-7 level, a 3-4 mm posterior and right sided disk herniation with mildly extruded nucleus pulposus with right sided spinal stenosis and right lateral recess narrowing at the C5-6 level, and a 2-3 mm broad based subligamentous posterior and right sided disk herniation with mildly extruded nucleus pulposus with spinal stenosis and right lateral recess narrowing at the C4-5 level. Pet. Ex. #4. On January 15, 2015, Dr. Patel reviewed the MRI and confirmed the multiple herniations resulting in cervical radiculopathy. Pet. Ex. #4. He recommended a series of C6-7 epidural steroid injections and continued pain medications, physical therapy, and her off work restrictions. Pet. Ex. #4. The Petitioner had two epidural injections on January 20, 2015 and February 10, 2015, which only temporarily relieved her pain. R. at 21-22. Dr. Patel then referred her to a surgical spine specialist on February 24, 2015. Pet. Ex. #4.

The Petitioner presented to Dr. Kern Singh at Midwest Orthopaedics at Rush on March 2, 2015 with continued complaints of neck pain. Pet. Ex. #6. Dr. Singh reviewed the MRI and diagnosed her with a work related herniated disc at C6-7. Pet. Ex. #6. He opined that she had failed conservative care and recommended an anterior cervical discectomy and fusion at C6-7 and continued her off work restrictions. Pet. Ex. #6.

The Respondent then arranged an Independent Medical Examination with Dr. Steven Mather at DuPage Medical Group Orthopaedics on May 4, 2015. Resp. Ex. #1. Dr. Mather diagnosed her with a left C6-7 herniated disk, opined that her treatment had been reasonable and necessary, and agreed that she required an anterior cervical discectomy and fusion. Resp. Ex. #1.

However, he opined that he was not sure if it was a work related injury because his review of the medical records did not indicate a work injury. Resp. Ex. #1. He admitted that she did not have any neck or arm symptoms prior to November 28, 2014 and requested more records to make a final determination regarding causation. Resp. Ex. #1. Dr. Mather received additional records and completed an addendum on August 2, 2015. Resp. Ex. #1. After reviewing these records, specifically the Illinois Masonic records from December 14, 2014, he opined that her herniated disc occurred spontaneously and was not caused by work. Resp. Ex. #1.

The evidence in this case proves that the Petitioner was working full duty, sustained an accident on November 28, 2014, and now has a herniated disc that requires surgery. The Petitioner testified that she had minor injuries at work in the past, but nothing that required consistent treatment. R. at 31-32. Dr. Mather agreed and wrote that she did not have any neck or arm symptoms prior to her work injury on November 28, 2014. Resp. Ex. #1. The Respondent tried to introduce prior records, but those records were for a back injury which was no way implicated in this injury. The chain of events proves causation by the fact that she was working full duty as of November 28, 2014, sustained a work accident, and has been unable to work since that date. No doctor in this has case has disagreed that opening the deli case could cause the herniated disc, and no doctor disputes that she was able to work full duty before November 28, 2014 and could no longer work from that date forward. Thus, the Petitioner has proven that her current condition of ill-being is causally related to her November 28, 2014 work injury.

J. WITH REGARD TO ITEM (J), WERE THE MEDICAL SERVICES PROVIDED TO THE PETITIONER REASONABLE AND NECESSARY AND HAS THE RESPONDENT PAID ALL APPROPRIATE CHARGES, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the medical services provided to the Petitioner have been reasonable and necessary. Due to the Petitioner's work related injury, she has required treatment in the form of doctor visits, injections, diagnostic testing, medication, and physical therapy.

After her work injury on December 28, 2014, the Petitioner sought care with her primary care physician, Dr. Steven Fox. Pet. Ex. #3. He ordered pain medications and physical therapy. Pet. Ex. #3. On January 8, 2015, the Petitioner presented at Elmwood Park Same Day Surgery with Dr. Arpan Patel for a second opinion. Pet. Ex. #4. Dr. Patel diagnosed the Petitioner with cervical radiculopathy and ordered physical therapy, pain medications, and a cervical MRI. Pet. Ex. #4. The Petitioner completed the MRI on January 9, 2015 and it revealed multiple herniations with the largest at C6-7 with significant left sided spinal stenosis and neuroforaminal narrowing. Pet. Ex. #4. The Petitioner completed a course of physical therapy at Athletico Physical Therapy from January 12, 2015 through February 20, 2015. Pet. Ex. #5. Dr. Patel ordered a series of cervical injections which were completed on January 20, 2015 and February 10, 2015 and only temporarily relieved her pain. R. at 21-22. Eventually Dr. Patel referred the Petitioner to Dr. Kern Singh for a surgical consultation. Pet. Ex. #4.

The Petitioner presented to Dr. Singh at the Midwest Orthopaedics at Rush on March 2, 2015 where he diagnosed her with a C6-7 herniated disc. Pet. Ex. #6. Dr. Singh opined by that date she had failed conservative care and recommended an anterior cervical discectomy and fusion. Pet. Ex. #4. She continued to see Dr. Patel and Dr. Mehta at Elmwood Park Same Day Surgery on a monthly basis for pain management pending surgery. Pet. Ex. #4.

The Petitioner underwent an Independent Medical Examination with Dr. Steven Mather on May 4, 2015. Resp. Ex. #1. Dr. Mather diagnosed her with a left C6-7 herniated disc, opined that her care and treatment had been reasonable and necessary, and agreed that she required surgery as recommended by Dr. Singh. Resp. Ex. #1.

All doctors in this case agree that the treatment to date has been reasonable and necessary and that she now requires surgery. The Arbitrator finds that the Respondent has not paid all appropriate charges. The Petitioner testified that her medical bills have not been paid as of the date of trial. R. at 26. The Petitioner produced an itemization of all medical bills that the Respondent has refused to pay. Pet. Ex. #1. For the reasons stated above, her injury occurred in the course and scope of her employment, her current condition of ill being is causally related to her work injury and her treatment has been reasonable and necessary. As such, the Arbitrator hereby awards the Petitioner the medical bills contained in Petitioner's Exhibit #1.

K. WITH REGARD TO ITEM (K), WHETHER THE PETITIONER IS ENTITLED TO PROSPECTIVE MEDICAL CARE, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Petitioner sustained a work related injury on November 28, 2014. Following this injury, she sought care of Dr. Steven Fox and later Dr. Arpan Patel and other colleagues at Elmwood Park Same Day Surgery. Pet. Ex. #3 and #4. Dr. Patel diagnosed her with cervical radiculopathy and ordered a cervical MRI. Pet. Ex. #4. The MRI revealed multiple herniations, the largest of which is located at C6-7. Pet. Ex. #4. Dr. Patel first recommended injections, which she received on January 20, 2015 and February 20, 2015, with temporary relief. Pet. Ex. #4. Dr. Patel eventually referred the Petitioner to Dr. Kern Singh for a surgical consultation. Pet. Ex. #4. Dr. Singh confirmed the diagnosis of a C6-7 herniated disc and opined that she had

failed conservative care as of March 2, 2015. Pet. Ex. #6. Based on that, he recommended a discectomy and fusion, which he causally related to her employment. Pet. Ex. #6.

All doctors in this case agree that the Petitioner is not at maximum medical improvement and agree that she needs a cervical surgery. The Petitioner testified that as of the date of trial she is still experiencing neck pain, and would complete the recommended treatment right away if the Arbitrator awarded it. R. at 29-30. Since there is no opinion disputing the need for further care, and her current condition of ill being is causally related to her work injury, the Arbitrator awards prospective medical as recommended by Dr. Singh.

L. WITH REGARD TO ITEM (L), ARE TTD BENEFITS OWED TO PETITIONER, THE ARBITRATOR RENDERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Arbitrator finds that the Petitioner is entitled to TTD benefits from November 28, 2014 through April 16, 2018, a period of 176 3/7 weeks. The Petitioner has shown by a preponderance of credible evidence that her current condition of ill-being is causally related to her work injury. The Petitioner was initially taken off of work by Dr. Steven Fox at Advocate Medical Group. Pet. Ex. #3. Shortly thereafter, she was continued off of work by Dr. Arpan Patel and Dr. Amit Mehta at Elmwood Park Same Day Surgery. Pet. Ex. 4. Dr. Kern Singh continued her off work restrictions pending surgery. Pet. Ex. #6. The Petitioner testified that she never received any temporary total disability benefits from the Respondent during the time that she was off of work. R. at 26.

The Petitioner's medical records establish that she has been off of work since the date of injury through the date of trial. Therefore, the Petitioner is entitled to TTD benefits for the time period ranging from November 28, 2014 through April 16, 2018 and ongoing TTD following surgery as recommended by Dr. Singh.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gary Puffpaff,

Petitioner,

19IWCC0122

vs.

No. 09 WC 23472

Mark Weir, and
Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Respondents herein and notice given to all parties, the Commission, after considering the issues of jurisdiction, employment relationship, accident, notice, causal connection, medical expenses, benefit rates, temporary disability, permanent disability and fraud, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below.

On June 3, 2009, Petitioner filed an application for adjustment of claim against Respondents alleging that on March 18, 2009, he injured his left leg and foot when he fell on the jobsite. On April 2, 2013, Petitioner amended the application for adjustment of claim to add injuries to both ankles and feet, as well as person as a whole. Contemporaneously with filing the instant claim against Respondents, Petitioner filed a claim (case No. 09 WC 23497) against Deborah Blue of rural Ottawa. Petitioner's claim against Blue alleged an injury to the left foot and ankle sustained as a result of the fall on March 18, 2009. On February 20, 2015, an arbitrator dismissed the claim against Blue for want of prosecution.

In his testimony during an *ex-parte* arbitration hearing, Petitioner acknowledged prior convictions of crimes of theft and dishonesty. Within the past ten years, he had also been

convicted of possession of a controlled substance and "driving on a revoked license with a DUI." Petitioner acknowledged past problems with illegal drug use, including heroin.

Petitioner testified on direct examination that he was employed by Mark Weir (Weir), stating he started working for Weir "the week before the injury happened. The injury happened on the last day of the first week that I had started for him. I started on a Monday, and the injury happened, I believe, on a Friday afternoon." Petitioner described the circumstances of his hiring as follows: "Mark Weir called me and asked me if I was looking for a job, and I told him I was definitely looking for a job, and he offered me $15.00 an hour cash and guaranteed me 40 hours a week."[1] Petitioner understood he would be doing construction work, stating he had "lots" of experience in the construction field, having been in construction trades his whole adult life. Petitioner accepted the job, expecting to be paid an average weekly wage of $600.00.

Petitioner further testified that shortly after midnight on March 18, 2009, he "used a little bit of heroin after leaving the bar" and went to bed. He woke up at 6 a.m. and "went to work at seven." Petitioner stated that when he went to work and at the time of the accident, he was "[n]ot at all" under the influence of heroin. That day, Petitioner did roofing work on a barn in rural Ottawa. The alleged accident occurred at approximately 1:30 p.m., when Petitioner was pushing a 4-foot by 8-foot sheet of plywood up a ladder. Petitioner described the accident as follows: "I got to the top of the ladder and was handing a sheet of plywood off to one of the other workers on the roof, and the ladder I was on slid out from underneath me, and I fell straight to the ground." Petitioner stated he fell 10 to 15 feet, landing on concrete with his left foot first and fracturing his left ankle and foot.

Petitioner further testified that "[t]he guys that [he] was working with" put him in a work truck and drove him to Ottawa Regional Hospital. Because of the severity of the fracture, the staff at Ottawa Regional Hospital transferred Petitioner to OSF St. Francis Medical Center in Peoria. On March 19, 2009, Dr. Nirain D'Souza performed an open reduction and internal fixation of the left talus. Petitioner testified that while he was in the hospital, he was given a cash payment for his work for Weir. Petitioner stated: "I was laying in the hospital bed and one of the other workers from the company showed up and told me he was there to drop off my payroll for the week that I had worked." The unnamed worker gave Petitioner "a little less" than $600.00 because Petitioner "didn't quite work the full day Friday, so he paid me, I think, until 2 o'clock that afternoon." Petitioner followed up with Dr. D'Souza through August 28, 2009, during which time Dr. D'Souza kept him off work. Petitioner sought temporary total disability benefits until March 28, 2010, when he began serving a prison term for an unspecified offense. While in prison, Petitioner suffered from pain and discomfort in both ankles and received some treatment from the prison medical staff. After being released from prison in 2011, Petitioner received treatment at Perry Memorial Hospital, St. Margaret's Hospital, Family Health Center

[1] In an affidavit filed with his petition for review, Weir states: "At no time, and particularly on March 18, 2009, did he, individually, or doing business as B&M Concrete Construction, employ the Petitioner *** in any capacity whatsoever." Weir further states: "Neither he nor anyone from B&M Concrete Construction has ever spoken to or have any knowledge of the Petitioner" or paid any money to Petitioner.

and OSF Medical Group. He was prescribed medications, including morphine, hydrocodone, Dilaudid and hydrochloramide. At the time of the arbitration hearing, Petitioner was looking for work. Petitioner stated he continued to suffer from frequent swelling and pain, which made it difficult to work in construction.

At the close of direct examination, Petitioner's counsel asked whether Weir was present at the time of the accident. Petitioner answered in the affirmative, adding: "He's the one that drove me to the hospital."

On cross-examination, the following testimony was adduced:

"Q. [G]oing to your relationship with Mark Weir, how did you meet Mark?

A. I never had met Mark prior to getting the job with him. He got my name and number from a friend of mine.

Q. Does Mark own a company?

A. I have no idea. I don't know if he was building it by himself, or what the deal was.

Q. So what did he offer you when he called you?

A. He offered me $15.00 an hour cash for 40 hours a week work. He told me he could keep me busy for six months to a year at least. He actually told me he had insurance too, and when he took me to the hospital and dropped me off at the hospital, he told the nurses at the desk he was going out to get his company insurance card and bring it in, and he never came back and he never came back in."

Petitioner was asked where Weir had told him to report for work, to which Petitioner responded: "He gave me the address where the barn was at and he told me to meet him there, and that's where I met him that morning, the first day I started working for him. I'm not sure what the exact street address is of the job. It was the job that we were doing for, I believe the lady's name was Debra Blue or somebody. I think it was Debra Blue whose house it was." Petitioner continued that he was scheduled to work from 7 a.m. until 4 p.m. every day that week. He used solely Weir's equipment and wore "a fluorescent green or orange shirt" provided by Weir. Petitioner received no W-2 forms from Weir, and no taxes were withheld from his pay. Petitioner maintained he was paid "[w]eekly, in cash," and Weir "actually sent one of the other workers that worked for him to the hospital to give [him his] money," adding that the money "went into an attorney's escrow account." Since then, Petitioner had been unable to contact Weir because Weir changed his phone number. Petitioner stated his friend who knew Weir also had no idea

where Weir was, adding about the circumstances of his hiring: "[I]t was a friend of a friend that called my friend about the job, that's all. I didn't know the guy or anything like that. I was simply just looking for a job." Petitioner acknowledged telling the staff at OSF St. Francis Medical Center that he was self-employed, explaining he did so because he also did odd jobs "on the side."

On redirect and re-cross examinations, Petitioner testified that at the time of the alleged accident he was working with three other laborers, as well as Weir. When asked whether any of the workers would testify on his behalf, Petitioner responded: "I don't know any of those guys." Petitioner did not call any occurrence witnesses to corroborate his testimony.

The medical records in evidence contain an admitting record dated March 18, 2009, from Ottawa Regional Hospital stating Petitioner was self-employed, self-pay. However, the triage record had a "W/C" box checked. The attending emergency room physician noted the following history: "[The patient] was on a ladder and fell 10 feet onto the left ankle." The attending physician diagnosed a talus fracture, reduced the fracture, and ordered a transfer to OSF St. Francis Medical Center. Post-reduction x-rays showed a "comminuted age undetermined fracture of the talus with nonunion."

The admitting record from OSF St. Francis Medical Center dated March 18, 2009, states Petitioner was a self-employed carpenter. The admitting physician noted the following history: [The patient] fell from a ladder when it slipped out from beneath him. He states the fall was approximately ten feet and he landed on his feet on concrete." Petitioner also reported using heroin daily. A drug screen was positive for benzodiazepines, opiates and cannabinoid. A consulting physician from the trauma team noted: "Apparently [the patient] had fallen approximately 15 feet off of a ladder while at work. He suffered a significant injury to his left foot." X-rays showed a comminuted displaced left talus fracture. The team consulted Dr. D'Souza. On March 19, 2009, Dr. D'Souza diagnosed a comminuted left talus fracture and left foot compartment syndrome, and performed an open reduction and internal fixation of the left talus and a fasciotomy of the left foot. Petitioner was discharged from the hospital on March 20, 2009.

The medical records from Dr. D'Souza contain a medical history questionnaire Petitioner completed on March 23, 2009, listing the date of accident as "Wednesday, March 18, 2009" and the employer as "B&M Concrete." Petitioner listed his occupation as carpenter, indicated he was injured on the job, and further indicated there would be litigation. During the visit on March 23, 2009, Petitioner complained to Dr. D'Souza of a lot of pain. Dr. D'Souza noted: "This is not to be unexpected since he is a regular heroin user and states that he last used heroin a long time ago, which was a week." Dr. D'Souza prescribed Vicodin and Levaquin. On March 31, 2009, Dr. D'Souza noted the wounds were healing nicely, without infection. Petitioner was "doing well other than his pain which is obviously an issue given his history of heroin use. He is having problems with vomiting so I asked him if he thought he was withdrawing and he said no." Dr. D'Souza prescribed anti-nausea medication. Thereafter, Petitioner continued to regularly follow

up with Dr. D'Souza. The last note is dated August 28, 2009. At that time, Dr. D'Souza diagnosed a varus malunion and predicted Petitioner would continue to suffer from constant pain and probably require further surgeries.

Subsequent medical records from Perry Memorial Hospital and St. Margaret's Hospital are negative for deep vein thrombosis and edema, and positive for multiple osteoarthritic changes and deformities associated with the fracture.

Medical records from Dr. Timothy Pratt and Family Health Center are significant for Dr. Pratt's note dated June 22, 2012, stating Petitioner was establishing care after recently getting out of prison for delivery of a controlled substance. On September 11, 2012, Dr. Pratt noted that Petitioner had also been getting pain medications from Dr. Morrow. Dr. Pratt's office called Dr. Morrow to advise that Dr. Pratt was now Petitioner's primary care provider and prescribing pain medications. On September 17, 2012, Petitioner called Dr. Morrow claiming to have lost his pain medications and requesting a refill, which Dr. Morrow denied. On January 22, 2013, Dr. Pratt noted that Petitioner thought he would soon go back to prison. On January 5, 2015, Petitioner returned to Dr. Pratt after serving a 21-month sentence for "driving on a revoked license – again." Petitioner complained of chronic pain and reported "working some doing some carpentry work." Dr. Pratt restarted acetaminophen-hydrocodone and MS Contin.

The Arbitrator found the claim compensable and awarded benefits. Respondents ask the Commission to reverse the Arbitrator's decision and deny the claim. The Injured Workers' Benefit Fund (the Fund) argues Petitioner lacks credibility because: "[Petitioner] originally filed two independent claims against two individuals, indicating he did not know by whom, if anyone, he was employed;" on March 18, 2009, Petitioner told the emergency room staff at Ottawa Regional Hospital and the emergency room staff at OSF St. Francis Medical Center that he was self-employed; Petitioner testified the injury occurred on a Friday and he was paid cash for almost the full week, when March 18, 2009 was actually a Wednesday; Petitioner is a drug addict and had been convicted of delivery of a controlled substance; Petitioner attempted to obtain narcotic prescription medication through deceit; and Petitioner had been convicted of crimes involving theft and dishonesty.

Weir disputes an employment relationship. Like the Fund, Weir attacks Petitioner's credibility. Weir relies on Petitioner's filing two independent claims against two individuals and Petitioner's telling the emergency room staff at two hospitals that he was self-employed. Weir also points out that March 18, 2009 was a Wednesday, and not a Friday. Additionally, Weir points to Petitioner's testimony that Petitioner did not know if Weir owned a construction company.

Having carefully considered the entire record, the Commission agrees with Respondents that Petitioner is not credible. The Commission finds that Petitioner failed to prove by a preponderance of the evidence an employment relationship between himself and Weir. Accordingly, the Commission denies the claim.

19IWCC0122

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 15, 2016, is hereby reversed and Petitioner's claim is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents 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 2 1 2019
o-12/06/2018
SM/sk
44

Stephen Mathis

Deborah Simpson

DISSENT

I respectfully dissent from the majority decision and would affirm the Arbitrator's well-reasoned decision in its entirety. The majority bases its reversal of the Arbitrator's decision on credibility. Although the medical histories provided by Petitioner are consistent regarding the mechanism of injury and ongoing symptomology, there are minute inconsistencies with respect to the height from which Petitioner fell and the date of the accident. The majority, in a footnote, noted that Respondent Weir, by way of an affidavit attached to his Petition for Review, denied knowing, employing or paying Petitioner. The majority, however, fails to note that the Arbitrator found that Respondent Weir had proper notice of the hearing date but was not present at trial (Respondent Injured Workers Benefit Fund was represented at trial).

Petitioner's claim basically turns on credibility. The Arbitrator had the opportunity to observe the Petitioner's demeanor and hear Petitioner's testimony regarding his history of drug use, criminal convictions, and alleged inconsistencies, live. After hearing Petitioner's unrebutted testimony, the arbitrator found Petitioner to be credible and that he met his burden of proof in regard to Employer/Employee relationship, accident and causal connection. Ultimately, the basis of the majority's reversal of the Arbitrator's decision is Petitioner's credibility or lack thereof. I

would defer to the credibility finding of the trier of fact who had the opportunity to hear the Petitioner's testimony in person. Accordingly, I would affirm the Arbitrator's well-reasoned decision in its entirety.

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PUFFPAFF, GARY
Employee/Petitioner

Case# **09WC023472**

MARK WEIR/INJURED WORKERS' BENEFIT FUND BY IL STATE TREASURER AS EX OFFICIO CUSTODIAN
Employer/Respondent

19IWCC0122

On 8/15/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.44% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1097 SCHWEICKERT & GANASSIN LLP
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PERU, IL 61354

0000 MARK WEIR
17902 KENTVILLE RD
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100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS

COUNTY OF LaSalle)

19IWCC0122

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Gary Puffpaff
Employee/Petitioner

v.

Case # **09** WC **23472**

Consolidated cases: _____

Mark Weir/Injured Workers Benefit Fund by IL State Treasurer as ex officio custodian
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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Ottawa**, on **July 27, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 18, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

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

On the date of accident, Petitioner was **37** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of his causally related injuries and reimburse Petitioner's reasonable and necessary out-of-pocket medical expenses pursuant to Sections 8(a) and 8.2 of the Act. PX 1.

Respondent shall pay Petitioner temporary total disability benefits of **$400/week** for **53 3/7 weeks**, commencing March 18, 2009 through March 27, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$360/week** for **66.8 weeks**, because the injuries sustained caused the 40% loss of the left foot, as provided in Section 8(e) of the Act.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund. was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event that the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Signature of Arbitrator — Date: 8/12/16

AUG 15 2016

19IWCC0122

FINDINGS OF FACT

The Arbitrator initially notes that Respondent Mark Weir was given proper notice of the trial date and was not present at trial. The IWBF was represented at trial. At trial, Petitioner Gary Puffpaff testified he was offered a construction job by the Respondent, Mark Weir, paying $15/hr in cash for 40 hrs/week of construction work. On March 18, 2009, approximately one week after Petitioner began working for Respondent, he was injured falling off a ladder.

Petitioner testified that he began work that day at 7 a.m. building a roof for a one-story barn. As part of his job, he was required to carry plywood sheeting up a ladder to be used for building a roof. As he carried a heavy 4' x 8' plywood sheet to the top of the ladder, the ladder slid out from under him and Petitioner fell 10 feet or more onto the concrete below. Petitioner described hitting the ground with his left leg first, causing his left ankle to roll and fracture. His co-workers and Mark Weir immediately put him in a truck. He was then rushed to Community Hospital of Ottawa (now OSF Saint Elizabeth Medical Center). Petitioner testified Mark Weir brought him to the hospital. He indicates Mr. Weir told him and the staff he was going to get his insurance card from his pick-up truck. He then left and did not return. Petitioner testified he never saw Mr. Weir again and, despite his continued efforts, has not been able to contact him since his work accident.

The Emergency Room records indicate Petitioner presented with an obviously deformed left ankle and 10/10 pain after falling 10 feet from a ladder. Px. 7. Imaging was performed and showed a comminuted talus fracture. Id. Petitioner's left ankle was reduced and splinted before he was transferred by ambulance to OSF St. Francis in Peoria, IL for additional treatment. Id. At OSF St. Francis, Petitioner was examined and found to have a comminuted displaced left talus fracture. Px. 6. The following day, March 19, 2009, Petitioner consulted with Dr. D'Souza, an orthopedic who performed an open reduction of the left talus, placed internal fixation, and performed a fasciotomy of the left foot. Id. At discharge on March 20, 2009, he was prescribed Vicodin, Ultram and Colace and was further ordered to bear no weight on his left leg. Id. He was instructed to use crutches at all times and to follow up with Dr. D'Souza at the Trauma Clinic in one week. Id.

Petitioner followed with Dr. D'Souza on March 23, 2009. Px. 8. He noted Petitioner's wounds were healing nicely and placed his leg in a Castellani compression dressing. Id. At his next visits of March 31 and April 7, 2009, Dr. D'Souza reported continued wound healing. Id. At the April 7, 2009 appointment, Petitioner had his staples removed and was placed in a short leg cast. Id.
In his notes of May 7, 2009, Dr. D'Souza noted significant swelling in Petitioner's left foot, despite healed incisions. Id. X-rays demonstrated rotation through the talar neck and signs of avascular changes on the lateral side of the talar dome. Id. These findings prompted the doctor to note that Petitioner may have experienced some medial column collapse and, therefore, required additional time non-weight-bearing to allow for additional healing and revascularization. Id. Dr. D'Souza also noted concerns the Petitioner would have at least partial avascular necrosis of his talus. Id.

At Petitioner's next appointment on June 25, 2009, Dr. D'Souza wrote the Petitioner was doing better. Px. 5. The exam demonstrated moderate swelling and pain only with inversion and eversion. Id. X-rays indicated adequate alignment and only one small area of subchondral resorption laterally. Id. Dr. D'Souza cleared Petitioner to bear 30% of his bodyweight and ordered a course of physical therapy. Id. He was also ordered to remain off work until further notice. Id.

Petitioner next met with Dr. D'Souza on August 28, 2009. Id. Upon examination of the left ankle, Dr. D'Souza found tenderness over the medial side of the talus and a varus deformity with slight supination of the forefoot. Id. X-rays demonstrated varus collapse. Id. Dr. D'Souza opined in his records, "At this point, I have explained to Gary he has probably gone on to what I expected which was a varus malunion. He is going to be looking at probably a constant pain in the future. I think a fixed molded ankle-foot orthosis would be helpful in unloading and maintain some of the positioning of his foot and we gave given him a prescription for this. I told him at this time he would be at very high risk for any type of reconstructive osteotomy of his talus in light of his medical condition, his smoking, and the severity of the initial injury. He would risk failure of this procedure with subsequent infection or continued malunion and nonunion that may also require lower extremity amputation as a salvage." Id.

Petitioner testified he subsequently purchased, out of his own pocket, an orthotic device as recommended by Dr. D'Souza. However, he explained he was required to settle for a generic model because he could not afford a custom fit one. Petitioner reported he continued to have issues with the ankle while using the brace but the device kept it from moving side to side.

Petitioner testified that after his last appointment with Dr. D'Souza, he had an incident which led to his incarceration with the Illinois Department of Corrections beginning on March 28, 2010. During his time there, Petitioner reported he continued to experience pain and discomfort in his left ankle and received treatment with physicians at the Department of Corrections.

Petitioner continued to receive treatment for his left ankle following his release from the Department of Corrections. Px. 4. On June 20, 2011, Petitioner presented to the emergency room at Perry Memorial Hospital with complaints of pain and swelling in both ankles and lower legs. Id. At trial, Petitioner explained he went to the hospital because his left foot was so swollen, he was afraid it might need to be amputated. A Doppler study was performed but showed no evidence of deep vein thrombosis in either leg. Id. He was examined, diagnosed with dependent pedal edema, provided with pain medication, and instructed to elevate. Id.

Petitioner next sought treatment for ongoing swelling at St. Margaret's Hospital on August 29, 2011. Px. 3. According to the medical records, Petitioner reported moderate, intermittent leg swelling of variable duration in both legs. Id. This swelling is exacerbated by standing more than 4 hours and can get to be the size of a volleyball. Id. He believed the hardware from his ankle surgery was loose. Id. X-rays taken that day demonstrate moderate osteoarthritic changes to the left tibiotalar and talocalcaneal joint and a deformed talus related to the prior fracture. Id. Petitioner was diagnosed with leg swelling, exacerbation of his arthritis, and edema. Id. He was provided with medication for pain, ordered to follow-up with both his primary care physician and orthopedic. Id. Petitioner was also instructed to use Thrombo-Embolic Deterrent (TED) hose. Id.

Petitioner continued to report ankle pain and swelling at his visit with the Family Health Center on September 14, 2011. Px. 10. The medical records indicate Petitioner was unable to see an orthopedic doctor during his incarceration and was feeling stressed and depressed since his release. Id. He was diagnosed with left ankle pain and lower extremity edema and prescribed an antidepressant to treat his depression. Id. Thereafter, Petitioner's symptoms persisted and the Family Health Center has provided medication for pain management and depression. Px. 10; 5.

Petitioner's left ankle was next evaluated by Dr. Pratt, Petitioner's family physician, on June 22, 2012. Px. 11. Dr. Pratt recounted Petitioner's history of a work-related fall in 2009, his reconstructive ankle surgery, and chronic symptoms of pain and swelling. Id. Upon examination of the ankle, Dr. Pratt noted numerous postop scars, mild swelling, decreased range of motion, an antalgic gait and wrote "He certainly has legitimate reason [to] have chronic pain in his left ankle." Id. Petitioner was prescribed Dilaudid for pain management. Id.

At his follow-up appointment with Dr. Pratt on September 11, 2012, the Petitioner reported his ankle "was doing terrible" and getting worse. Px. 11. He also repeated his belief the hardware was loose. Id. He reported being unable to work and described getting a lot of swelling when he tries. Id. Dr. Pratt revised Petitioner's medications due to the failure of short-acting medications like Vicodin to provide relief. Id. Petitioner's symptomology remained unchanged at his next appointment with Dr. Pratt on January 22, 2013. Id.

Petitioner returned to see Dr. Pratt on January 5, 2015, following 21 months in jail for driving on a revoked license. Px. 11. At that time, Petitioner reported ongoing chronic bilateral ankle and foot pain. Id. He described clicking and popping in his left ankle and wonders if his hardware is coming loose. Id. Tenderness was noted upon palpation by Dr. Pratt. Id. X-rays proceeded on February 5, 2015 at Perry Memorial Hospital. Px. 11; 4. The right ankle x-ray showed mild anterior soft tissue swelling but was otherwise unremarkable. Id. The left ankle x-ray had significant findings and revealed mild to moderate soft tissue swelling, an ORIF of the talus with 2 plates and 4 screws that had healed with deformity, osteoarthritis within the subtalar joint narrowed with periarticular sclerosis, a broad-based osteophyte arising dorsally from the talar head that may be a potential source of anterior ankle impingement. Id. There was also a large osteophyte arising laterally from the left hindfoot. Id.

No additional medical records after February 5, 2015 were submitted into evidence. However, Petitioner testified he continues to follow with Dr. Pratt for treatment and had seen him last on July 19, 2016. Petitioner testified he continues to suffer pain and swelling in his ankles, especially his left. He reports these symptoms become intolerable with activity or standing for more than 1 ½ hours. As a result, he has experienced difficulty finding and holding employment. Since the injury, Petitioner states he found two construction jobs. The first was doing roofing work for CH Electric. He explained he could not tolerate the left ankle pain and swelling he experienced with climbing ladders or prolonged activity on his feet and was laid off after just two weeks. The second job was with Kramer Construction. He reports being laid off after two months of work for the same reasons. Petitioner testified he had no pre March 18, 2009 history of foot or ankle issues and claims nothing else happened that could explain his current condition.

Another issue addressed at trial was Petitioner's usage of illicit drugs. Petitioner admitted to using heroin about midnight the night before his March 18, 2009 injury. He testified that he was not under the influence of heroin or impaired in anyway when he woke up at 6 a.m. and began work at 7 a.m. After his accident, he reports being taken to the hospital immediately by his co-workers and Respondent, Mark Weir. The hospital record demonstrates a time of arrival of 13:39 hours (1:39 p.m.) Px 7. No record or testimony indicates he was under the influence of drugs at the time of his injury. Id. Of note, the medical records immediately after the injury show Petitioner expressed a desire for treatment of his drug usage. Px. 6. Subsequent records demonstrate Petitioner followed through on that desire and he has not used heroin since the injury. Px. 6; 8; 11.

Petitioner placed into evidence a certification of non-insurance demonstrating Mark Weir did not hold workers' compensation insurance as required under the Workers' Compensation Act, 820 ILCS 305/1, *et. seq.* ("Act") on the date of accident. Px. 2. Accordingly, Petitioner properly added the Illinois State Treasurer as ex officio custodian of the Injured Workers Benefit Fund as an additional Respondent. As part of his relief, Petitioner seeks temporary total disability benefits from the date of injury on March 18, 2009 through March 27, 2010, a period of 53-3/7 weeks.

Through the date of hearing, Petitioner incurred gross medical bills of $79,200.54 (OSF Saint Elizabeth Medical Center: $2,333.66; OSF St. Francis Medical Center: $44,008.16; Perry Memorial Hospital: $17,344.25; Midwest Orthopedic Center/Dr. D'Souza: $5,542.00; Peoria Surgical Group: $595.00; Marseilles Area Ambulance: $1,663.00; Central Illinois Pathology: $256.00; Ottawa Imaging: $40.00; Associated Anesthesiologists: $1,710.00; Heart Care Midwest: $400.00; Midwest Emergency Northern Illinois: $1,276.00; Central Illinois Radiological: $705.00; St. Margaret's Hospital: $2,305.50; St. Margaret's Clinic: $211.00;

Hospital Radiology: $42.00; Sheffield Family Medical Center Dr. Pratt OSF Medical Group: $529.00; and $239.97 in prescriptions for medication that were paid by Petitioner out-of-pocket. Px. 1.

CONCLUSIONS OF LAW

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

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

The undisputed evidence and testimony presented indicates Respondent was engaged in the business of construction within the State of Illinois at the time of Petitioner's injury. Following consideration of the testimony and evidence presented, this Arbitrator finds that Respondent was an employer operating an extra hazardous enterprise or business automatically subject to the Illinois Workers Compensation Act.

B. Was there an employee-employer relationship?

The undisputed evidence and testimony presented shows the Respondent hired and paid Petitioner $15/hr to perform construction work. Petitioner testified he was paid by Respondent only once, in cash, and did not have taxes withheld or receive a W-2 form. The Arbitrator notes that Respondent, however, controlled the location and type of work, dictated Petitioner's hours, supplied the tools and materials, and directed Petitioner's work. Therefore, following consideration of the evidence and testimony presented, this Arbitrator finds that an employee-employer relationship did exist between Petitioner and Respondent on March 18, 2009.

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

The undisputed evidence and testimony presented demonstrates Respondent hired and paid Petitioner $15/hr to perform construction work. On March 18, 2009, Petitioner was injured when he fell 10-15 feet from a ladder which slipped while building a roof for Respondent at Respondent's job site. However, Respondent disputes accident asserting that Petitioner's heroin use the night before the accident mandates a finding of no accident under the Act.

The Petitioner's use of heroin the night before his accident at 1:30 pm the following day and the positive drug testing for benzodiazepine, opiates, and cannabinoid at St. Francis Hospital following the accident are not lost on the Arbitrator. However, the Arbitrator further notes that Petitioner's accident occurred in 2009 predating the September 1, 2011 amendment to the Act installing a rebuttable presumption that the drug use is the proximate cause of the injury. In the current matter, the Arbitrator notes that intoxication which does not incapacitate a claimant from performing his work-related duties is not sufficient to defeat recovery of compensation under the Act. In the present case, Petitioner admitted to using heroin before going to bed the night before his injury on March 18, 2009. He further testified he was not under the influence of heroin or impaired in any way when he began work at 7 a.m. The undisputed evidence is that Petitioner had worked nearly an entire day before suffering the injury between 1:00 and 2:00 p.m. All medical records introduced provide a consistent history with Petitioner's testimony that he was carrying a heavy sheet of plywood up Respondent's ladder when the ladder slid out from under him, causing him to fall 10-15 feet. He described the ladder, itself, "looked old" and broke into four pieces as a result of this incident. Furthermore, no evidence or testimony was presented to indicate that Petitioner was impaired at the time of the accident, that his drug use constituted a departure from the course of his employment or that his drug use the night before, rather than the

ladder slipping, was the cause of the accident. The St. Francis and Ottawa Hospital ER records note Petitioner's normal appearance on presentation.

Accordingly, after consideration of the credible testimony and evidence presented, this Arbitrator finds Petitioner's left ankle injury, a complex talar neck fracture and dislocation with associated pain and disability, arose out of and in the course of Petitioner's employment with Respondent.

D. What was the date of the accident?

After consideration of the undisputed testimony and evidence presented, this Arbitrator finds the date of accident was March 18, 2009.

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

The undisputed evidence and testimony presented demonstrates that Respondent, Mark Weir, was at the job site on March 18, 2009, when Petitioner fell from a ladder and was seriously injured. Respondent then transported Petitioner to the hospital for medical treatment. Consequently, the Arbitrator finds Respondent was given timely notice of the accident within the time limits stated in the Act on March 18, 2009.

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

Petitioner sustained a complex fracture of his left ankle as a result of falling 10-15 feet off a ladder while in the course of his employment with Respondent on March 18, 2009. The medical records demonstrate Petitioner immediately went to the Community Hospital of Ottawa where he was stabilized and next transported to St. Francis Hospital in Peoria where he underwent an open reduction and internal fixation of his left talus and fasciotomy of his left foot. Px. 6. Thereafter, Petitioner had a continuous course of treatment for chronic pain and swelling due his left talus healing with deformity leading Dr. Pratt to write "He certainly has legitimate reason [to] have chronic pain in his left ankle." Px. 11. Petitioner's credible, unrebutted testimony, consistent with the medical records presented, demonstrates he had no prior history of injury to his lower extremities and he continues to have chronic pain and swelling in his ankle since the date of the accident. Following consideration of the undisputed testimony and evidence presented, this Arbitrator finds Petitioner's current condition of ill-being causally related to the work injury he sustained on March 18, 2009.

G. What were Petitioner's earnings?

Petitioner's credible, unrebutted testimony is that Respondent offered him a construction job paying $15/hr and guaranteed him 40 hours a week. Petitioner further testified that while he was in the hospital, Respondent paid him a little less than $600 in cash, which represented one week of pay less a few hours that were cut short due to his injury the afternoon of March 18, 2009. During trial, Petitioner was very specific as to his hours and days worked, as well as his rate of pay, despite the fact that he was paid cash. Pursuant to Section 10 of the Act, this Arbitrator finds that, barring his shortened work day on March 18, 2009 due to injury, Petitioner would have weekly earnings of $600/week. Accordingly, this Arbitrator finds Petitioner's average weekly wage as calculated pursuant to Section 10 of the Act, was $600.00.

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

The undisputed evidence and testimony presented demonstrates that Petitioner's date of birth is October 20, 1971. Accordingly, this Arbitrator finds Petitioner was 37 years of age on the date of the accident, March 18, 2009 with no dependent children.

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

Following consideration of the undisputed evidence and testimony presented, this Arbitrator finds that Petitioner was single at the time of the accident with no dependent children.

J. Were 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 medical records presented demonstrate Petitioner sustained serious injuries as a result of his work-related fall on March 18, 2009. The Petitioner has submitted treatment records supporting the severity of the injuries and the reasonableness and necessity of the medical care and services provided. Px 3-8; 10-11. Respondent has offered no evidence to discredit the severity of these injuries or the reasonableness or necessity of the medical services provided. Accordingly, this Arbitrator finds the medical services that were provided to Petitioner were reasonable and necessary. Due to Respondent's failure to maintain workers' compensation insurance coverage as required under the Act or any known effort of the employer to pay the same directly, this Arbitrator further finds Respondent has failed to pay all appropriate charges for all reasonable and necessary medical services. Px. 1 and 3-11. Based on the Arbitrator's findings on the issues of accident and causal connection, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in the connection with the care and treatment of his causally related medical condition, including the out of pocket expenses, pursuant to Sections 8 and 8.2 of the Act.

K. What temporary benefits are in dispute? (TTD)

Petitioner seeks TTD from the date of injury on March 18, 2009 through March 27, 2010, a period of 53 and 3/7 weeks, the day preceding his incarceration for unrelated matters. On March 18, 2009, Petitioner sustained a complex fracture of his left talus, the weight-bearing connector between the foot and leg. The fracture was so severe, Petitioner required an open reduction internal fixation of talus with placement of two metal plates and four screws, which are intended to remain permanently in Petitioner's body and may require future revision. Px. 6. Even with surgical instrumentation, Petitioner's left ankle healed with deformity which continues to cause significant pain, discomfort, and swelling. Px. 5. For several months after Petitioner's injury and ORIF, his ability to walk or engage in work-activities with the affected member was simply impossible. On June 25, 2009, Dr. D'Souza allowed Petitioner bear only 30% of his weight on his left leg and took him off work until further notice. Px. 5. Thereafter, the medical records presented demonstrate Petitioner's ability to walk or work remained significantly compromised due to chronic pain and swelling, which he continued to suffer through the date of hearing in this matter. Px. 3; 5; 10; 11.

Following consideration of the evidence and testimony presented, this Arbitrator finds by a preponderance of the evidence that Petitioner was temporarily totally disabled pursuant to Section 8(b) of the Act from March 18, 2009 through March 27, 2010, a period of 53 and 3/7 weeks and that Respondent shall pay that period of TTD at the TTD rate of $400.00 per week.

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

Petitioner's accident pre-dates September 1, 2011 and no AMA impairment rating was provided. Petitioner sustained a complex fracture of his left talus, the weight-bearing connector between the foot and leg. Petitioner required an open reduction internal fixation of talus with placement of two metal plates and four screws, which are intended to remain permanently in Petitioner's body and may require future revision. Px. 6. Even with surgical instrumentation, Petitioner's left ankle healed with deformity which continue to cause significant

symptomology. Px. 5. Symptoms experienced at this time, over 2 years after the accident, include significant left ankle pain, discomfort and swelling. Even with pain medication, Petitioner testified these symptoms become intolerable with activity or standing for more than 1 ½ hours, significantly affecting Petitioner's activities of daily living and ability to perform duties of employment. Said symptoms required Petitioner to follow-up with Dr. Pratt for care, including medication for pain. Px. 10 & 11.

Of further note is the treatment of Dr. D'Souza who wrote in his records of August 28, 2009:

Gary has probably gone on to what I expected which was a varus malunion. He is going to be looking at probably a constant pain in the future. …I told him at this time he would be at very high risk for any type of reconstructive osteotomy of his talus in light of his medical condition, his smoking, and the severity of the initial injury. He would risk failure of this procedure with subsequently infection or continued malunion and nonunion that may also require lower extremity amputation as a salvage. He is in agreement, understands what he is looking at in terms of long-term sequela of his injury.

Following consideration of the credible, unrebutted evidence and testimony presented, this Arbitrator finds Petitioner sustained a 40% loss of a foot, pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Welcome,
Petitioner,

vs.

NO: 10WC 49486

Illinois State Police,
Respondent.

19IWCC0123

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 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 November 6, 2017, is hereby affirmed and adopted.

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

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

No bond or summons required for State of Illinois cases.

DATED: FEB 22 2019

o021119
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WELCOME, JOHN
Employee/Petitioner

Case# **10WC049486**

ILLINOIS STATE POLICE
Employer/Respondent

19IWCC0123

On 11/6/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.26% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0412 RIDGE & DOWNES
GERALD W NAPLETON
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

2202 ILLINOIS STATE POLICE
801 S 7TH ST
SPRINGFIELD, IL 62794

5782 ASSISTANT ATTORNEY GENERAL
KELLY KAMSTRA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

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

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

NOV 6 - 2017

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

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

John Welcome
Employee/Petitioner

v.

Illinois State Police
Employer/Respondent

Case # **10** WC **49486**

Consolidated cases: **N/A**

19IWCC0123

An *Application for Adjustment 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 **September 12, 2017**. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On October 29, 2010, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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 $117,624.00, and the average weekly wage was $2,262.00.

On the date of accident, Petitioner was 52 years of age, *married* with 2 dependent children.

Petitioner *has* received all reasonable and necessary medical services as explained *infra*.

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

Respondent shall be given a credit of $0 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $0. *See* AX1.

Respondent is entitled to a credit of $2,761.52 under Section 8(j) of the Act. *See* AX1.

ORDER

Medical Benefits

Respondent shall pay the following outstanding reasonable and necessary medical services incurred by Petitioner totaling $3,999.58 in outstanding bills due to AthletiCo Physical Therapy and $370.00 to West Suburban Neurosurgical Associates pursuant to Sections 8(a) and 8.2 of the Act, as well as $443.00 to reimburse Petitioner for his out-of-pocket payment to Suburban Radiologists.

Permanent Partial Disability

As explained in the Arbitration Decision Addendum, and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $669.64/week for 17.5 weeks, because the injury sustained caused permanent partial disability to the extent of 3.5% of the person as a whole (lumbar spine), as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from October 29, 2010 through September 12, 2017, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

October 31, 2017
Date

ICArbDec p 3

NOV 6 - 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

John Welcome
Employee/Petitioner

v.

Illinois State Police
Employer/Respondent

Case # 10 WC 49486

Consolidated cases: N/A

FINDINGS OF FACT

The only issue in dispute in this case is the nature and extent of Petitioner's injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

John Welcome (Petitioner) testified that he was employed by Illinois State Police (Respondent) as a Master Sergeant at the time of his accident at work. He had been employed by Respondent approximately since June 16, 1986. Petitioner's job duties were to supervise gaming activities at Hollywood Casino Aurora. He was the supervisor and examined dockside records and worked a desk job.

Petitioner testified that a new office was built across street from the casino and movers were scheduled to come to the casino to move computers. The Springfield IT department was going to have movers perform this work, but the movers never showed up. Petitioner took two officers, Steve Sandack and John Feld, to move a desk and the printers to the new office. He explained that the desk was 12 feet long and about 36 inches tall with a high back that held the necessary fingerprinting machines. Petitioner estimated that the desk weighed 500 pounds. He explained that they rolled the desk across the street on two dollies because it was too heavy to carry. While moving the desk with the other officers, Petitioner explained that the desk slipped and pinned one of the officer's hands against the wall. He testified that he felt low back pain while helping lift the desk to free the officer's hand.

Petitioner wrote a report about the incident on November 1, 2010. He testified that he continued to work during this busy time, but eventually sought medical treatment.

The medical records reflect that Petitioner sought treatment with Robert Petitioner Kazan, M.D. (Dr. Kazan) at West Suburban Neurosurgical Associates on January 11, 2011. PX1. He reported a consistent mechanism of injury with initially extremely severe back pain that had improved with rest. *Id.* Dr. Kazan ordered a Medrol Dosepak and sent Petitioner for testing. *Id.* As of May 18, 2012, Petitioner continued to follow up with Dr. Kazan and reported ongoing back pain mainly on the left side with numbness down the left leg. PX1. Dr. Kazan ordered a lumbar spine MRI, which did not show any evidence of a herniated disc or stenosis. *Id.* Petitioner was eventually referred for physical therapy for muscle strengthening. *Id.* He underwent the recommended physical therapy treatment at AthletiCo. PX2. After completing this treatment, Petitioner returned to Dr. Kazan and was released from care on August 18, 2014. PX1. Petitioner did not miss any time from work while employed by Respondent. The medical records reflect that Petitioner's last visit with Dr. Kazan was on September 10, 2015. PX1. Petitioner testified that his hip started to deteriorate.

[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.

In the interim, Petitioner testified that he retired from Respondent's employment on December 31, 2010. He then became employed again in May of 2012 with the Illinois Gaming Board, under contract, to perform background checks for video poker machines. He started working about once per week the following month. Petitioner worked through April 1, 2014. During that same period, Petitioner was also employed as a part-time police officer with the Orland Park Police Department as of December 28, 2012. He worked desk duty for both employers. While working for the Orland Park Police Department, Petitioner was also assigned to a local mall to maintain safety. Petitioner testified that he continues to work for the Orland Park Police Department and will do so through October 1, 2017, but he will be unable to pass the physical fitness examination.

Regarding his current condition of ill-being, Petitioner testified that he continues to walk with a limp. Petitioner testified that his back bothers him a lot and he experiences stiffness every morning. He also experiences weakness in the left leg. Petitioner explained that he cannot lift heavy objects anymore and he wears a brace every day. Petitioner also explained that he cannot golf anymore because he cannot bend down or twist as needed. He also finds it hard to drive long distances and he experiences back aches. Petitioner testified that he takes Advil 400 mg, five times per day.

CONCLUSIONS OF LAW

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.

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

Petitioner claims entitlement to payment of reasonable and necessary medical bills from medical providers that administered care after his accident at work. The medical bills submitted into evidence relate to physicians' services, diagnostic testing, and conservative treatment modalities prescribed by Petitioner's physician and rendered to him as a direct result of his injury at work. No evidence was presented to refute the reasonableness or necessity of Petitioner's treatment. The exhibits offered at the hearing reflect the following unpaid medical bills for services rendered in relation to the injury at work:

- $3,999.58 AthletiCo Physical Therapy
- $370.00 West Suburban Neurosurgical Associates
- $443.00 Petitioner's out-of-pocket payment to Suburban Radiologists

Based on a review of the medical records and bills submitted into evidence, in conjunction with Petitioner's testimony at the hearing, the Arbitrator finds that Petitioner's medical bills are for reasonable and necessary medical care to alleviate him of the effects of his injury at work and the Arbitrator awards the outstanding medical bills admitted into evidence pursuant to Sections 8(a) and 8.2 of the Act.

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

Based on the totality of the record—which reflects the credible and uncontroverted testimony of Petitioner with medical treatment records corroborating his testimony regarding a low back injury at the age of 52 while

working as a Master Sergeant for Respondent that required physical therapy and return to work with no lost time, but with ongoing low back and radiating left leg symptoms—the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 3.5% loss of use of the person as a whole (low back) as provided in Section 8(d)2 of the Act.

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

CHRISTOPHER BREITBARTH,

Petitioner,

vs.

NO: 15 WC 38149

PEPSI,

Respondent.

19IWCC0124

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, permanent disability, and the admissibility of Respondent's Exhibit 3, and being advised of the facts and law, supplements 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.

Evidentiary Ruling

Prior to the taking of witness testimony, the parties offered their respective exhibits into evidence. Petitioner offered two exhibits which were admitted without objection. Respondent offered three exhibits with Petitioner objecting to Respondent's Exhibit 3, the certified records of Petitioner's treatment at Tyler Medical Services. Petitioner's objection was predicated on the 48-hour rule, arguing the records were not provided to him until well after the treating doctor's deposition. The Arbitrator overruled the objection and the exhibit was admitted.

On review, Petitioner argues the Arbitrator's evidentiary ruling was improper. Relying on *Ghere v. Industrial Commission,* 278 Ill. App. 3d 840, 663 N.E.2d 1046 (1996), and *City of Chicago v. Illinois Workers' Compensation Commission*, 387 Ill. App. 3d 276, 899 N.E.2d 1247 (2008), Petitioner posits Respondent obtained the records before the deposition of Dr. Overpeck

19IWCC0124

but "withheld" them until just prior to the date of hearing, thereby denying Petitioner the ability to question Dr. Overpeck about it. The Commission finds Petitioner's argument is untenable.

While Petitioner repeatedly claims Respondent "withheld" and "did not produce the records," we emphasize Respondent was not required to do so. Moreover, Petitioner's argument fails to acknowledge his ability to subpoena the records himself. This is a treating record, and Section 16 affords Petitioner the identical ability to issue a subpoena as Respondent. As such, we find Petitioner's argument he was denied the opportunity to question Dr. Overpeck about the Tyler Medical Services records lacks support in the record. The Commission finds Respondent's Exhibit 3 was properly admitted.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 18, 2017, as modified above, is hereby affirmed and adopted.

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

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

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

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

DATED: FEB 2 2 2019

L. Elizabeth Coppoletti

LEC/mck

O: 1/16/19

Charles J. DeVriendt

43

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BREITBARTH, CHRISTOPHER
Employee/Petitioner

Case# **15WC038149**

PEPSI
Employer/Respondent

19IWCC0124

On 12/18/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0700 GREGORIO & MARCO
TODD P KLEIN
2 N LASALLE ST SUITE 1650
CHICAGO, IL 60602

5001 GAIDO & FINTZEN
GAIL BEMBNISTER
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF DU PAGE)

☐ 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

CHRISTOPHER BREITBARTH
Employee/Petitioner

v.

PEPSI
Employer/Respondent

Case # 15 WC 38149

Consolidated cases: ___

19IWCC0124

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **October 30, 2017**. After reviewing all of 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 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 $**54,340.00**; the average weekly wage was $**1,045.00**.

On the date of accident, Petitioner was **44** years of age, *married* with **1** dependent children.

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

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

Respondent shall be given a credit of $**0.00** 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

Because the Petitioner failed to prove that an accident occurred that arose out of and in the course of Petitioner's employment by Respondent all benefits are denied.

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

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

Signature of Arbitrator

12/15/17
Date

DEC 18 2017

FINDINGS OF FACT

This case involves a Petitioner alleging injuries sustained while working for the Respondent on March 15, 2014. Respondent disputes Petitioner's claims and the issues in dispute are: 1) accident, 2) notice, 3) causation, 4) medical expenses and 5) permanency.

Petitioner testified that on March 15, 2014, he was working for the Respondent, Pepsi, as a truck hiker/case picker. He has held that position since May 2003. Petitioner's job duties as a truck hiker/case picker involve driving a forklift in aisles and putting cases of beverages [weighing 25 – 60 pounds] on a pallet, wrapping the beverages, then driving the beverages to a staging area and removing the beverages from the pallet. Petitioner testified he would work 50 to 70 hours a week, 8 – 13 hours a day. Petitioner further testified that during an eight-hour work day, he was on his feet approximately six hours a day, and during a thirteen- hour work day, Petitioner was on his feet 10 – 12 hours a day. About 2-3 times a month, Petitioner worked on a different machine and was only on his feet roughly 2 hours a day. For Petitioner's position, Respondent requires the work shoes to have slip resistant soles that are steel or composite toed. Petitioner testified he purchased new boots in December of 2013. Petitioner picked out the boots through a website provided by Respondent. Petitioner testified he participated in no activities that required him being on his feet for an extended time period while not a work.

Petitioner testified he began to feel pain to his heels in December 2013. At that point in time, Petitioner was working a lot of hours, due to the holiday season. The pain increased during work hours. Petitioner testified he reported this pain to his supervisor, Russel Gillette on March 15, 2014.

Petitioner reported to Tyler Medical Services on March 17, 2014, complaining of pain in both heels and rashes on his feet [RX3]. According to the records, Petitioner stated his heel pain began 6 to 8 weeks ago and rashes 4 to 5 weeks ago. The records stated Petitioner denied any injury at work or any exposure at work that may have precipitated this condition; however, Petitioner denied making this statement in his testimony. Dr. Pappas diagnosed Petitioner with bilateral heel pain with rashes on the feet, and opined it was not work-related. Petitioner was instructed to follow-up with a private care physician.

Petitioner next reported to Foot and Ankle Center on March 18, 2014 [PX1]. Dr. Overpeck diagnosed Petitioner with bilateral plantar fasciitis and tarsal tunnel syndrome on the left side. Petitioner began treating with oral anti-inflammatories, orthotics, and topical cream. Eventually, Petitioner underwent a series of injections to his feet and was discharged from treatment on July 8, 2014. At that point, Petitioner stated his pain was a 4 out of 10 on the pain scale.

Dr. Overpeck authored a letter dated October 6, 2015 opining, "the work he [Petitioner] performs on a daily basis was likely contributing factor to the pain that he [Petitioner] experienced." Dr. Overpeck testified that Petitioner's job at Pepsi requires Petitioner to do more than the average person, which played a role in the foot pain [PX2]. Dr. Overpeck testified that the work performed, including the time on Petitioner's feet, were a cause of the plantar fasciitis and left tarsal tunnel syndrome [PX2]. On cross-examination, Dr. Overpeck testified that plantar fasciitis was from a variety of reasons, which can include the time spent on the feet, other medical conditions, and how much a person weighs. Dr. Overpeck testified Petitioner weighed 260 pounds. Dr. Overpeck further testified that upon examination, Mr. Breitbarth did have TendoAchilles contracture, which is a tight tendon that does not have a full range of motion, or a shortening of the Achilles [PX2]. Dr. Overpeck testified the TendoAchilles contracture was preexisting. Dr. Overpeck additionally testified that due to the

19IWCC0124

contracture, any normal activities could have caused his diagnosis of plantar fasciitis and left tarsal tunnel syndrome [PX2].

Dr. Vora, a specialist in orthopedic foot and ankle surgery, from Illinois Bone and Joint Institute, performed an independent medical evaluation of Petitioner on September 23, 2016 [RX1]. On the date of evaluation, Mr. Breitbarth did provide the details of his daily work activities and hours on his feet. Dr. Vora testified Petitioner's diagnosis was bilateral heel pain syndrome, plantar fasciitis. According to Dr. Vora, there is a band of tissue on the bottom of the foot that can become irritated and aggravated, which causes plantar fasciitis. Dr. Vora further testified this is a chronic degenerative condition that occurs in one out of ten people. Dr. Vora testified plantar fasciitis and plantar fasciosis are interchangeable. Dr. Vora testified that Petitioner's injury was not causally related to Petitioner's work [RX1]. Dr. Vora further testified the only chronic repetitive trauma that causes plantar fasciitis is in high impact athletes, like runners or professional basketball players. Other etiologies are because of body mass index, diabetes, and tight Achilles tendon. Upon physical examination, Dr. Vora did find bilateral Achilles contracture [RX1].

An affidavit of Larry Vicic was admitted into evidence indicating Vicic is Petitioner's supervisor and was his supervisor at the time of Petitioner's alleged accident. (RX 2) Vicic further indicated in his affidavit that Petitioner has to wear steel or composite toed shoes and that the amount of time and frequency Petitioner spends on his feet varies daily and weekly between two hours a day to twelve hours per day.

On cross-examination, Petitioner testified that he had been working for Respondent for over ten years and worked long hours before the alleged date of accident, but did not have heel pain before the alleged date of accident.

Petitioner testified he earns $1.50 more per hour then he did in March 2014. Petitioner continues to work the same job and the same hours that he did in March 2014. He still feels pain while working, in his left foot. While off work he continues to treat his foot with home remedies. Petitioner has not sought medical treatment since July 8, 2014.

CONCLUSIONS OF LAW

1. With regard to the issue of accident and causation, the Arbitrator finds that the Petitioner failed to meet his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony, the affidavit of Larry Vicic and the medical evidence. In analyzing this issue, the first question to address is how did the accident supposedly occur. There was no medical evidence provided by Petitioner to support a claim that the boots he wore caused his injury. There was no evidence presented of a specific trauma that may have caused Petitioner's plantar fasciitis. Which leads to the analysis of whether the Petitioner's repetitive work activities of working on his feet for extended periods of time rose to the level of an accident in this case. The evidence shows that the time Petitioner would be on his feet varied each day from two hours to twelve hours. Petitioner's job also required he operate a forklift and Petitioner confirmed that there were days where he would be on a machine and not working on his feet. Petitioner had worked for Respondent for years and worked long days before this alleged date of accident and did not have any complaints of foot/heel pain. When Petitioner first sought medical attention for his feet, he denied any injury at work or any exposure at work that may have precipitated this condition. The initial medical provider indicated Petitioner's heel pain was not work-related. These facts do not support a claim of accident stemming from the time Petitioner spent working on his feet.

19IWCC0124

In coming to this conclusion, the Arbitrator also looked at the opinions of the two experts who testified via evidence deposition. In weighing the opinions of the medical experts in this case, the Arbitrator is persuaded more so by the opinions of Dr. Vora. Interestingly, both experts are in agreement on a number of things in this matter. Both experts in this case agree with Petitioner's diagnosis of plantar fasciitis. Petitioner's expert, Dr. Overpeck opined that the Petitioner's condition was work related due to the type of work he was doing and the amount of time Petitioner spent on his feet. However, Dr. Overpeck also conceded that normal life activities could have caused Petitioner's condition. Dr. Overpeck testified that plantar fasciitis was from a variety of reasons, which can include the time spent on the feet, other medical conditions, and how much a person weighs. Dr. Overpeck testified Petitioner weighed 260 pounds. Respondent's expert, Dr. Vora testified plantar fasciitis or fasciosis is a degenerative disease because pathology studies have shown there is no acute inflammatory cells; that and the condition does not occur in young people; and that the medical literature supports the conclusion plantar fasciitis/fasciosis cannot be caused by any cumulative traumatic condition, save from high impact athletes. The evidence did not show the Petitioner was involved in any high impact activities at work. Therefore Dr. Vora testified Petitioner's long hours on his feet was not a contributing factor more so than general, everyday life.

Based on the facts presented above, the Arbitrator concludes that the Petitioner failed to prove that he sustained an accident arising out of and in the course of his employment on March 15, 2014 or that his condition of plantar fasciitis is causally connected to his employment. Accordingly, the Petitioner's claim for benefits is denied.

2. Based on the Arbitrator's findings above, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLAIMSON

☐ 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

JUSTIN PICKETT,

Petitioner,

vs.

NO: 15 WC 08252

CHESTER MENTAL HEALTH CENTER,

Respondent.

19IWCC0125

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical and permanent 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.

The Commission affirms and adopts the Arbitrator's Findings of Fact and Conclusions of Law in its entirety. The Commission further specially concurs with the Arbitrator's Decision in finding the Petitioner's accident arose out of and in the course of his employment due to the fact his injury occurred on the employer's premises due to a dangerous hazardous condition.

Whether a parking lot is used primarily by employees or by the general public, the proper inquiry is whether the employer maintains and provides the lot for its employees' use. If this is the case, then the lot constitutes part of the employer's premises. The presence of a hazardous condition on the employer's premises that causes a claimant's injury supports the finding of a compensable claim. *Mores-Harvey v. Indus. Comm'n* (Bob Evans Rest.), 345 Ill. App. 3d 1034, 1040, 804 N.E.2d 1086, 1092, 281 Ill. Dec. 791, 797

Therefore, the Commission finds a risk-analysis is unnecessary if the injury occurred on premises due to an unsafe or hazardous condition.

19IWCC0125

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 10, 2018, 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 $761.42 per week for a period of 10-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall be given a credit of $6,853.14 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $685.28 per week for a period of 10.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 5% of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $96.65 to the Orthopedic Center of Southern Illinois for medical expenses under §8(a) and subject to §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid through their group health insurance plan, and Respondent shall 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.

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.

FEB 2 2 2019

DATED:
KWL/bsd
O:2/5/19
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PICKETT, JUSTIN
Employee/Petitioner

Case# **15WC008252**

CHESTER MENTAL HEALTH CENTER
Employer/Respondent

19IWCC0125

On 5/10/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.00% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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 KERKHOVER COFFEY ET AL
JASON E COFFEY
1300 1/2 SWANWICK ST POB 191
CHESTER, IL 62233

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

MAY 10 2018

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

Justin Pickett
Employee/Petitioner

v.

Chester Mental Health Center
Employer/Respondent

Case # **15** WC **008252**

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **March 15, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What 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 28, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$59,390.61**; the average weekly wage was **$1,142.13**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **1** dependent child.

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

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

Respondent shall be given a credit of **$6,853.14** for TTD paid prior to arbitration, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$6,853.14**.

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 pay reasonable and necessary medical services of **$96.65** to the Orthopedic Center of Southern Illinois, subject to the Medical Fee Schedule, 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 through their group health insurance plan, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$761.42/week** for **10 3/7 weeks**, commencing **February 28, 2015** through **May 11, 2015**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$6,853.14** for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of **$685.28/week** for **10.75 weeks**, because the injuries sustained caused the **5% loss of the left leg**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued between **February 28, 2015** and **March 15, 2018** and shall pay the remainder of the award, if any, in weekly installments.

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

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

Nancy Lindsay
Signature of Arbitrator

May 7, 2018
Date

MAY 10 2018

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner's case proceeded to arbitration on March 15, 2018. The disputed issues were accident, causal connection, medical bills, temporary total disability, nature and extent and credit due Respondent. The primary issue in dispute was accident as Respondent's defenses to causation, TTD, and medical bills was premised on a finding of no liability for the accident. Respondent's representative at the hearing was Laurie Irose.

With regard to Issue (C) Did an accident occur on February 28, 2015 that arose out of and in the course of Petitioner's employment with Respondent:

The Arbitrator finds:

Petitioner presented for medical treatment at the Emergency Room at Chester Memorial Hospital on February 28, 2015. (PX1) Petitioner stated he worked at Chester Mental Health and was on his break walking out to his car to get something when he slipped on some ice and fell landing on his left buttocks and feeling his left knee twist (PX1). Petitioner underwent x-ray examination which showed no radiographic abnormality (PX)1. Petitioner was ordered to seek further medical treatment and to be evaluated by an Orthopedic Surgeon (PX1). The Work Release indicated Petitioner should be evaluated by the Orthopedic Surgeon who repaired his right knee before returning to work (PX1). Prior to this work injury, Petitioner had suffered a right knee injury which was treated by Dr. J.T. Davis.

Accordingly, Petitioner presented for further medical treatment with Dr. J.T. Davis on March 9, 2015. Petitioner presented with complaints of left knee pain following an injury that occurred at work on the parking lot when he slipped and fell on ice (PX2). As Petitioner fell down, he felt his left knee buckle and pop (PX2). Petitioner had immediate pain and struck his left knee on the pavement as well (PX2). Dr. Davis performed a physical examination and ordered further x-ray examination on March 9, 2015 (PX2). Based upon the physical evaluation and diagnostic examination, Dr. Davis assessed Petitioner to be suffering from a likely Grade I LCL sprain and possible ACL sprain (PX2). Dr. Davis referred Petitioner for MRI evaluation (PX2).

At the arbitration hearing Petitioner testified that he is currently 35 years old and just recently resigned from the State of Illinois and is currently working for his uncle in the private sector. Petitioner testified that he worked for Chester Mental Health Center for 10 years as an Activity Therapist. As such, Petitioner would provide leisure activities for the patients within the facility utilizing the facility's gym, yard, movies, music, and group therapy. Petitioner testified that he was not involved in the security of the patients at the facility.

Petitioner was then shown an aerial photo at arbitration (PX3). Petitioner identified the photo as accurately depicting an aerial view of Chester Mental Health Center. The photo had yellow property lines indicating the property consisting of Chester Mental Health Center. The photo depicts Chester Mental Health Center as well as its parking lot. Petitioner identified the employee designated parking are. Petitioner testified he is assigned to park in his specific area of the parking lot. Petitioner testified that visitors to the facility must park in a separate designated area. The State of Illinois owns the entire parking lot. Petitioner testified there are no other areas to park except the employee designated parking lot.

Petitioner testified that he parked in the designated employee parking lot every time he worked. On February 28, 2015, Petitioner suffered a work injury when he was going out to his vehicle. Petitioner further testified that he grabbed the driver's side door and slipped on ice which had not been cleared from the parking lot. The ice caused Petitioner to slip and he fell down on his left knee and on his buttocks. Petitioner felt a buckling in the left side that was painful, so he went back into the facility to document it.

Petitioner also testified that he had already been working for a while at the facility when he went out to his motor vehicle. Petitioner testified that he was walking to his car to retrieve a certain music CD that he played a lot for his patients and had forgotten to bring in when he first arrived at work. He explained that he was going out there to retrieve it so that he would have it for the gym session held later in the afternoon. Petitioner testified he would often play music for the patients when they requested it. He would play personal CDs or the radio for the patients.

Petitioner also took photos 48 hours following the accident of his motor vehicle where he slipped. The snow and ice were still built up on the parking lot at that time. Petitioner testified that nothing has changed because it was really cold that week and it looked the exact same on his date of injury. (PX 5)

Petitioner testified that after the injury he went back into the facility and notified his employer that he had suffered an injury. He was sent by his employer to Chester Memorial Hospital.

Petitioner testified that he gave Chester Memorial Hospital a history of his injury and underwent x-ray/examination.

Petitioner testified that he had suffered a right knee injury back in 2008 which he had received treatment for. Petitioner testified at arbitration he did not re-injure his right knee in his work injury.

During cross-examination, Petitioner was shown various injury reporting forms indicating that the injury occurred sometime around 11:00 a.m. in the middle of his 8am-4pm shift. The forms also indicated Petitioner was first seen by a nurse within the facility before being sent to Chester Memorial Hospital. Petitioner acknowledged that he indicated on the forms he completed that he was injured when he went outside to his car in the parking lot and as he attempted to open the car door he slipped and fell. Petitioner admitted not noting that he was going to his car to retrieve a CD.

Petitioner also admitted telling the nursing staff at Chester Memorial Hospital that he was on a break when he slipped and fell. Petitioner testified that he told the nurse at Chester Memorial Hospital that he was on a break in order to protect his employment. As he explained it, he was entitled to two 15-minute breaks per day while he was working and if he left the building he was "technically" supposed to call it a break. Petitioner was asked if he went to the parking lot on February 28, 2015 to meet his girlfriend. Petitioner testified that he did not because she would not have been at work that day.

On re-direct examination, Petitioner testified that he was retrieving a Rolling Stones CD.

Respondent called Lori Irose to testify at arbitration. Ms. Irose works at Chester Mental Health Center as an Activity Therapy Supervisor. She has been working at Chester Mental Health Center for 12 years. In February 2015, Ms. Irose was an Activity Therapist Supervisor and she was in charge of supervising Petitioner. Ms. Irose testified that she was familiar with the work that Petitioner did as an Activity Therapist. Ms. Irose was not working on the day of the injury. Ms. Irose testified that there are usually 8 Activity Therapists

throughout the facility; however, on the weekends, there are only two Activity Therapists. Petitioner's injury occurred on a Saturday.

Ms. Irose confirmed Petitioner's testimony regarding breaks for activity therapists throughout the day. However, Ms. Irose testified that Petitioner should not have been on break at 11:00 a.m. on February 28, 2015. Ms. Irose believed Petitioner should have been participating in the gym with a "Unit" of patients and should not have been outside the facility at that time.

On cross-examination, Ms. Irose admitted it is her duty as an Activity Therapist Supervisor to talk to an Activity Therapist if they were doing something they were not authorized to do or performing duties outside the scope of their employment. Ms. Irose did not recall talking to Petitioner about the incident occurring on February 28, 2015.

Ms. Irose also testified it was common for Activity Therapists to play music for the patients and that there was a stereo system in the gym. Ms. Irose testified that Petitioner should not have brought in a CD from his car because it would have been considered contraband. Ms. Irose did not know if it was common for Activity Therapists to bring in CDs and play them for patients. She agreed that if an Activity Therapist were to bring in contraband it would be her responsibility to talk to them or reprimand them. Ms. Irose stated she did not reprimand or talk to Petitioner because she was not aware of the reason he went outside to his car.

The Arbitrator concludes:

Petitioner sustained an accident on February 28, 2015 that arose out of and in the course of his employment with Respondent.

Respondent suggests that Petitioner was in violation of company policy when he left the gym and went to his car to retrieve a music CD he was planning on playing in the gym for one of the patients he was charged with supervising. Ms. Irose maintained the CD was contraband and that, furthermore, Petitioner should not have been outside the facility on break at 11:00 a.m. Ms. Irose acknowledged, however, that she was not working on the day of the alleged accident as it was a Saturday and she did not work on Saturdays. Furthermore, she acknowledged that Petitioner was never reprimanded for his actions on February 28, 2015. While she testified that she was unaware of the reason Petitioner went outside on the 28th, the ER records do state that Petitioner was going out to his car to get something. (PX 1, p. 3) While the violation of company policy may take an employee outside the scope of his employment, in this instance Petitioner was acting within the scope of his employment as he was performing duties for which he was hired to do. Petitioner was employed by Respondent as an activity therapist and, as such, is charged with planning and providing leisure activities for the facility patients including gym time, activity in the yard, movies, music and group activities. He testified, without rebuttal, that it was common for him to play music for patients. Petitioner was on the clock when he left the building to go to his vehicle to retrieve a CD for a patient. He testified that he had forgotten it earlier and wanted to have it for a particular patient when they were in the gym later in the day. Petitioner further testified that he indicated he was on his break when he went to his car because, technically, if one leaves the building one is to call it a "break" and each employee is allowed two breaks per day. Petitioner was in the course of his employment at the time of his accident.

The Arbitrator finds it significant to address some of Ms. Irose's testimony which centered around her belief that Petitioner left the gym to go out to his car and that he should not have done that. First, Ms. Irose did not work on the day of the accident so she would have been seemingly unaware of what was

going on at the facility that day or exactly what Petitioner's movements were throughout that day. Secondly, Petitioner never testified that he left the gym to go to his car. He testified that he left the facility to go and retrieve the CD so that he would have it for the gym session later on in the day. Ms. Irose testified that there were five units of patients and five different gym times, but only two activity therapists on Saturdays. She also testified that one therapist was assigned one special unit and the other therapist was responsible for the remaining four units; however, she never testified that Petitioner was the activity therapist scheduled to handle the four units that day and that, as such, he would have been in the gym at 11:00 a.m. that day. Thus, her testimony suggesting that Petitioner was outside the scope of his job duties when his accident occurred is largely speculative.

Petitioner's accident also arose out of his employment. It is uncontroverted that Petitioner was on his employer's premises in the parking lot by his car when he was injured. While injuries sustained by an employee off of the employer's premises are generally not compensable under the Act, there are two exceptions one of which is for injuries sustained by an employee in a parking lot provided by and under the control of the employer. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483-84, 546 N.E.2d 603, 605 (1989). In the instant case, Petitioner was injured in a parking lot provided by, and under the control of, Respondent. He slipped on ice and snow which had not been cleared away.

Based upon the foregoing, the Arbitrator concludes that Petitioner sustained an accident on February 28, 2015 that arose out of and in the course of his employment.

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

The Arbitrator finds:

Petitioner underwent an MRI examination on April 13, 2015. The MRI findings suggested an ACL sprain with no tear identified (PX2). Following MRI, Petitioner followed-up with Dr. Davis on May 9, 2015. Dr. Davis reviewed the MRI and assessed Petitioner at that time with a mild ACL sprain (PX2).

Petitioner was referred for physical therapy by Dr. Davis (PX2). Petitioner underwent physical therapy at the Orthopedic Institute of Southern Illinois beginning on May 26, 2015 and continuing through his discharge on July 8, 2015 (PX2). Upon discharge, Petitioner stated that he was working full duty but still had pain at night (PX2). Petitioner reported his left knee was a little tight after long drives (PX2).

On August 17, 2016, Petitioner returned to the Orthopedic Institute of Southern Illinois (PX2). Petitioner reported he was still having some ongoing aches and pains in the knee was never able to complete his physical therapy due to the claim being denied by his employer (PX2). Petitioner reported intermittent swelling and an occasional feeling like his knee wanted to lock particularly when he was lying flat and the knee was extended (PX2). Dr. Davis continued to assess Petitioner with a Grade I ACL sprain in Petitioner's left knee (PX2). Dr. Davis felt Petitioner was getting some symptoms from the patella femoral compartment of the left knee due to some quad atrophy resulting from the work injury (PX2). Dr. Davis felt Petitioner would mostly benefit from physical therapy to work on quad strengthening (PX2).

There were no other medical records entered into evidence at the arbitration indicating Petitioner ever underwent a second round of physical therapy as recommended by Dr. Davis on August 17, 2016.

Petitioner testified that he had suffered a right knee injury back in 2008 which he had received treatment for. Petitioner testified at arbitration he did not re-injure his right knee in his work injury.

Petitioner testified consistent with the medical treatment records including undergoing MRI and undergoing physical therapy at the request of Dr. Davis. He testified to a tightness in his left knee when sleeping or driving. Petitioner testified that his doctor recommended additional therapy but he never received it.

Respondent did not have Petitioner examined by a doctor of its choosing.

The Arbitrator concludes:

Petitioner's current condition of ill-being in his left knee is causally related to his accident of February 28, 2015. In so concluding the Arbitrator relies upon Petitioner's credible testimony and the medical records of the treating physicians, and a chain of events. It should also be noted that Respondent only disputed causal connection based upon its accident dispute. Accordingly, the Arbitrator concludes that Petitioner sustained his burden of proof regarding causal connection.

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

The Arbitrator finds:

Respondent did not dispute whether Petitioner's medical treatment was reasonable and necessary. The only medical bill remaining unpaid that was submitted into evidence at arbitration was a bill from the Orthopedic Center of Southern Illinois in the amount of $96.65[1]. Respondent disputed liability for the medical bill based upon its dispute as to accident.

The Arbitrator concludes:

Consistent with her decision on accident, the Arbitrator awards Petitioner his bill in the amount of $96.65 owing to the Orthopedic Center of Southern Illinois. Said bill is to be paid pursuant to the Medical Fee Schedule pursuant to Sections 8(a) and 8.2 of the Act.

Issue (K) What temporary benefits (TTD) are in dispute?

The Arbitrator finds:

Respondent stipulated to the dates of temporary total disability (2/28/15 – 5/11/15) but disputed liability for the benefits based upon its dispute over accident.

The Arbitrator concludes:

[1] The Request for Hearing erroneously listed the outstanding bill as $96.15.

Consistent with her liability determination, the Arbitrator awards Petitioner temporary total disability benefits from February 28, 2015 through May 11, 2015, a period of 10 3/7 weeks. Respondent shall receive credit in the amount of $6,853.14 for TTD previously paid.

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

The Arbitrator finds:

Petitioner testified that he still notices tightness in his left knee at the of a day. He feels tightness and some pain in his left knee when he gets out of bed and begins moving around. Petitioner sometimes notices pain in his left knee after long car rides.

Petitioner was able to return to work full duty following his release from medical treatment. Petitioner resigned from Chester Mental Health Center, but it had nothing to do with his injury. Petitioner testified it was planned by he and his fiancé because he had new career goals.

The Arbitrator concludes:

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).

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 an activity therapist at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that Petitioner sought alternative employment due to personal choice and unrelated to this injury several months following his work injury. Because of the fact Petitioner was able to return to his prior position following release from medical treatment, the Arbitrator gives lesser weight to this factor in assessing permanency.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 32 years old at the time of the accident. In light of Petitioner's younger age, one may reasonably infer that he will have to live and work with the effects of his injury for a longer period of time than a much older member of the work force. The Arbitrator gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that no evidence was presented to show any impact from Petitioner's injury on his future earning capacity. Therefore, the Arbitrator gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability as corroborated by the treating medical records, the Arbitrator notes that Petitioner returned to Dr. Davis in August 2017 complaining of continued tightness in his knee. He had been diagnosed with, and treated for, a grade 1 ACL sprain. Because of the evidence in the medical records of continued complaints which corresponded with Petitioner's testimony at arbitration, the Arbitrator gives 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 5% loss of use of Petitioner's left leg pursuant to §8(e)12 of the Act.

Issue (N) Is Respondent due any credit?

The Arbitrator finds:

Respondent sought a credit for TTD paid by it in the event it prevailed on the issue of accident.

The Arbitrator concludes:

Based upon her determination as to accident and temporary total disability, this issue is moot.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MALESIA ROBINSON,

Petitioner,

vs.

NOS: 13 WC 05741
14 WC 42917

CHICAGO TRANSIT AUTHORITY,

Respondent.

19IWCC0126

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, temporary total disability, and 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 these cases 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 Findings of Fact and Conclusions of Law in its entirety. Furthermore, the Commission finds it necessary to clarify the procedural history of the cases. The subject consolidated cases were dismissed for want of prosecution at the status call on October 20, 2017. The parties appeared before the Arbitrator on October 23, 2017, a mutually agreed date for the arbitration hearing, and the same date the notices of the dismissals were mailed. The parties proceeded to trial and the Arbitrator authored one Decision, the subject of the two Petitions for Review of the Arbitrator's Decision filed by Petitioner herein.

When the parties appeared before Panel A, consisting of Commissioners Lamborn, Tyrrell and Brennan, for the scheduled oral arguments on Review of the Arbitrator's Decision, they were

19IWCC0126

asked whether or not they received the Notices issued by the Commission and whether a subsequent motion to reinstate the cases was filed. Both parties stipulated that when they appeared for trial, the Arbitrator granted the Petitioner's attorney request to reinstate the cases instanter so they could proceed. Although the Arbitrator failed to reflect the reinstatement on the record, and the Commission records subsequently failed to reflect the motion for reinstatement was granted, the Commission finds that the oversight was harmless error given the parties proceeded to trial on the substantive issues, and the parties stipulated as referenced.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 8, 2017, is hereby modified for the reasons stated herein, and otherwise 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 county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. *820 ILCS 305/19(f)(2)*. Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

FEB 2 2 2019

DATED:
KWL/bsd
O:2/11/19
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

ROBINSON, MALESIA
Employee/Petitioner

Case# **13WC005741**

14WC042917

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

19IWCC0126

On 11/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.30% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1727 LAW OFFICE OF MARK N LEE
1101 S SECOND ST
SPRINGFIELD, IL 62704

0515 CHICAGO TRANSIT AUTHORITY
ELIZABETH L MEYER
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Malesia Robinson
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # 13 WC 05741

Consolidated cases: 14 WC 42917

19IWCC0126

An *Application for Adjustment 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 Luedke**, Arbitrator of the Commission, in the city of **Chicago**, on **October 23, 2017**. After reviewing all of 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. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What 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 19IWCC0126

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

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

On September 11 2012, Petitioner *did* sustain an accident that arose out of and in the course of employment.

On January 29, 2014, 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 **$39,374.40**; the average weekly wage was **$757.20**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **1** dependent children.

Respondent *has* paid all reasonable and necessary charges for all reasonable and necessary medical services. Nothing further is owed.

Respondent shall be given a credit of **$46,982.45** for TTD, **$4939.83** for TPD, $ for maintenance, and **$5720.00** for other benefits, for a total credit of **$57,642.28**.

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

ORDER

Current Condition/Causal Connection

The Arbitrator finds the Petitioner's current condition of ill-being and need for treatment is not causally related to the injury of 9/11/2012.

Medical benefits

The Arbitrator finds the medical services provided to the Petitioner prior to 11/18/2014 were reasonable and necessary. Any medical treatment after that date is found to be unrelated to the work accident of 9/11/2012. Any bills for treatment prior to 11/18/2014 are found to be owed by Respondent, pursuant to the medical fee schedule; However, if any bills are shown to have been paid, then no further payments are owed by Respondent.

Petitioner is not entitled to any prospective medical care.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $504.80/week for 91 4/7 weeks, representing 9/16/2012 – 9/26/2012, 10/10/2012 – 10/17/2012, 2/26/2013 – 1/14/2014, and 1/30/2014 – 11/24/2014, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $57,642.28 for temporary total disability benefits, TPD, and 8(j) benefits that have been paid.

Penalties

Respondent shall pay to Petitioner penalties of **$0**, as provided in Section 16 of the Act; **$0**, as provided in Section 19(k) of the Act; and **$0**, as provided in Section 19(l) of the Act.

Credits

Respondent shall be given a credit of **$46,982.45** for TTD, **$4939.83** for TPD, and **$5720.00** for other benefits, for a total credit of **$57,642.28**.

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

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

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

Robert E. Luedke

Signature of Arbitrator

November 8, 2017
Date

ICArbDec19(b)

NOV 8 - 2017

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner testified that on 9/11/2012, she was employed as a combined rail operator for the Respondent and had been employed in this position for about six months. On the date in question, she was walking from one end of the train to the other when a motor cab door slammed on her right hand. She testified she completed two more runs and that her hand was swelling. Parties agree petitioner suffered a compensable accident on that date. Petitioner is right hand dominant.

Petitioner testified she treated at Concentra and then with Dr. Vender. *P1.* After conservative treatment including injections and physical therapy, petitioner underwent a release of the flexor tendon sheaths of the index finger, middle finger, and thumb of the right hand on February 26, 2013. After physical therapy the petitioner was eventually discharged from treatment and released to unrestricted employment.

Petitioner attempted a return to work on January 29, 2014. Petitioner stated she was unable to perform her job because of right hand swelling and cramping. The January 29, 2014 incident is the accident alleged in 14 WC 42917. Petitioner came under the care of Dr. Finke after the January 29, 2014 incident. Petitioner underwent surgery and physical therapy. Petitioner underwent an FCE at Premier Physical Therapy on January 27, 2016. Petitioner has not returned to work for the respondent.

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

Dr. Vender treated the petitioner after September 11, 2012. Dr. Vender's treating records include a report sent to Sedgwick dated August 7, 2013. *P1 in 13WC 5741.* On August 7, 2013 Dr. Vender's diagnosis was status post multiple trigger finger releases. *Id.* Dr. Vender commented that blood work showed an increased sedimentation rate. *Id.* The petitioner was referred to her primary care physician for a rheumatology consult. *Id.* Dr. Vender commented that the "purpose of this is to look for a possible systemic contribution to her ongoing complaints and findings." *Id.*

Respondent has entered a report from Dr. Fernandez dated September 12, 2013. *R1.* Dr. Fernandez opines that there is a causal connection between the right hand injury of 9/11/12 and the right thumb, index, and middle finger A1 pulley releases and subsequent therapy. Dr. Fernandez remarked that her current condition may be unrelated to the surgery because there was no evidence of any active tendon adhesions or tendon damage.

Dr. Fernandez examined the petitioner on 9/12/13. Dr. Fernandez noted no CRPS, vascular problems, sensory problems, crepitus, locking, or clicking. The petitioner had full range of motion in the right hand and fingers. The petitioner had pain complaints. Dr. Fernandez took x-rays which showed no degenerative process or dislocation.

On September 12, 2013 Dr. Fernandez commented that it was possible that the petitioner's current condition was unrelated. The petitioner's A1 pulley surgical sites shouldn't cause pain and swelling. There was no evidence of any active tendon adhesions or tendon damage. There was not much in the way of objective findings. There was no significant injury. It has been a significant amount of time since the accident and months since the surgery.

Dr. Robert Finke testified by way of evidence deposition. *P2.* Dr. Finke first saw the petitioner on February 12, 2014. *Id at 10.* Petitioner had an EMG/NCV test on or about October 15, 2014 which showed no peripheral neuropathy. *Id at 16.* Dr. Finke opined that the de Quervain's tenosynovitis was related to the 9/11/12 accident. *Id at 17-18.* The basis of Dr. Finke's opinion is that the petitioner had tightening tendon sheaths because she works with the T handle on a repetitive basis. *Id at 18.* Petitioner started using her group coverage for her treatment. *Id at 21-22.* The petitioner underwent a de Quervain's contracture release on March 5, 2015. *Id. at 22.* She underwent this surgery because of tightness in her wrist tendons. *Id at 22.* Dr. Finke placed restrictions on the petitioner on February 10, 2016 based on an FCE. *Id at 27-28.* Dr. Finke opined that the deQuervain's contracture release of March 5, 2015 was causally connected to the first accident of 9/11/12. *Id at 31.* The basis of Dr. Finke's opinion is that the petitioner had tight tendons resulting from the first accident and her repetitive job. *Id at 32.*

During cross examination Dr. Finke testified he didn't know if the petitioner was working anywhere when he first saw her on February 12, 2014. *Id. at 39.* On November 2, 2015 Dr. Finke didn't know where the petitioner was working. *Id at 42.* The petitioner had one injury with the T handle and it took two years to show up. *Id at 43-44.* Dr. Finke did not review Dr. Vender's treating records regarding the first accident and treatment. *Id. at 43.* Dr. Finke does not know if the petitioner went back to work. *Id. at 44-45.* Dr. Finke doesn't know when the petitioner went back to work. *Id at 44.* Dr. Finke didn't review any other treating records when he first started treating the petitioner. *Id at 46-47.*

Respondent also entered a report from Dr. Fernandez dated November 18, 2014. *R2.* The petitioner had complaints of generalized pain. The petitioner did have a possible new diagnosis of right wrist deQuervain's tenosynovitis and that this:

"has nothing to do with 9/11/2012 events. In addition, I do not believe that her return to a single day of work ... had any significant contributory effect to her current condition and residual complaints." ***Id.***

Dr. Fernandez opines that there is no causal connection between the right hand injury of 9/11/12 and the medical treatment after Dr. Fernandez' recommendations on September 12, 2013. No further treatment was necessary for the 9/11/12 accident. Dr. Fernandez opined that the petitioner's complaints of pain are unrelated to the 9/11/12 accident. The right wrist deQuervain's tenosynovitis has nothing to do with the 9/11/12 accident. When Dr. Fernandez saw the petitioner on 9/12/13 there were no complaints of wrist pathology or deQuervain's tenosynovitis. The petitioner obviously has some systemic condition which is not work related. The petitioner is capable of full duty work without restrictions as a consequence of the 9/11/12 accident. The petitioner has no objective disability or impairment. Dr. Fernandez further indicated:

"It should be noted that there was no indication of wrist pathology or deQuervain's tenosynovitis when we had seen her back in September 2013. These are essentially new and unrelated complaints . . . This is not work related." ***Id.***

Dr. Fernandez related it to a systemic condition and stated she should follow up with her primary care physician and/or a rheumatologist. Id. At his deposition, Dr. Fink testified that a diagnosis of de Quervain's syndrome could show up 25 months after an original injury. *P3 at 44.* Dr. Fernandez found the diagnosis of de Quervain's syndrome and subsequent complaints were not related to the 9/11/2012 accident. Dr. Vender had released her to work and had recommended she see a rheumatologist. The Arbitrator finds the opinions of Dr. Fernandez and Dr. Vender to be more persuasive than those of Dr. Fink.

Dr. Fernandez opined that her current condition may be unrelated to the surgery because there was no evidence of any active tendon adhesions or tendon damage. Dr. Fernandez commented that when he saw the petitioner on 9/12/13 there were no complaints of wrist pathology or de Quervain's tenosynovitis.

Dr. Finke opined that the de Quervain's tenosynovitis was related to the 9/11/12 accident. As a basis for his causal connection opinion Dr. Finke assumed the petitioner continued to work after the 9/11/12 accident and continued to use the T bar. *P2 at 18.* Dr. Finke doesn't know when the petitioner went back to work. *Id at 44.* Dr. Finke's assumption that the petitioner continued to work is erroneous as the petitioner testified she has worked one day since 9/11/12.

Petitioner was released to unrestricted work by Dr. Vender on 1/14/2014. Petitioner returned to work on 1/29/2014. She testified she took a written test, did a retraining, and went for a test run driving the train. She was operating the T-bar, which is used to speed up and slow the train, when she noticed swelling in her right hand.

Based upon the above facts and conclusions of law, the Arbitrator finds the Petitioner's current condition of ill-being and diagnosis of deQuervain's tenosynovitis and any treatment after 11/18/2014 not causally related to her employment.

J, & K. Are the medical bills outstanding owed by Respondent? Is Petitioner entitled to prospective medical care?

The Arbitrator finds the Petitioner's current condition of ill-being and diagnosis of de Quervain's tenosynovitis and any treatment after 11/18/2014 is not related to the 9/11/2012 accident. The arbitrator finds that the medical bills listed on P3 are not causally connected to the work accident of 9/11/12. Respondent has already paid reasonable and necessary medical expenses for the compensable right hand injury of 9/11/12. No additional medical bills are awarded.

L. & N. What TTD benefits are owed to Petitioner? Is Respondent entitled to credit for benefits paid?

The stipulation sheet between the parties entered as Arb. 1 indicates the respondent paid $46,982.45 in TTD benefits and $5720.00 in other benefits for various periods of time ending on November 24, 2014.

The Arbitrator finds the Petitioner's diagnosis of deQuervain's tenosynovitis and current condition of ill-being after 11/18/2014 is not related to the 9/11/2012 accident. No further TTD benefits are awarded.

Petitioner did agree that she worked some periods of light duty and that temporary partial disability (TPD was paid). These dates are: 9/27/2012 – 10/9/2012 and 10/18/2012 – 2/25/2013, representing 20 4/7 weeks and payments in the amount of $4939.83. Respondent is entitled to a credit for this amount.

For the above-mentioned reasons, the Arbitrator awards TTD benefits to Petitioner for the following dates: 9/16/2012 – 9/26/2012, 10/10/2012 – 10/17-2012, 2/26/2013 – 1/14/2014, and 1/30/2014 – 11/24/2014, representing 91 4/7 weeks. Respondent paid $46,982.45 in TTD and $5720.00 in other benefits for which credit is allowed under the Act, for a total of $52,702.45. Any of this amount that is not used by the award for TTD shall be applied to any award for permanency in the future.

C. Did an accident occur on January 29, 2014 that arose out of and in the course of Petitioner's employment by Respondent?

Petitioner alleges an accident occurring on January 29, 2014 filed as 14 WC 42917. Both 13 WC 5741 and 14 WC 42917 were consolidated and tried together on October 23, 2017. The petitioner testified she returned to work for one day on January 29, 2014. The petitioner operated an elevated train for a test run. This is her usual and customary employment. She operated the "T" bar and then complained of right hand swelling and cramping. The petitioner testified to work duties on January 29, 2014 that were no more strenuous than those performed by the general public in the course of daily activities. The arbitrator finds the petitioner has not met her burden of proving a compensable accident occurred on January 29, 2014.

Petitioner testified at trial that she returned to work for Respondent on 1/29/2014 after being released to work by Dr. Vender after treatment for her 9/11/2012 work accident. She testified she took a written test, did a retraining, and went for a test run driving the train. She was operating the T-bar, which is used to speed up and slow the train, when she noticed swelling in her right hand. There was no specific incident and nothing happened to cause injury to her hand. There was no testimony that the petitioner was prevented from operating the T bar with her uninjured left hand.

The arbitrator's opinion in 13 WC 5741 regarding causal connection further supports the Arbitrator's finding that the petitioner has not met her burden of proving a compensable accident occurring on January 29, 2014.

Robert E. Luedke November 8, 2017

Signature of arbitrator Date

STATE OF ILLINOIS)
) SS.
COUNTY OF LaSALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HEATHER GIESEKE,

Petitioner,

19IWCC0127

vs. NO: 15 WC 14454

STATE OF ILLINOIS – DIXON CRRECITONAL CENTER,

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, temporary total disability benefits, medical expenses, permanent partial disability benefits, and evidentiary issues, 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 sustained a work-related accident on February 7, 2014, when she slipped on ice and "landed on [her] right knee and twisted – like it was twisted and [she] fell to the ground, first landing on the left – right and landing on the left knee and palms down." By the end of her shift, both her knees were sore, "still stinging from the fall, achy and some minimal bruising after being home for a while on both knees." She took Ibuprofen, elevated her legs, and applied ice. She went to work the next day. She "tried suffering through this for maybe just shy of a couple of months" before seeking medical attention. She noted that her job was sedentary.

On May 15, 2014, Petitioner saw Dr. Hanlon whom she had previously seen for an ankle injury. He diagnosed bilateral knee pain with grinding, left worse than right with radiographic evidence of an osteochondral defect in the lateral femoral condyle of the left knee since the accident. He recommended MRIs. He did not restrict her work activities.

19IWCC0127

On June 16, 2014, Petitioner had MRIs of her knees. The MRI of the left knee showed fissuring of the patella cartilage compatible with severe chondromalacia, an abnormal posterior horn with a possible free edge tear with signal abnormality extending into the body of the meniscus, osteochondral defect versus impaction injury of the lateral femoral condyle with overlying cartilage loss, and joint effusion. The MRI of the right knee showed possible early chondral change, possible free edge tear of the posterior horn of the lateral meniscus, and osteochondral defect of the lateral femoral condyle. The ligaments of both knees were normal.

Petitioner had numerous injections, including a set of bilateral Synvisc injections, three Orthovisc injections, and numerous cortisone injections. Her condition did not resolve and on February 10, 2017, Dr. Hanlon performed arthroscopic debridement and partial lateral meniscectomy of the left knee for the postop diagnosis of lateral meniscus tear, grade III chondromalacia of the patella, and grade IV chondromalacia of the lateral femoral condyle. There are no medical records in the transcript after the surgery.

Petitioner testified that she no longer worked for the Department of Correction, but as an administrator earning a "substantially higher" salary. Currently, the "left knee is still on a 1 to 10." She still takes "Ibuprofen on any given day. Rain or overcast affects it. Just getting up and standing [she has] to kind of move them." She still uses ice. She wears a brace on occasion when she has been on her feet during the day. She has to go to "seven homes as an administrator" and walks on concrete about an hour and a half a day. She worked full-duty in her job.

The Arbitrator found that the accident caused Petitioner's condition of ill-being of her knees bilaterally and awarded her 3&6/7 weeks of temporary total disability benefits, $64,944.25 in medical expenses, and 59.125 weeks of permanent partial disability benefits, representing loss of 20% of the left leg and 7.5% of the right leg respectively. She also admitted into evidence a narrative statement by Dr. Hanlon. The Commission agrees with the determination of the Arbitrator regarding the issues of causation, temporary total disability benefits, medical expenses, and the admissibility of the statement by Dr. Hanlon. Accordingly, the Commission affirms and adopts those aspects of the Decision of the Arbitrator.

On the issue of permanent partial disability, the Commission notes that Petitioner's testimony about her current disability did not provide compelling evidence of extreme ongoing impairment. In addition, the medical records are devoid of evidence corroborating Petitioner's current degree of disability. In looking at the entire record before us, the Commission concludes that in this claim the most salient statutory factor for determining permanent partial disability is the fact that not only did Petitioner not sustain any potential loss of earning potential after the accident, she actually experienced a "substantial increase" in her salary post-accident. She was also only off work for less than a month due to the injury. The Commission concludes that an award of 48.375 weeks representing loss of the use of 17.5% of the left leg and loss of the use of 5% of the right leg is appropriate here and modifies the Decision of the Arbitrator accordingly.

19IWCC0127

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $558.74 per week for a period of 3&6/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $64,656.50 for medical expenses under §8(a) of the Act, subject to the applicable medical fee schedule in §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION, that Respondent reimburse Petitioner $287.75 in medical expenses she paid out-of-pocket.

IT IS FURTHER ORDERED BY THE COMMISSION, that Respondent pay to Petitioner $502.87 a week for 48.375 weeks pursuant to §8(e) of the Act, because the injuries sustained caused the loss of the use of 17.5% of the left leg and 5% of the right leg, respectively.

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 22 2019

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/dw
O-2/7/19
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0127

GIESEKE, HEATHER
Employee/Petitioner

Case# 15WC014454

SOI-DIXON CORRECTIONAL CENTER
Employer/Respondent

On 4/2/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0139 CORNFIELD AND FELDMAN LLP
JIM M VAINIKOS
25 E WASHINGTON ST SUITE 1400
CHICAGO, IL 60602

5875 ASSISTANT ATTORNEY GENERAL
STEPHANIE KEVIL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

APR 2 - 2018

Acting Secretary
Illinois Workers' Compensation Commission

19IWCC0127

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSALLE)

- [ ] 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

Heather Gieseke
Employee/Petitioner

v.

State of Illinois - Dixon Correctional Center
Employer/Respondent

Case # **15** WC **14454**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Ottawa**, on **February 26, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On February 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 as explained *infra*.

In the year preceding the injury, Petitioner earned $43,581.64; the average weekly wage was $838.11.

On the date of accident, Petitioner was 38 years of age, *single* with 1 dependent child.

Petitioner *has* received all reasonable and necessary medical services as explained *infra*.

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

Respondent shall be given a credit of $0 for TTD, $0 for TPD, $0 for maintenance, and $1,085.09 for other benefits, for a total credit of $1,085.09. *See* AX1.

Respondent is entitled to a credit for any medical benefits that have been paid as agreed by the parties under Section 8(j) of the Act. *See* AX1.

ORDER

Causal Connection

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established a causal connection between her current condition of ill-being in the bilateral knees and accident at work on February 7, 2014.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $558.74/week for 3 & 6/7th weeks, commencing February 10, 2017 through March 8, 2017 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from February 7, 2014 through February 26, 2018, and shall pay the remainder of the award, if any, in weekly payments.

Medical Benefits

Respondent shall pay reasonable and necessary medical services as reflected in Petitioner's Exhibits totaling $64,656.50 for medical bills that remain unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also reimburse Petitioner $287.75 for her out of pocket expenses. Respondent shall be given a credit for any medical benefits that have been paid, as agreed by the parties, 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. *See* AX1.

Permanent Partial Disability

As explained in the Arbitration Decision Addendum, based on the factors delineated in Section 8.1b of the Act, and the record taken as a whole:

Respondent shall pay Petitioner permanent partial disability benefits of $502.87/week for 43 weeks, because the injuries sustained caused the 20% loss of use of the left leg (knee), as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $502.87/week for 16.125 weeks, because the injuries sustained caused the 7.5% loss of use of the right leg (knee), 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

March 26, 2018
Date

ICArbDec19(b) p. 3

APR 2 - 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Heather Gieseke
Employee/Petitioner

v.

State of Illinois - Dixon Correctional Center
Employer/Respondent

Case # 15 WC 14454

Consolidated cases: N/A

FINDINGS OF FACT

The issues in dispute at this hearing include whether a causal connection between Petitioner's current condition of ill-being and such an accident, Respondent's liability for payment of Petitioner's medical bills totaling $64,656.50 after reduction pursuant to Sections 8(a) and 8.2 of the Act, Respondent liability for payment of $287.75 for Petitioner's out of pocket expenses, Petitioner's entitlement to temporary total disability benefits commencing on February 10, 2017 through March 8, 2017, 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

Heather Gieseke (Petitioner) testified that she was employed as an Office Associate for the State of Illinois Dixon Correctional Center (Respondent), and had been so employed for 2-3 years at the time of her accident. Petitioner worked from 8:00 a.m. to 4:00 p.m. Monday through Friday. She explained that she performed primarily clerical work.

On February 7, 2014, Petitioner walked through administration building and go to commissary to get her beverage for the day, at approx. 8:05 a.m. Petitioner slipped on ice, landed on her right knee, and twisted and fell to the ground landing on her left knee and the palms of her hands. Petitioner testified that she noticed stinging and soreness in her knees, and she was assisted by a co-worker, Mr. Sitzmore, to the commissary. Petitioner then went in, got a beverage, and sat at a table to "regroup." She explained that Mr. Sitzmore stayed with her to make sure that she was ok. Petitioner returned to work and finished her shift, but noticed that both of her knees were sore, achy, and stinging from the fall. Petitioner elevated both legs, and applied ice and heat to both knees that evening. The following day, Petitioner returned to work. She explained that she worked for two months or so in a sedentary position, but then requested to see her doctor.

Medical Treatment

Petitioner testified that she returned to see Dr. Hanlon, who had treated her previously for a right broken ankle. The medical records reflect that Petitioner saw Shawn Hanlon, M.D. (Dr. Hanlon) at CGH Medical Center on May 15, 2014. PX1. She reported a consistent mechanism of injury at work when she fell landing on both knees "landing on her right knee and twisting her left knee." *Id.* Petitioner had no prior knee symptoms and reported post-injury pain, popping, and grinding in both knees, less so in the right knee. *Id.* After a physical examination noting , Dr. Hanlon recommended an MRI of both knees. *Id.* Dr. Hanlon diagnosed Petitioner with bilateral knee pain with grinding, left worse than right. *Id.*

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

Petitioner underwent the recommended MRIs on June 13, 2014. PX1. The left knee MRI showed abnormal appearance of the lateral meniscus with a question of a free edge tear. *Id.* The right knee MRI showed a question of a free edge tear of the lateral meniscus. *Id.*

On June 17, 2014, Dr. Hanlon prescribed viscosupplementation injections into both knees. PX1. As noted by Dr. Hanlon's office on July 9, 2014, the workers' compensation insurance carrier denied the recommended injections approving only cortisone injections. *Id.* The corticosteroid injections were performed on July 10, 2014. *Id.* On July 22, 2014 Petitioner reported that the injections did not provide her with any relief. *Id.* Dr. Hanlon again recommended a Synvisc One injection to be approved. *Id.*

Respondent scheduled Petitioner for an examination pursuant to Section 12 of the Act. In the meantime, Dr. Hanlon administered the recommended viscosupplementation injections to both knees on August 11, 2014. PX1.

Section 12 Examination – Dr. Shadid

On October 1, 2014, Petitioner submitted to a medical evaluation with Hythem Shadid, M.D. (Dr. Shadid) at Respondent's request. RX1. Dr. Shadid took a history from Petitioner, performed a physical examination, reviewed various treating medical records, and rendered opinions regarding the relatedness, if any, of Petitioner's medical conditions to her accident at work. *Id.*

Dr. Shadid noted significant crepitus in both knees on physical examination, but no evidence of patellar subluxation. RX1. He also reviewed May of 2014 x-rays reflecting chronic osteochondral defects, which he noted were not work-related conditions. *Id.* Dr. Shadid also noted that Petitioner's imaging studies showed severe chondromalacia of the patella in the left knee, which would also be a pre-existing condition. *Id.* Dr. Shadid opined that the twisting mechanism described by Petitioner of her left knee at the time of her fall was inconsistent with the etiology of chondromalacia patellae. *Id.* However, Dr. Shadid found that the pain described by Petitioner in the anterior left knee was consistent with chronic chondromalacia patellae. *Id.*

Ultimately, Dr. Shadid opined that Petitioner's fall at work caused a temporary aggravation of her pre-existing left knee condition and that Petitioner's right knee condition did not change because of the fall at work. *Id.* Dr. Shadid further opined that Petitioner was at maximum medical improvement. *Id.* Regarding the recommended Synvisc injections, Dr. Shadid indicated that those could be used to treat Petitioner's pre-existing conditions, but he opined that the need for those injections was unrelated to her accident at work. *Id.*

Continued Medical Treatment

Petitioner testified regarding a one year period of time during which she did not undergo active medical treatment. Petitioner explained that she understood that the injections should have lasted approximately six months, so as the effects of the injections wore off, she tried to continue to "self-treat" and ice her knees for as long as she could. However, she had too much swelling, popping, and grinding and returned to Dr. Hanlon. Petitioner testified that the injections that she underwent were not pleasant. Petitioner explained that she experienced symptoms in both knees, but more in the left knee. She was able to work full duty and testified that she took ibuprofen in the morning, and it was difficult to get her momentum going to get up after sitting for so long.

The medical records reflect that Petitioner returned to Dr. Hanlon in August of 2015. PX1. She called his office on August 24, 2015 reporting pain for over six months and taking 9-12 over-the-counter Ibuprofen tablets per day with minimal relief. *Id.* Petitioner also reported frequent weakness, worsened pain with increased activity, and grinding and popping sensations with walking. *Id.*

On August 31, 2015, Petitioner saw Dr. Hanlon again who noted the following:

> [Petitioner] returns. About a year ago, she had bilateral Synvisc injections. She tells me that she got reasonably good benefit from that and it lasted about 6 months. For the past months, she has been having pain. She wanted to return for a Synvisc injection, but according to her, she was told by her work comp insurance coverage people that she could not have another Synvisc injection. She has waited the 6 months since her pain recurred and has decided to return for a repeat Synvisc injection and is placing this on her regular insurance account. She continued to believe that her ongoing bilateral knee pain is attributable to her work-related injury that I have treater her for in the past. Barring any other prior knee issues or any subsequent injury and she has had ongoing issues with both knees since her work-related event.

PX1. Dr. Hanlon indicated that viscosupplementation injections are needed every 6 months and that it would be a reasonable option to inject Petitioner again. *Id.* He administered bilateral Synvisc injections to both knees on August 31, 2015. *Id.* On November 19, 2015, Petitioner was given corticosteroid injections to both knees. *Id.* On March 3, 2016, Petitioner was not doing much better and Dr. Hanlon proposed a series of three Orthovisc injections into each knee. *Id.* He performed the series on March 3, 2016, March 10, 2016, and March 17, 2016. *Id.*

Petitioner testified that she underwent additional viscosupplementation injections and felt significant improvement after the injections continuing through March, but the improvement faded. She further testified that she felt no more relief from the viscosupplementation injections after April. Petitioner did undergo more corticosteroid injections.

By April 11, 2016, Dr. Hanlon noted that Petitioner had no improvement with the Orthovisc. PX1. In fact, she was complaining of more popping, snapping, and grinding. *Id.* He prescribed another Synvisc injection and awaited insurance approval. *Id.*

On June 28, 2016, during a visit with Petitioner, Dr. Hanlon noted his disagreement with Dr. Shadid's opinions. PX1. "In fact, she continued to have bilateral knee pain. She never had any pain in either knee for which she saw a physician prior to the work related injuries that she sustained when she fell. It is for this reason that in my opinion, I believe that she has ongoing bilateral knee pain as a result of the work related injuries that she sustained. She was deriving significant benefit from the Synvisc injections and in my opinion should have ongoing access to Synvisc injections in the future for her bilateral knee pain. … In my opinion, her bilateral knee pain is a direct result of her work related injury and she has not reached MMI." *Id.* Dr. Hanlon proceeded with corticosteroid injections to both knees as a stop-gap measure. *Id.*

On November 2, 2016, Dr. Hanlon's history shows objective findings of large effusion of the left knee and moderate effusion of the right knee. *Id.* He gave Petitioner an injection of depo-medrol with Marcaine in each knee. *Id.* At this point, he recommended arthroscopic surgery of the left knee. *Id.*

On February 10, 2017, Dr. Hanlon performed the left knee surgery. PX1. Specifically, he performed a partial

lateral meniscectomy. *Id.* Petitioner continued to follow up with Dr. Hanlon post-operatively and he kept her off work from February 10, 2017 through March 8, 2017. *Id.* Petitioner testified that she saw Dr. Hanlon on August 25, 2017 and December 27, 2017 for follow up appointments when he administered additional cortisone injections in her knees. *Id.*

Additional Information

Petitioner testified that she noticed less popping and grinding in the left knee after her surgery. The cortisone injections were also more helpful then as she was able to run, use a stairmaster, and engage in low impact exercise classes. Petitioner cannot walk on a treadmill anymore or engage in any activities with impact to the knees.

Petitioner testified that she did not receive any payments or benefits from the workers' compensation insurance carrier. She used her personal accrued sick time. Petitioner also explained that the CGH bills were paid by her Coventry insurance and that she incurred out of pocket expenses including co-payments totalling $287.75.

Regarding her current condition, Petitioner testified that she still experienced pain in her left knee at a level of 2 out of 10 on any given day. She also is affected by rain in both knees and still feels popping in both knees albeit less in the left knee. Petitioner testified that she still ices her knees and has swelling in both knees. Petitioner wears a knee brace on left knee to keep down the swelling. Petitioner also experiences a lot of swelling after long periods of driving or car rides. At work, Petitioner testified that she struggles if she sits too much or stands to much. Petitioner testified that she had not injured either knee before her accident at work or thereafter. On cross-examination, Petitioner testified that she no longer works for Respondent and explained that she continues to perform sedentary administrative work. Petitioner also earns more now than she did while working for Respondent.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

Based on the totality of the evidence, the Arbitrator finds that Petitioner's claimed current conditions of ill-being in the bilateral knees are causally related to the injury sustained at work on February 7, 2014. In so finding, the Arbitrator relies on the opinions of Petitioner's treating physician, Dr. Hanlon, as well as Petitioner's credible testimony.

Respondent's Section 12 examiner, Dr. Shadid, opined that Petitioner sustained only a temporary aggravation to her otherwise wholly pre-existing degenerative condition in the bilateral knees. Given Petitioner's relatively young age of 38 at the time of her accident at work, the complete lack of symptoms or medical treatment for any pre-existing knee condition, and the uncontroverted testimony of the Petitioner, which is consistent with the medical records and her reports to Dr. Shadid regarding the foregoing, the opinions of Dr. Shadid are not

persuasive given the totality of this record.

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) (*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)).

In this case, the diagnostic studies showed some degeneration in the knees. However, Petitioner had no prior medical treatment to the knees and she had no history of symptoms requiring medical treatment or preventing her from performing full duty work for years until after her fall at work on February 7, 2014. The medical records corroborate Petitioner's testimony regarding her onset of symptoms in the knees only after her fall at work. Dr. Hanlon noted that Petitioner had no bilateral knee symptoms or treatment prior to her fall at work. Indeed, Petitioner was able to perform the sedentary responsibilities of her job for years prior to her accident, and throughout most of her medical treatment after her accident.

Given the totality of the record, the Arbitrator finds the opinions of Petitioner's treating physician, Dr. Hanlon, to be persuasive and adopts those opinions herein. Thus, the Arbitrator finds that Petitioner has established a continued causal connection between her bilateral knees condition of ill-being and accident at work on February 7, 2014.

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

Petitioner claims entitlement to payment of reasonable and necessary medical bills from medical providers that administered care after her accident at work. In consideration of the treatment records and medical bills, the Arbitrator finds that the treatment rendered to Petitioner is reflective of reasonable and necessary medical treatment to alleviate her of the effects of her accident at work. Therefore, the Arbitrator awards payment of the medical bills submitted in Petitioner's Exhibits totaling $64,656.50 after reduction pursuant to Sections 8(a) and 8.2 of the Act as those are reasonable, necessary, and related to medical treatment necessitated after Petitioner's accident at work. Respondent shall be given a credit of for any medical benefits that have been paid as agreed by the parties, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall also reimburse Petitioner $287.75 for her out of pocket expenses related to her medical care.

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

Considering the causal connection analysis explained above, the Arbitrator addresses Petitioner's claim that she is entitled to temporary total disability benefits from February 10, 2017 through March 8, 2017.

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County*

v. Ill. Workers' Comp. Comm'n, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that he was unable to work. Gallentine*, 201 Ill. App. 3d at 887 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

Petitioner's testimony and the medical records reflect that Petitioner underwent medical treatment and was incapacitated because of the effects of her accident such that she was placed off work for a short period of time post-operatively. Thus, based on the record the Arbitrator finds that Petitioner was temporarily totally disabled from February 10, 2017 through March 8, 2017 as claimed.

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

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (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. *Id.*

Considering these factors in light of the evidence submitted at the hearing, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report was offered into evidence. Thus, the Arbitrator assigns no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as an Office Associate at the time of her accident. Thus, the Arbitrator assigns significant weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was relatively young at the age of 38 at the time of the accident with the majority of her career ahead of her. Thus, the Arbitrator assigns significant weight to this factor.

With regard to subsection (iv) of §8.1b(b), the future earning capacity of the employee, the Arbitrator notes that there is no evidence of diminishment in Petitioner's future earnings capacity as a result of her accident. To the contrary, Petitioner testified that she now earns more than she did while employed by Respondent. Thus, the Arbitrator assigns significant weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner sustained an injury at work requiring a left knee lateral meniscectomy as well as numerous pre-operative and post-operative viscosupplementation injections and corticosteroid injections into both knees. Petitioner gave credible testimony that is corroborated by the medical records as well as her reports to Respondent's Section 12 examiner, Dr. Shadid, regarding her mechanism of injury and ongoing symptoms. Petitioner's testimony is uncontroverted by any other witness. She testified that she continues to have residual symptomatology that prevents her from engaging in activities that impact her knees, and requiring her to accommodate her activities at work including sitting and standing to alleviate swelling and popping in the knees. Thus, the Arbitrator assigns significant weight to this factor.

Based on all of the foregoing, and in consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 20% loss of use of the left leg and permanent partial disability to the extent of 7.5% loss of use of the right leg pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Clifford Maxwell,
Petitioner,

vs.

TF Courier Inc.,
Respondent.

19IWCC0128

NO: 16 WC 20820

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 16, 2018, is hereby affirmed and adopted.

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

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

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

DATED: FEB 2 7 2019
o2/21/19
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0128

MAXWELL, CLIFFORD R
Employee/Petitioner

Case# **16WC020820**

TF COURIER INC
Employer/Respondent

On 3/16/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.85% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

1596 MEACHUM BOYLE & TRAFMAN
KYLE P CARLSON
225 W WASHINGTON ST SUITE 500
CHICAGO, IL 60606

19IWCC0128

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

Clifford R. Maxwell
Employee/Petitioner

v.

TF Courier, Inc.
Employer/Respondent

Case # 16 WC 020820

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 **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **January 16, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 1, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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 **$26,253.90**; the average weekly wage was **$656.35**.

On the date of accident, Petitioner was **39** years of age, *married* with **1** dependent children.

Petitioner *has* received all reasonable and necessary medical services, though none are as a result of the alleged accident.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services, as none were the result of the alleged accident.

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

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

ORDER

BECAUSE NO ACCIDENTAL INJURY ARISING OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT OCCURRED, BENEFITS ARE DENIED.

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

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

Signature of Arbitrator

March 16, 2018
Date

MAR 16 2018

Preface

This matter was called for hearing January 16, 2018, on Petitioner's Petition for Immediate Hearing Under Section 19(b) of the Act, filed December 6, 2017. Prior to hearing, on January 10, 2018, Respondent's counsel sent an e-mail to Arbitrator Paul Cellini asking confirmation of the trial on January 16, 2018. Counsel represented "...the parties set Petitioner's pending 19b motion for trial on Tuesday 1/16/18 by agreement." Carlson, Kyle. "[External] Trial 1/16/18- Maxwell, Clifford R v TR Courier Inc/413-C70787/16WC20820/DOI 7/1/16" received by Paul Cellini. Date of Message Wednesday, January 10, 2018 5:47p.m.

When the matter was called for hearing, January 16, 2018, the parties informed the Arbitrator before whom this matter was to be heard that the matter was noticed as a 19(b), but it was to be a hearing on all issues. Clifford R. Maxwell v. TF Courier, Inc., No 16 WC 20820, Transcript of evidence on Arbitration at 4-6. And so, it was.

Findings of Fact

Clifford R. Maxwell (Petitioner), a 39 year old male, was working as a supervisor, overseeing freight for TF Courier (Respondent) on July 1, 2016, at its Elk Grove Village location. He testified that during his shift, he was inside a semi-trailer tractor at one of the dock doors, inspecting the trailer. He said he was working with three other people, a "Michael", and others whose names he does not remember. Petitioner testified "Mike" was driving a forklift backwards in the trailer. He testified the forklift rolled over his foot, struck him on the right foot and lower back. He testified his foot was hit first, the forklift actually rolled over the foot, and he felt immediate pain in his right foot and upper and lower back. No one else with whom he was working with saw this happen. Petitioner testified he let Mike know he had hit him and Mike apologized. However, Petitioner also testified he did not speak to any of those he was working with after the accident happened. Maxwell at 11-16, 33, 44; Petitioner's Exhibit 1.

In other circumstances, Petitioner said he was hit in the back by a forklift when a coworker backed a forklift into the right side of his back; the forklift rolled over his right foot; the forklift driver bumped him; and he was struck by a forklift. Petitioner's Exhibit 3; Petitioner's Exhibit 4; Petitioner's Exhibit 6. [Petitioner's Exhibits are not paginated].

Petitioner testified he was aware there was a surveillance system at the facility, but not inside the trailer. Joanie Tagalos, the former operations manager at the facility, testified that upwards of 20 surveillance cameras are always on, all loading docks are covered. She was notified of the accident, pulled the video from that morning, reviewed it, recognized Petitioner, and made an unedited clip of the relevant portion. Maxwell at 38, 44, 54, 61-62, 69.

The surveillance video was admitted into evidence, and played at the hearing. There is no sound. That video reveals a semi-trailer backed up into a loading dock with a pallet in view. There is also a male in a white t-shirt (I 1). There is a male in a dark t-shirt (I 2) and I 1 in front of the ramp into the trailer. The forklift enters the frame, both I 1 and I 2 move aside. The forklift drives into the trailer. A third male, Petitioner, walks into the frame from the left, the forklift is in the trailer. The forklift backs out of the trailer with a pallet. Petitioner goes into the trailer. I 1 and I 2 follow. The forklift is out of the frame. I 1 walks out of the trailer, the forklift goes back in again. I 1 and Petitioner move to the right, the forklift is close to the left side of the trailer. I 2 is about four feet from the back of the trailer, Petitioner is close to the front. Both are on the right wall of the trailer. Maxwell at 66, 74; Respondent's Exhibit 1 at 08-1:42.

The forklift is one foot or more from Petitioner's feet. The interior darkens, then brightens. Petitioner is two feet or more from the forklift. Petitioner then walks toward the forklift, turns his back to the forklift, his feet are pointing to the right wall of the trailer. Petitioner purposely leans into the forklift with his right side. I 2 watches the entire event from about one and a half feet away. Petitioner throws himself into the right wall of the trailer next to I 2, who does not move or react at all. Petitioner falls on his left side, I 2 points to him with his right hand. I 1 walks into the trailer. Petitioner gets up quickly, I 2 is standing still and I 1 steps out of the trailer. Respondent's Exhibit 1 at 2:08-2:17.

Petitioner walks out of the trailer holding his right side under his arm. He is smiling. Petitioner is outside of the trailer. The forklift comes out with a load. Petitioner does not talk to the driver or even look at him. The forklift leaves the frame. None of the three men talk to or look at the forklift driver. Petitioner is standing outside the trailer in no apparent pain or distress, and without apparent injury. Petitioner walks back to the trailer door and pulls out a cell phone. I 2 comes out of the trailer with a box. Petitioner walks into the trailer, he appears to have no problem or difficulty ambulating. Respondent's Exhibit 1 at 2:25-3:00.

Petitioner testified he finished his shift that day and drove himself to medical treatment. He testified that after the accident, he sent an e-mail to all the managers above him, from a computer in the warehouse. Maxwell at 15-16, 36-37.

Petitioner testified he went to Concentra for medical treatment. There he complained of pain to his right side back and right foot, pain in his chest wall and thorax pain, and right foot and toe pain. His physical exam was normal. His right foot and toes showed no deformity, no ecchymosis, no erythema, no swelling or tenderness. He had full range of motion. An x-ray of the right rib showed no fracture. An x-ray of the right foot showed no fracture or dislocation. He was diagnosed, nonetheless, with a contusion of the right side rib and a contusion of the right foot. Maxwell at 17; Petitioner's Exhibit 3.

Petitioner testified that after being released by Concentra, he saw his own doctor. The records, however, reveal Petitioner was seen the next day by Dr. Michael Taylor, Taylor Rehab and Wellness. The New Patient Information sheet from Taylor Rehab and Wellness indicates Petitioner was referred by his attorney, Ankin Law Office. The health insurance, accident insurance, and work or injury insurance portions are marked "N/A." Taylor placed and kept

Petitioner off work from July 2, 2016, to January 10, 2017, when Taylor found him at MMI, diagnosing Petitioner with lumbosacral disc displacement, lumbar myofascitis, lumbago, and right ankle pain. Taylor's treatment was chiropractic manipulation, therapy, stimulation, and exercises. Taylor noted, on November 11, 2016, Petitioner's right ankle was no longer painful. Maxwell at 17; Petitioner's Exhibit 4.

Dr. Taylor referred Petitioner to Dr. John F. Kane, July 5, 2016, who diagnosed Petitioner with a contusion to the right foot, contusion to the right ankle, and lower back injuries. Kane's treatment consisted of a boot, topical medications, and Tylenol 3. Although Petitioner told Dr. Taylor, on November 11, 2016, his ankle was no longer painful, Dr. Kane, on November 10, 2016, recorded Petitioner's ankle as sore to the touch. Petitioner's Exhibit 6.

Petitioner testified that after the accident, he just never went back to work at TF Courier. Joanie Tagalos testified Petitioner was terminated later the day of the accident. That termination was planned prior to the accident based on Petitioner's poor performance. Petitioner testified he never got a letter saying he was terminated. Maxwell at 32, 69.

Conclusions of Law

Just prior to his testimony, Petitioner swore to tell the truth, the whole truth and nothing but the truth. Maxwell at 9-10. And then he didn't.

The decision in this case begins and ends with disputed 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 Worker's Compensation Act, a petitioner bears the burden of showing, by a preponderance of the evidence, that he has sustained accidental injuries arising out of and in the course of employment. 820 ILCS 305/1(b)3(d). Under the Act, a compensable injury is one that both arises out of and is in the course of a claimant's employment. An injury arises out of employment when there is a causal connection between the employment and the injury. The cause of the injury must be some risk connected with the employment. *See* Hosteny v. Illinois Workers' Compensation Commission, 397 Ill. App. 665, 674 (2009). The purpose of the Act is to protect employees against risks and hazards that are peculiar to the nature of the work they are employed to do. Orsini v. Industrial Commission, 117 Ill. 2d 38 (1987).

What happed to Petitioner in that trailer was no accident. An accident happens without design and/or is not foreseen by the person to whom it happens. See E.Baggot Co. v. Industrial Commission, 290 Ill. 530 (1919). An injury is accidental, within the meaning of the Act, that occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee. Matthiessen & Hageler Zinc Co. v. Industrial Board, 284 Ill. 378, 384 (1918).

Here, Petitioner, well away from the forklift, walks toward it and purposely leans into it with his right side. Petitioner then, in a flop worthy of a World Cup football match, threw himself into the right wall of the trailer. He leaves the trailer smiling. In short order he walks back into

the trailer, without difficulty. Respondent's Exhibit 1 at 2:08, 2:10, 2:17, 2:30, 2:56-3:00. When a worker inflicts injury to his person, for the purpose of collecting compensation, such an injury is not an "accidental" injury, and therefore not compensable. Gallego v. Industrial Commission, 168 Ill. App. 3d 259, 269 (1988); Harper v. Industrial Commission, 24 Ill. 2d 103, 108 (1962).

As to this disputed issue, this Arbitrator makes the following conclusion of law: no accident occurred that arose out of and in the course of Petitioner's employment by respondent, it was an intentional act and not compensable.

Moreover, Petitioner's testimony the forklift rolled over his foot is a complete fabrication. The surveillance video shows Petitioner's feet well away from the forklift. Also, Petitioner's examination at Concentra showed no injury to his foot. His physical activity before going to Concentra does not support his testimony the forklift ran over his foot. Respondent's Exhibit 1 at 2:08, 2:48-3:00; Petitioner's Exhibit 3.

Petitioner's testimony he spoke to the forklift driver, who apologized, also seems disingenuous given Petitioner's testimony he did not speak to anyone he was working with after the accident; and given the surveillance video showing Petitioner did not talk or look at the driver of the forklift. Maxwell at 17; Respondent's Exhibit 1 at 2:40.

As to the disputed issues: **F**, whether the Petitioner's current condition of ill-being is causally related to the injury; **J**, were the medical services provided Petitioner reasonable and necessary and has Respondent paid all appropriate charges for reasonable and necessary medical services; **K**, what TTD benefits are due; and **L**, what is the nature and extent of the injury, this Arbitrator makes the following conclusion of law: because Petitioner did not sustain accidental injuries arising out of and in the course of employment, he is not entitled to medical benefits, temporary total disability benefits, or permanent partial disability. No benefits of any kind are awarded.

Arbitrator

March 16, 2018

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

Richard Stout, Jr.,

Petitioner,

19IWCC0129

vs.

NO: 17 WC 11416

State of Illinois/IDOT,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 4, 2018, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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

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 7 2019
o2/7/19
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

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

19IWCC0129

STOUT, RICHARD
Employee/Petitioner

Case# **17WC011416**

STATE OF ILLINOIS/IDOT
Employer/Respondent

On 6/4/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & EVANS
JAY JOHNSON
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

4138 ASSISTANT ATTORNEY GENERAL
WARREN A WILKE
500 S SECOND ST
SPRINGFIELD, IL 62706

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

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JUN 4 - 2018

Ronald A. Rupp
Illinois Workers' Compensation Commission

19IWCC0129

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)

Richard Stout
Employee/Petitioner

v.

State of Illinois/IDOT
Employer/Respondent

Case # **17** WC **11416**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Springfield**, on **2/28/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0129

FINDINGS

On the date of accident, **1/19/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**55,680.00**; the average weekly wage was $**1,070.77**.

On the date of accident, Petitioner was **52** 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 $**26,107.60** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**26,107.60**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $673.85/week for 56 6/7 weeks, commencing 1/27/17 through 2/28/18, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $26,107.60 for temporary total disability benefits that have been paid.

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

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

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

Michael K. Nowak, Arbitrator

5/24/18
Date

JUN 4 – 2018

ICArbDec19(b)

FINDINGS OF FACT

The vast majority of the facts in this matter are undisputed. The parties agree that Petitioner suffered a compensable accident that arose out of and in the course of his employment with Respondent. Petitioner's wages are agreed upon. The parties agree that, to date, all medical treatment has been both reasonable and necessary. As of the date of hearing, an additional surgery had been recommended and Respondent has authorized same. The only dispute between the parties is whether Petitioner is owed TTD after October 19, 2017. The parties agree that Petitioner had not reached MMI as of that date.

After suffering from a compensable accident wherein Petitioner suffered a torn rotator cuff, Petitioner underwent surgery to repair his injury. Following surgery Petitioner engaged in post-operative rehabilitation. During the course of his rehabilitation Petitioner's work restrictions were eventually stated as being no lifting of greater than 15 pounds and no activity at or above shoulder level. (PX 3).

Based on the above restrictions, of no lifting more than 15 pounds, Petitioner sought to return to work. (T. 22-23). On October 10, 2017 Petitioner took a drug test as a part of his return to work process. (RX 6 pg. 2, 5). This test was performed pursuant to the Illinois Department of Transportation Alcohol/Drug Testing Policy and Procedures. (RX 7). Those policies and procedures, included as Respondent's Exhibit 7, were established and required under the Federal Omnibus Transportation Employee Testing Act of 1991. (49 CFR 40.382), as amended. While Respondent's Exhibit 7 does not indicate what type of drug test was conducted on October 10, 2017, it does indicate that the second test (discussed below) was a gas chromatography mass spectrometry (GC/MS) test. *Id.*

On October 13, 2017, Respondent was notified that Petitioner "tested positive for drugs as a result of a Pre-employment/Reentry test conducted October 10, 2017). (RX 6 pg. 2, 5). The drug Petitioner tested positive for was cocaine. (RX 6 pg. 5). The record indicates that Petitioner requested a split specimen test on October 13, 2017. *Id.*

The results of the second confirmation test were issued on October 20, 2017, and indicated that Petitioner tested positive for a Cocaine metabolite (Benzoylecgonine). (RX 6 pg. 5). Based on the confirmation result of the split specimen test, Mr. Stout was removed from his duties and referred to a substance abuse counselor. (RX 6 pg. 4, 5). Petitioner did not contact the substance abuse counselor because "I don't do drugs." Petitioner testified that he and his union had begun the grievance process under the collective bargaining agreement (CBA) based upon the drug test and his termination.

Adam Stork testified for Respondent. He has been Respondent's operations supervisor for 2½ years. He agreed that the highway maintainer job is not a light duty job. He testified that the highway maintainer needs to lift in excess of 50 pounds to perform the full duties of his job. He testified that a highway maintainer on light duty is not capable of the full performance of the highway maintainer job. He did not mention any specific job for which Petitioner was being considered at the time of the drug test. He did, however that certain duties under his authority were not "safety sensitive."

Thus, it appears from the record that Petitioner was prohibited from returning to his pre-injury position with Respondent due to his restrictions. It is unclear, however whether any specific light duty position had been discussed or offered before the return to work process, which included the drug screen, had begun.

CONCLUSIONS

Issue (L): What temporary benefits are in dispute?

Petitioner asserts TTD should be paid through the date of hearing based upon the holding in *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill. 2d 132, 149 (2010), pointing out that there is no dispute to the fact he has not reached MMI, and in fact has an additional surgery upcoming.

Respondent asserts that Federal Regulations place certain restrictions on them with regard to the process for bringing employees with commercial driver's licenses (CDL) back to work after a failed drug or alcohol or drug screen. One of those requirements, they say, is evaluation by a substance abuse counselor. They allege that Federal Regulations prohibit them from allowing Petitioner to return to work and that by refusing to see the substance abuse counselor Petitioner voluntarily choose not to return to work. The Arbitrator is not persuaded by either argument.

As an initial observation, this Arbitrator does not believe the Act which grants the Commission authority allows us to interpret or definitively apply Federal Regulations dealing with the transportation industry. Nor, for that matter are we authorized to interpret or rule upon issues which arise between Petitioner's union and Respondent under the CBA.

That having been said a review of the Regulations cited by Respondent in their proposed decision appear to deal with "drivers" and specifically those in "safety sensitive" positions or activities. Thus, it is unclear to this Arbitrator whether the Regulations would in fact prohibit Petitioner's return to a light duty position. Mr. Stork made clear Petitioner was not going back to driving a maintenance truck. He further indicated that while Respondent required highway maintainers to possess a CDL there were some duties under him which were not safety sensitive.

Under Illinois law "the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits." *Interstate Scaffolding, Inc. v. Ill. Workers' Comp. Comm'n,* 236 Ill. 2d 132, at 149, 923 N.E.2d 266, 337 Ill. Dec. 707 (Ill., 2010). The Supreme Court went on to state:

> A claimant's entitlement to TTD benefits is governed by the Workers' Compensation Act.... Looking to the Act, we find that no reasonable construction of its provisions supports a finding that TTD benefits may be denied an employee who remains injured, yet has been discharged by his employer for "volitional conduct" unrelated to his injury.... Such an inquiry is foreign to the Illinois workers' compensation system.... [W]hen determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is

> capable of returning to the work force.... The Act provides incentive for the injured employee to strive toward recovery and the goal of returning to gainful employment by providing that TTD benefits may be suspended or terminated if the employee refuses to submit to medical, surgical, or hospital treatment essential to his recovery, or if the employee fails to cooperate in good faith with rehabilitation efforts. Benefits may also be suspended or terminated if the employee refuses work falling within the physical restrictions prescribed by his doctor. *Id.*, at 145-46

In *Interstate Scaffolding* the Commission awarded the claimant TTD benefits, finding that the work-related injury had not yet stabilized. The Appellate Court agreed with the Commission's factual findings that the work-related injury had not stabilized and that the claimant remained temporarily and totally disabled. Nevertheless, the appellate court set aside the Commission's award because the claimant had been discharged by his employer due to conduct unrelated to his injury while working light duty. The employer in *Interstate Scaffolding* relied on two cases which it claimed justified denial of TTD benefits, *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 666 N.E.2d 827, 217 Ill. Dec. 158 (1996)(claimant was denied TTD not because he was simultaneously receiving disability pension benefits, but because the claimant was able to work), and *Schmidgall v. Industrial Comm'n*, 268 Ill. App. 3d 845, 644 N.E.2d 1206, 206 Ill. Dec. 153 (1994)(Claimant was awarded TTD while simultaneously receiving Social Security Pension benefits). In rejecting the employer's arguments our Supreme Court stated:

> In both *Schmidgall* and *Granite City*, the touchstone for determining whether the claimants were entitled to TTD benefits was not the voluntariness of their departure from the workforce, as the appellate court believed. Rather, the touchstone was whether the claimants' conditions had stabilized to the extent that they were able to reenter the work force. *Interstate Scaffolding*, 236 Ill. 2d at 148.

The Supreme Court in *Interstate Scaffolding* addressed the situation of voluntary removal from the employment when it distinguished the holdings in *Schmidgall* and *Granite City.*

The Court in *Sharwarko* acknowledged that "according to our supreme court, the dispositive inquiry is whether the claimant has reached MMI. There are, however, three recognized exceptions. TTD benefits may be suspended or terminated before an employee reaches MMI if he: (1) refuses to submit to medical, surgical, or hospital treatment essential to his recovery; (2) refuses to cooperate in good faith with rehabilitation efforts; or (3) refuses work falling within the physical restrictions prescribed by his doctor. *Sharwarko,* 28 N.E.3d at 955 (citations omitted) The Court in *Sharwarko* focused its analysis on the applicability of the third permissible justification for terminating benefits before the employee reaches MMI. In this case the Arbitrator declines to find that Petitioner has not refused work within his restrictions. In fact he was attempting to return within those restrictions when the drug screen which culminated in his termination took place.

In this case, there is no dispute that Petitioner is not at MMI. Petitioner did not refuse treatment nor did he refuse to cooperate with rehabilitation efforts.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner was temporarily and totally disabled from January 27, 2017 through the date of hearing. Respondent shall pay

Petitioner temporary total disability benefits of $673.85/week for 56 6/7 weeks, commencing 1/27/17 through 2/28/18, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $26,107.60 for temporary total disability benefits that have been paid.

Issue (M) **Should penalties or fees be imposed upon Respondent?**

The Arbitrator there was an arguable defense raised by Respondent and therefore denies to award penalties.

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

Gary Walker,
Petitioner,

vs.

White County Coal,
Respondent.

19IWCC0130

NO: 13 WC 42390

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 occupational disease, notice, permanent disability, evidentiary issues and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 9, 2018, is hereby affirmed and adopted.

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

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

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

DATED: FEB 27 2019
o2/7/19
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0130

WALKER, GARY
Employee/Petitioner

Case# **13WC042390**

WHITE COUNTY COAL
Employer/Respondent

On 4/9/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.90% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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 & JORDAN
ROMAN P KUPPART
3 S MAIN ST SUITE 2
HARRISBURG, IL 62946

0693 FEIRICH MAGER GREEN RYAN
CHERYL L INTRAVAIA
2001 W MAIN PO BOX 1570
CARBONDALE, IL 62903

19IWCC0130

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

Gary Walker
Employee/Petitioner

v.

White County Coal
Employer/Respondent

Case # **13** WC **042390**

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 **Mt. Vernon**, on **February 7, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did Petitioner incur an occupational disease that arose out of and in the course of employment with Respondent?
D. ☐ What was the last date of exposure?
E. ☒ Was timely notice of the occupational disease given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the exposure?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the last date of exposure?
I. ☐ What was Petitioner's marital status at the time of the last date of exposure?
J. ☐ Were the 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 from the occupational disease?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Sections 1(f) and 6(c) of the OD Act**

FINDINGS

On **January 10, 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 ***was*** last exposed to coal dust and fumes arising out of and the course of employment.

Timely notice of Petitioner's claim of injury ***was not*** given to Respondent.

On the last date of exposure, Petitioner was **57** years of age, ***married*** with **0** dependent children.

In the year preceding the injury, Petitioner earned **$46,833.93**; the average weekly wage was **$900.65**.

Petitioner's current condition of ill-being ***is not*** causally related to his occupational exposure.

ORDER

Petitioner failed to prove he has an occupational disease due to an occupational exposure on January 10, 2010. 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

April 3, 2018

Date

APR 9 - 2018

Gary Walker v. White County Coal, 13 WC 42390

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds:

Pertinent Medical Records and Information

Petitioner's medical records from Harrisburg Medical Center (RX7), Memorial Hospital of Carbondale (RX8), Prairie Cardiovascular (RX9), Primary Care Group (RX10) and St. John's Hospital (RX11) were placed into evidence along with the examination reports and deposition testimonies of Dr. Westerfield (RX4 and RX5) and Dr. Istanbouly (PX9) as well as B-readings from Dr. Westerfield, Dr. Meyer, Dr. Tarver, Dr. Smith and Dr. Alexander (RX1, RX2, RX3, PX1, PX2, PX3, PX4, PX5, PX6, PX7 and PX8), and the B-readings from NIOSH (RX6). The records, reports, and testimonies revealed the following:

A NIOSH chest film taken on March 1, 1971 was negative for CWP. (RX6 at 4). A second NIOSH chest film taken on July 27, 1973, was negative for CWP. (RX6 at 5). A third NIOSH chest film taken on August 18, 1978 was reviewed by A-reader, DLS, and B-reader ADA as negative for CWP. (RX6 at 6-7). A fourth NIOSH chest film taken September 14, 1989 was read by A-reader, TAY and B-reader, JSG, as negative for CWP. (RX6 at 8-9). Granulomas were noted in the latter reading. (RX6 at 9).

A chest x-ray taken February 23, 1995 found well-healed hilar and parenchymal calcified granulomatous nodules and was designated 0/0, negative chest. (RX7 at 758). This film was also submitted to NIOSH and read by A-reader TAY, and B-reader PYW, as negative for CWP. (RX6 at 10-11). The latter reading noted multiple tiny scattered calcified granuloma in the lungs as "prob. healed histoplasmosis." (RX6 at 11).

A chest x-ray taken September 6, 1998 found a negative chest. (RX7 at 753; RX10 at 271). A chest x-ray taken July 23, 1999, found changes of old healed granulomatous disease and no acute cardiopulmonary process. (RX7 at 751). This film was submitted to NIOSH (RX6 at 3) and read by A-reader HTY, and B-reader, DRH, as negative for CWP. (RX6 at 12-13). The former reading noted benign calcified granulomas. (RX6 at 12).

On April 26, 2001, Petitioner presented to the emergency room with right hip pain. (RX7 at 701). An x-ray of the pelvis and hip found advanced osteoarthritis. (RX7 at 712). Petitioner was diagnosed with advanced degenerative joint disease and advanced osteoarthritis of the right hip. (RX7 at 709).

An echocardiogram taken July 17, 2003 revealed moderate left ventricular hypertrophy, heavily calcified and rigid upper cusp, mild aortic regurgitation, tricuspid regurgitation, pulmonary regurgitation, mitral regurgitation and moderate aortic stenosis. (RX10 at 270).

On January 20, 2004, Dr. Jones authored a letter stating Petitioner had advanced osteoarthritis causing bilateral hip replacements and severe osteoarthritis in both knees. (RX10 at 267).

On April 4, 2005, Petitioner presented to Dr. Jones stating he was fine as long as he was inactive but as soon as he increased activity, the pain would return. (RX10 at 264-265). Petitioner returned on May 5, 2005 and different medication was provided with the physician noting Petitioner had a severe problem with osteoarthritis

and was running out of options. (RX10 at 262). A return visit on August 12, 2005 revealed Petitioner was "doing better." (RX10 at 259). On February 6, 2006 Petitioner returned to Primary Care with elevated blood pressure and his hypertension medication was adjusted. (RX10 at 256-257). At that time, Petitioner had normal breath sounds with no adventitious sounds. *Id.* Petitioner returned on February 21, 2006 stating he was feeling better. (RX10 at 254). His breath sounds were normal. *Id.*

On February 5, 2007, Petitioner presented with complaints of runny nose, eye congestion, sneezing and nasal stuffiness. (RX10 at 252-253). His breath sounds were normal. He was diagnosed with sinusitis and prescribed Amoxicillin. *Id.* Petitioner returned on April 13, 2007 for a hypertension follow up. (RX10 at 250-251). His breath sounds were normal. Petitioner denied orthopnea and shortness of breath. *Id.* An April 23, 2007 treadmill stress test taken due to chest pain revealed no evidence of stress-induced myocardial ischemia; the left ventricular ejection fraction was 55%. (RX7 at 632; RX10 at 245).

On April 24, 2007, Petitioner returned to Primary Care. (RX10 at 248-249). His breath sounds were normal and Petitioner denied shortness of breath. *Id.* The assessment was hypertension and aortic valve stenosis. *Id.* Petitioner returned to Primary Care on July 6, 2007 with a sore throat and post-nasal drip. (RX10 at 242). His chest/lung exam revealed no adventitious sounds. *Id.* Pharyngitis and strep were diagnosed and Penicillin was prescribed. *Id.*

Petitioner returned to Primary Care on December 13, 2007. (RX10 at 239-240). Petitioner complained of shortness of breath which was gradual and occurring in a persistent pattern for years; he stated it was constant, mild to moderate and occurred with normal activities. *Id.* Symptoms associated with it included chest pain with swelling of the calf and feet. *Id.* On exam, Petitioner's breath sounds were normal. *Id.* Decreased exercise tolerance was noted. *Id.* Petitioner denied chronic cough and wheezing but complained of chest pain and difficulty breathing on exertion. *Id.* The diagnosis was aortic valve stenosis with recommendation for x-ray, hypertension and osteoarthritis. *Id.* A note at the bottom stated, "not sure, but his resp symptoms could be from aortic stenosis." *Id.* A December 13, 2007 chest x-ray found benign calcified granulomas with no active infiltrate or disease. (RX10 at 238).

A December 21, 2007 echocardiogram noted minor calcification in bicuspid aortic valve with mild aortic, mitral and pulmonary regurgitation. (RX9 at 199; RX10 at 237). Moderate tricuspid regurgitation with increase in right ventricular systolic pressure was also noted. *Id.*

Petitioner returned to Primary Care Group on March 5, 2008. (RX10 at 235). His lungs revealed normal excursion with symmetric chest walls, quiet, even and easy respiratory effort and normal breath sounds. *Id.* On March 11, 2008, Petitioner presented to the ER with right knee pain after stepping on a rock. (RX7 at 604). An x-ray revealed prominent osteoarthritis and a small joint effusion. (RX7 at 609; RX10 at 234). Petitioner presented to Dr. Morgan who had previously performed the bilateral hip replacements; Dr. Morgan recommended an MRI. (RX10 at 233). On March 18, 2008 Petitioner presented to Dr. Eversmann. (RX10 at 231-232). Petitioner's lungs were clear with no rales or rhonchi. *Id.* Petitioner returned to Primary Care on April 8, 2008. (RX10 at 223-224). Petitioner's chest exam revealed normal breath sounds. *Id.* Petitioner denied shortness of breath, wheezing and chronic cough and stated he was considering right knee arthroplasty. *Id.*

On April 14, 2008 Petitioner presented to the Harrisburg Medical ER with abdominal pain. (RX7 at 397-398). His lungs were clear in all lobes and he was noted to not use tobacco products. (RX7 at 502). A CT scan of the abdomen and pelvis revealed a mildly distended gall bladder. (RX7 at 423; RX10 at 221). A chest x-ray revealed a few parenchymal granulomas and no signs of pulmonary infiltrate. (RX7 at 424; RX10 at 222). The

impression found "no acute change." *Id.* Laparoscopy performed on April 17, 2008 revealed acute calculous gangrenous cholecystitis. (RX7 at 409-411; RX10 at 211-213). Following the surgery, Petitioner's pain resolved and he was discharged on April 18, 2008. (RX7 at 405-406; RX10 at 208-209). Follow up visits on April 21, 2008, April 26, 2008 and May 13, 2008 revealed Petitioner was substantially improved, feeling great and had no complaints. (RX10 at 205, 203 and 202). Petitioner was released to return to work on May 19, 2008. (RX10 at 202).

A chest x-ray dated August 25, 2008 was submitted to NIOSH. (RX6 at 3). The film was reviewed by B-readers, TES and RBH, who found the film was negative for CWP. (RX6 at 14-16). B-reader, TES, also noted granulomas. (RX6 at 15-16). On October 22, 2008, NIOSH sent correspondence to Petitioner advising there was no evidence of pneumoconiosis. (RX6 at 18-19). The letter further noted that a physician did find a granuloma, which was defined as a lung infection that had healed. (RX6 at 19).

On December 20, 2008 Petitioner presented to Primary Care with a sore throat. (RX10 at 200-201). His breath sounds were normal. Acute pharyngitis was diagnosed and Amoxil was prescribed. *Id.*

On March 30, 2009, Petitioner presented to Primary Care. (RX10 at 198-199). Petitioner denied chronic cough, wheezing, difficulty breathing and shortness of breath. *Id.* The physician was surprised Petitioner was able to continue working in view of his severe arthritis. *Id.*

On April 30, 2009, attorney Krystal Tison sent correspondence to Dr. Jones advising that she was helping Petitioner with his claim for Social Security Disability benefits. (RX10 at 196). Petitioner returned to Primary Care on July 30, 2009. (RX10 at 194). Petitioner's chest exam revealed normal breath sounds without chronic cough, wheezing, difficulty breathing or shortness of breath. *Id.* Petitioner was considering knee replacement due to osteoarthritis. *Id.*

Petitioner returned to Primary Care on November 19, 2009 stating he was going to have knee replacement surgery. (RX10 at 192-193). His breath sounds were normal and he denied chronic cough, wheezing and shortness of breath. *Id.* A November 20, 2009 echocardiogram revealed mild to moderate concentric LVH, mildly dilated ascending aortic, moderately dilated left atrium and mild aortic stenosis. (RX9 at 198; RX10 at 190).

Petitioner's last day at Respondent's mine was January 10, 2010.

Petitioner was admitted to Heartland Regional on January 11, 2010 for a total knee arthroplasty and discharged January 14, 2010. (RX10 at 185-186). Petitioner returned to Primary Care on February 5, 2010. (RX10 at 182-183). The lung exam revealed normal breath sounds and Petitioner denied chronic cough, wheezing, difficulty breathing on exertion and shortness of breath. *Id.* The physician stated that he was not sure Petitioner could return to working as a coal miner and suspected Petitioner should apply for disability because his osteoarthritis was truly disabling. *Id.*

Petitioner presented to Primary Care on April 29, 2010. (RX10 at 179-180). The lung exam revealed normal breath sounds. *Id.* The physician stated he did not think Petitioner was physically able to resume working in the coal mine. *Id.* A second letter from Petitioner's Social Security Disability attorney was sent to Dr. Jones on June 4, 2010. (RX10 at 170).

On December 3, 2010, Petitioner was referred for lower GI endoscopy on December 3, 2010. (RX7 at 280-281; RX10 at 163-164). His lung exam revealed clear breath sounds with no rales or rhonchi. *Id.* Follow ups on January 14, 2011 and January 28, 2011 revealed Petitioner was doing well. (RX10 at 152-153).

Petitioner presented to Primary Care on June 20, 2011 with arm pain. (RX10 at 150-151). Petitioner had normal breath sounds. *Id.* An NCV/EMG taken July 13, 2011 revealed carpal tunnel syndrome. (RX10 at 147). Petitioner was referred to Dr. Morgan. (RX10 at 146). Petitioner returned to Primary Care on July 22, 2011; lung exam revealed normal breath sounds. (RX10 at 144-145). Petitioner was referred to Dr. Jeffrey Jones for cervical treatment. *Id.* A July 27, 2011 MRI revealed moderate degenerative changes C2-3 through T2-3, diffuse disc bulging C2-3 to T1-2 and spinal canal narrowing C3-4 through C7-T1 with mild spinal cord compression C6-7 and C7-T1. (RX10 at 143). Dr. Morgan sent correspondence to Dr. Jones advising that a left cubital tunnel decompression and ulnar nerve transposition was scheduled. (RX10 at 141). An October 3, 2011 occupational therapy assessment found Petitioner's only concern was his ability to maintain a grip on a golf club. (RX10 at 139-140). Petitioner was released from therapy. *Id.*

On April 10, 2012, Petitioner returned to Primary Care with shortness of breath complaints. (RX10 at 137-138). An echocardiogram revealed evidence of a bicuspid, calcified aortic valve with severe aortic stenosis and mild AI. (RX9 at 196; RX10 at 136). Comparison to a prior echo in November 2009 revealed the aortic stenosis had worsened significantly. *Id.* Petitioner was referred to Dr. Le. (RX10 at 135).

Petitioner presented to Dr. Le on May 15, 2012. (RX9 at 192-195; RX10 at 131-134). Dr. Le noted complaints of dyspnea on exertion with syncope or near syncope. *Id.* He further noted Petitioner played golf but was limited by knee problems. *Id.* Petitioner complained of shortness of breath and snoring. *Id.* Dr. Le diagnosed bicuspid aortic valve with severe aortic stenosis and dilated ascending aorta. *Id.* Dr. Le noted Petitioner's level of function was restricted due to previous hip and knee surgery and dyspnea on exertion. *Id.* He was not certain whether the dyspnea on exertion was related to aortic stenosis or from poor physical condition. *Id.* He scheduled a limited treadmill stress to evaluate Petitioner's level of function. *Id.* Dr. Le stated if Petitioner demonstrated a good level of physical tolerance without symptoms Dr. Le would continue to monitor the aortic stenosis; however, if Petitioner had limited exercise tolerance he would considered for aortic valve replacement. *Id.* The cardiac stress test was performed on May 23, 2012 but was inconclusive due to Petitioner's not reaching the target heart rate. (RX8 at 064; RX9 at 191). On June 12, 2012 Dr. Le noted that Petitioner was only able to exercise for 6 minutes and 46 seconds and had to stop due to shortness of breath and fatigue. (RX8 at 596-598). He noted Petitioner was lightheaded and tired all the time and had been walking 1 - ½ mile a day but had some chest discomfort. *Id.* Petitioner advised that he got shortness of breath whenever he did any physical exertion. *Id.* The lungs were clear to auscultation with no crackles and no wheezing. *Id.* An ECG taken on June 14, 2012 revealed sinus bradycardia, possible left atrial enlargement, incomplete right bundle branch block, left anterior fascicular block, and ST&T wave abnormality. (RX8 at 539). A right heart catheterization performed on June 14, 2012 found no evidence of any significant coronary artery disease but did find mild pulmonary hypertension and severe aortic stenosis. (RX8 at 542-544; RX9 at 182-184). Petitioner was referred for aortic valve replacement. *Id.*

A CT scan taken on June 19, 2012 revealed thoracic aorta within normal limits, no pulmonary arterial filling defects or evidence of thromboembolism. (RX8 at 259-260; RX9 at 175-176; RX10 at 128-129). The CT scan also noted scattered pulmonary nodules bilaterally most which were calcified and consistent with benign granulomas along with a 1 cm nodule adjacent to the right minor fissure which could have minimal calcification. *Id.* Follow up for the nodule was recommended. *Id.*

Dr. Watson performed a consultation on July 2, 2012 and noted Petitioner's complaints of shortness of breath, fatigue, chest pain, cold feet and sweats. (RX8 at 518-521). Dr. Watson listed Petitioner as a current every day smoker with a 25-pack year history. *Id.* Petitioner's lungs were clear to auscultation with normal respiratory effort. *Id.* Dr. Watson scheduled aortic valve replacement surgery. *Id.* A pre-anesthesia sleep screen performed on July 6, 2012 noted Petitioner's complaints of snoring, being tired, fatigued or sleeping during the day, and difficulty falling asleep. (RX8 at 504; RX10 at 121). The study found Petitioner to be at risk for apnea. *Id.* A July 6, 2012 chest x-ray found small calcified granulomas and had a final impression of no acute cardiopulmonary process. (RX8 at 506; RX10 at 126).

Dr. Watson performed the aortic valve replacement on July 10, 2012. (RX7 at 181-182; RX8 at 255-256; RX9 at 172-173). A July 10, 2012 post-operative chest x-ray revealed persistent mild elevation of right hemidiaphragm, mild pulmonary vascular congestion and a small left pleural effusion with adjacent atelectasis. (RX8 at 253). Pulmonary function testing performed on July 10, 2012 found the FEV1 was 86.7% predicted, the FVC was 94.2% predicted and the FEV1/FVC ratio was 73.7%. (RX8 at 246). This was interpreted as "normal spirometry. (RX8 at 248). A chest x-ray taken July 11, 2012 found the lungs clear with significant improvement in pulmonary vascular congestion and bibasilar aeration from prior study. (RX8 at 244). A July 12, 2012 chest x-ray found both lungs remained unremarkable without consolidation, atelectasis, pneumothorax or pleural effusion. (RX8 at 241). The impression found "no acute process." *Id.* A July 13, 2012 chest x-ray found no consolidations or pleural fluid and had a final impression noting removal of the chest tube with no pneumothorax identified and no acute infiltrates. (RX8 at 240).

A July 14, 2012 chest x-ray revealed a stable, enlarged cardiomediastinal silhouette with clear lungs and no focal areas of airspace consolidation, pneumothorax or acute osseous abnormalities. (RX8 at 235). Petitioner was discharged on July 14, 2012. (RX7 at 177-178). He was noted to be a current smoker and was doing very well. *Id.* He denied chest pain, shortness of breath, fever and orthopnea. *Id.* Dr. Watson noted a moderate leak on the transesophageal echo but found Petitioner was doing very well clinically. (RX8 at 133).

Petitioner returned to Primary Care on October 9, 2012 and had normal breath sounds. (RX10 at 118-119). A flu vaccine was provided. *Id.* Petitioner returned to Primary Care on December 10, 2012 with a sore throat. (RX10 at 116-117). His breath sounds were normal and Petitioner was diagnosed with acute pharyngitis and sinusitis and provided Amoxicillin. *Id.*

An echocardiogram was performed on January 15, 2013 (RX8 at 129; RX9 at 161) and Petitioner returned to Prairie Cardiovascular on January 30, 2013. (RX9 at 156-159; RX10 at 112-115). Moderate aortic regurgitation and elevated blood pressure readings were noted. *Id.* Petitioner was having episodes of bradycardia with heart rate dropping into the low 50s. *Id.* He denied any chest pain, syncopal events, fatigue, or tiredness. *Id.* The chest was clear to auscultation. *Id.* Petitioner's medications (Lopressor, Lisinopril and Hydrochlorothazide) was adjusted. *Id.* Petitioner returned on March 26, 2013 and denied chest pain, shortness of breath, pitting edema, palpitation, dizziness or lightheadedness. (RX9 at 152-155). It was noted that Petitioner was currently retired and disabled but remained physically active by walking, weight exercise and stretching every day. *Id.* The chest was clear to auscultation. *Id.* Petitioner's cardiac medication was modified. *Id.* Petitioner presented to Primary Care on April 9, 2013. (RX10 at 110-111). His lungs had normal breath sounds. *Id.* Petitioner returned to Prairie Cardiovascular on May 7, 2013. (RX9 at 148-151). His chest was clear to auscultation. *Id.*

On June 20, 2013 a chest x-ray was taken at Ferrell Hospital. No interpretation was provided by that facility.

A July 29, 2013 transthoracic echocardiogram revealed moderately increased systolic pressure in the right ventricle, moderate pulmonary hypertension and moderate regurgitation of the bioprosthetic valve. (RX8 at 121; RX9 at 146). Petitioner presented to Prairie Cardiovascular on October 15, 2013 and advised of no recent shortness of breath. (RX9 at 142-145). He stated he walked a mile every morning without problem. *Id.* The previous Sunday he did notice some tightness on his chest that went away. *Id.* The physician noted that Petitioner's moderate pulmonary hypertension might be related to the moderate aortic insufficiency and was not present on the echocardiogram taken prior to surgery. *Id.*

On December 3, 2013, and at the request of Petitioner's attorney, Dr. Michael Alexander reviewed June 20, 2013 chest x-ray and diagnosed CWP, category p/p, 1/0 in all the lung zones. (PX6 at 1-2)[1].

Petitioner signed his Application for Adjustment of Claim herein on December 19, 2013. (AX 2)

At the request of his attorneys, Petitioner presented to Dr. Istanbouly on January 15, 2014 for evaluation for possible CWP. (PX7, exh. 2 at 1-2)[2]. Dr. Istanbouly reviewed Petitioner's 40-year coal mine employment, smoking history, medical history and noted complaints of daily cough triggered by strenuous activity and mild exertional dyspnea. (PX7, RX2 at 1). Dr. Istanbouly's spirometry revealed an FEV1 at 89% predicted, an FVC at 97% predicted and FEV1/FVC ratio of 74%. *Id.* Dr. Istanbouly diagnosed coal workers' pneumoconiosis and found Petitioner's daily cough and exertional dyspnea was caused by the disease. *Id.*

A January 14, 2014 transthoracic echocardiogram revealed the right ventricle had mildly increased systolic pressure resulting in mild pulmonary hypertension; moderate regurgitation was also noted. (RX8 at 113; RX9 at 140). On January 30, 2014, Petitioner presented to Primary Care with complaints of dizziness and weakness. (RX10 at 105-106). The dizziness was a loss of balance causing Petitioner to fall and he had bilateral leg weakness. *Id.* His chest exam was normal. *Id.* Petitioner returned to Prairie Cardiovascular on March 11, 2014 and denied recent chest pain, shortness of breath, edema, dizziness and/or lightheadedness. (RX9 at 136-139). Petitioner's bioprosthetic valve appeared to be functioning normally, the moderate AI (aortic insufficiency) was unchanged and the pulmonary hypotension was improved with a 20 mmHg drop in pulmonary arterial pressure. *Id.* Petitioner returned to Primary Care on March 27, 2014 and denied dizziness, palpitations, difficulty breathing and shortness of breath. (RX10 at 92-93). Normal breath sounds were noted. *Id.*

On March 12, 2014, Dr. B.T. Westerfield reviewed a chest x-ray of Petitioner dated June 20, 2013, at Respondent's request. (RX3). Dr. Westerfield is a board-certified pulmonologist who has a NIOSH B-reading certificate. Dr. Westerfield indicated the film was a quality 1 film. Dr. Westerfield's impression was that there were no radiographic findings of coal workers' pneumoconiosis on the film.

On March 29, 2014, Dr. Christopher A. Meyer[3] reviewed a chest x-ray of Petitioner dated June, 20, 2013, at Respondent's request. (RX1). Dr. Meyer indicated the film was a quality 1 film. Dr. Meyer's impression was that there were no radiographic findings of coal workers' pneumoconiosis on the film. Dr. Meyer did find sequelae of prior granulomatous disease and status post AVR.

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[1] Dr. Alexander is a qualified B-reader, board certified radiologist and medical doctor. (PX 8, pp. 1-2)

[2] Dr. Istanbouly is board certified in pulmonary and critical care but neither a B-reader nor board certified radiologist. (PX 7, p. 4)

[3] Dr. Christopher Meyer is a qualified B-reader, board certified radiologist and medical doctor. (RX 1, pp. 10-11)

On April 22, 2014 Dr. Cristopher Meyer reviewed the June 19, 2012 CT scan (RX1 at 5-6)[1] and found: 1. No radiographic findings of coal workers' pneumoconiosis; 2. Probable aortic stenosis; and 3. Sequelae of prior granulomatous disease, likely histoplasmosis. (RX1 at 5).

On May 7, 2014, Petitioner presented to Dr. Westerfield for an IME at the request of Respondent herein. (RX4). As part of the exam, a chest x-ray was taken that day. Dr. Westerfield read the May 7, 2014 chest x-ray as negative for coal workers' pneumoconiosis and noted sternal wire sutures, scattered granulomas, likely old histoplasmosis, and calcifications in the right shoulder joint. (RX4 at 11-12).

According to his report, Dr. Westerfield's spirometry, the lung volume measurements and the diffusing capacity were all normal. (RX4 at 15). Dr. Westerfield's echocardiogram revealed left axis deviation, premature ventricular contractions, intraventricular conduction delay and left ventricular hypertrophy. (RX4 at 13). On examination, Dr. Westerfield noted an irregular heartbeat with frequent extra beats. (RX4 at 9). Dr. Westerfield found that Petitioner did not have simple or complicated coal workers' pneumoconiosis. (RX4 at 5). He noted the presence of granulomas on the chest x-rays and found they likely represented histoplasmosis; he explained that granulomas can be confused with nodules of pneumoconiosis on some chest x-rays. *Id.* Dr. Westerfield noted that Petitioner reported a few non-specific respiratory symptoms but was not and had not been treated by his physicians for a pulmonary disease. *Id.* He had a history of cardiac disease and an aortic valve replacement from which he had recovered quite well. *Id.* Dr. Westerfield noted that Petitioner remained active in his retirement and played golf regularly. *Id.* In his opinion there was no medical evidence to make a diagnosis of respiratory disease of any kind in Petitioner. *Id.* Based on pulmonary function studies from his lab as well as Dr. Istanbouly's laboratory, Petitioner had no respiratory impairment and no pulmonary disability. (RX4 at 6). Dr. Westerfield found Petitioner had the breathing capacity to return to his previous position in the coal mine or, from a pulmonary perspective, he could enjoy in other job with equal energy requirements. *Id.* Petitioner did not have any evidence of any respiratory disease. *Id.* Dr. Westerfield found that Petitioner's shortness of breath with exertional activities was either related to his heart condition or deconditioning because the pulmonary function testing was completely normal which indicated no respiratory injury. (RX4 at 6-7). There was no relationship between coal mine dust exposure and Petitioner's symptoms because there was no evidence to support any respiratory injury from coal mine employment. (RX4 at 7).

On May 28, 2014, Petitioner presented to Prairie Cardiovascular with palpitations, chest discomfort and shortness of breath. (RX9 at 128-131). Petitioner advised the physician that when he was evaluated for black lung in May 2014, was told he had an irregular heartbeat and to contact his physician. *Id.* On Saturday, Petitioner noticed his heart was pounding fast and hard and skipping beats. *Id.* It stopped after 20 minutes and had been happening off and on since Saturday. *Id.* He felt short of breath, weak and had chest tightness. *Id.* His chest was clear to auscultation and his oxygen saturation was 98%. *Id.* A 48-hour Holter monitor taken May 28, 2014 revealed sinus rhythm with average heart rate of 73 beats per minute with very frequent isolated PVCs and bigeminal cycles which increased the ventricular ectopic burden 4.1% during those periods. (RX9 at 132-133; RX10 at 96-97). An echocardiogram taken June 2, 2014 revealed mild to moderate prosthetic aortic valve regurgitation and trace mitral regurgitation. (RX9 at 127; RX10 at 95). A June 10, 2014 Holter monitor report was abnormal after finding a significant number of ventricular abnormalities including PVSs, bigeminy, trigeminy and quadrigeminy events as well as one short ventricular run lasting 3 beats. (RX7 at 23; RX9 at 125). Petitioner returned to Prairie Cardiovascular on June 10, 2014 and stated since that he had frequent daily

[1] Dr. Cristopher Meyer is a dually-qualified B-reader, board certified radiologist and medical doctor. (RX1 at 10-11). He is currently the Professor of Diagnostic Radiology at the University of Wisconsin Hospital and Clinics in Madison, Wisconsin. *Id.*

palpitation which caused shortness of breath, weakness, lightheadedness, weighted chest, and he would be sweaty and clammy. (RX9 at 120-123). A June 27, 2014 Holter report revealed occasional PVCs, a couplet and a rare PAC. (RX9 at 112). Petitioner reported chest discomfort, shortness of breath and hot or clammy sensations during recording. *Id.* In most recordings there was no associated arrhythmia but two PVCs were seen at time of symptoms. *Id.* A June 30, 2014 transesophageal echocardiogram revealed moderate perivalvular regurgitation and mild atheromatous plaque in the descending aorta. (RX8 at 93; RX9 at 110-111). Petitioner returned to Primary Care on September 4, 2014 and advised about his extra heart beats with accompanying shortness of breath during those instances. (RX10 at 86-88). His chest revealed normal breath sounds. *Id.* An October 13, 2014 Holter monitor reported rare PACs and frequent PVCs totaling 22,585 beats (23.4% of beats). (RX9 at 100). Petitioner did not report any symptoms during the testing. *Id.* A follow up visit at Prairie Cardiovascular noted that Petitioner denied palpitations, presyncope, lightheadedness, fatigue, shortness of breath and chest pain. (RX9 at 95-98).

On November 11, 2014, Dr. Christopher A. Meyer reviewed a chest x-ray of Petitioner dated May 7, 2014, at Respondent's request. (RX1). Dr. Meyer indicated the film was a quality 2, under-inflation. Dr. Meyer's impression was that there were no radiographic findings of coal workers' pneumoconiosis on the film.

Petitioner presented to Primary Care on January 12, 2015. His breath sounds and lung exam were normal. (RX10 at 79-81). A January 21, 2015 transthoracic echocardiogram revealed mildly increased wall thickness in the left ventricle, moderately dilated atrium, mild pulmonary hypertension in the right ventricle and moderate to severe regurgitation in the aortic valve. (RX8 at 34; RX9 at 90). Prairie Cardiovascular classified the aortic insufficiency as mild to moderate. *Id.* The possibility of percutaneous treatment in Springfield was discussed. *Id.* An April 14, 2015 Holter monitor report revealed short runs of non-sustained atrial tachycardia (120 bpm), frequent uniform ventricular ectopy (9,777 beats 10.6% total beats), isolated couplets, and rare PACs (68 beats). (RX9 at76). Petitioner reported skipped beats and shortness of breath during testing when ventricular bigeminy was noted. *Id.* A transthoracic echocardiograph performed on April 14, 2015 revealed a moderately dilated left atrium, mild pulmonary hypertension in the right ventricle and moderate regurgitation in the aortic valve. (RX9 at 74-75). Follow up at Prairie Cardiovascular recommended continued monitoring. (RX9 at 69-72).

Petitioner returned to Primary Care on May 13, 2015 and stated that he thought he was doing okay. (RX10 at 55-57). His chest exam and breath sounds were normal. *Id.* Petitioner returned on June 16, 2015 and advised of dyspnea on exertion when the weather turned hot. (RX10 at 63-66). He had improvement with palpitations and had no dizziness, lightheadedness, syncope or change in his energy level. *Id.* He was exercising three times a week for about 25 minutes each time. *Id.* Petitioner was referred to Dr. Goldstein in Springfield for consideration of percutaneous repair of the AI. *Id.* Petitioner presented to Dr. Goldstein on July 24, 2015 for possible treatment of the perivalvular leak (RX9 at 55-58) and Dr. Goldstein approved the procedure on July 30, 2015. (RX9 at 51). Pre-operative information revealed Petitioner complained of fatigue but denied chronic cough. (RX9 at 27-29; RX11 at 4-5). His chest was clear to auscultation. *Id.* The surgical procedure to repair the aortic paravalvular leak was performed on September 11, 2015. (RX9 at 20-22; RX11 at 20-22). Post-operatively, Petitioner denied chest pain, shortness of breath and palpitations. (RX11 at 39-41). Cardiac monitoring was normal. *Id.* Petitioner was discharged on September 12, 2015. (RX11 at 2-3).

Petitioner presented to Primary Care on September 21, 2015; he was doing "quite well" post aortic valve repair. (RX10 at 53-54). Petitioner returned on November 2, 2015 with lumbar spine pain that began two weeks earlier while playing golf. (RX10 at 50-52). Petitioner denied difficulty breathing at that time. *Id.* Petitioner returned to Dr. Le on November 10, 2015 who noted Petitioner was doing well overall. (RX9 at 8-10). Petitioner was feeling much better since aortic insufficiency was repaired and no longer had any palpitation. *Id.* Petitioner denied chest pain, shortness of breath, dizziness and lightheadedness. *Id.* He had been fully active without any

restriction. *Id.* A transthoracic echocardiograph was performed on December 3, 2015. (RX8 at 11; RX9 at 5-6). Petitioner returned to Primary Care on December 21, 2015 and stated he thought was doing ok and advised his echo looked good according to Dr. Le. (RX10 at 4-7). Petitioner's symptoms did not include shortness of breath. *Id.* Petitioner returned to Primary Care on December 23, 2015 and stated he was able to play golf without increased pain. (RX10 at 2-3). Petitioner denied difficulty breathing at that time. *Id.*

Deposition of Dr. Istanbouly

Dr. Istanbouly was deposed on December 2, 2015. (PX7). He stated he was a physician specializing in pulmonary and critical care medicine. (PX7 at 4). Dr. Istanbouly evaluated Petitioner on January 15, 2014 at Petitioner's request. (PX7 at 7). Petitioner complained of chronic cough on a daily basis for a few years with slight, clear sputum and mild Exertional dyspnea. *Id.* His chest x-ray revealed multiple bilateral tiny round opacities consistent with coal workers' pneumoconiosis and that was confirmed by the B-reader as well. *Id.* The spirometry was within normal range and his physical exam was basically normal. *Id.* Dr. Istanbouly's impression was simple CWP and he opined the condition was contributing to Petitioner's chronic respiratory symptoms. *Id.*

Dr. Istanbouly stated Petitioner had a mild case of coal workers' pneumoconiosis because he did have symptoms. (PX7 at 10). Based on normal PFT, it was a mild case. *Id.* He stated, "in theory," if you had CWP you would also have an impairment of the function of the lung at least at the site of the scarring and fibrosis. (PX7 at 15-16). In this case, it could not be confirmed on the spirometry. (PX7 at 16). It may not be measurable but it was there. *Id.* Dr. Istanbouly testified that Petitioner did not have any pulmonary impairment. He felt he had mild changes suggestive, or consistent with, coal workers' pneumoconiosis. *Id.* The impairment evaluation was based on his symptoms and PFT. *Id.* Dr. Istanbouly would not call Petitioner's condition a clinically significant pulmonary impairment. (PX7 at 18). Petitioner had chronic persistent respiratory symptoms which could be a manifestation of coal workers' pneumoconiosis. *Id.* Petitioner definitely could not go back to work in the coal mine. *Id.* He would be taking a serious risk if he kept exposing himself to coal dust. *Id.* There was no evidence of emphysema or an obstructive condition based on the x-ray or spirometry but Petitioner's symptoms were suggestive. (PX7 at 21). The symptoms were cough and shortness of breath on exertion. *Id.* Dr. Istanbouly could not recall if Petitioner was coughing when he examined him. (PX7 at 23). The information about coughing was received from Petitioner and based on his description, Dr. Istanbouly classified it as mild. *Id.*

Dr. Istanbouly is not a B-reader or a board-certified radiologist. (PX7 at 23). When Dr. Istanbouly reviewed a chest film he did not use the ILO/NIOSH comparison films. (PX7 at 24-25). He just looked at the x-ray. (PX7 at 25). His diagnosis was based on his experience and knowledge and he will call it mild, moderate or severe; he did not put any numerical classification on a film. *Id.* Dr. Istanbouly stated that "mild early" included the classification of 0/1 and, in his world, that would still be positive for pneumoconiosis. *Id.* Based on Petitioner's mild chronic changes and mild respiratory symptoms, Dr. Istanbouly believed that Petitioner did not develop CWP after he left the mines; he was having the problem while working as a miner. (PX7 at 26-27). If Petitioner had coughing, wheezing and dyspnea with exertion, those symptoms were related to coal dust inhalation and could be COPD. (PX7 at 27). The PFTs showed no evidence of obstructive defect. (PX7 at 30). Dr. Istanbouly could not address restrictive impairment because he did not do complete pulmonary function testing. *Id.* Even if Petitioner did not have simple CWP, Dr. Istanbouly would still restrict Petitioner from returning to the mine based on his symptoms of chronic cough, sputum production and exertional dyspnea. (PX7 at 30-31). Dr. Istanbouly was under the impression Petitioner left the coal mine due to significant respiratory symptoms and arthritis.

Dr. Westerfield's Deposition

Dr. Westerfield was deposed on October 7, 2016. (RX5). He was a pulmonary specialist and was board certified in internal medicine, pulmonary medicine, sleep medicine and a certified B-reader. (RX5 at 5). He explained that B-reader certification was a program created by NIOSH for interpreting x-rays for pneumoconiosis. *Id.* He worked as an independent medical examiner. (RX5 at 8). He did work for plaintiffs, defendants, federal black lung program, insurance companies and the State of Kentucky. *Id.* He is currently serving as the University Examiner for the State of Kentucky. As such he performs the first impartial/independent examination for black lung when a claim has been filed. (RX 5 at 9)

Dr. Westerfield testified consistent with the report he had issued earlier and when he examined Petitioner he noted that Petitioner had some shortness of breath but found it did not limit Petitioner's activities because he played golf every day and was not treated for any breathing problem. (RX5, pp. 9 – 17) He was unable to get an arterial blood gas reading because they couldn't get a good draw of Petitioner's blood the first time and Petitioner refused any further attempts. (RX 5, p. 17) Dr. Westerfield discussed Petitioner's medications and explained that none of the medications were treating anything related to lung disease and were not for breathing. (RX5 at 22-23). Dr. Westerfield noted Petitioner's symptoms included shortness of breath at night and mucus. (RX5 at 24). Dr. Westerfield found the May 7, 2014 film was of good quality and negative for CWP. (RX5 at 31-32). The abnormalities of sternum wire sutures, granulomas and Petitioner's shoulder were not related to coal mine employment. (RX5 at 32-33). Scattered granulomas were scar tissue that reflected histoplasmosis which could be confused with pneumoconiosis. *Id.* Histoplasmosis was a fungal infection of the lungs which was very common in the Ohio River Valley. *Id.* Most people were not sick if they got it but it left scars in the lung tissue. (RX5 at 32-33). There was nothing on the May 7, 2014 chest x-ray that showed an injury from Petitioner's coal mining employment due to dust inhalation. (RX5 at 33). Petitioner's testing reflected normal breathing and Petitioner showed no indication of any injury from coal dust based on the spirometry. (RX5 at 39). The lung volumes were normal. There was no indication of any injury from coal dust in the lung volumes or the diffusing capacity. (RX5 at 39-40).

Dr. Westerfield explained that each film had gradations beginning at 0/0. (RX5 at 44). Everything on the 0 line, including 0/1, was a negative finding for pneumoconiosis. (RX5 at 44-45). It was not an "almost positive" finding. (RX5 at 45). It meant that the interpreter found some opacities that could be consistent with pneumoconiosis but it was not a positive finding. *Id.* A positive finding was 1/0. *Id.* 1/0 meant there were opacities present that looked like pneumoconiosis, but the interpreter also considered that this was a negative film. *Id.* It then moved up to 1/1, which had the interpreter clearly identifying the presence of opacities. *Id.* The reviewed film was compared with the standard category film and the reader matched the objective film to the standard film that most looked like the objective film. *Id.*

Dr. Westerfield noted Dr. Alexander's reading of 1/0 for the June 2, 2013 film. (RX5 at 45). That was a positive reading for the film but indicated Dr. Alexander considered that the film was actually a negative film, hence the "0." (RX5 at 45-46). By classifying the film 1/0, Dr. Alexander was stating that he found opacities and thought they were consistent with pneumoconiosis but acknowledged that they might not be. (RX5 at 46). Dr. Westerfield agreed that if Petitioner, or any petitioner, had CWP, he would recommend the individual have no further coal dust exposure. (RX5 at 59-60). Dr. Westerfield found no evidence of coal workers' pneumoconiosis in Petitioner's case. (RX5 at 62). Petitioner did not have radiographic evidence of CWP. *Id.* He had normal spirometry and normal lung function. *Id.* He had no lung disease. *Id.*

On October 24, 2016, Dr. Henry Smith read a chest film dated 05/17/2014, at Petitioner's request. Dr. Smith is a board-certified radiologist and doctor of osteopathic medicine who also holds a Certificate as a NIOSH Pneumoconiosis B-Reader. (PX5). Dr. Smith's impression was early mild simple coal workers' pneumoconiosis with small opacities, primary p, secondary q, mid to lower lung zones involved bilaterally, of a profusion 1/0. Dr. Smith graded the film as quality 1. (PX3).

On February 3, 2017, Dr. Henry K. Smith performed a Pneumoconiosis Chest Film Interpretation on a chest film dated 07/06/12, at Petitioner's request. (PX1). Dr. Smith's impression of the chest film was of simple coal workers' pneumoconiosis, with small opacities, primary p, secondary q, with all lung zones involved bilaterally, of a profusion 1/0. (PX3). Dr. Smith graded the film quality as a quality 1.

On February 3, 2017, Dr. Henry Smith read a chest film dated 06/20/13, at Petitioner's request. Dr. Smith's interpretation of this film was early mild simple coal worker's pneumoconiosis with small opacities, primary p, secondary s, mid to lower lung zones involved bilaterally, of a profusion 1/0. Dr. Smith graded the film as quality 2. (PX2).

On February 24, 2017, Dr. Robert D. Tarver, reviewed a chest x-ray of Petitioner dated June 20, 2013, at Respondent's request. (RX2). Dr. Tarver is a board-certified Radiologist who has a NIOSH B-reading certificate. Dr. Tarver indicated the film was a quality 1 film. Dr. Tarver's impression was that there were no radiographic findings of coal workers' pneumoconiosis on the film.

On February 24, 2017, Dr. Robert D. Tarver reviewed a chest x-ray of Petitioner dated May 7, 2014, at Respondent's request. (RX2). Dr. Tarver indicated the film was a quality 1 film. Dr. Tarver's impression was that there were no radiographic findings of coal workers' pneumoconiosis on the film.

On March 12, 2017, Dr. Christopher A. Meyer reviewed a chest x-ray of Petitioner dated July 6, 2012, at Respondent's request. (RX1). Dr. Meyer indicated the film was a quality 3 film. Dr. Meyer's impression was that there were no radiographic findings of coal workers' pneumoconiosis on the film. Dr. Meyer did find several calcified granulomas and clear lungs.

On April 6, 2017, Dr. Henry Smith read a chest CT scan dated 06/19/12, at Petitioner's request. Dr. Smith found mild diffuse interstitial fibrosis throughout the upper, mid and lower zones predominately radiographic type-p pneumoconiosis characterized by tiny branching lines and ill-defined punctate opacities in a predominant centrilobular location. The non-peripheral areas of low attenuation correspond to irregular fibrosis around and along the respiratory bronchioles and corresponds to changes associated with focal dust emphysema, which is most commonly seen in pneumoconiosis with predominate P-type changes. There were also scattered old granulomatous calcifications bilaterally in the lungs as well. There were small scattered blebs/bullae also seen. In summary, the CT chest findings are consistent with pneumoconiosis of a predominant p-type distribution throughout the upper, mid and lower zones, of a profusion, which appears likely 1/1. (PX4).

On April 13, 2017, Dr. Alexander read a chest film dated 05/07/14, at Petitioner's request. (PX7). Dr. Alexander's impression of the chest film was of coal workers' pneumoconiosis, with small opacities, primary p, secondary p, with all lung zones involved bilaterally, of a profusion 1/0. Dr. Alexander graded the film quality as a quality 1. (PX7).

On April 6, 2017, Dr. Henry Smith reviewed the CT scan of June 19, 2012 and noted findings consistent with pneumoconiosis of a predominant p-type distribution throughout the upper, mid and lower zones, of a profusion which appears to be likely 1/1. *Id.* Incidental scattered old granulomatous calcifications were also seen in the bilateral lung fields. (PX 4)

The Arbitration Hearing

Petitioner's case proceeded to arbitration on February 7, 2018. Petitioner was the sole witness testifying at the hearing.

Petitioner was born on April 28, 1952 and was 65 years of age at the time of the hearing. His wife is Deborah Jean. He completed high school and attended college but did not acquire a degree. Petitioner alleged 40 years of coal mine employment all of which was underground Except for three months on the surface. He last worked at White County Coal from 2008 to January 10, 2010 as the supervisor of the recovery crew. His prior coal mine employment classifications included shot firer, roof bolter (2 years), coal driller (2 years), miner operator (18-20 years), outby supervisor/mine manager (17 years), pumper and belt shoveler. He stated that all the jobs involved heavy manual labor.

Petitioner testified that he left the mine following knee replacement surgery when Dr. Morgan would not release him back to work. Petitioner stated he would have continued to work if not for the restriction and his breathing problems that consisted of shortness of breath when he was working. He did not want to retire as he wished to continue working to age 66. Prior to his leaving the mine he would take breaks for his breathing problems when he was shoveling, rock dusting, walking, lifting or hanging cables. He stated his breathing problems began in early 2000, about 10 years before leaving the mine. He was working as a miner operator and would notice that he would get out of breath quicker than in the past. He stated he declined jobs due to his breathing problems at Eagle Valley and White County because he did not feel he could do the walking that was required. Shoveling and lifting also caused problems. He stated he could no longer walk more than a quarter of a mile, up a hill, or up one flight of stairs without breathing problems and his breathing worsened after he left the mine. His breathing problems affected his activities of daily life to a certain degree when he worked around the house. He either got help or hired someone to do the job stating there was a dramatic change since he retired. Petitioner denied he was taking any breathing medications.

Petitioner did not know how to use a computer or type and stated he was a life-long, non-smoker. He stated he could no longer do his last coal mining job. He could not shovel, rock dust, hand dust, walk any distance, lift or hang cables. His treating physicians included Dr. Vargo at Harrisburg Primary Care, Dr. Larry Jones, Dr. Le (his cardiologist) and Dr. Morgan (his orthopedist). He did not discuss his breathing problems with Dr. Vargo but did discuss them with Dr. Jones. In addition to his breathing problems he had two hip replacements, one knee replacement, open heart surgery, neck surgery and ulnar nerve surgery. He was off work for about six months for his hip replacements and 6-8 weeks for his cervical surgery.

Petitioner never advised anyone at White County of his inability to shovel rock dust, walk or lift while he was working there. He began working at White County in September 2008 and left on January 10, 2010. He began the process of obtaining Social Security Disability benefits in April 2009. The reason he requested and ultimately obtained the SSD benefits was his osteoarthritis and artificial joints. He did not return to the coal mine because Dr. Morgan recommended he not put extra wear on his knee. When Petitioner left Respondent's employment he did not advise the mine that he was leaving due to any pulmonary problem. Neither Dr. Jones

nor Dr. Morgan diagnosed him with pneumoconiosis prior to leaving the mine and Dr. Le did not diagnose him with pneumoconiosis after he left the mine.

The Arbitrator concludes:

Section 6(c) of the Occupational Disease Act requires an employee to file a claim for benefits within three years of the last date of exposure. 820 ILCS 310/6(c). Claims for coal workers' pneumoconiosis must be filed within five years of Employee's last date of exposure. *Id.* Petitioner's last date of exposure was on January 10, 2010 and his claim was filed on December 30, 2013. Petitioner's claim is only valid for coal workers' pneumoconiosis.

The Occupational Disease Act also requires the employee to prove he was disabled within two years of his last date of exposure. 820 ILCS 310/1(f). Disablement is defined under the Act as an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body, or the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he or she claims compensation, or equal wages in other suitable employment. 820 ILCS 310/1(e). Therefore, pursuant to Sections 1(e), 1(f) and 6(c), the employee must show that he was disabled from coal workers' pneumoconiosis prior to January 10, 2012.

1. **Coal Workers' Pneumoconiosis**

Coal workers' pneumoconiosis can be diagnosed pathologically or radiographically. There was no pathological evidence in this case. The radiological evidence revealed the following:

The chest x-rays dated March 1, 1977, July 27, 1973, August 18, 1978, September 14, 1989, February 23, 1995, June 23, 1999, and August 25, 2008 were reviewed by NIOSH A-readers and B-readers. (RX5). All of the films were interpreted as negative for pneumoconiosis. *Id.*

Petitioner's medical records contained chest x-rays dated September 6, 1998, December 13, 2007, April 14, 2008, July 6, 2012, July 10, 2012, July 11, 2012, July 12, 2012. July 13, 2012, July 14, 2012. (RX7 at 753; RX10 at 271; RX10 at 238; RX7 at 424; RX10 at 222; RX8 at 506; RX10 at 126; RX8 at 253-254; RX8 at 241; RX8 at 240; RX8 at 235). Some of the films noted scattered calcified granulomas. *Id.* No radiologist diagnosed coal workers' pneumoconiosis or attributed any of the radiological findings to coal dust. *Id.*

The June 19, 2012 CT scan also noted the granulomas and similarly failed to diagnose coal workers' pneumoconiosis. (RX8 at 259-260; RX9 at 175-176; RX10 at 128-129). Dr. Meyer and Dr. Smith reviewed the film. (RX1 at 5-6; PX4). Dr. Meyer found: 1. No radiographic findings of coal workers' pneumoconiosis; 2. Probable aortic stenosis after noting atherosclerotic vascular calcification in the left anterior descending coronary artery and dense calcification of the aortic valve; and 3. Sequelae of prior granulomatous disease, likely histoplasmosis. (RX1 at 5). Dr. Smith found CT chest findings consistent with pneumoconiosis of a predominant p-type distribution throughout the upper, mid and lower zones, of a profusion which appears to be likely 1/1. (PX4). Dr. Smith also noted incidental scattered old granulomatous calcifications seen in the bilateral lung fields. *Id.*

The July 6, 2012 chest film found in Petitioner's medical records was also reviewed by Dr. Smith and Dr. Meyer. Dr. Smith read the July 6, 2012 chest film and issued an ILO classification form finding the film positive for CWP at level of 1/0, p/p, in all lung zones. (PX1). Dr. Meyer reviewed the film as negative for CWP and stated that, Except for several calcified granulomas, the lungs were clear. (RX1 at 1-2).

The June 20, 2013 chest x-ray was reviewed by Dr. Alexander, Dr. Istanbouly, Dr. Westerfield, Dr. Smith, Dr. Tarver and Dr. Meyer. (PX6, PX7, RX2 at 1, RX3 at 2, PX2, RX2 at 1-2, RX1 at 7). Dr. Alexander read the film as positive with an ILO classification of 1/0, p/p, in all lung zones. (PX6). Dr. Istanbouly found bilateral small round opacities, consistent with CWP. (PX7, exh. 2 at 1). Dr. Smith found simple CWP, 1/0, p/s, in the bilateral mid and lower zones. (PX2). Dr. Westerfield, Dr. Tarver and Dr. Meyer all noted granulomas but found the film was negative for coal workers' pneumoconiosis. (RX3 at 2, RX2 at 1-2, RX1 at 7).

The May 7, 2014 chest x-ray taken by Dr. Westerfield as part of his IME, was reviewed by Dr. Westerfield, Dr. Alexander, Dr. Smith, Dr. Meyer and Dr. Tarver. Dr. Alexander found the film was positive for CWP at 1/0, p/p, in all lung zones. (PX7 at 1-2). Dr. Smith read the film as positive at 1/0, p/p, in the mid and lower zones. (PX3). Dr. Westerfield, Dr. Meyer and Dr. Tarver again noted the scattered granulomas and found the film negative for pneumoconiosis. (RX4 at 11; RX1 at 3; RX2 at 3-4).

There is no conflict with any of the NIOSH chest x-rays interpretations. All of those films were read as negative for coal workers' pneumoconiosis. None of the x-rays in Petitioner's medical records diagnosed coal workers' pneumoconiosis. Dr. Istanbouly's lack of B-reading credentials and statement that a finding of 0/1 was positive for pneumoconiosis undermines reliance on his opinion. Of the qualified B-readers, Dr. Smith's earlier findings conflicted with his later findings to show pneumoconiosis in fewer areas of the lungs, i.e., the initial readings found the disease in all lung zones, later films only found the disease in mid and lower zones. This change is inconsistent with the scientific principle that pneumoconiosis is permanent. This internal inconsistency was not addressed by Dr. Smith and undermines his opinion. Dr. Alexander's opinion was rebutted by the B-readings of Dr. Meyer, Dr. Tarver and Dr. Westerfield, whose opinions were consistent with those in Petitioner's medical records, which contained the most recent radiological interpretation dated July 14, 2012 that found Petitioner's lungs were clear. (RX8 at 235). The preponderance of the radiological and medical opinion evidence, comprised of both experts and treating physicians, fails to support a finding of coal workers' pneumoconiosis.

2. Petitioner's symptoms of shortness of breath and fatigue.

Petitioner stated his breathing problems began in the early 2000, about 10 years before leaving the mine in 2010. Petitioner stated he discussed his breathing problems with Dr. Jones. The first mention of shortness of breath in Petitioner's medical records is in December 2007. (RX10 at 239-240). Dr. Jones attributed Petitioner's respiratory symptoms to his aortic stenosis. *Id.* Thereafter, Petitioner denied shortness of breath, wheezing and/or chronic cough on April 8, 2008, March 30, 2009, July 30, 2009, November 19, 2009, February 5, 2010. (RX10 at 223-224; RX10 at 198-199; RX10 at 194; RX9 at 198; RX10 at 190; RX10 at 182-183).

Petitioner again complained of shortness of breath and dyspnea on Exertion on May 15, 2012. (RX9 at 192-195; RX10 at 131-134). Dr. Le diagnosed bicuspid aortic valve with severe aortic stenosis and dilated ascending aorta and attributed Petitioner's dyspnea on Exertion to either aortic stenosis or poor physical condition. *Id.* Pulmonary function testing performed on July 10, 2012 found the FEV1 was 86.7% predicted, the FVC was 94.2% predicted and the FEV1/FVC ratio was 73.7%. (RX8 at 246). This was interpreted as "normal spirometry." (RX8 at 248). Dr. Watson performed the aortic valve replacement on July 10, 2012. (RX7 at 181-182; RX8 at 255-256; RX9 at 172-173). Following surgery, on July 14, 2012, Petitioner denied

shortness of breath. (RX7 at 177-178). Petitioner continued to deny shortness of breath on March 26, 2013, October 15, 2013, March 11, 2014 and March 27, 2014. (RX9 at 152-155, 142-145, 136-139; RX10 at 92-93).

Although Petitioner complained of shortness of breath during the exams with Dr. Istanbouly on January 14, 2014 and Dr. Westerfield on May 7, 2014, the spirometry taken by Dr. Istanbouly and Dr. Westerfield revealed normal testing with no obstructive condition. (PX7, RX2 at 1; RX4 at 15). Dr. Westerfield's additional pulmonary function testing revealed no evidence of any restrictive condition, normal total lung capacity at 92% predicted (RX5 at 35) and normal diffusing capacity at 104% predicted. (RX4 at 14). Dr. Istanbouly attributed Petitioner's symptoms to coal workers' pneumoconiosis. (PX7, exh. 2 at 2). Dr. Westerfield found that Petitioner's shortness of breath on exertion was either related to his heart condition or deconditioning because the PFTs were completely normal which indicated no respiratory injury. (RX4 at 6-7).

Dr. Westerfield's opinion was consistent with that of Dr. Jones (RX10 at 239-240) and Dr. Le (RX9 at 192-195; RX10 at 131-134) as well as the medical records obtained after Dr. Westerfield's exam which revealed Petitioner again complaining of shortness of breath, this time with associated symptoms including a fast, hard and skipping heartbeat. (RX9 at 128-131). Numerous Holter monitoring tests revealed frequent ventricular abnormalities and echocardiograms revealed mild to moderate aortic valve regurgitation that advanced to moderate to severe regurgitation in the aortic valve by January 2015. (RX9 at 132-133; RX10 at 96-97; RX9 at 127; RX10 at 95; RX7 at 23; RX9 at 125; RX9 at 120-123; RX9 at 112; RX9 at 110-111; RX8 at 93; RX9 at 100; RX8 at 34; RX9 at 90). Dr. Goldstein surgically repaired the aortic paravalvular leak on September 11, 2015. (RX9 at 20-22; RX11 at 20-22). Post-operatively, Petitioner denied chest pain, shortness of breath and palpitations. (RX11 at 39-41). Petitioner continued to deny difficulty breathing and/or shortness of breath on September 21, 2015, November 2, 2015, November 10, 2015, December 21, 2015 and December 23, 2015. (RX10 at 53-54; RX10 at 50-52; RX9 at 8-10, 5-6; RX8 at 11; RX10 at 2-7). Dr. Westerfield's opinion is entitled to greater weight based on his additional B-reader qualification, additional testing performed during the IME, and the consistency between his opinion and those rendered by Petitioner's treating physicians.

3. Conclusion

In concluding that Petitioner has failed to prove that he suffers from CWP as a result of his exposure to the hazards of coal mining the Arbitrator places great weight on the NIOSH B-readers' interpretations of chest x-rays, readings done at the behest of neither party herein. Additionally, Drs. Meyer, Tarver, and Westerfield, all of whom are B-readers, read numerous chest x-rays and found them all negative for CWP. In contrast, Petitioner's B-readers, Drs. Smith and Alexander read the x-rays as positive but at a profusion of 1/0, which is the lowest rating one may have and still be "positive" for CWP. Lastly, the Arbitrator has considered the record as a whole, especially the medical records pertaining to Petitioner. These records never mention CWP or problems with breathing or coughing that Petitioner attributed to his work as a coal miner. The records do reflect a gentleman with a myriad of medical conditions. Very significant is the fact that Petitioner left his work at the coal mine to have surgery done and was never released to return to that work by his treating physician because he needed to refrain from extra wear on his knees Thus, he was encouraged to go on disability. CWP or breathing problems generally were never used as a reason Petitioner could not return to work as a miner after his surgery. He received disability for his osteoarthritis and artificial joints. While Petitioner testified that his breathing problems began about ten years before he left the mine, that he declined jobs due to breathing problems, and that he would have returned to mining after his knee surgery except for the doctor's restriction and his breathing problem, there was no corroboration for this testimony.

The preponderance of the evidence fails to support a conclusion that Petitioner has coal workers' pneumoconiosis or was disabled from any occupational disease with two years of his last exposure, January 10, 2010. For these reasons, benefits are denied and all other issues are moot.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stacey Nathan-Hughes,

Petitioner,

vs. NO: 15 WC 27962

Peoria County Juvenile
Detention Center,

Respondent.

19IWCC0131

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 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 11, 2018, 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.

19IWCC0131

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.

FEB 28 2019

DATED:
o020719
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

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

NATHAN-HUGHES, STACEY
Employee/Petitioner

Case# **15WC027962**

15WC027963

PEORIA COUNTY JUVENILE CENTER
Employer/Respondent

19IWCC0131

On 6/11/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0225 GOLDFINE & BOWLES PC
KEVIN ELDER
4242 N KNOXVILLE AVE
PEORIA, IL 61614

5354 STEPHEN KELLY
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PEORIA, IL 61604

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

STACEY NATHAN-HUGHES
Employee/Petitioner

v.

PEORIA COUNTY JUVENILE CENTER
Employer/Respondent

Case # **15** WC **27962**

Consolidated cases: **15 WC 27963**

19IWCC0131

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS McCARTHY**, Arbitrator of the Commission, in the city of **PEORIA, ILLINOIS**, on **04/18/2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0131

FINDINGS

On the date of accident, **06/20/2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$41,017.60**; the average weekly wage was **$788.80**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **NO** dependent children.

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

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

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

ORDER

The total medical award is $9,238.45 in outstanding medical bills, and the lien in the amount of $14,285.63. Respondent is entitled to credit for payments made by its group carrier. All payments are subject to the Fee Schedule.

Petitioner is prospectively awarded the lumbar fusion surgery recommended by Dr. Mulconrey.

Petitioner is awarded T.T.D. benefits in the amount of $525.87 per week for a period of 11 6/7ths weeks covering September 25, 2015 through December 16, 2015.

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

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

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

Signature of Arbitrator

June 4, 2018
Date

ICArbDec19(b)

JUN 11 2018

ATTACHMENT TO ARBITRATOR'S DECISION

Stacey Nathan-Hughes vs. Peoria County Juvenile Center

IWCC No.: 15 WC 27962

In Support of the Arbitrator's Decision as to (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent and (D) What was the date of the accident:

This matter was tried as a 19(b)8(a) with a companion case, seeking payment of medical bills, T.T.D. benefits, and a prospective medical award pursuant to Section 8(a) for a recommended lumbar fusion.

Petitioner is employed by Respondent, County of Peoria, as a deputy/guard in their juvenile detention program. On June 20, 2015, Petitioner was monitoring a classroom when a fight broke out in another classroom. Petitioner ran to the fight and restrained a juvenile by grabbing her from behind, wrapping her arms around her. She and the juvenile fell to the ground with Petitioner landing on her rear end. Petitioner immediately felt sharp pain running down her left leg. Petitioner advised her supervisor of her accidental injury and a Form 45 was completed on June 25, 2015. (Petitioner Exhibit 7) The report states that a lumbar strain was suffered on June 20, 2015 while restraining a juvenile.

Respondent sent Ms. Nathan-Hughes to IWIRC where she was initially seen on June 25, 2015. (Petitioner Exhibit 4, p.p.8-9) Although IWIRC recorded the wrong accident date and wrong time of the day, they were able to accurately record that Petitioner broke up a fight by restraining a juvenile and going to the floor with her, causing immediate pain and then later, radicular pain down her left leg. Petitioner also

reported to IWIRC that her back pain started in 2013 with "fluctuating pain since". (Petitioner Exhibit 4, p.8)

Petitioner originally listed her date of accident as June 6, 2015 on her application for adjustment of claim, filed on August 25, 2015. Prior to trial, Petitioner moved to amend her accident date to June 20, 2015, which is the date she reported her accident to her supervisor. The motion was granted.

Respondent, as part of its argument against compensability, alleges that the date change affects the Petitioner's credibility. Had the Petitioner failed to report her accident in a fairly timely fashion and allege as the date of accident June 20, the Respondent's argument would be valid. However, her notice to her supervisor on June 25 corroborates her testimony as to when the accident occurred. The Arbitrator believes it is reasonable to assume that her attorney chose the date of June 6 because that was the date contained in the history note from her first medical provider, IWIRK. (PX 4) Furthermore, the Petitioner testified that while she did sign the application, she does not recall looking at the date of accident alleged. In addition, her testimony was that when she fell breaking up the fight at work, her back pain increased. She did not feel leg pain until waking up the next day. This factual presentation is consistent with her decision to wait a few days to report her accident and seek treatment. She'd had back pain before; it wasn't until it traveled into her left leg that she sought care.

Respondent also argues against credibility based upon the Petitioner denying any prior low back care or symptoms prior to January of 2013 when she was injured at work when slipping on ice. A claim was filed for that injury and it was tried along with this case by consolidation. The Arbitrator has reviewed all the medical records of prior care,

which date back to 1998. (RX 6) While there are occasional references to low back pain, there are no references to left leg radiation and no indication of any follow up care beyond emergency room visits. (Id, See 6-30-09; 8-29-09) The fact that the Petitioner did not remember them during her testimony is thus understandable.

Based upon the Form 45 and Petitioner's testimony, the Arbitrator finds that a compensable accident occurred on June 20, 2015.

In support of the Arbitrator's Award as to (F) Is Petitioner's current condition of ill-being causally related to the injury and (K) Prospective Medical Care, the Arbitrator notes as follows:

Respondent directed Petitioner to treat at IWIRC. She had an initial appointment on June 25, 2015. (Petitioner Exhibit 4, p.8) On June 30, 2015 she began physical therapy at IWIRC. On July 7, physical therapy was held up and an MRI was ordered. (Petitioner Exhibit 4, p.12)

A lumbar MRI performed on July 10, 2015 demonstrated a large left paracentral disc protrusion at L5-S1 which was compressing the thecal sac and left S1 nerve root. (Petitioner Exhibit 4, p.14)

On July 16, 2015 IWIRC referred Ms. Nathan-Hughes for an orthopedic spine consult. IWIRC also placed work restrictions on Petitioner.

Petitioner initially saw Dr. Mulconrey, a spine surgeon at Midwest Orthopedic Center, on July 22, 2015. (Petitioner Exhibit 2, pp.54-55) Dr. Mulconrey received an identical accident and symptom history as that given to IWIRC and to Petitioner's

Arbitration testimony. He interpreted the MRI as showing a large left disc protrusion and recommended an L5-S1 hemilaminectomy. (p.55)

On August 25, 2015, Respondent denied Petitioner's claim, advising IWIRC that they were denying the claim. (Respondent Exhibit 4, p.16) No reason was given for the denial.

Petitioner thereafter used her health insurance to cover her proposed lumbar surgery. On September 25, 2015 Ms. Nathan-Hughes underwent a left hemilaminectomy, partial facetectomy, foraminotomy, and discectomy at L5-S1. (Petitioner Exhibit 2, pp.3-4) She was released by Dr. Mulconrey to return to full duty work as of December 16, 2015. She saw him again in April of 2016, at which time she reported that she still had some lower back pain. She was placed at MMI. (PX 1 at 12)

She returned to Dr. Mulchonrey's office in September 2016. She reported that her lower back pain was increasing and that she was experiencing recurrent pain down the left leg. She also said she was having some numbness in the right foot. (Id at 12, 13) Dr. Mulconrey ordered a repeat MRI which was performed on September 23, 2016. The repeat MRI showed an "apparent posterior left disc protrusion / herniation deforms left preforaminal dural sac and left S1 nerve root, and contacts the right S1 nerve root". (Petitioner Exhibit 2, p.15) Dr. Mulconrey thereafter recommended a lumbar fusion.

On April 25, 2017 Petitioner attended an IME at Respondent's request with Dr. Morris Soriano. Dr. Soriano was deposed by the parties on February 19, 2018. (Respondent Exhibit 5) Dr. Soriano is a recently retired neurosurgeon who performs 10-15 IME's per month, nearly all of them for insurance companies. (Deposition, pp.7-9, pp.43-44) Dr. Soriano did not feel that Petitioner's first work accident on January 13,

2013 had any causal relationship to her condition of ill being on April 25, 2017. (Deposition, pp.20-21) Dr. Soriano opined that the June 2015 work accident "likely led to a disc herniation and led to the surgery that was performed". (Respondent Exhibit 4, p.25) On cross-examination, Dr. Soriano again opined that the June 2015 accident caused the development of left leg pain, leading to her surgery. (Deposition, p.31)

Dr. Soriano opined as to the proposed lumbar fusion, that a "contrast MRI" should be done first, to rule out scar tissue formation versus a recurrent disc herniation. (Deposition, pp.26-27) Dr. Soriano also felt that Petitioner's complaints were non-organic and that a fusion would not relieve them. (Deposition, p.27)

Dr. Mulconrey was deposed by the parties. (Petitioner Exhibit 1) He has been a board certified orthopedic surgeon for 8 years. (Petitioner Exhibit 1, p.5) Due to the severity of her pain, and the MRI findings, he recommended the initial surgery. (Deposition, p.9) The September 25, 2015 surgery went well and Ms. Nathan-Hughes had a fairly uneventful recovery, other than continuing left leg pain. At 3 months post operatively, Petitioner was released to return to light duty work. (Deposition, pp.10-11) He released her to full duty on January 25, 2016. He placed her at MMI in April 2016. (Deposition, pp.11-12) She next returned to his office five months later in September 2016 with increasing pain and recurrent leg pain. The repeat MRI showed a recurrent disc herniation and scarring on the left at L5-S1. (Deposition, pp.12-13)

Dr. Mulconrey last saw Petitioner on May 12, 2017. She had pain in both legs, left worse than right, and left leg weakness. Dr. Mulconrey recommended an L5-S1 fusion with revision decompression. (Deposition, pp.14-15)

Dr. Mulconrey opined that the patient's history, MRI findings and physical exam all correlated, and based upon the patient's history of that injury, he relates her symptoms to the injury she described. He further explained that a recurrent disc at the same level was a known complication associated with a discectomy. (Id at 13) The injury was the origin of the need for surgery as well. (Deposition, pp.16-17) He testified that her current diagnosis is status post left L5-S1 hemilaminectomy, recurrent spinal stenosis, and degenerative disc disease. This diagnosis is related to the L5-S1 segment, related to the stenosis and the scarring and are further symptoms which began in 2015. The need for a spinal fusion is necessary to address the same symptoms that began in 2015. (Deposition, pp.17-18)

Dr. Mulconrey addressed Dr. Soriano's recommendation that a contrast MRI be performed before surgery. He stated, "From my treatment stand point, it truly makes no difference because the patient has, either way…recurrent symptoms in the left lower extremity which are limiting her…(I'm) still recommending surgery either way". (Petitioner Exhibit 1, pp.18-19)

Petitioner was involved in two or three minor car accidents in 2015 and 2016. On approximately September 7, 2015 (post-accident and post-MRI) Petitioner was in a minor accident wherein she rear-ended a car at 25 mph and injured her left knee. (Petitioner Exhibit 3, pp.2-16) There was no complaint related to her lumbar spine. On approximately January 15, 2015, Petitioner was in a car accident and went to the OSF St. Francis Medical Center emergency room the following day for back pain. (Petitioner Exhibit 6, p.4) She also had flu-like symptoms and generalized muscle aches. X-rays of her lumbar spine were negative. (Petitioner Exhibit 7, p.7) She ended up being diagnosed

with muscle spasms. The hospital records show that her symptoms ran from her neck down to her lower back. There is no mention of any leg symptoms. Petitioner testified that she had no further treatment for this accident. She testified that she only hurt her knee in her September 2015 accident. Petitioner also testified to an altercation in 2017 wherein she rolled down a hill and broke her ankle, requiring surgery. She denied any back injury in that event. Furthermore, that event happened long after her MRI which was the basis of Dr. Mulchonrey's fusion recommendation.

The Arbitrator notes that the two medical experts agree that the September 25, 2015 hemilaminectomy is causally related to Petitioner's June 20, 2015 work accident. The Arbitrator is not convinced that the motor vehicle accident in January 2015 was anything significant. In fact, Respondent's examiner agreed that one visit to the emergency room for flu-like symptoms and back spasms "would not have any effect upon my opinions". (Respondent Exhibit 5, pp.31-32) The second motor vehicle accident was after her July 2015 MRI which showed a large disc herniation and after her surgical recommendation. This accident is not significant and there is no suggestion in the records that this involved her lumbar spine.

The Arbitrator also finds that the proposed L5-S1 fusion is causally related to the June 20, 2015 accident. The Arbitrator adopts the causation opinion of Dr. Mulconrey over the opinion of Dr. Soriano. It is unclear what additional information would be gathered from a second repeat MRI, and, based on Petitioner's current symptoms, she likely requires a second surgery to stabilize her L5-S1 segment, regardless of whether scarring or disc material is causing the stenosis. The Arbitrator finds that Petitioner has not suffered any intervening accident to break the causal connection chain.

In support of the Arbitrator's Award as 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 and (L) What temporary benefits are in dispute, the Arbitrator notes as follows:

Having found the issues of accident and causal connection in favor of Petitioner, it logically follows that the related medical expenses and T.T.D. benefits are also properly awarded.

Petitioner's Exhibit 5 is a compilation of medical bills and liens for related medical treatment.

The account at IWIRC is clearly related, as it is for services rendered between June 25, 2015 and August 25, 2015. This bill in the amount of $1,361.38 is awarded subject to fee schedule reduction.

The balance at Midwest Orthopedic Center, Dr. Mulconrey and Dr. Bell, is awarded in the total amount of $1,441.69, subject to fee schedule reduction.

The MRI bill for July 13, 2015 owed to UnityPoint Methodist in the amount of $4,617.00 is awarded subject to fee schedule reduction. Petitioner's pre-operative bill at UnityPoint in the amount of $1,051.05 is awarded subject to fee schedule reduction. A third UnityPoint account for date of service June 5, 2015 is not awarded as there is no evidence of its work relatedness.

The radiology bill for the July 13, 2015 MRI is awarded to Specialists in Medical Imaging in the amount of $429.83, subject to fee schedule reduction.

The anesthesia bill from the first lumbar surgery on September 25, 2015 is awarded in the amount of $337.50. subject to fee schedule reduction.

The last item listed on Petitioner's Exhibit 5 is a health insurance lien from the Phia Group in the amount of $14,285.63 which is awarded. Respondent is entitled to an 8(j) credit for this lien.

The total medical award is $9,238.45 in outstanding medical bills, and the lien in the amount of $14,285.63.

As for the issue of T.T.D. benefits, Petitioner's only lost work time was following her surgery on September 25, 2015. She returned to light duty work on December 17, 2015, for a lost work period of 11 6/7ths week. This T.T.D. period is awarded, subject to Respondent's credit for non-occupational benefits paid between September 25, 2015 and December 16, 2015 only.

15WC27963
Page1

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

Stacey Nathan-Hughes,

Petitioner,

vs. NO: 15 WC 27963

Peoria County Juvenile
Detention Center,

Respondent.

19IWCC0132

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 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 11, 2018, is hereby affirmed and adopted.

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

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

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

DATED: FEB 28 2019
o020719
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

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

NATHAN-HUGHES, STACEY
Employee/Petitioner

Case# **15WC027963**

15WC027962

PEORIA COUNTYJUVENILE CENTER
Employer/Respondent

19IWCC0132

On 6/11/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0225 GOLDFINE & BOWLES PC
KEVIN ELDER
4242 N KNOXVILLE AVE
PEORIA, IL 61614

5354 STEPHEN KELLY
ATTORNEY AT LAW
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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)

STACEY NATHAN-HUGHES
Employee/Petitioner

v.

PEORIA COUNTY JUVENILE CENTER
Employer/Respondent

Case # **15** WC **27963**

Consolidated cases: **15 WC 27962**

19IWCC0132

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS McCARTHY**, Arbitrator of the Commission, in the city of **PEORIA, ILLINOIS**, on **04/18/2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0132

FINDINGS

On the date of accident, **01/13/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$41,017.60**; the average weekly wage was **$788.80**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **NO** dependent children.

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

Respondent shall be given a credit of **$-0-** for TTD, **$-0-** for TPD, **$-0-** for maintenance, and **$-0-** for other benefits, for a total credit of **$0.00**.

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

ORDER

Respondent shall pay total medical bills in the amount of $495.00.

Petitioner's request for prospective medical treatment is denied.

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

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

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

Signature of Arbitrator

June 4, 2018
Date

JUN 11 2018

ICArbDec19(b)

ATTACHMENT TO ARBITRATOR'S DECISION

Stacey Nathan-Hughes vs. Peoria County Juvenile Center

IWCC No.: 15 WC 27963

In Support of the Arbitrator's ruling on causal connection and denial of prospective medical treatment, the Arbitrator notes as follows:

This matter was tried as a 19(b)8(a) petition seeking prospective medical care and T.T.D. benefits.

Petitioner is a forty-two-year-old female home detention officer for the County of Peoria. On January 13, 2013 Petitioner was leaving the private residence of a juvenile assigned to her, when she slipped on icy steps and fell, striking the back of her head as she landed on the left side of her back. She notified her supervisor of her accident and sought medical attention at the Methodist Hospital Emergency Room. A CT scan of her head was negative.

Respondent directed her to treat at IWIRC, where she was initially seen on January 14, 2013. (Petitioner Exhibit 4, p.2) Ms. Nathan-Hughes was diagnosed with multiple contusions, given pain medication, and allowed to continue to work regular duty. (Petitioner Exhibit 4, p.3) She was later diagnosed on January 17, 2013 with a lumbar strain and resolving contusions, was prescribed physical therapy, and was put on modified duty as to lifting. (Petitioner Exhibit 4, p.4) On January 31, 2013, Petitioner was released from care by WIRC and placed at full duty. (Petitioner Exhibit 4, p.6) Petitioner received no additional treatment for this injury. She testified that her low back continued to bother her off and on, and never really felt "right", following this injury.

She continued to work full duty up until a second work accident on June 20, 2015, which is her companion claim to this claim.

Ultimately, in 2015, Petitioner came under the care of Dr. Daniel Mulconrey, an orthopedic spine surgeon. (Petitioner Exhibit 2) She gave a history on July 22, 2015 that she had initially hurt her back in January 2013, and re-injured it on June 20, 2015. Her testimony at Arbitration as to the onset of her lumbar symptoms was consistent with this history. Dr. Mulconrey was deposed by the parties. (Petitioner Exhibit 1) He causally related Petitioner's L5-S1 herniated disc, surgery, and current condition of ill-being to her June 2015 accident. (Petitioner Exhibit 1, pp.16-18)

Petitioner was also examined by Dr. Morris Soriano at the request of Respondent. Dr. Soriano opined that Petitioner's January 13, 2013 work accident did not cause her herniated lumbar disc.

Based upon the above, the Arbitrator finds that there is not a causal connection between Petitioner's January 13, 2013 work accident and her herniated disc, discectomy, and current condition of ill-being. Accordingly, the Arbitrator also denies Petitioner's request for prospective medical treatment in the form of a lumbar fusion, as recommended by Dr. Mulconrey.

In Support of the Arbitrator's Award as 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 notes as follows:

Petitioner's Exhibit 5 is a complication of medical bills from both of Petitioner's workers' compensation filings. The first bill is from Comprehensive Emergency

Solutions in the amount of $495.00 for ER physician services on the day of accident, January 13, 2013. This bill is awarded subject to fee schedule reduction.

All other medical bills in Petitioner's Exhibit 5 are for treatment following her June 20, 2015 work accident, and will be addressed in that separate decision.

Petitioner is awarded $495.00 in related medical charges to this January 13, 2013 claim.

17WC14668
Page 1

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

Jackie Stueve Jr.,

Petitioner,

vs. NO: 17 WC 14668

State of Illinois/ Menard Correctional Center,

Respondent.

19IWCC0133

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, 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 June 6, 2018, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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

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.

19IWCC0133

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.

FEB 28 2019

DATED:
o020719
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

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

STUEVE JR, JACKIE
Employee/Petitioner

Case# **17WC014668**

STATE OF IL/MENARD CC
Employer/Respondent

19IWCC0133

On 6/6/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
601 S UNIVERSITY AVE
CARBONDALE, IL 62901

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 6 - 2018

Ronald A. Rios
RONALD A. RIOS, ARBITRATOR
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)

Jackie Stueve, Jr.
Employee/Petitioner

v.

State of IL/Menard C.C.
Employer/Respondent

Case # 17 WC 14668

Consolidated cases: n/a

19IWCC0133

An *Application for Adjustment 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 Herrin, on April 10, 2018. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0133

FINDINGS

On the date of accident, February 27, 2017, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $62,933.27; the average weekly wage was $1,210.25.

On the date of accident, Petitioner was 38 years of age, married with 1 dependent child(ren).

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

Respondent shall be given a credit of $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 1, 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 reasonable and necessary prospective medical treatment as recommended by Petitioner's treating physician, Dr. Nathan Mall.

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

June 3, 2018
Date

JUN 6 - 2018

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent. The Application alleged a date of accident (manifestation) of February 27, 2017, and that Petitioner sustained repetitive trauma to his right and left hands/wrists and right and left arms/elbows (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills as well as prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship in regard to Petitioner's bilateral cubital tunnel syndrome. Respondent admitted liability in regard to Petitioner's bilateral carpal tunnel syndrome (Arbitrator's Exhibit 1).

Petitioner became employed by Respondent in August, 2009, and worked as a correctional officer. Petitioner testified in detail regarding his job duties which included rapping bars, locking/unlocking doors with Folger Adams keys, cuffing/uncuffing inmates, performing shakedowns and restraining combative inmates.

Petitioner described the bar rapping as his using a 14 inch long steel rod and raking it across the bars in the gallery to make certain that the inmates had not tried to cut through them. Petitioner performed this task at the beginning of each shift. In regard to his use of the Folger Adams keys, Petitioner stated they would many times get stuck and have to be forcibly turned to unlock the doors.

Petitioner also testified that when the facility went on lockdown, the movement of the inmates was even more restricted than normal. When the facility was on lockdown, Petitioner stated he would use a gallery crank which was old and extremely difficult to operate.

Petitioner reviewed a Job Analysis of his position prepared by Corvel at the request of Respondent; a Post Description of the Duties of Cell House Officers prepared by Respondent; and a Demands of the Job form prepared by Respondent. Petitioner acknowledged that the information contained in the preceding documents was accurate. Further, Petitioner also testified he watched a DVD of other correctional officers performing various job duties which included bar rapping and using Folger Adams keys. Petitioner likewise agreed that this was an accurate depiction of his job duties as well (Petitioner's Exhibits 10, 11, 12 and 15).

All of the various preceding job duties of Petitioner required the active and repetitive use of both upper extremities. Petitioner testified that, over time, he began to experience symptoms of numbness and aching in both of his hands. Petitioner stated he frequently had the symptoms in both of his hands after he finished rapping the bars.

At trial, Petitioner testified he was 6 feet tall and weighed 300 pounds, but did not have diabetes, gout or hypothyroidism. Petitioner did state he had hypertension, but it was controlled with medication.

Petitioner initially sought medical treatment on January 23, 2017, from Dr. Joseph Molnar, his family physician. At that time, Petitioner complained of numbness/tingling in both arms. Dr. Molnar opined Petitioner had parasthesias in both hands, prescribed medication and ordered EMG/nerve conduction studies (Petitioner's Exhibit 3).

On February 21, 2017, Petitioner was seen by Dr. James Goldring, who performed EMG/nerve conduction studies. The diagnostic tests were positive for bilateral carpal tunnel syndrome, more on the right than left. However, the tests did not reveal any abnormalities in regard to both ulnar nerves (Petitioner's Exhibit 4).

Petitioner was subsequently treated by Dr. Nathan Mall, an orthopedic surgeon, who initially saw Petitioner on March 10, 2017. Dr. Mall noted Petitioner had bilateral numbness/tingling in both the median and ulnar distribution which Petitioner specifically associated with bar rapping and key turning while at work. Dr. Mall's findings on examination were consistent with bilateral carpal tunnel and cubital tunnel syndrome. Dr. Mall noted that the EMG/nerve conduction studies revealed Petitioner had bilateral carpal tunnel syndrome, but were negative for cubital tunnel syndrome. He ordered another set of EMG/nerve conduction studies to be performed and referred Petitioner to Dr. Daniel Phillips (Petitioner's Exhibit 5).

When Dr. Mall saw Petitioner on that initial visit, he noted Petitioner had high blood pressure and was obese and that these were both risk factors for the development of carpal tunnel and cubital tunnel syndrome. However, Dr. Mall stated that Petitioner's bar rapping and key turning were factors in the development of both conditions. He also stated that Petitioner had cubital tunnel syndrome, and even if the new EMG/nerve conduction studies did not reveal ulnar neuropathy, Petitioner's hand symptoms were indicative of both nerve compression syndromes (Petitioner's Exhibit 5).

Dr. Phillips saw Petitioner on April 6, 2017, and performed EMG/nerve conduction studies on Petitioner's right upper extremity. The diagnostic tests were negative for right ulnar neuropathy, but positive for right median neuropathy (Petitioner's Exhibit 6).

Dr. Phillips again saw Petitioner on May 4, 2017, and performed EMG/nerve conduction studies on Petitioner's left upper extremity. The diagnostic tests were positive for a mild left ulnar neuropathy and positive for left median neuropathy (Petitioner's Exhibit 6).

Dr. Mall saw Petitioner on April 6, 2017, and reviewed the EMG/nerve conduction studies that had been performed by Dr. Phillips on that same day. While he noted the diagnostic studies were negative for right ulnar nerve compression, he again opined Petitioner clearly had cubital tunnel syndrome. He recommended Petitioner undergo both a carpal tunnel release and cubital tunnel decompression/transposition surgery (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Anthony Sudekum, a hand surgeon, on August 22, 2017. In connection with his examination of Petitioner, Dr. Sudekum reviewed medical records and information regarding Petitioner's job duties provided to him by Respondent. Dr. Sudekum opined Petitioner had mild to moderate bilateral carpal tunnel

syndrome, but that Petitioner did not have ulnar neuropathy on either side. He based this latter opinion upon the lack of any findings on his clinical examination (Respondent's Exhibit 3).

In regard to causality, Dr. Sudekum noted Petitioner had a number of other risk factors, specifically, Petitioner's age, morbid obesity, hypertension, fluid retention, smoking, arthritis and a history of diabetes. However, Dr. Sudekum also opined Petitioner's employment activities were a "...minor contributing factor" to the development of Petitioner's bilateral carpal tunnel syndrome. Although Dr. Sudekum did not diagnose Petitioner with cubital tunnel syndrome, he opined Petitioner's employment activities did not contribute to ulnar neuropathy on either side (Respondent's Exhibit 3).

Dr. Mall subsequently performed surgery on February 15, 2018, and the procedure consisted of a left carpal tunnel release and left elbow ulnar nerve decompression and transposition. On March 1, 2018, Dr. Mall performed surgery which consisted of a right carpal tunnel release and right elbow ulnar nerve decompression and transposition (Petitioner's Exhibit 7).

Dr. Mall was deposed on October 23, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Mall's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. Mall testified that he diagnosed Petitioner with bilateral carpal tunnel and cubital tunnel syndrome for which he recommended surgery consisting of a carpal tunnel release and ulnar nerve transposition. In regard to the bilateral cubital tunnel syndrome, Dr. Mall made that diagnosis based upon his findings on examination. While he acknowledged that the diagnostic tests showed some compression of the ulnar nerve on the left, but not on the right, he testified that compression of elbow nerves is not always seen on nerve conduction studies. Dr. Mall specifically stated that on examination when he pushed on the ulnar nerve, Petitioner had immediate symptoms in the ulnar distribution (Petitioner's Exhibit 9; pp 9-11).

In regard to causality, Dr. Mall testified that he reviewed data regarding Petitioner's job duties and opined that Petitioner's upper extremity conditions were related to Petitioner's work activities. Dr. Mall did acknowledge Petitioner had other risk factors for the development of the conditions, specifically, obesity and hypertension (Petitioner's Exhibit 9; pp 10-16).

On cross-examination, Dr. Mall agreed that diabetes can also be a contributing factor to the development of carpal tunnel and cubital tunnel syndrome. However, he did not believe that smoking was such a contributing factor (Petitioner's Exhibit 9; pp 18-19).

Dr. Sudekum was deposed on January 25, 2018, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Sudekum's testimony was consistent with his medical report and he reaffirmed the opinions contained therein, specifically, that Petitioner had mild/moderate carpal tunnel syndrome, but Petitioner did not have cubital tunnel syndrome on either side. Dr. Sudekum testified Petitioner had no findings on examination indicative of cubital tunnel syndrome. In regard to causality, Dr. Sudekum testified that Petitioner's work activities were a minor contributing factor to the development of Petitioner's bilateral carpal tunnel syndrome (Respondent's Exhibit 4; pp 22, 28-30).

At trial, Petitioner testified he is still being seen by Dr. Mall and had an appointment to be evaluated by him the following day. Petitioner stated he was continuing to work light duty, was doing home exercises but was not at MMI.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent that manifested itself on February 27, 2017, and that his current condition of ill-being, specifically, his bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome is causally related to same.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner's bilateral carpal tunnel syndrome was causally related to Petitioner's work activities because, at trial, Respondent stipulated that it was related. Further, Petitioner's treating physician, Dr. Mall, opined it was related and Respondent's Section 12 examiner, Dr. Sudekum, opined that Petitioner's bilateral carpal tunnel syndrome was, at least, caused in part by Petitioner's work activities.

Dr. Mall's findings on examination were positive for bilateral cubital tunnel syndrome. Even though the EMG/nerve conduction studies were positive for left ulnar neuropathy, but negative for right ulnar neuropathy, Dr. Mall testified that individuals can have cubital tunnel syndrome even when the diagnostic tests are negative. Further, on examination, when Dr. Mall pressed the ulnar nerve, it immediately caused symptoms in the ulnar distribution.

While Dr. Sudekum stated there were no positive findings on examination indicative of cubital tunnel syndrome, Dr. Mall consistently found cubital tunnel syndrome based upon his findings on examination and he subsequently performed corrective surgery.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Mall to be more persuasive than that of Dr. Sudekum.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, 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 reasonable and necessary medical treatment, recommended by Petitioner's treating physician, Dr. Nathan Mall.

In support of this conclusion the Arbitrator notes the following:

Petitioner is still being seen and treated by Dr. Mall and is not yet at MMI.

William R. Gallagher, Arbitrator

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

Michael L. Dunbar,
Petitioner,
vs.

NO: 08 WC 16451

Monterey Coal Company,
Respondent.

19IWCC0134

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 occupational disease, permanent partial disability, evidentiary error and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 8, 2018, is hereby affirmed and adopted.

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

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

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

FEB 28 2019

DATED:
O020719
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DUNBAR, MICHAEL L
Employee/Petitioner

Case# **08WC016451**

MONTEREY COAL COMPANY
Employer/Respondent

19IWCC0134

On 1/8/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.57% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
620 E EDWARD ST
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael L. Dunbar
Employee/Petitioner

v.

Monterey Coal Company
Employer/Respondent

Case # 08 WC 16451

Consolidated cases: N/A

19IWCC0134

An *Application for Adjustment 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 **Springfield**, on **11/14/17**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12/29/07**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this alleged occupational disease ***was*** given to Respondent.

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

In the year preceding the last exposure, Petitioner earned **$46,907.85**; the average weekly wage was **$1,066.09**.

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

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

ORDER

Petitioner failed to prove he sustained an occupational disease arising out of and in the course of his employment with Respondent. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

Signature of Arbitrator

December 29, 2017
Date

ICArbDec p. 2

JAN 8 - 2018

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds:

Petitioner began working for Respondent in 1980. He originally worked at Mine #2 and did so until August 30, 1996 when he was laid off. Petitioner then went to school and received an Applied Science Associate's Degree, Phi Beta Kappa, and learned to become a butcher/meat cutter. Petitioner worked as a butcher/meat cutter until he began working for Respondent at its Mine #1 on October 4, 2004.

One of Petitioner's treating doctors has been Dr. Mahmud. The medical records from Dr. Mahmud begin on 9/01/06. At that time, Petitioner was complaining of pain and discomfort in his facial sinuses with nasal congestion. There was no difficulty in breathing and no shortness of breath. The physical examination of the chest indicates that he was clear to percussion and auscultation. (PX 5)

The next visit with Dr. Mahmud was on 11/16/06 at which time Petitioner gave a history of two days of cough, congestion, sore throat, and fever. He had no difficulty in breathing and no shortness of breath. Petitioner's chest was clear to percussion and auscultation. (PX 5)

On 1/29/07, Petitioner was complaining to Dr. Mahmud of pain and tenderness in his right lower leg. His chest was clear to percussion and auscultation. (PX 5)

The next office visit with Dr. Mahmud was on 5/22/07 when Petitioner was in for a complete history and physical examination. The doctor noted no difficulty in breathing and no shortness of breath. Under medical history, the note says that Petitioner's past history was negative for asthma, bronchitis or allergies. The note indicates that Petitioner was smoking one-half pack a day. Once again, his chest was clear to percussion and auscultation. (PX 5)

On 7/16/07, Petitioner returned to Dr. Mahmud's office complaining of a lower back ache. His chest was examined and was clear to auscultation and percussion. (PX 5)

On 7/20/07, Petitioner returned to Dr. Mahmud's office with the low back complaints. Petitioner returned to see the doctor with low back complaints on 7/25/07, 8/01/07, and 8/10/07, 8/17/07 and 8/22/07. (PX 5)

Petitioner next saw Dr. Mahmud on 10/22/07 complaining of a cough, congestion, sore throat and fever for six days. He had no difficulty in breathing and no shortness of breath. The chest was clear to percussion and auscultation. (PX 5)

Petitioner's last day working for Respondent was December 29, 2007 when the mine closed.

At Petitioner's request, on February 2, 2008, b-reader, Dr. Henry K. Smith reviewed a grade 1 chest x-ray dated January 7, 2008. Dr. Smith found mild interstitial fibrosis, s/s, mid to lower zones, 1/0. No chest wall plaques, calcifications or large opacities seen. There are slight thickened interlobar fissures. Heart size is normal. Bony thorax is unremarkable. Dr. Smith's impression is pneumoconiosis with interstitial fibrosis s/s, mid to lower zones 1/0. (PX 2)

Petitioner signed his Application for Adjustment of Claim herein on March 18, 2008. (AX 2)

At Petitioner's attorney's request, Petitioner was examined by Dr. Glennon Paul on September 23, 2008. Petitioner told the doctor he had worked in the coal mine for twenty years, beginning at mine #2 from 1980 through 1996 and then at mine #1 from 2004 to 2007. He worked all underground. He also had worked as a meat cutter between stints at the mine and since the mine had closed. Petitioner reported shortness of breath and a dry coughing more so in the morning but worse with an upper respiratory tract infection. He also noticed shortness of breath walking two flights of stairs and going approximately one mile. Petitioner had been a cigarette smoker of about 30 years with less than half a pack of cigarettes per day. Petitioner told the doctor that he had quit smoking earlier in the year. Petitioner's chest x-ray shoed fibronodular lesions in all zones of the lungs, the lower zones being greater than the upper. Pulmonary function studies were normal. Dr. Paul felt Petitioner had coal workers' pneumoconiosis complicated by asthmatic bronchitis (asthma and chronic bronchitis). (PX 1, dep. ex. 2)

Petitioner presented to Dr. Mahmud's office on 9/30/08. Petitioner reported no difficulty in breathing and no shortness of breath. The past history is noted to be negative for asthma, bronchitis, or allergies. The history notes that the Petitioner used to smoke but quit earlier in the year. Petitioner was next seen a few days later on 10/09/08, at which time there was no difficulty in breathing and no shortness of breath. The chest was clear to percussion and auscultation (PX5).

Petitioner was again seen by Dr. Mahmud on 6/01/09 with an injury to his left index finger. His chest was clear to percussion and auscultation. (PX 6)

There is no indication in the record of any medical treatment being rendered to Petitioner between June 1, 2009 and July 2, 2012.

With regard to the records from Dr. Castle/Southern Illinois Heathcare Foundation (PX4), the Arbitrator notes that those records begin on July 2, 2012. On a history and physical form dated 7/2/12 and filled out by Petitioner, he indicates under "Medical History/ROS," black lung. Petitioner noted on the form that he was not taking any medications at the time. (PX 4)

Dr. Castle performed a DOT physical on 8/15/12. The doctor felt that Petitioner was qualified as long as he wore corrective lenses. With regard to Petitioner's lungs and chest, there were no abnormalities noted. This included there being no impaired respiratory function. Petitioner's next visit with the doctor was on 10/04/12. Petitioner

had been in a motor vehicle accident at that time and was prescribed Celebrex and Hydrocodone. (PX 4)

When next seen on 3/21/13, Petitioner advised Dr. Castle that he was suffering from an upper respiratory infection with symptoms beginning one week earlier. These symptoms included cough, earache, fatigue, fever, and dyspnea. Albuterol sulfate was prescribed at that time, as well as Zithromax. The Arbitrator notes that the day before this appointment, on 3/20/13, Petitioner's attorneys sent a copy of Dr. Paul's 9/23/08 report to Dr. Castle. The 3/21/13 note says risk factors include chronic lung disease. (PX 4)

Petitioner returned to see Dr. Mahmud on 4/22/13, having last been seen in June of 2009. Petitioner reported having a cough and congestion with wheezing for the past year. The history further indicates that Petitioner had been diagnosed with black lung disease. Petitioner complained of exertional wheezing and shortness of breath. Petitioner indicated he had been prescribed a Proventil inhaler by his doctor. The patient history was negative for asthma, bronchitis or allergies to inhalants. Petitioner's chest exam showed crepitations with rhonchi at both lung bases. Petitioner was also noted to be working at the IGA. (PX 6)

Dr. Paul was deposed on April 22, 2013. Dr. Paul is the medical director of St. John's respiratory therapy and clinical assistant professor of medicine at SIU Medical School. (PX. 1, p 6) He is also the senior physician at the Central Illinois Allergy and Respiratory Clinic. Dr. Paul examined Petitioner at the request of his attorneys. The doctor was asked about his written report, testifying that he felt Petitioner was suffering from CWP and asthmatic bronchitis (chronic bronchitis and asthma). Dr. Paul further noted in his report that Petitioner had never been treated for any lung disease but had a history of cough and shortness of breath, worse with URIs. Dr. Paul was asked how a "guy with three diagnoses and this history of cough and shortness of breath [worse] with upper respiratory tract infections" could not have been treated and he responded that many of them don't bother to get treatment and just plug along thinking that's the way they are because they're out of shape or because they are a smoker or overweight. He felt Petitioner was more stoic than a complainer. (PX 1, pp. 9 – 11) Dr. Paul on examination found two plus wheezes and rhonchi throughout both lung fields. That is consistent with narrowing of the windpipes on exhalation. That would be consistent with chronic bronchitis as well as asthma. (PX. 1, p 11) Petitioner's pulmonary function test baseline was found to be normal but with a positive methacholine stimulation test. (PX. 1, p 11) Dr. Paul testified to a reasonable degree of medical certainty that he felt that Petitioner had coal worker's pneumoconiosis, which was caused by coal dust. (PX. 1, p 12) Dr. Paul also testified to a reasonable degree of medical certainty that Petitioner has chronic bronchitis which was caused by the coal mining environment and cigarette smoking. Dr. Paul also testified to a reasonable degree of medical certainty that Petitioner has asthma. Dr. Paul felt that the coal mining environment caused his asthma. (PX. 1, p 13) Dr. Paul defined the coal mining environment as being coal dust, silica dust, and/or mixed dust and also to include roof bolting glue fumes. In addition, diesel fumes, fire, or chemicals, and paint. (PX. 1, p 14) Dr. Paul was asked the question, "Even if he had his asthma or chronic bronchitis before he entered the coal, would those exposures you're just talking about have made his diseases aggravated and worse?" His answer, "yes." Dr. Paul

testified that there is no cure for CWP. (PX. 1, p 16) In light of his diagnoses of CWP, asthma and chronic bronchitis, Dr. Paul testified that Petitioner could have no further exposure to the environment of the coal mine without endangering his health. (PX. 1, p 17) Dr. Paul testified that Petitioner had clinically significant pulmonary impairment, which was caused by the coal mining environment with smoking maybe playing a part. (PX. 1, p 17 & 18) Dr. Paul also felt that Petitioner had radiologically and physiologically significant pulmonary impairment, which was caused by the coal mine environment. (PX. 1, p 18) Dr. Paul testified that based on all of his data and diagnoses, he felt to a reasonable degree of medical certainty that Petitioner is totally disabled from working as a coal miner. (PX. 1, p 18 & 19) Dr. Paul went on that he felt that given his description of his impairment that Petitioner would only be able to do light manual labor for eight hours a day, five days a week. (PX. 1, p 19) Dr. Paul testified that the scarring caused by CWP cannot perform the function of normal healthy lung tissue. (PX. 1, p 20 & 21) By definition if you have CWP it is true that you necessarily have some impairment in the function of the lung at the site of the scarring whether it can be measured by spirometry or not. (PX. 1, p 21) Dr. Paul testified that CWP is considered a progressive disease with no cure that can be life threatening. This progression can happen even after a coal worker ends his exposure in the coal mine. (PX. 1, p 25)

Dr. Paul agreed that some of the jobs in a coal mine are not classified as heavy manual labor. He did not talk to Petitioner about any of his coal mine jobs including his last coal mine job. The doctor agreed that a B-reading of 1/0 is positive for CWP but has the fewest opacities of any positive interpretation. With regard to the physiologically significant pulmonary impairment, Dr. Paul agreed that smoking could play a part. With regard to clinically significant and physiologically significant pulmonary impairment, asthma would play a part. Based upon the normal baseline pulmonary function study, Petitioner could do more than light work. With Petitioner being evaluated by the doctor nine months after he ended his coal mine employment, the doctor felt his pulmonary function studies were about the same when seen as they would have been when he last worked. When seen by the doctor, Petitioner was not under any treatment at all for lung or breathing problems, including the fact that he was not on any medication. The doctor indicated that as far as he knew, Petitioner had not been diagnosed with asthma before he saw him. The same would be true for chronic bronchitis. The doctor indicated that smoking is the number one cause of chronic bronchitis in the United States. The doctor agreed that over the years he has had thousands of patients with asthma and chronic bronchitis who were never in a coal mine. There are triggers to asthma outside the coal mine environment such as perfumes, hairsprays, and cleaning products. Allergies can also make asthma worse. The doctor noted that his testimony that Petitioner was permanently disabled from coal mine employment was because of the risk of the diagnosed CWP worsening with further exposure. The same was true for the chronic bronchitis and asthma. The doctor noted that with proper treatment, the symptoms of asthma can be lessened and the duration of the symptoms shortened. The possibility of progression of CWP after cessation of exposure is only a small percentage chance. (PX 1)

There was a follow up visit with Dr. Castle regarding Petitioner's URI on 4/24/13. There was no change in the medication at that point. Petitioner indicated his other symptoms were controlled pretty well with the inhaler. The note indicates that he was still positive for cough, dyspnea and wheezing. (PX 4, p. 33)

At the next visit with Dr. Mahmud on 7/03/13. Petitioner's chief complaints were: 1. cough and congestion, 2. wheezing, 3. black lung disease. Under the "History of Present Illness" it was noted that Petitioner's symptoms consisted of coughing and congestion with wheezing for the past year. It was also noted that Petitioner had been diagnosed with black lung disease since he works in coal mines. He had not been working in coal mines since December of 2007. Petitioner reported exertional wheezing and shortness of breath. He denied any chest pain. The doctor noted an extensive work-up for black lung disease and it was positive. Petitioner had been using a Proventil inhaler as prescribed by his physician. He wanted to be referred to Dr. Paul for retesting of lung function. On that same visit under objective; chest: crepitations with rhonchi at both lung bases. (PX. 6, p 3)

At Respondent's attorney's request, Petitioner was examined by Dr. Peter Tuteur on September 26, 2013. (RX 1, dep. ex.)

On November 15, 2013, and at Respondent's attorney's request, b-reader, Dr. Ralph Shipley reviewed a grade 2 chest x-ray dated September 26, 2013. Dr. Shipley's impression was negative study, with no findings consistent with coal worker's pneumoconiosis. (RX. 2)

Petitioner returned to see Dr. Castle on 2/27/14, Petitioner was being seen for an abnormal thyroid test. (PX 4)

On March 3, 2014, and at the request of Petitioner, Dr. Smith also reviewed a grade 1, chest x-ray dated September 26, 2013. Dr. Smith found interstitial fibrosis of classification p/p, bilateral upper, mid and lower zones involved, of a profusion 1/0. There are no chest wall plaques or calcifications. There are mild thickened interlobar fissures. Heart size is normal. There is minimal thoracic atherosclerosis. The bony structures are unremarkable. Dr. Smith's impression is simple CWP with small opacities, primary p, secondary p, upper, mid and lower zones bilaterally, profusion 1/0. (PX 2)

On May 21, 2014, and at Petitioner's attorney's request, b-reader, Dr. Michael Alexander reviewed a grade 1 chest x-ray dated January 7, 2008. Dr. Alexander's impression was lung volumes normal. Small round and irregular opacities are present bilaterally, consistent with pneumoconiosis, category p/s, 1/0. No areas of coalescence or large opacities are present. The costophrenic angles and diaphragms are clear. The cardiomediastinal structures and distribution of the pulmonary vasculature are normal. The bones are intact. There is a mild thoracic spine. Dr. Alexander's impression was coal worker's pneumoconiosis, category p/s, 1/0. (PX 3)

As of 12/12/14, when Petitioner returned to Dr. Castle's office, the note mentions asthma as a chief complaint for the first time. (PX 4)

As of 1/30/15, Dr. Castle's office notes shows a past medical history of asthma, high cholesterol and a thyroid problem. At that visit Petitioner denied any shortness of breath and under "respiratory effort" it states no dyspnea. (PX 4)

A final office note with Dr. Castle dated 4/17/15 indicated he had no shortness of breath with regard to hypertension. Under respiratory effort, the note states he had no dyspnea. Breath sounds were normal. (PX 4)

Petitioner has undergone no medical treatment since April 17, 2015.

Dr. Tuteur was deposed on November 23, 2015. (RX 1) The doctor is board certified in internal medicine and pulmonary diseases. Dr. Tuteur noted that Petitioner was in the obese range. He noted that the more weight one carries, the more breathless one might feel doing a particular activity. Petitioner's oxygen saturation level was measured throughout exercise and was within the normal range. His FEV1 was also measured before and after exercise and revealed no significant change. The implication is that with this level of exercise, there is no bronchial reactivity. The arterial blood gas study measured Petitioner at rest and with exercise. Both values were within the normal range. The physical examination of the chest was normal. He reviewed chest x-ray films and found that they were totally free of changes compatible with CWP. The FVC and FEV1 revealed values which were over 100% of predicted. The doctor noted a very minimal obstructive defect. He indicated that based upon the ATS/ERS criteria, there would be no obstruction. Dr. Tuteur felt there was a very minimal obstructive abnormality because of the slowing of the expiratory flow at very low lung volumes, the FEF75% and the 7% reduction of the FEV1/FVC ratio. He also noted the visual scalloping of the flow volume loop. There was also significant improvement following the administration of the bronchodilator. He noted that the ATS/ERS criteria is 200cc plus 12% and in this case it was 200cc and only 11%. No finding on the pulmonary function study would have an effect upon Petitioner's ability to work. The total lung capacity measurement at 104% of predicted essentially rules out a restrictive lung defect. The diffusing capacity was within the normal range. In talking with Petitioner about any triggers, he could not identify any. Dr. Tuteur indicated that he had reviewed the results of the Methacholine test from Dr. Paul's evaluation, to include the graphic data. His impression was that the test was invalid since there was substantial variability with the expiratory volume maneuvers. Based upon his evaluation, Dr. Tuteur found no evidence to support a diagnosis of coal workers' pneumoconiosis. He found no evidence of any dust-related occupational lung disease. He thought that the findings on his pulmonary function study were of no clinical significance as there was not an abnormal FEV1 at any time and the improvement reached super normal values.

Dr. Tuteur noted that wheezes would be consistent with the improvement after the administration of the bronchodilator. Included in the history from Petitioner was that he

had Qvar and rescue Albuterol. These medicines could be given for asthma. The Qvar contains an inhaled corticosteroid which decreases inflammation of the airways. The Albuterol is a smooth muscle relaxant tending to help dilate the airways. The Qvar would be a maintenance type medicine and the Albuterol used if there were a bronchospasm or attack. The doctor noted Petitioner had a cough on a daily basis and indicated this was a minor response to a perception of irritation in the back of his throat. He did not feel this was a cough initiated by lower airways abnormalities. If in fact it was a cough, it would be consistent with chronic bronchitis. Wheezing that develops with cough and exercise would be consistent with asthma. Chest tightness with wheezing and coughing with exercise would also be consistent with asthma. Petitioner did have exposures as a coal miner that can cause and aggravate asthma. That would include roof bolting glue, trowel-on, and diesel fumes. If a person has asthma, the best medical advice would be to avoid the exposures that cause or aggravate it. The inhalation of coal mine dust can result in shortness of breath and a cough. Dr. Tuteur agreed that if he did diagnosis a person as having x-ray evidence of CWP, he would recommend no further exposure to coal dust. It is possible for somebody to have x-ray evidence of CWP and have normal pulmonary function testing including spirometry and blood gases. It is also possible with a positive chest x-ray to have a normal physical examination of the chest and no symptoms or complaints. If a person had x-ray evidence of CWP 1/0, the expectation would be that he would not have symptoms. Dr. Tuteur indicated that the number one cause of chronic bronchitis in the United States is cigarette smoking. He indicated that in talking with Petitioner, he did not indicate that he had any triggers when working as a coal miner.

On cross-examination Dr. Tuteur was asked about Petitioner's history of a cough on a daily basis and frequently clearing his throat. He was asked if that would be consistent with chronic bronchitis. His response, "As you know, the definition of chronic bronchitis is cough present most days three months out of the year without any reason defined for that. And – so whether or not it meets criteria for the diagnosis of chronic bronchitis is a function of what the patient and/or the physician would consider - - whether or not this was a cough, or just a sort of clearing of the throat." Question, "If in fact it was a cough, would that be consistent with chronic bronchitis - -" answer, "Yes." He was then asked the question, now the wheezing that would develop with cough and exercise - - is that something that could be consistent with asthma and reactive airways disease?" Answer: "Yes." (RX. 1, p 18) Dr. Tuteur went on to testify that the chest tightness with wheezing and coughing with exercise is something that would be consistent with asthma or chronic bronchitis. (RX. 1, p 19) On cross-examination Dr. Tuteur was asked, "Now this man did have exposures as a coal miner that you were able to document in patient history that can cause and aggravate reactive airways disease or asthma; is that correct?" His answer, "Yes." (RX. 1, p 20) Question, "That would include roof-bolting glue, Trowel-On, and diesel fumes?" His answer, "Yes." He was then asked, "If a person has reactive airways disease or asthma, would the best medical advice be for them to avoid the exposures that can cause and aggravate it?" Answer, "Of Course." (RX. 1, p 20 & 21) Dr. Tuteur went on to testify that the inhalation of coal dust can result in shortness of breath and cough. (RX. 1, p 21) Dr. Tuteur agreed that the scarring of CWP is permanent. (RX. 1, p 22) He was then asked the question, "Is it possible for a person to have radiographically significant coal worker's pneumoconiosis and still have normal pulmonary function

testing?" His answer, "Yes, it is possible. In fact, it is the rule." He was then asked, "And what that would include spirometry and blood gases?" His response, "Correct." Dr. Tuteur testified that it is possible for a person to have an abnormal chest radiograph and a normal physical examination of the chest and have no symptoms or complaints of coal worker's pneumoconiosis. (RX.1, p 25)

Dr. Tuteur further testified that shortness of breath can be due to a variety of problems. (RX 1, p. 27) He further testified that just because a former miner has coal dust in his lungs doesn't automatically mean that they have CWP or dust-related lung disease. The host has to react to the dust. (RX 1, pp. 54-55)

On March 25, 2014, and at Respondent's attorney's request, b-reader, Dr. Robert Tarver reviewed a grade 1 chest x-ray dated September 26, 2013. Dr. Tarver's impression was normal chest. No radiographic findings consistent with coal worker's pneumoconiosis. (RX. 3)

On June 28, 2014, and at Respondent's attorney's request, b-reader, Dr. Cristopher Meyer reviewed a grade 1 chest x-ray dated September 26, 2013. Dr. Meyer's impression was no radiographic findings of coal worker's pneumoconiosis. (RX. 4)

The Arbitration Hearing

Petitioner's case proceeded to arbitration on November 14, 2017.

John Kimball testified on behalf of Petitioner. Mr. Kimball began working in the mines in 1980 and in the last three years of his career he was a supervisor working for the company. He worked until approximately March of 1993. During this time he worked at Respondent's mine #2. Mr. Kimball was Petitioner's direct supervisor while Petitioner was a roof bolter. Mr. Kimball described the roof bolting process and described working with the glue pins. He said the fumes that come from the glue pins were really bad. He testified that sometimes the pins would come broken in the box and they would be emitting an odor. This odor would get into your nostrils and on your clothing. The roof bolters were constantly exposed to this every day. Mr. Kimball testified that Petitioner complained several times about the smell of the roof bolting glue pins and that it was not uncommon for the roof bolters to have to take breaks because the smell was so strong. Mr. Kimball also testified that he did not notice anything about Petitioner by way of physical limitations. He would tell Petitioner, and others, to get out into the fresh air after roof bolting. Mr. Kimball did not witness Petitioner having any kind of breathing difficulties nor was he told of any.

Petitioner testified that he was 60 years of age at the time of arbitration with a date of birth of January 13, 1957. He graduated high school from Sandoval High. When he was 41 years of age he went back to school and got an Associates Degree in Applied Science. Petitioner worked 21 and a quarter years in the coal mines, all of which were underground. In addition to coal dust, Petitioner was exposed to and breathed silica dust, roof bolting glue fumes, diesel fumes, and trowel-on.

Petitioner's last day of work was December 29, 2007. On that day he worked for Monterey Coal Company at their #1 mine in Carlinville. Petitioner was 50 years of age with a job classification of shuttle car operator. December 29, 2007 was Petitioner's last day in that mine because it was closing. Petitioner had other offers and opportunities to work in the mine but given the nature of his breathing difficulties he decided to end his mining employment. Petitioner stated that he had considered ending his mining career earlier due to his breathing but since the mine was going to be closing anyway, he decided to work until the end.

Approximately two weeks after ending his mining career, Petitioner took a meat cutting job. He worked at the Carlyle IGA for approximately $15.00 per hour or approximately $500.00 a week. After about 11 months, Petitioner was laid off. Petitioner next took a job at Ahlf Acres as a farm hand. This farm was owned by a former co-worker of his at the coal mine. Petitioner testified he makes $11.50 an hour, which works out to be between $400.00 and $500.00 per week. Petitioner continues to work at this farm up to the date of trial.

Petitioner began his mining career in February of 1980 at Monterey #2 mine in Albers. He was hired in as a general inside laborer. After his first 90 days, Petitioner bid into a construction job. The duties of this job included extending belt lines, setting props, and if there are any falls on the track they went in and re-supported the areas that had fallen and cleaned up the mess. Petitioner describes going into the areas where there had been a fall and using scoops to scoop out the fallen debris so that the roads could be reopened. Petitioner did this job for a couple of years. Petitioner then bid into working the idle units. This job consisted of cleaning up the units that cut the coal from the face of the mine. You would also roof bolt up supports to make the mine safer. He also described using a duster that would be loaded with 500 bags of dust and spraying that rock dust everywhere to potentially prevent explosions. Petitioner described this as a very dusty job and described the dust as actually blowing back at you as you would attempt to spread it on the surface. Petitioner worked the idle unit job for a couple of years. Petitioner then worked as a vent man. Petitioner testified to the duties of this job as, "…so we had this big fiberglass tubing that you hang in the last open, and then an 18-inch tube goes around the corner and down into the face where the coal is actually being cut. And as the miner moves across the face and cuts each place it was my job to set that tubing up and make the break so the buggies could get in and come in behind the miner, and hang all the wing curtains and line curtains and all that, too." Petitioner testified that anything downwind of the continuous miner machine was pretty dirty. Petitioner ran a shuttle car for approximately five years. A shuttle car takes the coal up from where it is being cut and takes it to the belt so that it can be transported out of the mine. Petitioner then testified that he was a roof bolter for approximately ten years. Petitioner described quite a bit of dust when emptying the filters throughout the roof bolting process. Petitioner described using roof bolting glue pins, which were used to help support the bolt in the ceiling. He described a smell that would come when the pins broke and would often get onto your clothing and you would carry the smell everywhere. Petitioner spent his last two years as a buggy runner.

Petitioner said he started noticing breathing problems about a year after he started using the roof bolting glue pins. Petitioner noticed his asthma worsening and his chest tightening when being exposed to the glue pins or the diesel smoke. This would cause him to have to take breaks from time to time. From the first time Petitioner noticed breathing problems until he left the mine, his breathing got progressively worse. From the time he left the mine until the time of trial, his breathing problems have continued to slide downhill and get worse. Petitioner testified he can walk a quarter mile on level ground at a normal pace before becoming short of breath. He can also climb a couple flights of stairs before having to take a break and rest. Petitioner testified that he does take two types of inhalers for his breathing. One is Qvar two times a day, two puffs a day and he also uses a rescue inhaler. Petitioner testified that his breathing affects his daily living. He does not burn leaves anymore and instead uses them for mulch in his garden. He used to walk his dog but now cannot go as far. Hunting has also become a problem because of having to climb the trees.

Petitioner testified that his treating doctors were Dr. Castle and Dr. Mahmud. When asked by his attorney if he discussed his breathing difficulties with Dr. Mahmud, Petitioner replied "yes" and said that the doctor told him he needed to find another type of work.

Petitioner acknowledged that he was a smoker but he has not smoked for the past 11 years. He smoked from his late twenties to his early 50s. Petitioner testified that he would smoke a couple packs a week when he was smoking.

Petitioner also acknowledged that he began at Mine #2 in 1980 and was laid off on August 30, 1996. He then went to school and graduated Phi Beta Kappa with an Applied Science Associate's Degree. He also learned to be a butcher/meat cutter and worked as same until he was recalled to Mine #1 in October of 2004.

Besides breathing difficulties, Petitioner has high blood pressure and takes a pill for cholesterol. Petitioner testified that if he was offered a job in the mines today that he would not take it. He feels that he would not be able to breathe with the diesel fumes in the mines.

During the trial Petitioner was presented with Petitioner' Exhibit 8, which he identified as a bituminous wage agreement. Petitioner testified that if he were working the mines today he would be making $29.63 per hour.

The Arbitrator concludes:

Issue (C) and (O): Did Petitioner suffer disease which arose out of and in the course of his employment by Respondent?

The Arbitrator finds that Petitioner does not suffer from coal worker's pneumoconiosis. In so concluding the Arbitrator relies upon the reports of the B-readers. While Dr. Paul was of the opinion that Petitioner has coal worker's pneumoconiosis (CWP), Dr. Paul is

not a B-reader. Three B-readers read the most recent chest films of September 26, 2013 as negative for pneumoconiosis. Only one B-reader read that film as positive for CWP.

That Arbitrator further finds that Petitioner does not suffer from occupational diseases of asthma or chronic bronchitis. In so finding, the Arbitrator has considered the opinions and testimony of Dr. Paul and Dr. Tuteur and finds the testimony and opinions of Dr. Tuteur more persuasive.

The Arbitrator notes that Dr. Paul's opinions regarding Petitioner's diagnoses and their causal relationship to Petitioner's work as a miner were based upon an uncorroborated history from Petitioner. None of Petitioner's medical records from Dr. Castle, Dr. Mahmud or any other doctor pre-dating the September 23, 2008 examination with Dr. Paul indicate a history of shortness of breath and morning coughing. Petitioner's attorney acknowledged as much during the deposition when he noted a lack of treatment for these alleged complaints. (PX 1, p. 9) Petitioner himself never explained at the arbitration hearing why he didn't seek treatment for these alleged complaints prior to seeing Dr. Paul. While Dr. Paul surmised it was because Petitioner was stoic and just "plugged along" he never actually reviewed Petitioner's medical records and, as such, was completely unaware of Petitioner's repeated denials of shortness of breath and coughing in those records. Dr. Paul further conceded that as far as he knew Petitioner had never been diagnosed with asthma or chronic bronchitis before he examined him at the request of his attorneys. He also conceded that Petitioner was a smoker and that smoking aggravates asthma and is the #1 cause of chronic bronchitis.

The Arbitrator also had some difficulty with Petitioner's credibility regarding his complaints of shortness of breath and coughing, given the lack of corroboration contained within the medical records. He further testified that Dr. Mahmud had spoken with him about his work in the coal mines and told him to get out; however, Dr. Mahmud's records don't corroborate any such conversations nor was the doctor deposed. Petitioner also testified to "probably" noticing problems with breathing about a year after he started working with glue bolts. Again, this isn't corroborated in any medical records. Additionally, the record shows significant gaps in treatment (June of 2009 to July of 2012 and since April of 2015 through the date of arbitration) for Petitioner suggesting no health issues or problems whatsoever. During the arbitration hearing, Petitioner did not have any episodes of coughing nor did he display any outward signs of breathing difficulties.

With regard to the opinions, testimony and examination conducted by Dr. Tuteur, the Arbitrator finds Dr. Tuteur's evaluation to have been more involved than that of Dr. Paul. Specifically, the Arbitrator notes that Dr. Tuteur had Petitioner exercising in the course of the evaluation. Petitioner's oxygen saturation level was measured during that exercise, as were his arterial blood gases. Further, his FEV1 was measured before and after exercise. All of these studies surrounding the exercise were normal. Although Dr. Tuteur felt that there was a very minimal obstructive defect, he noted it was of no clinical significance since there was never an abnormal FEV1 and the improvement reached super normal values. The FEV1 was always over 100% of predicted. While Dr. Paul's physical

examination of the chest revealed wheezing and rhonchi, Dr. Tuteur's physical examination of the chest was normal. Dr. Tuteur's evaluation of the chest was consistent with the medical records contained in the record. For example, there were no abnormalities at the time of Dr. Castle's DOT physical on 8/15/12. There were no abnormal findings in Dr. Mahmud's records from 2006 up through June of 2009. Routinely, Petitioner's chest examination was clear to percussion and auscultation. While there were some findings of crepitations with rhonchi these were present when Petitioner was diagnosed with upper respiratory infections (such as in 2013). The last office note from Dr. Castle dated 4/17/15 indicates that Petitoiner's breath sounds were normal. With regard to the Methacholine test and Dr. Paul's diagnosis of asthma as a result, Dr. Tuteur felt that the test was invalid because of substantial variability with regard to the results obtained. The Arbitrator notes corroboration for Dr. Tuteur's testimony regarding the invalid test in the medical records. While there is no mention of the test itself, the records from Dr. Mahmud indicate that in 2013 Petitioner's past history was negative for asthma, bronchitis, or allergies. That particular notation was also in his records from 2007 and 2008. Dr. Tuteur found no evidence to support a diagnosis of coal workers' pneumoconiosis and no evidence of any dust-related lung disease. Dr. Paul indicated that his baseline pulmonary function study was normal. The Arbitrator notes that three B-readers read the most recent chest films of 9/26/13 as negative for pneumoconiosis. Only one B-reader read that film as positive for CWP.

With regard to the medical records, the Arbitrator notes that Petitioner filled out a history form indicating that he had black lung at Southern Illinois Healthcare Foundation. Further, his attorneys sent a copy of Dr. Paul's report to that facility on 3/20/13. The first medical treatment records, however, are from Dr. Mahmud and begin on 9/01/06. Petitioner testified that he was noting shortness of breath and tightness prior to the end of his coal mine employment and had asthma. The record from 9/01/06 indicates that there was no difficulty in breathing and no shortness of breath. In the subsequent office visits through 5/22/07, this indication was repeated that he had no difficulty breathing and no shortness of breath. On that latter date, the medical history indicates that Petitioner's past history was negative for asthma. After that, the next seven visits had to do with a low back problem Petitioner was having. At the time of the last visit before the mine closed, there was an indication of no difficulty breathing and no shortness of breath on 10/22/07. The next visit is a year later on 9/30/08 at which time there was again no difficulty breathing and no shortness of breath. The past history was negative for asthma. The Arbitrator notes a gap of almost four years in the medical records of Dr. Mahmud from 6/01/09 to 4/22/13. In 2012, Dr. Castle performed a DOT physical on 8/15/12. There were no abnormalities with regard to Petitioner's lungs including the fact that there was no impaired respiratory function. When Petitioner was seen on 3/21/13, he was suffering from an upper respiratory infection and complained of cough, earache, fatigue, fever and dyspnea. Albuterol sulfate was prescribed at that time. The note indicates that the symptoms had begun about a week before. Petitioner then saw Dr. Mahmud on 4/22/13 indicating similar symptoms of cough, congestion and wheezing, but the note says this had been going on for the past year. Petitioner advised Dr. Mahmud that he had been provided an inhaler by his doctor, which would have been the Albuterol the month before. The patient history at that time was negative for asthma. When Petitioner

returned to see Dr. Castle two days later on 4/24/13, he indicated that his symptoms were pretty well controlled with the inhaler. He still had a cough, wheezing, and dyspnea. When he returned to Dr. Mahmud on 7/03/13, a similar history was given as he had stated on 4/22/13. The past history was again negative for asthma.

In looking at the records from Dr. Castle, it appears the first mention of asthma as a complaint or diagnosis was on 12/12/14. This would be almost seven years after Petitioner last worked as a coal miner. As of 1/30/15, the past medical history showed asthma and Petitioner had no shortness of breath and no dyspnea. The final office note is dated 4/17/15 and again the note says no shortness of breath and no dyspnea. The breath sounds were normal at that time. The Arbitrator notes that the first time an inhaler was prescribed was when Petitioner was suffering from an upper respiratory infection on 3/21/13, which was over five years after he last worked as a coal miner. The actual mention of asthma as a diagnosis does not appear until later chronologically in the medical records. The Arbitrator specifically notes that the most recent office notes in 2015 indicating no dyspnea which, again, would be consistent with Dr. Tuteur's indication that Petitioner's pulmonary function study was of no clinical significance. This is also contrary to Petitioner's testimony regarding shortness of breath. Based upon the evaluation and conclusions of Dr. Tuteur, supported by the three negative B-readings of the 9/26/13 films, and taking into account the medical records which do not suggest any problems at all with Petitioner's lungs for many years after he last worked as a coal miner, the Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence that he developed any occupational disease in the course of his employment with Respondent. Petitioner's claim for compensation is denied and no benefits are awarded.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ricky Stewart,
Petitioner,

vs.

NO: 17 WC 24209

Jewel Food Stores/New Albertson's Inc.,
Respondent.

19IWCC0135

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, prospective medical, wage rate, employee/employer relationship 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 29, 2018, is hereby affirmed and adopted.

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

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

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

FEB 28 2019

DATED:
o022119
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

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

STEWART, RICKY
Employee/Petitioner

Case# **17WC024209**

JEWEL FOOD STORES/NEW ALBERTSON'S INC
Employer/Respondent

19IWCC0135

On 8/29/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.21% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0659 BRILL & FISHEL PC
FRANCINE R FISHEL
180 N LASALLE ST SUITE 3700
CHICAGO, IL 60601

5074 QUINTAIROS PRIETO WOOD & BOYER
KYLE JEFFERSON
233 S WACKER DR 70TH FL
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)

Ricky Stewart
Employee/Petitioner

v.

Jewel Food Stores/New Albertson's Inc.
Employer/Respondent

Case # 17 WC 24209

Consolidated cases: _____

19IWCC0135

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on 07-09-18. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

19IWCC0135

FINDINGS

On the date of accident, **06-13-17**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did 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 $**$53,553.24**; the average weekly wage was $**1,029.87**.

On the date of accident, Petitioner was **53** 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 $**37,467.65** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**2,689.60** for other benefits, for a total credit of $**40,157.25**.

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

ORDER

Because Petitioner failed to meet his burden of proof as to accident and causal connection, all benefits are 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

08-29-18
Date

ICArbDec19(b)

AUG 29 2018

FINDINGS OF FACT

The Petitioner, Ricky Stewart, stated that he was an employee of Jewel on June 13, 2017. (T.12) He had begun working for Jewel in October 2015. (T.8) He worked at the Jewel Distribution Warehouse located in Melrose Park, IL, specifically in Building A. (T.10) He was hired as a Janitor, and in January 2017 he was moved into the Recoup Room. (T.9)

His job in the Recoup Room was to recoup all of the damaged product that can be salvaged. (T.9) The Recoup Room is a large room, and in his area all of the damaged product comes in on pallets in a tote, and it is stacked three or four totes high. (T.11) A tote is a plastic bin. (T.11) The pallet has a boundary area demarcated by yellow lines. (T.11) There is a yellow line on the floor that the pallets should not come beyond, front and back. (T.11)

Petitioner initially testified that he reported to work at 10:00 a.m. on June 13, 2017. (T.12) It was later confirmed that Petitioner actually began his shift at 10:00 p.m. (T.56)

Petitioner testified on direct that on June 13, 2017, the Recoup Room was overcrowded. (T.13) He testified that there were tote pallets outside of the Recoup Room that were waiting to come in, and he had no walkway but proceeded with his job. (T.13) He testified that he uses a chair and positioned himself to the totes because the totes weigh in excess of 500 pounds, so he could not move them. (T.13) He testified that he normally has walkways that he can walk around and walk through, but on this particular day he could only step across the tote because there was no room at all. (T.13) He described that the pallets exceeded the yellow line all the way up to the entranceway past halfway towards the garbage basket, and it was pushed closer to the table that allowed him no walkway or not much room to work with. (T.12)

Petitioner initially testified that on this date around 11:25 p.m. when he completed a brown box, he walked toward an empty pallet and placed it on his pallet, and when he walked back toward his seat, he tripped over the tote and landed on his tailbone. (T.14) Specifically, Petitioner testified:

> "When I fell and landed on my tailbone, I couldn't do nothing. I felt a sharp electric pain in the base of my neck; and it seemed like I was there forever, I'd say about eight to ten minutes. I couldn't move. I couldn't move nothing. It's like I blanked out. Then when I was able to move, I pulled the tote up under my leg and I stood up; and I just stood up back to my work area because I would just trip. I would just trip over the tote. I started back to working and, about 15 minutes later, my back just started pounding real bad, my left shoulder blade, a pain I never ever described before. It just started pounding. So at this time, it's about 11:45. The next room over is my janitorial room where my supervisor is located." (T.15)

Petitioner testified that he reported to his supervisor, Tom Amburn, that he had tripped over a tote about 15-20 minutes ago. (T.16) Petitioner testified that his back was really hurting.

(T.16) He went on break at midnight, and after the break he went back to his work area and the pain came back around 1:30 a.m. (T.16) He testified that he took his lunch at 2:00 a.m., and then returned to the Recoup Room at about 3:10. (T.18) He testified that he continued to work and was picking up jelly when his he suddenly could not move such that his left arm was paralyzed. (T.18) He testified that his supervisor pulled up on a golf cart and they filled out an accident report at 3:45 a.m. (T.19) He testified that he called a taxi and was taken to Gottlieb Hospital, where he was eventually seen at 5:00 a.m. (T.19) Petitioner did not provide any medical reports at trial to verify this ER visit.

On cross-examination, Petitioner testified that the alleged accident occurred as he completed a brown box and he stood up out of his seat and stepped over the totes that he was loading the bad products, and he walked toward the pallet where he put the brown box. (T.57) He returned walking back to his seat, and when he turned he tripped over the tote and landed on his tailbone. (T.57) He continued to testify that he walked back towards his seat and he tripped. (T.59) He testified that he had no walking room, and he even had to step over the pallet before he got to the tote because the pallet and the wastebasket normally should have a four- to five-foot gap, but there wasn't even a one foot gap between the pallet and the tote because it was so congested. (T.59)

Petitioner testified that a pallet is 40 inches long by 44 inches wide, and is 4-5 inches tall. (T.60) He testified that he stepped over the corner of a pallet, not directly over the whole width of it. (T.60)

Petitioner further testified that the totes are about two feet long and about a foot and a half wide, and they are about a foot and a half to two feet tall. (T.58)

Petitioner again testified that there were eight to ten minutes where he could not move when he fell. (T.61) He testified that he continued to work, and then about 15 minutes later his back shoulder, left shoulder blade started hurting real bad. (T.61) Petitioner states "all I can recall is that, when I made it around the tote area, my seat, when I turn around and I trip, it's like I blanked out because of the pain – it was like electric shock. It's like everything blanked out. Everything was dark for a moment." (T.61)

He further testified that for those few minutes after he fell he just sat there. (T.61) He added "I couldn't move. My brain and my hand was not coordinating. I could not move." (T.61)

Petitioner testified that there was another individual working with him in the Recoup Room that night named J.R. (T.62) Petitioner testified that J.R. said he did not see him fall. (T.63) Petitioner testified that he did not ask J.R. for help because he got up on his own after ten minutes. (T.63) Petitioner stated that for those ten minutes, he was laying between the table and the pallet on the floor. (T.63) Petitioner confirmed that he did not hit his head, but rather he landed on his tailbone. (T.63)

Respondent called witness Tom Amburn to the stand. Mr. Amburn is a Warehouse Supervisor at the Jewel Distribution Center in Melrose Park, IL. (T.72) He has been employed with Jewel for over 23 years, and he has been in his current position for almost 2 years now. (T.73) Mr. Amburn is familiar with the Petitioner, Ricky Stewart, and was able to identify him on the stand. (T.73)

Mr. Amburn testified that this Jewel location has a security camera system installed inside the warehouse. (T.74) There are cameras located in the Recoup Area in Building A. (T.74) Mr. Amburn confirmed he was working in his position on June 13, 2017. (T.74) He testified that the cameras were installed and in operation on June 13, 2017 and June 14, 2017, and the cameras are located in fixated positions throughout the warehouse. (T.75)

Mr. Amburn provided video surveillance footage dated June 13, 2017 and June 14, 2017, which was played on the record. Mr. Amburn was able to positively identify the location of the footage was taken at the Dried Grocery Recoup Room located in Building A of the Melrose Park Distribution Center. (T.77) Mr. Amburn was also able to positively identify the Petitioner, Ricky Stewart, in the surveillance footage as wearing dark pants and a light olive green short-sleeve shirt. (T.79) He also identifies a second individual working in the Recoup Room as J.R. Ambrosia. (T.79)

Mr. Amburn testified that the surveillance begins at 10:45:00 on June 13, 2017 and depicts the camera angle "336 Building A, Recoup Room West" which refers to the camera pointing from west to east. (T.77) At this time, Petitioner appears to be working by recouping damaged product, possibly making boxes, and throwing things away into a white dumpster. (T.82) He appears to be sitting, and he appears to get up and down at various points. (T.82)

At 10:59:57, Mr. Amburn observes Petitioner working a pallet. (T.85) He testifies that it looks like he is walking forward, turning to sit and falls on his backside. (T.85) Directly after the fall, Mr. Amburn observes Petitioner pick himself up, sit back on the chair, and begin to go about his business working in the Recoup Room. (T.86) At 11:00:45, he observes Petitioner sitting in his chair working at either the table or throwing some product into the white gondola that is next to him, but apparently he is continuing his normal work for the day. (T.86)

Mr. Amburn then reviewed slow motion replays of the alleged incident beginning on the video at precisely 11:00:00 p.m. He testifies that it looks like Petitioner is standing up and possibly starting to walk toward the west, toward the camera. (T.89) Petitioner is walking forward, walking forward, turning to sit, setting up and falling down backwards. He does not believe he saw Petitioner stepping over any objects at any point during that time. (T.89) He testified that it looks like Petitioner just shuffled his feet to turn sideways to sit down from what he could see. (T.90)

Mr. Amburn testifies that at 11:00:05, Petitioner seems to be in a position where he should have already sat in the chair because it appears as though his backside is about level with

where the seat is on the chair. (T.92) He states it looks like an individual that did not sit down in the chair, and he is going past the seat of the chair and possibly going towards the ground. (T.92) He does not believe the chair has moved yet at this point. (T.92) He testifies that physically, his bottom looks like it is below the seat of the chair. (T.92) Up to this point, Mr. Amburn has not noticed Petitioner appear to slip or trip of any nature that he can tell from the video. (T.94)

Mr. Amburn testifies that following the fall, the secondary employee, J.R. Ambrosia, does not appear to turn his head or move in any kind of fashion to notice that something has occurred. (T.95) He does not appear to offer help at any point. (T.95) He further testifies that it does not appear that Petitioner asks for help at any point. (T.96) He testifies that it does not appear that Mr. Ambrosia even flinches throughout the whole process. (T.96)

Mr. Amburn testifies that the instant Petitioner falls appears to occur at 11:00:06 p.m. (T.96) He further observes that Petitioner appears to be back sitting in his chair at 11:00:11, which is a span of 5 seconds. (T.97)

Mr. Amburn testifies that the yellow lines on the floor are there to keep order in the Recoup Room to ensure that the products are organized. (T.98) He states: "In most cases, there is normally a lot more product in the Recoup Room than this. This appears to be a lighter day. You can see a lot of floor space in between the yellow lines, and you can see easy pathways to move throughout going in one of the large doors and/or openings I should say and then out the other without any clutter or anything in the way that would obstruct any driving." (T.97-98) However, he admits that he cannot see all of the floor of the far east end of the room, but for the most part what he can see is that most product is between the yellow lines and there is room – it looks like everything is actually in the lines that are painted. (T.98)

Mr. Amburn reviews an additional camera angle appearing as "335 Building A Recoup Room East" which appears to depict the same room but from the east looking toward the west. (T.99) He testifies that from this angle, most of the area, the floor space where the yellow lines are painted is actually kind of empty. (T.99) In most cases, it is filled up with four to five to six pallets from front to back, and right now he sees a lot of empty floor space in there. (T.99)

Mr. Amburn testifies that the general size of a typical pallet is 40-by-48 and are about 6-7 inches tall off the ground. (T.100) A typical size of a tote is 14 inches tall, maybe 18-20 inches wide, and 14 inches across. (T.100)

Mr. Amburn testifies that at 11:03 p.m., an individual named Dave Wolf is seen walking through the Recoup Area. (T.102) Mr. Wolf is a plant superintendent and is someone to whom Petitioner could have reported the alleged accident, but he does not observe Petitioner make any contact with Mr. Wolf at this time. (T.102-103)

Mr. Amburn testifies that passing time stamp 11:10:00, he has not noticed anything out of the ordinary. (T.104) He states that the only time Petitioner is seen lying on the ground was for the brief five second period immediately following the alleged accident. (T.104)

At 11:25:00, he testifies that Petitioner appears to still be doing his job sorting plastic bottles and throwing them in a garbage can. (T.105) At 11:27:00, he testifies that Petitioner is intermittently getting up out of his seat and walking around doing work. (T.107) It appears he is operating a machine in the Recoup Room. (T.107) At no point does he see Petitioner appear to favor his back or neck. (T.107) At 11:34:00 he appears to be operating a machine, and he also appears to be bending over. (T.107)

At 11:40:00, he testifies that it looks like Petitioner is pulling a pallet jack. (T.108) He appears to have jacked up a pallet and moved it forward, and he again appears to be bending over. (T.108) Mr. Amburn testifies that Petitioner does not appear to be favoring his back or neck in any way that he can see. (T.108) At 11:44:00, he observes that Petitioner appears to be lifting plastic pallets and pulling a pallet jack. (T.108)

Petitioner initially sought treatment at Occupational Health Centers of Illinois (Concentra) on June 14, 2017. (PX4) Petitioner reported to Dr. Stanley Simon that he was tripped and fell backwards and injured his lower back and neck. (PX4 / T.63) He was initially diagnosed with a cervical strain and lumbar strain. (PX4)

Petitioner also sought an opinion from the VA Hospital on June 21, 2017 via email. (PX3) Petitioner reported to Dr. David Hartwell Rogers that he fell on his back Tuesday night and hurt his back. (PX3 / T.64) He was recommended to schedule an appointment to be evaluated in the clinic. (PX3)

Petitioner presented to Concentra on June 29, 2017 for physical therapy. (PX4) He reported to Reshawn White, DPT that he either tripped over a heavy box or missed the rolling chair he was sitting in when we went to sit down, and he fell directly on his tailbone. (PX4 / T.64)

Petitioner presented to Dr. Emmanuel Ansong at the VA Hospital on June 30, 2017. (PX2) Petitioner reported that his fall at work was after missing a rolling chair, and he landed on his coccyx, not able to get up for over 10 minutes due to pain. (PX2 / T.65) Based in part on this history, Petitioner was diagnosed with cervical sprain leading to radiculopathy. (PX2)

Petitioner eventually presented to Dr. Sean Salehi at Concentra on August 11, 2017. (PX4) He reported he was injured at work when he went to go sit in a rolling chair. He is unsure exactly what happened if the chair slipped out from under him or if he tripped over a nearby bench, but he ended up falling to the floor. (PX4) He was diagnosed with a herniated disc at C6-7; disc disease at C5-6; and lumbosacral spondylosis, and it was noted that he may require a cervical procedure.

Petitioner eventually presented to Dr. Leslie Shaffer at Advocate Christ Hospital for elective admission for an anterior cervical discectomy and fusion at C6-7 on September 22, 2017.

On cross examination, Petitioner denied having issues with his cervical spine prior to June 13, 2017. (T.51) He did not recall seeing Dr. Ivankovich at Loretto Hospital in October 2010 regarding his cervical spine. (T.51) He claims he went to Loretto for a hemorrhoid surgery, but "never ever went to Loretto besides that." (T.51) He testified that he never went to Loretto Hospital with complaints of his cervical spine. (T.51)

However, on October 8, 2010, Petitioner presented to Dr. Ivankovich at Loretto Hospital Diagnostic Imaging for an MRI of the cervical spine. (RX2) The indication was for cervical spine pain. (RX2) The observations at that time included endplate spurring and discogenic disease at C4-5, as well as mild endplate spurring and mild disc space narrowing at C5-6. (RX2)

Petitioner testified that he also underwent a prior MRI of the cervical spine in May 2016. (T.50)

Additionally, Petitioner testified that he underwent a brain surgery in January 2017. (T.47) Following this procedure, Petitioner was off work for 13 weeks until he returned to work at the Jewel Warehouse on May 1, 2017. (T.47)

On May 26, 2017, just 18 days prior the alleged accident, Petitioner underwent MRI's of the brain and lumbar spine. (T.50) On June 5, 2017, just 8 days prior to the alleged accident, Dr. Rogers recommended that Petitioner be placed in physical therapy for complaints of back pain. (T.50)

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision as to C. WHETHER PETITIONER SUFFERED ACCIDENTAL INJURIES WHICH AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH RESPONDENT, the Arbitrator finds the following:

Petitioner is alleging that he suffered an acute trauma injury to his cervical spine and lumbar spine on June 13, 2017. Petitioner has the burden of providing the Arbitrator with sufficient evidence as to the alleged employment activities which he claims contributed to his condition. Petitioner testified that prior to June 13, 2017 he had never injured his neck or had any cervical complaints.

At trial, Petitioner testified that his work area was unusually congested on the date of June 13, 2017. He testified that there were pallets and totes in his work area beyond the yellow boundary lines. He testified that where he normally has five to six feet of clearance to walk in his work area, he had less than one foot of space to walk on this particular date.

He testified that as a result of this congested work area, he was forced to step over a pallet roughly six to seven inches tall as he walked back to his chair. He further testified that he then tripped over a tote roughly fourteen inches tall, which caused him to fall on his tailbone. He specifically testified that on this day he could only step across the tote because there was no room at all.

Petitioner testified that after he tripped on the tote, he was in so much pain that he lied on the ground for eight to ten minutes before he was able to get up. He testified that within 15-20 minutes of getting up, he was in so much pain that he went to report the accident to his supervisor.

At trial, Respondent presented witness Tom Amburn, a warehouse supervisor. Mr. Amburn provided video surveillance of the alleged accident date of June 13, 2017, which was played on the record at trial. Mr. Amburn was able to positively identify the Petitioner in the surveillance footage.

The Arbitrator finds that Mr. Amburn credibly testified that on the date in question, the area of the Recoup Room where Petitioner was working appeared to be less congested than a normal day. He credibly testified that the yellow lines were visible on the video and there was visible floor space between the yellow lines. He credibly testified that it appears all of the visible product is within the yellow lines that are painted. In light of Mr. Amburn's credible testimony and in review of the provided surveillance, the Arbitrator finds Petitioner's testimony regarding the alleged congested nature of the workspace to be not credible.

The Arbitrator finds that the surveillance video clearly shows Petitioner fell to the ground at 11:00:06 p.m. and subsequently got up and returned to his chair at 11:00:11 p.m., which is a total span of five seconds. The Arbitrator finds that the surveillance appears to show Petitioner continue working immediately upon getting up after those five seconds. Prior to the surveillance video being introduced at trial, Petitioner testified multiple times that he was unable to get up for eight to ten minutes following his fall. Petitioner even detailed that he specifically was laying between the table and the pallet on the floor for that timespan. The Arbitrator finds Petitioner's testimony is not consistent with the provided surveillance, and therefore Petitioner's testimony is not credible.

In careful review of the surveillance footage, the Arbitrator also agrees with Mr. Amburn's assessment that Petitioner does not appear to slip or trip on any objects causing him to fall. Moreover, Petitioner does not appear to navigate around or over any objects in the seconds leading up to the fall. Rather, it appears that Petitioner is able to walk freely through his work area with a steady and unobstructed gait.

Although the surveillance does not specifically show Petitioner's feet as he walks prior to his fall, the video does show the top of Petitioner's legs and he does not appear to lift either leg in any unnatural motion at any time. Mr, Amburn credibly testified that an empty pallet is six to

seven inches tall, and a tote is fourteen inches tall. The Arbitrator finds that if Petitioner were to lift either leg at least six to fourteen inches in the air as he walked toward the chair, then Petitioner would have clearly and noticeably altered his gait on the surveillance video. The Arbitrator finds that there was no such clear alteration of Petitioner's gait.

The Arbitrator acknowledges that the area around Petitioner's feet is obstructed from view in the surveillance footage, and as such there is no visual evidence to confirm or deny whether there were any objects obstructing his path. However, Petitioner has the burden to provide the Arbitrator with sufficient evidence to demonstrate the presence of such obstructing objects. The Arbitrator has already found that Petitioner did not credibly testify to the congested nature of the workspace, and he did not credibly testify to the length of time he was on the floor following the fall. In light of Petitioner's lack of credible testimony on those issues, and in conjunction with careful review of the surveillance footage as outlined above, the Arbitrator finds that Petitioner's testimony regarding an obstructed walking path is not credible.

In review of the medical evidence, the Arbitrator finds that Petitioner gave conflicting reports of the alleged mechanism of injury to various treating physicians. On June 14, 2017, Petitioner reported that tripped and fell backwards. On June 21, 2017, Petitioner reported that he fell on his back. On June 29, 2017, Petitioner reported that he had either tripped over a heavy box or missed the rolling chair he was sitting in when he went to sit down. On June 30, 2017, Petitioner reported that his fall at work was after missing a rolling chair, and he was not able to get up for over ten minutes due to his pain. On August 11, 2017, Petitioner reported he was injured at work when he went to go sit in a rolling chair – he is unsure exactly what happened if the chair slipped out from under him or if he tripped over a nearby bench, but he ended up falling to the floor.

After careful review of the surveillance footage, the Arbitrator finds that it does not appear Petitioner slips or trips at any time. The Arbitrator finds that Petitioner approaches the chair, attempts to sit down, and misses the chair causing him to fall to the floor. Upon reviewing the surveillance frame-by-frame at trial, the surveillance clearly shows that the chair does not move until after Petitioner's bottom side is already below the plane of the seat, which suggests that Petitioner simply misjudged where he was in relation to the chair as he attempted to sit. No evidence was presented at trial to suggest there was any defect with the chair or surrounding area which would have contributed to Petitioner's fall.

The Arbitrator finds it significant that the Petitioner did not appear to report the alleged injury immediately after the fall. The Arbitrator notes that Petitioner fell within a short distance of a colleague and does not appear to ask for help or assistance at any point. Further, his colleague does not appear to react to the fall or even acknowledge that it occurred at any point. Moreover, the surveillance shows that the Plant Superintendent, Dave Wolf, walks through the Recoup Room at 11:03 p.m. – three minutes after Petitioner's fall – and Petitioner fails to report the injury at that time. Finally, the Arbitrator finds it significant that Petitioner does not appear

to favor his neck or back in any significant manner following the fall, and instead appears to continue doing his job in a consistent manner with his work prior to the alleged fall.

"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, 207 Ill.2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665, 671 (2003). "The 'arising out of' component is primarily concerned with causal connection" and is satisfied when the claimant shows "that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." Id. at 203, 278 Ill.Dec. 70, 797 N.E.2d at 672.

"Stated otherwise, 'an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties.'" Id. at 204, 278 Ill.Dec. 70, 797 N.E.2d at 672 (quoting Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill.2d 52, 58, 133 Ill.Dec. 454, 541 N.E.2d 667 (1989)).

"For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment." Orsini v. Industrial Comm'n, 117 Ill.2d 38, 45, 109 Ill.Dec. 166, 509 N.E.2d 1005, 1008 (1987). "[I]f 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." Caterpillar, 129 Ill.2d at 59, 133 Ill.Dec. 454, 541 N.E.2d at 667.

Consistent with these principles, this court has categorized the risks to which an employee may be exposed as: "(1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics." Metropolitan, 407 Ill.App.3d at 1014, 348 Ill.Dec. 559, 944 N.E.2d at 804. As indicated by the relevant case authority, employment-related risks are compensable while personal risks typically are not. Further, "[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." Id. "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." Id.

The Arbitrator declines to find that Petitioner's risk of injury in the present case was distinctly associated with his work for the employer. Instead, the Arbitrator finds that the risk of

Petitioner missing his chair and falling to the ground is one which Petitioner would have been equally exposed to apart from his work for the employer. Thus, it presents a neutral risk, and Petitioner has presented no evidence to at trial to establish that he was quantitatively or qualitatively exposed to the risk to a greater degree than the general public.

In Noonan v. IWCC, it was found that the claimant's action of bending over or reaching while seated in his work chair, without more, is insufficient to establish a work-related cause of his accidental injury. 2016 IL App (1st) 152300WC, 36, 65 N.E.3d 530, 539 (Jan. 26, 2017). In Board of Trustees of Univ. of Ill v. IC, it was determined that the claimant simply turned in his chair and suffered the injury and there was no suggestion that the chair was defective or unusual in any way, and there was no evidence of a causal connection between claimant's employment and the injury. 44 Ill. 2d 207, 214-215, 254 N.E.2d 522, 526 (1969). Finally, Hopkins v. IC noted that the claimant simply turned in his chair and suffered injury, and the court found the injury resulted from a hazard personal to the claimant and, therefore, did not arise out of claimant's employment. 196 Ill. App. 3d 347, 351-52, 553 N.E.2d 732, 735 (1990). More is required than the fact that an accident occurred at claimant's workplace. Id.

Similar to these claims, the Arbitrator finds that the facts of this claim are insufficient to establish a work-related cause of action. Based upon a preponderance of the evidence, the Arbitrator finds that Petitioner did not meet the burden of proving that he suffered accidental injuries arising out of and in the course of his employment on June 13, 2017.

In support of the Arbitrator's Decision as to F. WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, the Arbitrator finds the following:

Because this Arbitrator found that Petitioner did not suffer accidental injuries arising out of and in the course of his employment with Respondent, the issue of causal connection is moot.

However, even if this Arbitrator were to find that Petitioner met the burden of proof for accident, Petitioner failed to meet the burden of proof necessary to prove causation. Petitioner testified that he sought treatment at Gottlieb Hospital Emergency Room immediately following the alleged accident on June 13, 2017. However, no such records were submitted into evidence at trial. As such, this Arbitrator presumes that the ER records, if they exist, are not helpful to Petitioner's claim as they were never presented at hearing.

The Arbitrator finds that Petitioner provided his treating physicians with an overall inconsistent history of the alleged mechanism of injury. The various records reflect that Petitioner alleged over the course of his treatment, among other things, that he recalls falling on his back and was not able to get up for over ten minutes due to the pain. This history is also consistent with Petitioner's initial testimony at trial.

The Arbitrator finds that the surveillance video is in direct contradiction of Petitioner's alleged history of accident. The surveillance shows that it only took Petitioner a total of five seconds to get back up and resume working following the alleged fall. The Arbitrator finds that Petitioner's testimony and report to physicians that he was on the ground in pain for over ten minutes overstates the severity of Petitioner's pain level following the injury. As a result, the Arbitrator finds that Petitioner's treating physicians relied on a false history of the mechanism of injury. No evidence was presented at trial to suggest that any of the treating physicians have reviewed the surveillance footage of the alleged accident. Therefore, the Arbitrator finds that any causal opinions in contained in the treatment records cannot be properly relied upon.

The Arbitrator finds that Petitioner's testimony at trial that following the alleged accident, his "back started pounding real bad." (T.15) Petitioner further testified that he initially reported to his supervisor that his "back was really hurting." (T.16-17) Petitioner did not testify to any initial cervical pain following the alleged accident. Upon careful review of the surveillance footage of the Petitioner appearing to fall on his rear-end, the Arbitrator finds that the footage is more likely indicative of a tailbone injury, if any injury was sustained at all, and is not likely indicative of a cervical injury.

However, the Arbitrator finds that there is no evidence in the surveillance footage of Petitioner appearing to favor his neck or back following the alleged accident. As such, the Arbitrator finds that there is no evidence on surveillance of an acute injury, aggravation, or exacerbation to Petitioner's neck or back.

The Arbitrator notes that Petitioner did experience prior back problems immediately prior to the alleged accident date. Petitioner presented for a lumbar spine MRI on May 26, 2017 – just eighteen days prior to the alleged accident. On June 5, 2017 – just eight days prior to the alleged accident – Petitioner was recommended for physical therapy for back-related issues. The Arbitrator finds that any ongoing back issues Petitioner may have experienced were more likely than not related to his documented prior back issues, and there is no evidence that the alleged accident of June 13, 2017 aggravated or exacerbated his back condition.

Regarding the cervical spine, the Arbitrator notes that Petitioner presented for an MRI of the cervical spine as early as October 8, 2010, which showed signs of endplate spurring and discogenic disease. The indication at that time was of cervical spine pain. Petitioner testified that he had an additional cervical spine MRI in 2016, however he did not present those records at trial. The Arbitrator finds that Petitioner's history of obtaining cervical spine MRI's is evidence of prior cervical issues, and there is no evidence that Petitioner's alleged accident of June 13, 2017 specifically aggravated or exacerbated his prior cervical issues.

For the foregoing reasons, even if the Petitioner were to prove a compensable accident, the Arbitrator finds that Petitioner has not met his burden of proving that his current condition is causally related to the injury.

In support of the Arbitrator's Decision as to J. WHAT AMOUNT OF REASONABLE AND NECESSARY MEDICAL EXPENSES SHOULD AWARDED, the Arbitrator finds the following:

Because Petitioner failed to meet his burden of proof as to accident and causal connection, the Arbitrator finds that all medical benefits are denied. In addition, Respondent shall be entitled to a credit in the amount of $2,689.60 reflective of all medical payments made by the Respondent to date.

In support of the Arbitrator's Decision as to K. WHETHER ANY PROSPECTIVE MEDICAL SHOULD BE AWARDED, the Arbitrator finds the following:

Because Petitioner failed to meet his burden of proof as to accident and causal connection, the Arbitrator finds that no prospective medical should be awarded. The Arbitrator finds the opinions of Petitioner's treating physicians at Concentra and the VA to be flawed, as the opinions appear to be based in part on a false history presented by the Petitioner regarding the alleged mechanism of injury. Additionally, Petitioner has presented no evidence to suggest that any of his treating physicians have had the opportunity to review the surveillance video of the alleged mechanism of injury.

As a result, the Arbitrator finds that none of the treating physicians are in a positon to accurately comment on the necessity of prospective future medical care as it relates to the alleged mechanism of injury in this claim.

Based upon the failure of the Arbitrator to adopt the opinions of Petitioner's treating physicians, the Arbitrator denies any prospective medical even if he were to find the claim compensable.

In support of the Arbitrator's Decision as to L. WHAT AMOUNT OF TEMPORARY TOTAL DISABILITY EXPENSES SHOULD BE AWARDED, the Arbitrator finds the following:

Because Petitioner failed to meet his burden of proof as to accident and causal connection, the Arbitrator finds that all temporary total disability benefits are denied.

The Arbitrator finds that Respondent has previously paid TTD to the Petitioner for the period of June 23, 2017 through July 9, 2018, or 54-4/7 weeks, at a TTD rate of $686.58 per week, for a total of $37,467.65. The Arbitrator finds that the Respondent shall be entitled to a credit for this total amount of $37,467.65.

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

Amy Stoner,

Petitioner,

vs.

NO: 13 WC 09452

19IWCC0136

Belleville Area Special Services,

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 issue(s) of accident, 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 August 14, 2018 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 28 2019
SJM/sj
o-2/7/2019
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

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

STONER, AMY
Employee/Petitioner

Case# **13WC009452**

BELLEVILLE AREA SPECIAL SERVICES
Employer/Respondent

19IWCC0136

On 8/14/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4888 LAW OFFICE KEITH SHORT
KEITH SHORT
1355 N BLUFF ROAD
COLLINSVILLE, IL 62234

0560 WIEDNER & MCAULIFFE LTD
KHRISTOPHER S DUNARD
8000 MARYLAND AVE STE 550
ST LOUIS, MO 63105

19IWCC0136

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Amy Stoner
Employee/Petitioner

v.

Belleville Area Special Services
Employer/Respondent

Case # 13 WC 9452

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 **6/21/18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **2/9/12**, 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 **$54,302.56**; the average weekly wage was **$1,044.28**.

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 **$n/a** for TTD, **$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 **$any/all** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner has proved that she injured her cervical spine in the course of her employment. The Arbitrator finds that Petitioner has proved that her cervical spine injuries are causally connected to the work-related assault and that surgery proposed by Dr. Gornet is reasonable and necessary and is hereby awarded. For the reasons stated above Petitioner is here in awarded medical bills in the amount of $77,928.54 as set forth in Petitioner's exhibits 14 through 27. Respondent is entitled to a credit for all amounts previously paid.

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

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

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

Edward Lee
Signature of Arbitrator

8/12/18
Date

AUG 14 2018

ICArbDec19(b)

STATE OF ILLINOIS

WORKERS' COMPENSATION COMMISSION

Amy Stoner, Petitioner, vs. Belleville Area Special Services, Respondent.	)	13 WC 009452

DECISION

Issues in Dispute:

Accident, causal connection, medical bills and 8(j) credit. Respondent does not dispute that Petitioner's right shoulder was injured nor does it dispute liability for medical bills and TTD associated with the right shoulder. Respondent disputes that Petitioner's cervical spine was injured and disputes all medical treatment related thereto.

Facts:

On 2/9/12 Petitioner, then 39 years old, was physically assaulted during the course of her employment with Respondent. There is no dispute the assault occurred. Petitioner was attacked by a 6', 200 lbs. teenage boy. Petitioner was a teacher in a school district that specialized in educating troubled or emotionally unstable children.

The employer completed a Form 45 accident report. (Resp. ex 2). The report corroborates Petitioner's testimony as to the nature of the assault. Petitioner testified that the student became agitated and turned over a desk. He then charged toward her and swung downward at her. Petitioner raised her right arm to block the blow and was forcibly struck. She was up against a wall and felt her head go back, striking the wall. She noticed the immediate onset of right shoulder pain.

Prior to the assault on 2/9/12 Petitioner had never treated with any physician for injury or complaints involving the right shoulder or cervical spine. Prior to the date of the assault she was working full duty, without any restrictions.

Medical Treatment:

Petitioner testified that she waited a few days after the assault before seeing her physician. She was hoping that her

symptoms would resolve on their own. Eventually she was seen at Memorial Hospital in Belleville Illinois on 2/26/12. Petitioner also followed up with her family physician, Dr. Astrides Gargia.

On 4/5/12 Petitioner had an MRI of the right shoulder. It revealed a partial tear of the long head of the biceps tendon. (Pet. Ex. 6) There was an abnormal supraspinatus tendon. A follow-up arthrogram on 5/7/12 confirmed the tendon and supraspinatus tears. Petitioner was then referred to orthopedic surgeon, Dr. Donald Weimer.

Dr. Weimer saw Petitioner from May 1, 2012 through April 6, 2014. (Pet. Ex. 7). Dr. Weimer reviewed the diagnostic studies and recommended physical therapy. Petitioner did not improve and ultimately was told that surgery was the best option. On 7/17/12 Petitioner had a right shoulder bursectomy, biceps tendon repair, and debridement of the supraspinatus tendon. Petitioner participated in postoperative physical therapy but did not notice significant improvement in her symptoms. Despite that, she was released to return to full duty on 11/1/12 and has continued to work in full duty until this day. All TTD payments have been made and no claim for TTD is pending.

On 4/16/14 Petitioner had a subacromial diagnostic injection by Dr. Weimer. She noted some improvement. However, her condition remained painful for the next year. Eventually, Dr. Weimer felt he could offer no additional help and referred her to Dr. Nathan Mall.

On 5/11/15 Petitioner saw Dr. Mall complaining of pain and numbness extending into her right shoulder and arm. Dr. Mall noted that Petitioner had a complicated history with her right shoulder. Petitioner gave a history of injury consistent with that given to all other providers. Dr. Mall noted that Petitioner had been suffering, "anterior shoulder pain ever since the injury." Dr. Mall also noted that Petitioner had complaints of numbness that goes into her hand and arm. Numbness went into the ulnar two digits of the hand. She was having difficulty sleeping. Although Petitioner was working for a new employer, she was continuing to have difficulty with activities of daily living and with specific aspects of her new job.

Dr. Mall clearly related all of Petitioner's shoulder complaints including subcoracoid impingement, subscapularis tears and biceps tendon injuries to the assault at work. He felt there might still be a remaining subscapularis tear. He also believed that an MRI of the cervical spine was necessary to rule out any companion injury to the neck.

Dr. Mall noted on the first visit that there was, "possible cervical involvement." (Pet. Ex. 10). Dr. Mall's working diagnosis was subacromial impingement and potential cervical disc herniation at C-5 – C6, C6 – C7 and C7-T1.

On 6/2/15 Petitioner underwent a cervical MRI at MRI partners of Chesterfield. The radiologist read that study showing a, "broad-based central disc herniation at C6 – C7 extending toward the foramina worse on the right than left". He also found "subtle right-sided disc herniation at C-5 – C6 with left side component possible impingement of either C6 root

more prominent on the right than the left." The radiologist found annular disc bulge superimposed on the right lateral recess with care and cranial extruded disc fragments. (Pet. Ex. 5)

Petitioner return to Dr. Mall on 6/2/15 for follow-up and review of the MRI study. The doctor felt there could be a narrow cortical humoral index suggesting subcoracoid impingement as the source of her subscapularis tear and current symptoms. He also noted the cervical spine findings mentioned above. He stated, "I do believe that her cervical spine is causally connected with her initial injury as a special education teacher." He allowed Petitioner to continue to work without restrictions and made a recommendation for referral to Dr. Gornet. (Pet. Ex. 10)

Petitioner first saw Dr. Gornet on 6/22/15. Dr. Gornet reviewed the MRI study and felt there was a large annular tear at C6 – C7 on the right side. He also felt there was foraminal encroachment at C-5 – C6. Dr. Gornet directly attributed the cervical findings to the assault at work on 2/9/12. He also referred Petitioner to Dr. Boutwell for pain management cervical injections.

Petitioner had her first series of injections by Dr. Boutwell on 7/16/15 and a second set on 7/30/15. She noted some improvement following the injections.

On 8/8/16 Petitioner return to Dr. Gornet who noted that the injections had caused some relief in pain. He kept Petitioner on her regular work duties.

On 10/14/16 Petitioner underwent a repeat MRI per Dr. Gornet. She had seen the doctor the day before and noted continuing and increasing discomfort into the right arm. Dr. Gornet reviewed the study and found severe right greater than left foraminal stenosis with herniated disc at C-5 – C6 and C6 – C7. He recommended disc replacement and fusion. He also allowed Petitioner to continue working and sent her back to Dr. Boutwell for injections at C6 – C7.

The Petitioner returned to Dr. Gornet on 1/19/17. She advised that the shots were not successful in resolving her symptoms. He reiterated the need for disc replacement and fusion.

<u>IME and Testimony of Dr. Bernardi:</u>

Respondent obtained an IME with Dr. Robert Bernardi in regard to the cervical spine and took the deposition of Dr. Michael Milne regarding petitioner's right shoulder. Both men testified via deposition.

Dr. Bernardi testified that he believes Petitioner suffered a shoulder injury and cervical sprain is a consequence of the assault at work. However, he did not believe she had any symptomology that was directly attributable to her cervical spine. He agreed that it would be difficult to distinguish if any ongoing pathology would be related to pre-existing conditions which might or might not have been aggravated as a consequence of the assault. (Resp. ex 3, pg. 9) He also

agreed that there could be an overlap between shoulder symptoms and neck symptoms. However, the doctor did not believe that the symptomology allegedly expressed to Dr. Gornet was consistent with the symptomology presented in his examination. (at 15)

Dr. Bernardi reviewed the MRI and concluded that Petitioner had disc disease at C-5 – C6 and C6 – C7. He did not believe the findings could explain her bilateral hand numbness nor her residual right shoulder/parascapular pain. (at 16) Dr. Bernardi did not believe that the MRIs, the epidural injections or cervical fusion and disc replacement were reasonable or necessary. He did not believe Petitioner required work restrictions.

On cross examination Dr. Bernardi agreed that the force of the assault would be expected to affect both Petitioner's right arm, shoulder and cervical spine. (at 29) Dr. Bernardi agreed that Petitioner was, "very nice, very straightforward. Nothing to suggest to me that she was magnifying her symptoms." However, Dr. Bernardi was unable to explain the symptom patterns expressed by the Petitioner. This was despite the fact that the MRI read by the radiologist and Dr. Gornet showed a broad central disc herniation at C6 – C7. When pressed on the findings in Petitioner's exhibits four and five, Dr. Bernardi testified that the images actually showed disc bulges rather than herniations. (24) He equivocated on whether there was an annular tear at C6 – C7. However, he later added, "it's possible that the protruded part is acute, it's possible, if this lady has the right symptom in the right physical exam findings and you might be able to make such a statement" (that there exists an acute injury requiring surgery). Dr. Bernardi did not believe that Petitioner's complaints were consistent with findings of the MRI.

<u>Testimony of Dr. Gornet:</u>

Dr. Gornet testified at the request of Petitioner. He felt her right trapezius discomfort, tingling in the fingertips and right shoulder pain were a direct result of injury to the C-5-6, C6-7 nerve roots. Dr. Gornet testified that the MRI of June 2, 2015 revealed, "an obvious large annular tear at C6 – 7 with a central right-sided herniation present... Foraminal views revealed a large foraminal fragment encroaching on the nerve roots at C5-6 and a small fragment of foramen at C6-7." (Pet. Ex 1, pg7) He initially believe she would be a candidate for conservative care and recommended the injections by Dr. Boutwell.

After a year of conservative management Dr. Gornet believe that a repeat MRI was warranted. He again saw structural anomalies at C5-6 and C6-7. He testified that the herniation and tears were classic of some of the shoulder and arm pathology that Petitioner exhibited. Dr. Gornet specifically countered the opinions of Dr. Bernardi. He testified, "what we know is that there's objective pathology. We know that she's already been evaluated by shoulder specialists and they determine it's not coming from her shoulder. We also know that Dr. Bernardi feels that she a reasonable, credible

individual and doesn't have any functional overlays." He added, "so now she has motor weakness, she has objective pathology in her MRI, by the way, almost completely on the right side, not on the left, and yet we now say that her symptoms cannot in any way be associated with the objective pathology which correlates with the subjective complaints and physical examination. That is illogical." He later added, "this C6 or C7 nerve root often may be a different component of how much C5, C6, C7 depending on that patient's individual anatomy." He later testified, "only thing I can say is that her objective pathology, which is so obvious on the image nine of 13 which I presented to you, I have made two black marks up to the large herniation at C5-6, it's essentially obliterating her foramen."

The Arbitrator notes that the testimony of Dr. Gornet is supported by the objective evidence presented in Petitioner's exhibits four and five. Those exhibits are large, blowups of the MRIs taken on 6/2/15. Dr. Gornet has marked each vertebrae and has indicated where there is cord compression evidenced on the films. In reviewing the films, it is plainly apparent to the Arbitrator that there is objective indication of cord interruption and nerve root compromise as evidenced on the films. These markings are consistent with the subjective complaints expressed to Drs. Gornet, Mall and Weimer.

Conclusion:

The Arbitrator must weigh the medical evidence along with the credibility of the Petitioner. To that and, the Petitioner's testimony cannot be imputed. In fact, the Respondent's physician agreed that she had no evidence of false findings or exaggeration. She testified that her right arm symptoms began consequential to the assault that occurred at work. The only defense to medical causation is Dr. Bernardi's assertion that her symptom pattern expressed on the day of his examination was not wholly consistent with what is later seen on the MRI. It must be noted that during his first examination he did not have an opportunity to review the detailed MRI ordered by Dr. Gornet. Dr. Bernardi's opinion on whether there was objective indication of injury seemed affected by the subsequent MRI. Essentially, he agreed that there was an indication of cervical abnormality but would not give causal connection because the complaints expressed during the independent medical examination would not normally be expected to be produced by the injured areas reflected in the MRI. However, the doctor noted that it could be anatomical crossover/variance which would explain the inconsistency.

As indicated above, there is no basis for questioning the veracity or truthfulness of the Petitioner. She testified that she has never had pain, numbness or tingling into her right arm and hand until after the assault at work. The assault she described would reasonably be expected to cause the right shoulder injury she suffered. All of the doctors agreed that there would be transfer of force through the shoulder into the cervical spine. There is no indication Petitioner had any injury to the cervical spine prior to the assault. There is also no evidence that Petitioner had any complaints or work

limitations regarding her neck prior to the assault. Accordingly, the only issue is whether the assault has caused or aggravated an injury to her neck such that surgery is the only viable option.

The primary difference between their examinations was the assessment of the precise nerve distribution pattern complained of by Petitioner. In looking at the films, considering the testimony of Petitioner and weighing the respective opinions of the experts, it is the determination of the Arbitrator that the Petitioner has suffered an injury to C-5 – C6 and to C6 – C7 that will require surgical repair. The Petitioner has exhausted all reasonable conservative measures. She participated in physical therapy, received cervical injections and has cooperated with all recommendations from all treating physicians. The fact that she has worked throughout the years since the accident only bolsters her credibility.

AWARD:

1. **The Arbitrator finds that Petitioner has proved that she injured her cervical spine in the course of her employment.**
2. **The Arbitrator finds that Petitioner has proved that her cervical spine injuries are causally connected to the work-related assault and that surgery proposed by Dr. Gornet is reasonable and necessary and is hereby awarded.**
3. **For the reasons stated above Petitioner is here in awarded medical bills in the amount of $77,928.54 as set forth in Petitioner's exhibits 14 through 27. Respondent is entitled to a credit for all amounts previously paid.**

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

Todd Werneburg,

Petitioner,

vs. NO: 15WC 30793

19IWCC0138

George Young & Sons,

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 issue(s) of accident, medical expenses, causal connection, prospective medical care, permanent disability, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 5, 2018 is hereby affirmed and adopted.

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

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

No bond is required for 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 28 2019
SJM/sj
o-2/7/2019
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

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

WERNEBURG, TODD
Employee/Petitioner

Case# **15WC030793**

GEORGE YOUNG & SONS
Employer/Respondent

19IWCC0138

On 6/5/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4707 LAW OFFICE OF CHRIS DOSCOTCH
DAMON YOUNG
2708 N KNOXVILLE AVE
PEORIA, IL 61604

1454 THOMAS & PORTELLA
ROBERT HOFFMAN
500 W MADISON ST SUITE 2900
CHICAGO, IL 60661

19IWCC0138

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Todd Werneburg
Employee/Petitioner

v.

George Young & Sons
Employer/Respondent

Case # 15 WC 30793

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Bloomington**, on **April 20, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **May 12, 2015,** Respondent *was* operating under and subject to the provisions of the Act.

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

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

Per the stipulation of the parties, in the 32 weeks preceding the injury, Petitioner earned **$26,440.56**; the average weekly wage was **$826.27**.

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

Respondent shall be given a credit of **$40,522.54** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$40,522.54.**

Respondent shall be given a credit of **$0** in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment with Respondent and, as such, all benefits are denied. The remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

Respondent shall be given a credit of **$40,522.54** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$40,522.54.**

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Melinda M. Rose Sullivan
Signature of Arbitrator

5/31/18
Date

ICArbDec19(b)

JUN 5 - 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Todd Werneburg
Employee/Petitioner

Case # 15 WC 30793

v.

Consolidated cases: N/A

George Young & Sons
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified he was a union painter and was working for Respondent in Bloomington on the alleged date of accident. He testified that on May 12, 2015, he was sandblasting cooling units at State Farm and reached down to pick up a piece of steel which he estimated weighed anywhere from 300-400 pounds. He testified that when he tried to flip it, he developed back pain, groin pain, left abdomen pain and left thigh pain.

In addition to outlining various medical treatment that he received, Petitioner testified that after the date of accident he worked until May 20th but could no longer perform the job duties as requested of him. He testified that after he failed conservative care he ultimately had surgery in August of 2016, which was that of a lumbar fusion at L5-S1. He testified that he continued to follow-up with Dr. O'Leary, who sent him for an FCE. He testified that he was then given permanent restrictions and was released. He testified that he is now treating at Illinois Regional Pain Institute. He testified that in June of 2017, he started looking for work and has not yet found a job.

On cross examination, Petitioner agreed that he went to a doctor with hip or groin pain on April 23, 2015. On additional cross examination, Petitioner was unable to remember a multitude of things, including whether or not he told Dr. Bernstein that he did not have any prior back problems; whether or not he was involved in a motor vehicle accident in 2006; whether or not he went to Dr. Johnson in 2011 with complaints of back pain; whether or not he was in an altercation with his neighbor; and whether or not in 2010 he plead guilty to a theft charge.

George Eric Young, III ("Eric") was called as a witness by Petitioner at the time of the arbitration. He testified that in May of 2015, he was a foreman with Respondent and that he worked for Local 157 District Council 30, which was a painter's union.

Mr. Young testified that on the alleged date of accident, he was working with Petitioner as his direct supervisor. He testified that they were sandblasting the ends of tanks and that there were heavy plates that were pulled out. He testified that it was a two-man lift and that a fork truck should have been used. He testified that Petitioner lifted more than he did and that after they were finished, Petitioner said that he hurt himself with the heavier plate. He testified that they had a hard job, but that he did not worry about it.

On cross examination, Mr. Young testified that he worked for Respondent until June of 2015, which was when he last worked there. He testified that he has issues with his femur and has had surgery, and that he had not been back to work for Respondent since then.

On cross examination, Mr. Young testified that the next morning after the alleged accident, he met Petitioner and they drove to work together. He testified that Petitioner continued to work for the next several days.

The medical records of UnityPoint Health/Methodist Medical Group were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that Petitioner was seen on November 18, 2014, at which time it was noted that he was seen for his annual appointment. The assessment was noted to be that of generalized osteoarthrosis, headache and low back pain, among other issues. Petitioner was instructed to continue his current medications and was instructed to return in one year. It was noted that Petitioner was taking Neurontin, Mobic and Prilosec. At the time of the April 23, 2015 visit, it was noted that Petitioner was seen for rectal bleeding. In addition to having made complaints of blood in his stool, it was noted that Petitioner stated that he had begun a workout regimen in which his left hip had started to ache and that he had been taking Ibuprofen four times daily for his hip discomfort. The assessment was noted to be that of blood in stool and left hip pain. Petitioner was given a prescription for Anusol and Mobic and was instructed to limit the use of NSAIDs such as Ibuprofen while taking Meloxicam. (PX1).

The records of UnityPoint Health reflect that Petitioner was seen on May 20, 2015, at which time it was noted that he was complaining of lower abdominal pain and burning in the left thigh. It was noted that Petitioner was complaining of suprapubic pain with radiation across the lower abdomen, worse on the left side, and that it radiated down the left groin. It was noted that the onset was a few days ago and that it had been worsening the past 1-2 days. It was noted that Petitioner denied injury, that he did tell "rooming staff" that he had lifted some metal and denied it was at work, and that he noticed swelling. It was noted that Petitioner appeared uncomfortable and was unable to remain in any position for long and that his suprapubic/left lower quadrant abdomen was soft, swollen and tender. Petitioner was recommended to undergo a stat sonogram. It was also noted that Radiology called back to report that Petitioner had bilateral hernias (inguinal and femoral) and that a surgery appointment had been scheduled for the next day. It was noted that when Petitioner was notified of the appointment, he mentioned that he injured himself at work. It was noted that there was conflicting information and that Petitioner told the nurse that he hurt himself on May 12th and had informed his foreman that day. It was noted that the surgery appointment was cancelled and that Petitioner would be scheduled to go to IWIRC. (PX1).

Included within the records of UnityPoint Health was an interpretive report for x-rays of the left hip dated May 13, 2015, which were interpreted as revealing minimal osteoarthritic change; no acute abnormality. It was noted that the indication was that of left hip pain that radiated to the groin for the last week. Included within the records of UnityPoint Health was an interpretive report for x-rays of the lumbosacral spine also dated May 13, 2015, which were interpreted as revealing advanced degenerative disk disease at L5-S1; multilevel endplate depression of mild severity; MRI may be helpful for further evaluation of these findings. It was noted that the indication was that of left hip pain radiating to the groin for the last one week, possible radiculopathy, no trauma. The records reflect that Petitioner underwent an ultrasound on May 21, 2015 for diagnoses of abdominal pain, suprapubic pain and difficulty voiding, which was interpreted as revealing (1) likely right femoral hernia containing non-obstructed and reducible loop of bowel; patient did demonstrate tenderness in the region of the hernia; (2) probable small left inguinal hernia. Petitioner also underwent an MRI of the lumbar spine on May 29, 2015 for an indication of chronic low backache, pain in the left upper inner thigh since May 12, 2015; advanced degenerative changes noted on the spinal radiograph. According to the interpretive report, the films were interpreted as revealing (1) mild multilevel degenerative changes in the spine most prominent at L5-S1 where there is disc extrusion with severe left neural foraminal stenosis; (2) incidental note of prominent retrocrural lymph nodes. (PX1).

The records of UnityPoint Health reflect that Petitioner was seen on April 8, 2014 for a sore throat and head congestion. At the time of the June 26, 2012 visit, it was noted that Petitioner complained of joint discomfort throughout the body, worse with the knees and hands, with an onset of months ago. It was noted that Petitioner worked as a painter, that he was frequently on ladders and used a sprayer and that sometimes his hands fell asleep at night. It was noted that Petitioner had Tramadol and Flexeril from a prior injury more than one year ago and was not effective with his current pain. The assessment was noted to be that of carpal tunnel syndrome and generalized osteoarthritis. Petitioner was prescribed Mobic and was recommended to use wrist braces at night. At the time of the June 22, 2011 visit, it was noted that Petitioner had nausea, among other issues. Petitioner's Tramadol was refilled as requested. At the time of the April 8, 2011 visit, it was noted that Petitioner had back pain that continued since an altercation, among other issues. It was noted that Petitioner was being seen for a recheck of back pain following a fall nearly one month ago, that he had been seeing a chiropractor without relief and that he was planning to return to work the next week. It was noted that Petitioner's pain had improved some since the injury and that he requested refills on pain medication and muscle relaxer. The assessment was noted to be that of lumbago, among other issues. Petitioner was prescribed Flexeril and Tramadol and it was noted that he could consider a referral to physical therapy. At the time of the March 18, 2011 visit, it was noted that Petitioner was seen for headaches, neck and back pain after being involved in an altercation on March 14th. It was noted that four days prior Petitioner was involved in a dispute with his neighbor over property lines, that the neighbor pulled a stake out of the ground by wire, that it was attached to cause the wire to hit him across the neck and that the weight of the stake caused him to fall backwards on concrete, injuring his head, neck and low/mid back. It was noted that the following morning Petitioner awoke with a headache from the posterior neck radiating up over his head to his forehead and that he also had light sensitivity. It was noted that Petitioner had been taking Ibuprofen and using heat without headache/back improvement, that he had seen a chiropractor, that his x-rays were normal and that he was told he had a whiplash injury. The assessment was noted to be that of low back pain, neck strain, accidental fall and headache. Petitioner was recommended to continue with the chiropractor if he wished, was prescribed Tramadol and Flexeril and was given a back and neck exercises handout. (PX1).

The medical records of Midwest Orthopaedic Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on May 18, 2017, at which time it was noted that he had been seen by the pain doctor, Dr. Feather. It was noted that Petitioner was nearly a year out from an L5-S1 anterior lumbar interbody fusion. It was noted that Dr. O'Leary believed that Petitioner was healed and that he had a functional capacity evaluation which demonstrated that he could work at the Medium category of work and that it was a valid test. It was noted that Dr. O'Leary was recommending that Petitioner return to work at a Medium functional capacity that was 20-50 pounds lifting occasionally, 10-25 pounds lifting frequently, and up to 10 pounds lifting constantly and that the remainder of the restrictions were as per his FCE. The assessment was noted to be that of lumbar intervertebral disc disorder with displacement. It was noted that Petitioner was instructed to follow-up as needed and that he was at maximum medical improvement. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on April 25, 2017, at which time it was noted that his anterior lumbar interbody fusion, L5-S1, was to treat a symptomatic disk herniation with foraminal stenosis. It was noted that Dr. O'Leary believed that it was a work injury and that Petitioner had to see an independent evaluator the month prior and that it was recommended that he undergo a CT of the lumbar spine. It was noted that Petitioner stated that he had good days and bad days but that there were some things where if he was doing something, he would have little shocks or jolts in his back and that it went away when he stopped doing it. It was noted that Petitioner wanted something to manage the pain, but that he was frustrated by the opioid epidemic and the press that was covering that. The impression was noted to be that of (1) lumbar foraminal stenosis, status post anterior lumbar interbody fusion, L5-S1; (2) ongoing low back pain. It was noted that Petitioner was informed that there was not going to be more surgery in the future and that to Dr. O'Leary he had a solid fusion. It was noted that with

lack of motion on flexion-extension, Dr. O'Leary did not feel that a CT scan was going to be very beneficial. Petitioner was referred for chronic pain management to Dr. Feather. It was noted that with regard to his work capacity, Petitioner could lift 20 pounds frequently and up to 40 pounds occasionally and that Dr. O'Leary wanted an FCE. Petitioner was instructed to follow-up after the FCE. (PX2).

The records of Midwest Orthopaedic Center `reflect that at the time of the January 10, 2017 visit, it was noted that Petitioner called before the holidays saying that his pain had escalated quite severely and that he was carrying 4-gallon buckets of paint. It was noted that Petitioner only did that four times and could barely take it. It was noted that Petitioner's injury was back in May of 2015 and that he had not done normal work since that time. It was noted that Petitioner had a constant achiness in his low back which he rated as a 3-4, that it never went away and that he had had it since he was taken off narcotics. It was noted that Petitioner took narcotics chronically prior to the surgery, that Tramadol and Norco made him ill and that his current level of pain was unacceptable. It was noted that Petitioner was very concerned because he felt like he should be able to do more and should be able to return to work, that at that point there was no work because it was the light season and that he wanted to be ready come the spring. The impression was noted to be that of lumbar spondylosis, foraminal stenosis and disc displacement status post L5-S1 anterior lumbar interbody fusion. It was noted that it was very difficult for Dr. O'Leary to identify exactly where the pain generation was coming from, that the exam did not lead him in one direction or another and that the x-rays showed stable alignment. It was noted that Dr. O'Leary did not want to start Petitioner back on any kind of narcotic regimen and that he thought they should do a topical agent for his back pain with anti-inflammatories, muscle relaxants and pain medication instead. It was noted that Dr. O'Leary also wanted Petitioner to try physical therapy again and that he would be kept on a 20-pound limit and anticipated raising it in 2-3 months. It was noted that prior to return to work full-time, Petitioner was to undergo a CT of the lumbar spine to make sure that the spine was completely healed. Petitioner cancelled his appointment scheduled for December 22, 2016 due to being in a lot of pain. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen in physical therapy on December 19, 2016, at which time it was noted that he was quite sore and had done a lot of work over the weekend which involved crawling, bending and lifting 50-60# carpet rolls. It was noted that Petitioner felt that some of the discomfort was due to the weather and the increase in activity and that he noted that it was hard for him to get up occasionally and that he noted a lot of left leg weakness which took a while to walk out. It was noted that Petitioner was walking with a very pronounced limp in the left lower extremity. At the time of the December 16, 2016 physical therapy session, it was noted that Petitioner continued to need a little more strengthening of the core prior to returning to job duties of heavier lifting and squatting activities. It was noted that Petitioner did not show up for his scheduled physical therapy session on December 9, 2016 and that he cancelled his physical therapy session scheduled for December 6, 2016 due to not feeling well. At the time of the December 2, 2016 physical therapy session, it was noted that Petitioner reported needing to go back to work due to finances and that the doctor had released him. It was noted that Petitioner stated that he would like to continue with therapy until he found a company to hire him due to being unsure his old company would take him back. It was noted that Petitioner stated that he was sore on that date, but had no real pain. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on December 1, 2016, at which time it was noted that he was doing okay and just had an ache in his back. It was noted that Petitioner stopped taking Vicodin and that he took a little bit of Tramadol. It was noted that Petitioner told Dr. O'Leary that he was not getting payments anymore and really wanted to go back to work and that he was "between a rock and a hard place." The impression was noted to be that of lumbar spondylosis with foraminal stenosis, status post anterior lumbar interbody fusion L5-S1, condition improving. It was noted that the issues that Petitioner had with his stomach were very common taking narcotics and that the Tramadol was helping his headaches, which was telling Dr. O'Leary that it may be some withdrawal symptoms. It was noted that Petitioner was encouraged to taper slowly. It was noted that Petitioner was

good to return to work and that he was to be given a return to work without restriction effective December 2, 2016. (PX2).

The records of Midwest Orthopaedic Center reflect that at the time of the November 30, 2016 physical therapy session, Petitioner noted that he could tell if he lifted or did too much around the house. At the time of the November 28, 2016 physical therapy session, it was noted that Petitioner reported that his exercises were going well, that he was eager to get back to work and that he was doing all that he could in therapy to help with that. At the time of the November 17, 2016 physical therapy session, it was noted that greater hip weakness was noted in the left hip, that Petitioner tolerated the increase in resistance fairly well and that he was eager to do all he could to get back to work. At the time of the November 15, 2016 physical therapy session, it was noted that Petitioner was an industrial sandblaster, that he was sandblasting on May 12, 2015 while working with coolants, that he picked up a steel plate to flip it and injured his back, that he tried to finish the job and consulted with the doctor for an MRI which progressed to surgery, and that he originally thought he strained his left groin. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on October 13, 2016, at which time it was noted that he was doing very well and had had a significant improvement in his condition. It was noted that Petitioner was taking a minimal dose of Norco, that he wanted to get back to work, that his job was that of an industrial sandblaster and that he had to be capable of lifting hundreds of pounds at a time. The impression was noted to be that of status post L5-S1 anterior lumbar interbody fusion, condition improved. It was noted that Dr. O'Leary believed that Petitioner was well on his way and looked very good overall. It was noted that Petitioner was to be given a 25-pound lift with occasional lifting up to 50 pounds for work restrictions at that point, and that he was going to do physical therapy. It was noted that Petitioner was told that it was time to diminish the intake of narcotics completely and that he was to taper to a non-narcotic dose. At the time of the August 30, 2016 visit, it was noted that Petitioner was readmitted on the 21st for acute pericarditis and that he felt okay following his ALIF. It was noted that Petitioner had a little bit of soreness in his abdomen and a little bit of soreness in his back, but otherwise his legs felt very good. It was noted that Petitioner was going to be following up with his cardiologist. The impression was noted to be that of status post L5-S1 anterior lumbar interbody fusion. Petitioner's pain medication was refilled. It was noted that Petitioner was to stay off work. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on December 22, 2015, at which time it was noted that he injured himself while working on May 12, 2015. It was noted that Petitioner was working and sandblasting, that he had his whole garb and was going to lift a cooling plate that weighed 300-400 pounds, that he lifted it just to gently move it, that he felt a tug and lifted the rest of the way and that he felt excruciating pain in his back and then going down his leg. It was noted that Petitioner ended up having acute hernia surgery, but developed some significant low back pain as a result of this as well. It was noted that Petitioner was initially referred for some epidural injections and therapy and that he was being seen at the request of Dr. Sureka to see if there was something that could be done from a surgical perspective. It was noted that Petitioner had mostly low back pain and shooting pains, more on the left leg than the right leg, and that the pains had calmed down in the legs but that he still got them from time to time. The impression was noted to be that of (1) lumbar disk disease, L5, S1; (2) lumbar foraminal stenosis, L5-S1; (3) back and lower extremity pain. It was noted that Petitioner had more of a discogenic back pain component with foraminal symptoms and that the mechanism of lifting the cooling plate was believed to have caused the condition with regard to the low back and left leg complaints and had necessitated his care. It was noted that Dr. O'Leary indicated that Petitioner was probably best served with an anterior lumbar interbody fusion at L5-S1 and that he did not think a microdiskectomy/micro cleanout procedure was going to be of long-term benefit to him. It was noted that Petitioner was going to consider his options and that he was to remain on his 40-pound lifting restriction. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on September 29, 2015 by Dr. Sureka, at which time it was noted that he had undergone two epidural steroid injections. It was

noted that Petitioner's leg pain had been eliminated but that he continued to have left-sided low back pain. It was noted that Petitioner noted that this was problematic while working and that lifting and bending forward would worsen his pain. The assessment was noted to be that of (1) low back pain; (2) history of facet disease. The plan was noted to be that of (1) left L5 transforaminal epidural steroid injection #3; (2) follow-up in two weeks; (3) consider a facet injection if there was not adequate relief with the epidural steroid injection. According to the Procedure Note dated September 29, 2015, Petitioner underwent left L5 transforaminal epidural steroid injection #3 under fluoroscopic guidance on that date for a diagnosis of degenerative spine disease. At the time of the September 11, 2015 visit with Dr. Sureka, it was noted that Petitioner had undergone two epidural injections so far and that he felt that his pain was significantly improved. It was noted that Petitioner's back pain was improved and his leg pain was no longer merely as sharp as it once was. It was noted that bending forward would worsen Petitioner's pain and that sitting would relieve it. The assessment was noted to be that of (1) lumbar radicular pain; (2) L5-S1 foraminal stenosis. Petitioner was recommended to increase his home exercise program and consider a third epidural injection if he did not have adequate relief with the increased home exercise program alone. According to the Procedure Note dated August 27, 2015, Petitioner underwent left L5 transforaminal epidural steroid injection #2 under fluoroscopic guidance on that date for a diagnosis of degenerative spine disease. According to the Procedure Note dated August 13, 2015, Petitioner underwent left L5 transforaminal epidural steroid injection #1 under fluoroscopic guidance on that date for a diagnosis of degenerative spine disease. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on August 5, 2015, at which time it was noted that he had successfully had his hernia repaired, that he continued to have back pain, back stiffness and leg pain and that the pain was on the inside of his left leg mainly, down the entire leg. It was noted that Petitioner was working light duty and that he continued to feel that his back was bothersome. The impression was noted to be that of (1) L5-S1 disk herniation; (2) left L5-S1 radiculopathy. It was noted that Petitioner had been doing therapy that was not helping him as much, that he continued to have some symptoms and that Dr. O'Leary thought that it would be worthwhile to try an epidural steroid injection at L5-S1 to see if they could calm down the pain and break the pain cycle. It was noted that Petitioner was given work restrictions and instructed to return in six weeks. It was noted that Dr. O'Leary opined that lifting the plate aggravated and potentially even caused the disk herniation at L5-S1 and led Petitioner to be symptomatic and that prior to this, he had not significant symptoms of back or leg pain. At the time of the July 1, 2015 visit, it was noted that Petitioner described an injury at work on May 12, 2015, that he was sandblasting cooling units at State Farm in Bloomington, that he reached down to pick up a piece of steel to flip it and that when he lifted it, he felt a pull in his back, lower groin and severe low back pain. It was noted that Petitioner tried to keep working but that he was continuing to have groin pain, back pain and shooting pains and that through the process, he was diagnosed with a hernia and an undescended testicle on the left side. It was noted that Petitioner had pretty significant pain in both groins and his back. The impression was noted to be that of (1) L5-S1 disk disease; (2) left L5-S1 disk herniation; (3) leg pain, left greater than right, with back and groin pain. It was noted that Dr. O'Leary opined that it was a work-related condition and that Petitioner had a degenerative disk that probably pre-existed, but that he suspected that he may have an acute disk finding at L5-S1. It was noted that Petitioner would require physical therapy and possibly an epidural steroid injection and that he was placed under work restrictions. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner underwent bilateral L5 and S1 facet joint injections under fluoroscopic guidance on December 27, 2012 and October 15, 2012 by Dr. Sureka for a diagnosis of degenerative spine disease. Included within the records of Midwest Orthopaedic Center was an interpretive report for a total body bone scan and lumbar SPECT performed at OSF St. Francis Medical Center on October 8, 2012, which was interpreted as revealing (1) low grade degenerative osteoblastic activity throughout the lower thoracic spine and lumbar spine most marked at the L5-S1 level; correlation with lumbar radiographs is suggested; (2) degenerative changes in other areas as discussed; specifically, there is intense activity in the left AC joint compatible with severe arthritis, however infection

is not excluded on this study; (3) probable post-traumatic activity in the distal right clavicle possibly related to the non-unionized fracture; if clinically indicated, right shoulder radiographs may be helpful. The history noted was that of a history of chronic low back pain, bilateral shoulder arthritis, cortisone injection in the left shoulder last week and previous right clavicular fracture; no history of cancer or recent trauma. The Radiology note as authored by Dr. Sureka noted that the imaging revealed increased uptake noted at the right L5-S1 facet joint and some facet arthropathy at the left L5-S1 facet joint as well. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on October 5, 2012 by Dr. Sureka, at which time it was noted that he complained of a one-year history of neck pain and low back pain. It was noted that Petitioner denied any leg symptoms and that he graded his pain as 9/10 with occasional worsening 10/10. It was noted that bending forward tended to worsen his pain, that lying down tended to relieve his pain and that he had been doing some exercises on his own. The assessment was noted to be that of (1) low back pain; (2) neck pain. Petitioner was recommended to start physical therapy to address back and abdominal strengthening as well as range of motion exercises. Petitioner was also prescribed medication for symptomatic pain relief and he was recommended to undergo a lumbar bone scan with SPECT to determine the etiology of his symptoms. The records further reflect that in 2007, Petitioner underwent non-operative treatment by Dr. Levine for a right ankle fracture after a slip and fall on the ice. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner was issued a Return to Work slip on May 18, 2017, which indicated that he was allowed to return to work on May 18, 2017 with restrictions in accordance with FCE recommendations and a Medium category of work with occasional 20-50 pound lift, frequent 10-25 pound lift and constant up to 10 pound lift. Petitioner was issued a Return to Work slip dated April 27, 2017, which indicated that he was able to return to work with restrictions of not lifting/pulling/carrying more than 20 pounds frequently/40 pounds occasionally and light duty only and were to apply until follow-up after the FCE. Petitioner was issued a Return to Work slip dated January 10, 2017, which indicated that he was able to return to work with restrictions of not lifting/pulling/carrying more than 20 pounds and were to apply until follow-up in 2-3 months. Petitioner was issued a Return to Work slip dated December 1, 2016, which indicated that he was able to return to work with no restrictions or limitations starting December 2, 2016 and were to apply until follow-up in four months. (PX2).

The records of Midwest Orthopaedic Center reflect that Petitioner was issued a Return to Work slip dated October 13, 2016, which indicated that he was able to return to work with restrictions of not lifting/pulling/carrying more than 25 pounds frequently/50 pounds occasionally and light duty only and were to apply until follow-up in eight weeks. Petitioner was issued a Return to Work slip dated August 30, 2016, which indicated that he was totally unable to return to work until his six-week follow-up visit. Petitioner was issued a Return to Work slip dated December 22, 2015, which indicated that he was able to return to work with restrictions of not lifting/pulling/carrying more than 40 pounds. No timeframe was indicated as to how long the restrictions were to remain in effect. Petitioner was issued a Return to Work slip dated August 5, 2015, which indicated that he was able to return to work with restrictions of not lifting/pulling/carrying more than 20 pounds frequently/40 pounds occasionally and were to apply until his follow-up appointment in six weeks. Petitioner was issued a Return to Work slip dated July 1, 2015, which indicated that he was able to return to work with restrictions of not lifting/pulling/carrying more than 20 pounds, light duty only, no repetitive bending or twisting from the waist and allowance of a 5-minute break for every hour of work to stand, sit or change positions and were to apply until his follow-up in six weeks. (PX2).

The medical records of Mid Illini Surgical Associates were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that on July 2, 2015, Petitioner underwent laparoscopic bilateral groin (inguinal) exploration by Dr. Salimath for pre-operative diagnoses of (1) chronic recurrent lower abdominal pain and bilateral groin pain with activity, ultrasound suspicious for femoral hernia and also bilateral inguinal hernia; (2) left cryptorchidism and a post-operative diagnosis of

no inguinal hernia noted. Included within the records of Mid Illini Surgical Associates was an interpretive report for a CT of the abdomen and pelvis performed on June 8, 2015 at UnityPoint Health Methodist, which was interpreted as revealing (1) small left-sided inguinal hernia; (2) soft tissue material in the right inguinal canal which based on the patient's history could represent atrophied undescended testicle. Also included within the records of Mid Illini Surgical Associates was an interpretive report for an ultrasound bilateral limited extremity for hernia performed on May 20, 2015 at UnityPoint Health Methodist, which was interpreted as revealing (1) likely right femoral hernia containing non-obstructed and reducible loop of bowel; patient did demonstrate tenderness in the region of the hernia; (2) probable small left inguinal hernia. The history noted that Petitioner had suprapubic pain of 12 days and voiding problems. (PX3).

The records of Mid Illini Surgical Associates reflect that Petitioner was seen on May 29, 2015, at which time it was noted that he had complaints of left groin and suprapubic pain. It was noted that Petitioner stated that on May 12, 2015 he felt a pull in his left groin/thigh area while picking up/moving a piece of steel at work, that he noted that since that time he had had an increase of pain and that the pain was associated with increased frequency of urination, pain and nausea. The assessment was noted to be that of bilateral inguinal hernia ? right one being femoral based on ultrasound findings; right femoral hernia reducible; prostatitis ?; left cryptorchidism ? the source of his abdominal pain. Petitioner was recommended to undergo a CT of the abdomen and pelvis to locate his left testicle and he would be empirically treated for urinary tract infection and prostatitis. At the time of the June 26, 2015 visit, it was noted that Petitioner noted shooting pains down his left leg, a pulling sensation in the groin when lifting and testicular achiness and pain in the bilateral groin area with activity. It was noted that Petitioner was convinced that his pain was due to hernia. Petitioner was recommended to undergo laparoscopic bilateral groin exploration with possible bilateral inguinal hernia repair with mesh. Petitioner was advised not to lift anything over 40 pounds for 4-6 weeks. It was noted that Petitioner was given the option of observation, but that he wanted to undergo surgery since he was having a lot of pain in the groin area every time he lifted anything. (PX3).

The records of Mid Illini Surgical Associates reflect that Petitioner was seen on July 17, 2015 visit, at which time it was noted that he noted no groin pain or tenderness, that he had some umbilical redness and tenderness and that there had not been any bleeding or drainage from the umbilicus, but that he was concerned about possible infection. It was noted that since Petitioner's pain had completely resolved and he did not want to see the urologist to get the undescended testicle removed, he was advised to avoid lifting over 40 pounds for another two weeks and to return on an as needed basis. A "To Whom It May Concern" letter dated July 17, 2015 was issued by Dr. Salimath, noting that Petitioner was totally incapacitated during the dates of July 2, 2015 to present, that he was unable to lift more than 40 pounds for two weeks and that he would have no lifting restrictions as of July 31, 2015. (PX3).

The transcript of the deposition of Dr. Patrick O'Leary was entered into evidence at the time of arbitration as Petitioner's Exhibit 4.[1] Dr. O'Leary testified that he is a board-certified orthopedic spine surgeon and that his practice is dedicated to the treatment of spinal disorders. (PX4).

Dr. O'Leary testified that he first saw Petitioner on July 1, 2015, at which time he stated that he was working as a painter and sandblaster and that on May 12, 2015, he was sandblasting cooling units at State Farm in Bloomington. He testified that Petitioner indicated that he reached down to pick up some type of piece of steel, that the records revealed that the piece weighed 300-400 pounds, that he had to flip it "or something like that" and that in doing that he developed back pain, groin pain and felt a pull in his back. He testified that on physical examination, Petitioner had some subjective tenderness in his low back, that there was no weakness in any motor groups and that he had a little bit of pain when his left hip was moved but that mostly the hip exam was benign. He testified that he reviewed the MRI of May 29, 2015, which showed a degenerative disc at L5-S1 with a left paracentral disc protrusion and some foraminal

[1] The deposition was taken on May 19, 2016.

stenosis, left more than right, at L5-S1. He testified that his diagnosis was that of L5-S1 disc disease, a left L5-S1 disc herniation, and leg pain with back and groin pain, left side more than right. (PX4).

Dr. O'Leary testified that he believed that there was some connection in the work accident having aggravated an underlying condition. He testified that he wanted to prescribe some physical therapy and give work restrictions. He testified that he next saw Petitioner on August 5, 2015. He testified that Petitioner stated that his pain was on the inside of his left leg going down the entire leg and that he continued to have back pain. He testified that Petitioner had been in physical therapy and that it was not helping very much, so he suggested an epidural steroid injection. He testified that Petitioner followed up on December 22, 2015 after the injections were performed, at which time he stated that he felt it gave him a little bit of relief but was not really anything that lasted. He testified that he thought that Dr. Sureka was out of conservative options and that he referred Petitioner back to him to see if he was a candidate for surgery. He testified that Petitioner's symptoms overall throughout were relatively consistent and that he seemed to have back pain and left leg pain with a pretty substantial finding at the L5-S1 level. (PX4).

Dr. O'Leary testified that in his opinion he had found that a laborer that was going to have to push or pull a number of pounds did not usually very well with a simple laminectomy alone and that he found that stability was provided with an anterior lumbar interbody fusion, so he recommended that Petitioner have a one-level lumbar fusion. He testified that the need for the surgery was related to the May 12, 2015 accident. He testified that Petitioner had a preexisting back disorder and that the accident did not cause his L5-S1 disc to wear out to the degree that it had, but that something in the process of his lifting caused him to become symptomatic and continue to seek treatment. He testified that he thought it was an unusual case in that Petitioner did not have a hernia after surgery was performed and that, to him, Petitioner's pain was consistent throughout the time that he evaluated him and seemed to not be abated despite preventive conservative measures. He testified that the mechanism of lifting a substantial plate could "tweak" a low back condition and aggravate it, so he thought that the rationale for recommending the treatment was related to that injury. (PX4).

Dr. O'Leary testified that there was no way to compare the findings on an MRI in 2015 to a bone scan in 2012. He testified that there was some correlation, though, in the sense that the study in 2012 suggested that Petitioner had degenerative changes at L5-S1 and that he was not surprised by that. He testified that the bone scan did not change his opinion if Petitioner was treated three years ago, had an injection and got better and then did not have a path of care, ongoing treatment or a surgical recommendation at L5-S1. He testified that the office note from April 23, 2015 at UnityPoint Health by nurse practitioner Candy Johnson had no affect on his causation opinion. He testified that the treatment he performed, including the steroid injections and physical therapy, was reasonable and necessary medical treatment and that he would like to perform a single level fusion at L5-S1. (PX4).

On cross examination, Dr. O'Leary testified that he did not know before the deposition that Petitioner had treated at Midwest Orthopaedic Center in 2012 and that he was not aware that he had had spinal injections before. He agreed that his opinions on causation were based solely on the history that Petitioner provided to him. When asked if Petitioner was going to the doctor on multiple occasions in the month of May and did not complain of back pain or radicular complaints and whether that would be an indicator that the incident on May 12, 2015 was not the cause of the disc herniation, Dr. O'Leary responded that if Petitioner had six weeks with no documented complaints of back or any kind of pain like that and that he then showed up six weeks later and stated that it all started 6-7 weeks ago, he would "scratch [his] head a little bit." He admitted that he had not reviewed any of the records from Petitioner's treaters who saw him for what they thought was a hernia and testified that he believed that Petitioner told him that he went to IWIRC. He testified that he had not reviewed any of the records initially right after the injury and that he did not review of any Dr. Salimath's records. (PX4).

On cross examination when asked if the medical records were silent on the subject of back pain or radicular pain and whether that would be an indicator to him that the accident might not be the cause of the disc herniation that he diagnosed, Dr. O'Leary responded that he did not think that Petitioner's predominant problem was a disc herniation and that he thought his predominant problem was severe disc degeneration at L5-S1. He testified that there may be a component of an acute herniation, but that Petitioner had foraminal stenosis and degenerative disk disease at L5-S1. He testified that it would be unusual for someone to be seeking care and then not really have any complaints of back pain or leg pain in terms of a sciatica documented, so it would raise suspicion for him. He further testified that not every medical record would raise suspicion for him, such as that from a surgical subspecialist who did not specialize in back disorders. (PX4).

On cross examination, Dr. O'Leary agreed that Petitioner's issues were degenerative in nature and pre-dated the alleged accident. He testified that after reviewing the MRI, he could assure that the vast majority of findings on the MRI were chronic and likely present for years. He agreed that he could not tell whether the possible disc herniation was something of three or four weeks' duration as opposed to a year. (PX4).

On redirect, Dr. O'Leary testified that radiating thigh pain could illustrate an issue with the low back. He testified that not everyone would develop symptoms immediately. He testified that the left hip x-ray report dated May 13, 2015 noted a reason of hip and thigh pain on the left side and that the lumbar x-ray report dated May 13, 2015 noted left hip pain radiating to the groin, possible radiculopathy. He testified that these records would be consistent with the accident history that he was given and the injuries that he would suspect after the accident. He further testified that thigh pain or radiating thigh pain right after the accident would be consistent with the low back injury that he treated Petitioner for, and that Petitioner had those symptoms when he came the first time and continued to have many of those same symptoms throughout the course of treatment given. He testified that he believed that in this case it was consistent with the low back etiology, particularly given the fact that Petitioner had a surgery to fix a hernia that was not found. (PX4).

On redirect when asked to assume that Petitioner was having the left thigh pain radiating down his leg right after the accident and did not have a hernia and whether this was consistent with a low back injury to L5-S1 even if the low back complaints were not initially in the records, Dr. O'Leary responded affirmatively. (PX4).

On further cross examination, Dr. O'Leary testified that L5-S1 could herniate for any number of reasons. He agreed that accidents as trivial as sneezing could cause a herniation. He agreed that he has had patients come into his office and say that their back started to hurt and that they did not know what happened and that he had found a herniated disc. (PX4).

On further redirect, Dr. O'Leary denied that Petitioner in this case ever said he did not know what happened or thought that the herniated disc happened because of sneezing. He agreed that Petitioner's history was consistent every time that he saw him regarding the work accident. (PX4).

The medical records of IWIRC were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner was seen on August 21, 2015, at which time it was noted that he returned for evaluation of his bilateral groin strain and degenerative disease of the lumbar spine. It was noted that Petitioner stated that his symptoms had improved, that he rated his current pain level at 5/10 and described it as intermittent soreness, that he was currently taking Vicodin and bought a back brace to wear when doing activities, that he was on Medium work restrictions and that he stated that his employer was compliant with the restrictions that were given. It was noted that Petitioner stated that he was feeling better in the lower abdomen, groin areas with no real pain but some soreness/sensitivity at times. It was noted that Petitioner had been released to regular duty by his surgeon, that he continued to work on restrictions

and had been seeing Dr. O'Leary and had had an epidural steroid injection. It was noted that Petitioner continued to have back pain and was taking Vicodin. The assessment was noted to be that of (1) bilateral groin strains; no hernia noted per Dr. Salimath during surgical exploration; released to regular duty by the surgeon; (2) degenerative disease of the lumbar spine, not work-related, for which he was undergoing treatment by Dr. O'Leary. Petitioner was instructed to follow-up with Orthopedics/primary care physician as directed for the non-work issue, was restricted to no safety sensitive duties (due to a medication for a non-work-related issue), and was released from care. It was noted that Petitioner was recommended a fitness for duty evaluation prior to return to regular duty without restrictions. (PX5).

The records of IWIRC reflect that Petitioner was seen on July 22, 2015, at which time it was noted that he returned for evaluation of his right femoral hernia and left inguinal hernia. It was noted that Petitioner stated that his symptoms had improved for his stomach/hernia area rating at 0/10 as far as pain. It was noted that Petitioner stated that his back was still bothering him, that he went to physical therapy two times per week at Midwest Orthopaedic and that certain movements could cause him to have pain rating 10/10 that went down his left leg. It was noted that Petitioner was currently taking Vicodin in the morning as needed and Meloxicam daily. It was noted that Petitioner was on sedentary, minimum bending and twisting of the back, frequent position changes and no safety sensitive duties work restrictions which he stated his employer was compliant with. It was noted that Petitioner continued his treatment for non-work related degenerative joint disease of the spine with his primary care physician. The assessment was noted to be that of (1) bilateral groin strains; no hernia noted per Dr. Salimath during surgical exploration; remains on restrictions until July 31, 2015 at which point may return to unrestricted duty for this injury; (2) degenerative disease of the lumbar spine, not work-related. Petitioner was recommended to continue his medications as prescribed by his primary care physician and to return to work with restrictions of Medium duty (maximum lifting of 40 pounds) and no safety sensitive duties (due to a medication for a non-work-related issue) and follow-up in 3-4 weeks. (PX5).

The records of IWIRC reflect that Petitioner was seen on July 8, 2015, at which time it was noted that he returned for evaluation of his right femoral hernia, left inguinal hernia. It was noted that Petitioner stated that his symptoms had improved since his last office visit and that he rated his current pain level at 5/10 with constant soreness due to surgery on July 3, 2015. It was noted that Petitioner was on sedentary work restrictions and that he stated that his employer was compliant with the restrictions that were given. It was noted that Petitioner was taking Norco as needed and Meloxicam. The assessment was noted to be that of (1) right femoral hernia, work-related; post-surgical repair; (2) left inguinal hernia; work-related; post-surgical repair; (3) lumbar spine degenerative changes; not work-related and persistent; (4) left cryptorchidism; not work-related. Petitioner was instructed to follow-up with his surgeon and was prescribed medications. Petitioner was also allowed to return to work with restrictions of lifting 10 pounds occasionally, sitting mostly; minimal bending or twisting of the back; frequent position changes for comfort; no safety sensitive duties. At the time of the June 16, 2015 visit, it was noted that Petitioner stated that his symptoms had not improved and that he was going to Midwest Illini on June 26th and Midwest Orthopaedics on July 7th. It was noted that Petitioner stated that he was still having pain shooting down both of his legs, that he rated his current pain level at 8/10 and that he was currently taking Vicodin. It was noted that Petitioner was on light, no safety sensitive work restrictions and that he stated that his employer was compliant with the restrictions that were given. The assessment was noted to be that of (1) right femoral hernia; work-related; stable; awaiting surgery; (2) left inguinal hernia; work-related; stable; awaiting surgery; (3) lumbar spine degenerative changes; not work-related; (4) left cryptorchidism; not work-related. It was noted that Petitioner was awaiting surgery on June 26, 2015 and that he was prescribed medications. Petitioner was also issued work restrictions of sedentary duty (lifting 10 pounds occasionally, siting mostly), frequent position changes, minimal bending and twisting of the back and no safety sensitive duties. (PX5).

The records of IWIRC reflect that Petitioner was seen on June 9, 2015, at which time it was noted that he returned for evaluation of his right femoral hernia and left inguinal hernia. It was noted that Petitioner stated that his symptoms had remained the same since his last office visit and that he stated that he still had pain that shot down both of his legs. It was noted that Petitioner rated his current pain level at a constant, sharp, burning 5/10 and that he was currently taking Vicodin. It was noted that Petitioner was on sedentary work restrictions with minimum bending and twisting of his back and no safety sensitive duties and that he stated that his employer was compliant with the restrictions that were given. It was noted that Petitioner stated that he felt a pulling in the bilateral groin with bending and lifting and that it made his stomach upset. The assessment was noted to be that of (1) right femoral groin strain per CT; (2) left inguinal hernia; work-related; (2) lumbar spine degenerative changes; chronic; not work-related; (4) left cryptorchidism; not work-related; (5) diverticulosis; not work-related. Petitioner was instructed to follow-up with Mid Illini and to continue Vicodin. Petitioner was allowed to return to work with restrictions of light duty (lifting 20 pounds occasionally, 10 pounds frequently) and no safety sensitive duties. Petitioner was also instructed to follow-up with his primary care physician for diverticulosis and the right inguinal density seen on the CT scan, which were not work-related. (PX5).

The records of IWIRC reflect that Petitioner was seen on June 2, 2015, at which time it was noted that he returned for evaluation of his right femoral hernia and left inguinal hernia. It was noted that Petitioner stated that his symptoms had worsened since his last office visit, that he stated he had shooting pain in the lower back that went up and down both legs as well and that he stated that the pain woke him up at night. It was noted that Petitioner had had an MRI done on May 29, 2015 and that it showed a herniated disc in the lower back and that he rated his current pain level at 10/10. It was noted that Petitioner was on sedentary work restrictions and that he stated that his employer was compliant with the restrictions that were given. The assessment was noted to be that of (1) right femoral hernia; work-related; surgery pending; (2) left inguinal hernia; work-related; surgery pending; (3) lumbar spine degenerative changes; not work-related; (4) left cryptorchidism; not work-related. Petitioner was instructed to follow-up with surgery and was prescribed Vicodin. It was noted that Petitioner was able to return to work with restrictions of sedentary duty (lifting 10 pounds occasionally, sitting mostly); frequent position changes; minimal bending and twisting of the back; no safety sensitive duties. Petitioner was instructed to return in 5-7 days. (PX5).

The records of IWIRC reflect that Petitioner was seen on May 26, 2015, at which time it was noted that he stated that his symptoms had not improved, that he was having constant pain in the groin area and that it was very difficult to sleep, stand and sit for any length of time. It was noted that Petitioner rated his current pain level at 8/10 and was currently taking Vicodin. It was noted that Petitioner was on sedentary work restrictions and that he stated that his employer was compliant with the restrictions that were given. It was noted that Petitioner was scheduled for surgery on May 29, 2015 and that he also had left inner thigh pain that was being worked up by his primary care physician. It was noted that Petitioner stated that the pain was so bad sometimes that he needed to urinate or have a bowel movement, but that he denied incontinence of bowels or bladder. The assessment was noted to be that of (1) right femoral hernia, surgery pending; (2) left inguinal hernia, surgery pending. Petitioner was instructed to continue Hydrocodone as directed per his primary care physician and to return to work with restrictions of sedentary duty (lifting 10 pounds occasionally, sitting mostly); frequent position changes for comfort; minimal bending or twisting of the back; no safety sensitive duties. Petitioner was also instructed to return in three weeks. At the time of the May 21, 2015 visit, it was noted that Petitioner presented for initial evaluation of his double hernia. It was noted that Petitioner stated that his injury occurred on May 12, 2015 at 1100 hours, that he stated that he went to pick up a piece of steel to flip it and that when he got it about a foot in the air, he felt a tear in his hernia. It was noted that Petitioner rated his pain at 10/10 at initial onset and was now 8/10. It was noted that Petitioner described his symptoms as constant pressure and that he had been taking Vicodin for symptom relief. It was noted that Petitioner stated that he was sandblasting on May 12, 2015 when he bent to pick up a heavy piece of steel when he felt a sharp pain in the right lower groin and in the left lower groin

with shooting pain down the left leg. It was noted that initially Petitioner thought that it was a pulled muscle and that he continued working, that each day the pain increased and encompassed the lower abdomen and that position changes were painful. The assessment was noted to be that of (1) right femoral hernia with protruding bowel per ultrasound from Methodist; (2) left inguinal hernia, small, per ultrasound from Methodist. Petitioner was recommended a surgical consult with Midwest Illini for bilateral hernias with bowel involvement and was instructed to continue Hydrocodone as directed per his primary care physician. Petitioner was allowed to return to work with restrictions of sedentary duty (lifting 10 pounds occasionally, sitting mostly); frequent position changes for comfort; minimal bending or twisting of the back; no safety sensitive duties. Petitioner was instructed to return for a recheck in 3-5 days. (PX5).

The Operative Report dated August 14, 2016 was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The Operative Report noted that Petitioner underwent (1) anterior interbody lumbar fusion, L5-S1; (2) application of a PEEK cage by Medtronic; (3) crushed spinal allograft in the form of one small kit of bone morphogenic protein by Dr. O'Leary for pre-operative diagnoses of (1) lumbar disk displacement, L5-S1; (2) lumbar foraminal stenosis, L5-S1; (3) back and lower extremity pain and post-operative diagnoses of (1) lumbar disk displacement, L5-S1; (2) lumbar foraminal stenosis, L5-S1; (3) back and left more than right lower extremity pain. (PX7).

The medical records of Restore Medical/Koch Physical Therapy were entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The records reflect that Petitioner was seen on May 30, 2017 by Dr. Cummings for follow-up of low back pain. It was noted that Petitioner was feeling the same as he was since the last visit and that he had back pain many times per day, which limited his movement. It was noted that the pain did not radiate into his legs, that he had no numbness in his legs and that he still felt some weakness in his left leg, especially his hip area. It was noted that Petitioner was at maximum medical improvement and had permanent work restrictions. It was noted that Petitioner was referred to Illinois Regional Pain Clinic for continued management. The Physical Therapy Discharge Note dated May 8, 2017 noted that Petitioner was no longer receiving authorized visits and just underwent an FCE to determine possible return to work. At the time of the April 24, 2017 visit, it was noted that Petitioner reported having a work injury when lifting a steel beam at work back in May of 2015, that he had a lumbar fusion in 2016 and that he only went through a couple of physical therapy visits and was doing fairly well until he had an incident at home when he was lifting something while painting back in December of 2016 which seemed to re-injure his back. At the time of the April 19, 2017 visit, it was noted that Petitioner reported that he was definitely getting stronger and that he stated that the strength was resulting in higher endurance levels with activities, but that his pain level remained fairly steady. At the time of the March 31, 2017 visit, it was noted that Petitioner reported a constant achy feeling in his lower back, 3/10, and that he still needed to take medication for the intensity of back pain, but that he was taking it less often and not every day. (PX8).

The records of Restore Medical/Koch Physical Therapy reflect that Petitioner was seen by Dr. Cummings on March 28, 2017, at which time it was noted that he stated that he felt like physical therapy was making significant improvement in his strength and that he felt like it was helping him deal with the pain. It was noted that Petitioner stated that as to the pain his lower back, it was about the same and constant and that it was worse if he did a lot of activities or sat too long. It was noted that Petitioner stated that he felt like he was walking with less of a limp but still felt he was waddling to a degree, that he was having no new weakness in his legs and that he felt like they were much stronger. It was noted that there was no pain or numbness going down at the legs. It was noted that Petitioner had an IME in Chicago a few days ago and that a CT was being ordered of his back. It was noted that Petitioner was doing well and making good improvements from the physical therapy and that it would continue for at least another month. At the time of the March 17, 2017 visit, it was noted that Petitioner stated that he had good days and bad days in regard to his pain. At the time of the March 16, 2017 visit, it was noted that Petitioner reported that he had to drive

from Texas from a family event, that it was a 16-hour drive and that it was very uncomfortable in the car with increased back pain. (PX8).

The records of Restore Medical/Koch Physical Therapy reflect that Petitioner was seen on February 27, 2017, at which time it was noted that the therapist believed that he may benefit from pool therapy or getting a gym membership to get into a pool to normalize his gait pattern and that he would continue to benefit from skilled land-based therapy to further improve strength and core stability. At the time of the February 17, 2017 visit, it was noted that Petitioner stated that prior to December he still had some nagging pain with prolonged activities but since then he had noticed a decline in function. It was noted that Petitioner stated that sitting in one place or without moving for too long was very hard for him to do and that he said both with static positions and with prolonged walking or with weightbearing he would have pain in his back and significant weakness into both legs, but left greater than right. At the time of the February 16, 2017 visit with Dr. Cummings, it was noted that on May 12, 2015 Petitioner was at work sandblasting in an enclosed space and that he had a helmet on. It was noted that they had moved two pieces of steel, that Petitioner went to move the piece of steel back and that as he squatted down and began to pick it up, he got about halfway and suddenly had a terrible pain in his lower back. It was noted that Petitioner had undergone a spinal fusion by Dr. O'Leary, that after surgery he had had limited physical therapy and that there was an incident where it flared up the pain and made it worse. It was noted that Petitioner felt that his legs were not as strong as they used to be, that when the back pain flared up his legs felt even weaker, that if he walked too far and aggravated the back pain his legs felt weak and that it usually started in his left leg. It was noted that Petitioner felt the low back pain essentially every day, that it was mostly in the middle of his back but could go down lower and to the sides of his back also, that he stated that the pain went into his posterior hip areas and was usually worse on the left side and that he felt it when he woke up in the morning. The assessment was noted to be that of acute low back pain, muscle pain and weakness of the leg. It was noted that Petitioner had a tender trigger point in his left lower lumbar area and that he had a significant antalgic gait with significant leaning to the left. Petitioner was recommended to undergo physical therapy, to keep the same work restrictions of 20 pounds that he had from Dr. O'Leary and that he would continue to see his primary care physician for non-work-related issues. It was noted that Petitioner requested Norco for his back pain and that a script would be provided while he was working to get back to baseline with physical therapy. Petitioner underwent lumbar trigger point injections on that date. (PX8).

The records of Restore Medical/Koch Physical Therapy reflect that Petitioner was seen on March 2, 2017 by Dr. Cummings, at which time it was noted that he had been able to get back into physical therapy and felt that this was movement in the positive direction. It was noted that Petitioner could see that his body mechanics were off and that he still felt that he was having some weakness, especially in his left leg. It was noted that the trigger point injections Petitioner had had the last time helped with some of the muscle pain but that he felt it was temporary and did not last even a whole day. Petitioner was prescribed anti-inflammatory pain medication as well as a muscle relaxer, and his narcotic pain medication was refilled. It was noted that Petitioner was to phase-out of the narcotics and did not need them, and that he understood and agreed. (PX8).

The medical records of Illinois Regional Pain Institute were entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The records reflect that Petitioner was seen on November 1, 2017 for a medication refill. It was noted that Petitioner had been using only two Norco per day with minimal pain relief, that he did not want to increase his narcotics as he was waiting for his MC card and that he stated he was interested in the spinal cord stimulator. The assessment was noted to be that of other chronic pain, post-laminectomy syndrome, spondylosis without myelopathy or radiculopathy, lumbosacral region, and long-term (current) use of methadone for pain management. At the time of the October 2, 2017 visit, it was noted that Petitioner was there to discuss his psychology report and plan of care with Dr. Feather. It was noted that Petitioner wanted to get off the opiates and was interested in the spinal cord stimulator. The assessment was noted to be that of other chronic pain, post-laminectomy syndrome, spondylosis without

myelopathy or radiculopathy, lumbosacral region, and long-term (current) use of methadone for pain management. It was noted that Petitioner would continue the Norco until he got his medical cannabis card. At the time of the September 11, 2017 visit, it was noted that Petitioner was to undergo an evaluation for medical marijuana. It was noted that Petitioner was questioning his script refill and that he was sent to "David" for psychological testing due to testing positive for cocaine. It was noted that Petitioner had failed back syndrome and continued with pain that impacted his activities of daily living and function and that he had failed conservative therapy and surgery. The assessment was noted to be that of other chronic pain, post-laminectomy syndrome and spondylosis without myelopathy or radiculopathy, lumbosacral region. It was noted that Dr. Feather thought that Petitioner had qualified for the medical cannabis program and had exhausted conservative therapy. (PX9).

The records of Illinois Regional Pain Institute reflect that Petitioner was seen on August 30, 2017, at which time it was noted that he was seen for evaluation and medication refill. It was noted that Petitioner stated that he continued to have low back pain, that he described his pain as aching, stabbing and nagging in nature and that he stated that bending over worsened his pain. It was noted that Petitioner stated that he did have a visit with "pain psych" a few weeks ago to evaluate for narcotic dependence. It was noted that Petitioner was still not interested in any interventions at that point, that he stated that he had had a lot done and that he did not think anything would help. It was noted that Petitioner was interested in "MMJ" and had a consult with Dr. Feather on September 11th. The assessment was noted to be that of other chronic pain, post-laminectomy syndrome, spondylosis without myelopathy or radiculopathy, lumbosacral region, and long-term (current) use of methadone for pain management. It was noted that Petitioner would be notified of the decision to prescribe narcotics after the report. At the time of the July 31, 2017 visit, it was noted that Petitioner was considering medical cannabis but could not afford it at that time. It was noted that his pain to the low back was rated 4/10 with a daily average 4/10 that was stabbing, nagging, sharp, worse in the afternoon and aggravated by bending or lifting. It was noted that lying down helped alleviate Petitioner's pain and that his pain medications helped him become more active at home with chores. The assessment was noted to be that of other chronic pain, post-laminectomy syndrome and spondylosis without myelopathy or radiculopathy, lumbosacral region. It was noted that a Norco script was not given, that a discussion was had regarding a positive cocaine test, that Petitioner denied using cocaine and that he was saving money for a medical cannabis visit. (PX9).

The records of Illinois Regional Pain Institute reflect that Petitioner was seen on June 30, 2017, at which time he was seen for a medication refill. It was noted that Petitioner was considering medical cannabis. It was noted that Petitioner's pain remained at 3-4/10, that it was stabbing and nagging and that it was worse with bending and walking. The assessment was noted to be that of other chronic pain, post-laminectomy syndrome, spondylosis without myelopathy or radiculopathy, lumbosacral region, and long-term (current) use of methadone for pain management. Petitioner's Norco was refilled and it was noted that he could make an appointment for medical cannabis if he wished to pursue the program. At the time of the May 30, 2017 visit, it was noted that Petitioner was referred by Dr. O'Leary for low back pain that started back in 2015 with a job injury and then after having a spinal fusion in 2016, the pain had gotten worse. It was noted that the pain was sharp, shocking and constant and that he had a daily pain average of 3/10. The assessment was noted to be that of other chronic pain, post-laminectomy syndrome, spondylosis without myelopathy or radiculopathy, lumbosacral region, and long-term (current) use of methadone for pain management. Petitioner was given prescriptions for Norco and Gabapentin. (PX9).

Included within the records of Illinois Regional Pain Institute was an evaluation from Psychology Specialists dated November 9, 2017 pertaining to a diagnostic interview to assist in the decision-making process as a candidate for a spinal cord stimulator. It was noted that Petitioner reported a history of chronic pain in his back and legs subsequent to an injury at work. It was noted that Petitioner reported that he had a spinal fusion in 2016 and developed pericarditis twice within two weeks after the surgery. It was noted that Petitioner was assessed to be low level of risk for poor outcome. Also included within the records of

Illinois Regional Pain Institute was an evaluation from Psychology Specialists dated August 30, 2017 pertaining to a psychological interview to assist in the decision-making process for his medication protocol. It was noted that Petitioner reported currently being prescribed Vicodin and Gabapentin. It was noted that based on Petitioner's SOAPP-R scores, his responses placed him in the moderate risk category for opioid misuse. It was noted that treatment recommendations included periodic urine screens, among others. (PX9).

The FCE Report dated May 8, 2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 10. The report reflects that Petitioner demonstrated the ability to perform within the Medium Physical Demand Category and that he was presently able to work full time for up to eight hours per day while taking into account his need to alternate sitting and standing. It was noted that during objective functional testing, Petitioner demonstrated consistent effort throughout 100% of the test which suggested that he put forth full and consistent biomechanical and evidence-based effort during the evaluation. It was noted that Petitioner presented with a Waddell score of 0/4 which suggested a negative Waddell sign and the potential for reliable pain reports during functional testing. (PX10).

The medical records of OSF St. Francis Medical Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 11. The records reflect that Petitioner was seen in the emergency room on August 29, 2016, at which time it was noted that he was seen for chest pain. It was noted that Petitioner while sitting at home six hours ago developed left-sided sharp chest pain 9/10 with radiation into the left jaw and shoulder. It was noted that Petitioner was recently treated for carditis. The diagnosis was noted to be that of acute pericarditis. The records reflect that Petitioner was seen on August 12, 2016, at which time it was noted that he was admitted for L5-S1 anterior lumbar interbody fusion with instrumentation and C-arm. The Ortho Discharge Summary noted that Petitioner's discharge diagnoses were that of lumbago – sciatica due to displacement of lumbar intervertebral disc and lumbar stenosis with neurogenic claudication. (PX11).

The records of OSF St. Francis Medical Center reflect that Petitioner was seen in the emergency room on August 20, 2016, at which time it was noted that he had complaints of chest pain. It was noted that Petitioner stated that he had a spinal fusion surgery done eight days ago and that he had been healing well since that time. It was noted that Petitioner had progressively improving abdominal and back pain. The assessment was noted to be that of acute pericarditis, likely AKI and bibasilar post-operative atelectasis, likely post-operative from L5-S1 spinal fusion on August 12, 2016 per the History and Physical from Heartcare Midwest. (PX11).

Job Search Documentation was entered into evidence at the time of arbitration as Petitioner's Exhibit 12. The Arbitrator points out that while many of the job search logs were very difficult to read, the Arbitrator notes that Petitioner applied for a variety of positions as documented in the logs including that of Assistant Director to Accounting, CEO, Finance Manager, Controller, Court Advocate, HR Generalist, Eye Technician, Pilot, Meteorologist, News Anchor, Psychologist, Pharmacy Tech and Jewelry Store Manager, among others. (PX12).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 13.

The Wage Statement was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The TTD Advancement was entered into evidence at the time of arbitration as Respondent's Exhibit 2.

Various medical records of Midwest Orthopaedic Center were entered into evidence at the time of arbitration as Respondent's Exhibit 3. The records were duplicative of those as contained in Petitioner's Exhibit 2. (RX3; PX2).

The transcript of the deposition of Dr. Avi Bernstein was entered into evidence at the time of arbitration as Respondent's Exhibit 4.[2] Dr. Bernstein testified that he is board-certified in orthopedic surgery and that he limits his practice to the spine. (RX4).

Dr. Bernstein testified that he examined Petitioner on March 27, 2017, at which time he gave a history that on May 12, 2015 he was flipping a piece of steel which was very heavy (weighing up to 200-300 pounds) and that he began to experience low back pain and left lower extremity sciatica. He testified that Petitioner indicated that he went through a course of physical therapy, took multiple medications, tried epidural steroid injections and had continued pain. He testified that Petitioner indicated that he had a pain level of 10/10 with severe pain in the left buttock radiating down the left leg. He testified that Petitioner had an MRI scan and then underwent a spinal fusion in August of 2016 through an anterior approach. He testified that Petitioner indicated that he had a physical therapy program post-operatively and that he indicated that he was definitely improved following surgery, but still had some persistent complaints. He testified that Petitioner complained of low back pain to a level of 3/10 and that when he was active, his pain would increase up to 5/10 or 7/10. He further testified that Petitioner indicated that his symptoms were aggravated by activity, that he was generally comfortable when he was inactive and that he was using Vicodin for pain control as needed. (RX4).

Dr. Bernstein testified that Petitioner did not indicate to him during the exam that he was initially diagnosed with a hernia. He testified that on physical examination, Petitioner had some slight pain guarding during the evaluation. He testified that neurologically, Petitioner was completely normal and intact. He testified that his diagnosis was that of status post anterior lumbar L5-S1 spinal fusion and that he had looked at x-rays and felt that they demonstrated a clinically-healed fusion. When asked whether he formulated an opinion as to whether or not Petitioner had any restrictions at the time of the examination, Dr. Bernstein responded that he felt that Petitioner could at least perform in a light duty capacity with a 20-pound lifting restriction and that he was at a point where he could pursue unrestricted physical therapy to increase his functional ability and then transition to a work conditioning or hardening program. He testified that based on the history that Petitioner gave him, he believed that Petitioner had aggravated a pre-existing degenerative condition of the low back as the result of his work injury, necessitating his care, treatment and surgery. (RX4).

Dr. Bernstein testified that subsequent to his examination he received additional medical records pertaining to care and treatment of Petitioner, including records from Dr. Salimath. He testified that what he found of significance was that Petitioner's complaints were abdominal and groin pain and no complaints of low back pain or radicular pain. He testified that as a result of the medical records that he reviewed, he revised his opinion on causation and believed that Petitioner did not suffer a low back injury as a result of his work-related accident. When asked to assume that Petitioner had a hernia repair on July 2, 2015 which revealed no hernia and that subsequent to the hernia repair he reported low back pain to his treating physicians and whether he had an opinion as to what, if any, significance that additional history gave to him, Dr. Bernstein responded that it indicated that the patient developed back pain following his abdominal or hernia surgery and not directly as a consequence of an injury on the job. (RX4).

Dr. Bernstein testified that from the medical records that he reviewed, Petitioner had a prior history of back complaints leading to care of the low back. He testified that Petitioner had facet injections to L5-S1 in October of 2012, that he had an x-ray following the work incident of the low back that revealed an advanced degenerative disk at L5-S1 and that the MRI obtained on May 29, 2015 described an indication of chronic low back pain and pain in the left upper inner thigh since May 12th. He testified that the indication on the MRI scan report suggested the chronic history of low back pain, not an acute injury to the low back.

[2] The deposition took place on November 29, 2017.

He testified that he would not use the term "chronic" for someone who was complaining of back pain for a period of two or three weeks. (RX4).

Dr. Bernstein testified that he believed that the degenerative changes shown on the MRI of May 29, 2015 pre-dated the alleged incident on May 12, 2015. He testified that he did not think that if Petitioner initially had hernia-like complaints they would have masked or hidden low back pain or complaints. He testified that he thought that if a patient had a significant injury to the low back such that they had a fusion, then he would expect them to have pain at the time of the event or within a few days of the event and that the pain would be significant. He testified that he did not believe that the back surgery that Petitioner had was caused or aggravated by the alleged incident of May 12, 2015. (RX4).

On cross examination, Dr. Bernstein testified that he met with Petitioner about 15-20 minutes. He testified that he did not believe that he had medical records from IWIRC. He testified that he did not have the treating doctor's records that recommended the MRI. He agreed that since he did not have the records, he was not able to review the histories that were given. He agreed that the only history that he had at that time was from the hernia surgeon and, in fact, he only had his operative report. He testified that he did not have any other history then around the time of the accident other than Petitioner's history that he gave him. (RX4).

On cross examination, Dr. Bernstein agreed that Petitioner did not mention a hernia to him. He testified that he did not recall if he asked Petitioner about the hernia, but that he referred to a hernia scar so there was probably some discussion. He testified that he did not find Petitioner to be malingering. He agreed that because there was a history issue, it would be important to review the medical records at or around the time of the accident as for causation. He agreed that if Petitioner did have radicular symptoms or low back pain starting right after the accident, it would be one of the factors that would allow him to causally connect the low back condition to the accident. (RX4).

On cross examination, Dr. Bernstein agreed that in his first report he causally connected the low back injury to the work accident based on Petitioner's history. When asked if the initial medical reports mirrored his history and whether he would still relate it, Dr. Bernstein responded that he might and that it depended on how it was written and what was said. (RX4).

On cross examination, Dr. Bernstein testified that if one damaged an L5-S1 disc and pinched the left SI or L5 nerve root, one would expect posterior lateral buttock, thigh and lateral radiation down the calf into the foot. He testified that one did not expect left medial groin pain or left medial thigh pain and that it did not really correlate with the L5-S1 level. He agreed that the May 13, 2015 x-ray report stated that there were radicular symptoms. He agreed that the history that Petitioner gave him was that he was having radicular symptoms. He testified that that it did not tell him, however, that they were the same symptoms that constituted radiculopathy. He agreed, however, that the report was one day after the accident. He testified that term "radiculopathy" was very subjective to whoever wrote it in the record and was typically accompanied by a description. (RX4).

On cross examination, Dr. Bernstein testified that he agreed with the surgery that was performed and thought it was a reasonable option. He testified that he did not have any opinions as to permanent restrictions as he did not know Petitioner's current status. He agreed that in his first report he had discussed some prior medical treatment that Petitioner had received and that he still causally connected it to the work accident and testified that it was based on the history that he gave him. He testified that in addition to the history given to him by Petitioner, he also had the history of Dr. Salimath from May 29, 2015 describing the symptoms that Petitioner experienced at the time of the injury and subsequent to it. He agreed that Dr. Salimath was the doctor treating Petitioner's hernia and not the low back. He agreed that just based on the hernia doctor's opinion, he changed his causal connection opinion. He testified that it could be an issue

that the hernia doctor did not put anything in about the low back because he was not treating the low back. (RX4).

On redirect, Dr. Bernstein testified that the March 13th [*sic*] x-ray report indicated possible radiculopathy and also indicated chronic low backache and no trauma and that the combination did not imply or indicate a new back injury. When asked of the significance of the May 29th note from Dr. Salimath that led him to change his opinion, Dr. Bernstein responded that there was no discussion of any other symptoms except for abdominal pain, groin pain, inguinal pain and medial thigh pain, none of which should be associated with a disk problem at L5-S1. When asked whether he would expect Dr. Salimath to comment on whether there were radicular complaints and low back complaints, Dr. Bernstein responded that he could not speak for him, but that he would expect doctors to describe "kind of a global condition" of someone if they had other dominating complaints. (RX4).

On further cross examination when asked whether based on Dr. Salimath's abdominal complaints he would have ever ordered an MRI for the lumbar spine, Dr. Bernstein responded that he did not think so. He agreed that he probably would not have done an x-ray of the lumbar spine but that both of those were done after the accident in question. He agreed that he did not have the treatment records that based the ordering of the MRI or x-ray. (RX4).

CONCLUSIONS OF LAW

With respect to disputed issue (C) pertaining to accident, the Arbitrator finds that Petitioner has failed to prove that he sustained an accident that arose out of and in the course of his employment with Respondent on May 12, 2015.

At the outset, the Arbitrator finds Petitioner not to be a credible witness, as he did not appear to be candid and forthcoming in his testimony at arbitration. While Petitioner easily answered questions on direct examination from his counsel, on cross examination Petitioner was unable to remember a number of things, including whether or not he told Dr. Bernstein that he did not have any prior back problems; whether or not he was involved in a motor vehicle accident in 2006; whether or not he went to Dr. Johnson in 2011 with complaints of back pain; whether or not he was in an altercation with his neighbor; and, perhaps most significantly to the Arbitrator, whether or not in 2010 he plead guilty to a theft charge. This, when coupled with some of the types of positions that Petitioner (a self-described union painter) applied for during his self-directed job search as contained in Petitioner's Exhibit 12 (*e.g.*, CEO, Controller, Court Advocate, Pilot, Meteorologist, News Anchor and Psychologist, among others) causes the Arbitrator to place no evidentiary weight on his testimony.

Furthermore, the Arbitrator finds that there are numerous inconsistencies in this case, including those as contained in the testimonial evidence as well as those as contained in the medical evidence. For example, Petitioner testified that on May 12, 2015 while he was working with his foreman and fellow union member, he injured himself lifting a sheet of steel. Petitioner testified that he had an immediate onset of groin, abdominal and back pain. His co-worker and direct supervisor, Eric Young, testified that Petitioner began to limp and complain of abdominal/groin pain on the date of the alleged accident. While Petitioner testified that he sought medical care the following day, Mr. Young's testimony was that he picked Petitioner up the following morning, that he drove him to work and that he worked for several days before Mr. Young told him to go the doctor.

Additionally, there are inconsistent histories as contained in the medical records as well. For example, the interpretive report for x-rays of the left hip dated May 13, 2015 noted that the indication was that of left hip pain that radiated to the groin for the last week. (PX1). Similarly, the interpretive report for

x-rays of the lumbosacral spine also dated May 13, 2015 noted that the indication was that of left hip pain radiating to the groin for the last one week, possible radiculopathy, no trauma. (PX1). Furthermore, the records of UnityPoint Health reflect that Petitioner was seen on May 20, 2015, at which time it was noted that he was complaining of lower abdominal pain and burning in the left thigh. It was noted that Petitioner was complaining of suprapubic pain with radiation across the lower abdomen, worse on the left side, and that it radiated down the left groin. It was noted that the onset was a few days ago and that it had been worsening the past 1-2 days. It was noted that Petitioner denied injury, that he did tell "rooming staff" that he had lifted some metal and denied it was at work, and that he noticed swelling. Petitioner was recommended to undergo a stat sonogram. It was also noted that Radiology called back to report that Petitioner had bilateral hernias (inguinal and femoral) and that a surgery appointment had been scheduled for the next day. It was noted that when Petitioner was notified of the appointment, he mentioned that he injured himself at work. It was further noted that there was conflicting information and that Petitioner told the nurse that he hurt himself on May 12th and had informed his foreman that day. (PX1). Similarly, the interpretive report for the lumbosacral MRI dated May 29, 2015 noted that the indication was that of chronic low backache, pain in the left upper inner thigh since May 12, 2015 and advanced degenerative changes noted on the spinal radiograph. (PX2).

Having considered and reviewed the entirety of the evidence in this matter and having placed no evidentiary weight on Petitioner's testimony, in light of the multitude of inconsistences in the evidence the Arbitrator finds that Petitioner has failed to prove that he sustained an accident that arose out of and in the course of his employment with Respondent on May 12, 2015.

All benefits are denied. The Arbitrator finds that the remaining issues of notice, causation, medical bills, temporary total disability benefits, maintenance benefits, and vocational rehabilitation are moot, and the Arbitrator accordingly makes no conclusions as to those issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jason Kleich,

Petitioner,

vs.

NO: 17WC 02146

GM Sign, Inc.,

19IWCC0139

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19b having been filed by the parties herein and proper notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, all issues raised at trial, and temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 24, 2018 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 $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 28 2019
SJM/sj
o-2/21/2019
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

KLEICH, JASON
Employee/Petitioner

Case# **17WC002146**

GM SIGN INC
Employer/Respondent

19IWCC0139

On 7/24/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1067 ANKIN LAW OFFICE LLC
JOSHUA E RUDOLFI
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

2542 BRYCE DOWNEY & LENKOV LLC
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CHICAGO, IL 60601

19IWCC0139

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jason Kleich
Employee/Petitioner

v.

G.M. Sign, Inc.
Employer/Respondent

Case # 17 WC 2146

Consolidated cases: ----

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Glaub**, Arbitrator of the Commission, in the city of **Waukegan**, on **5/24/2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **7/26/2016**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$35,334.00**; the average weekly wage was **$702.74**.

On the date of accident, Petitioner was **44** 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 **$15,802.96** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$15,802.96**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $468.49/week for 29 weeks, commencing 8/4/2016 through 2/23/2017, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $15,802.96 for temporary total disability benefits that have been paid.

Prospective Medical Care
Petitioner is hereby awarded prospective medical care in the form of a right carpal tunnel release surgery as recommended by Dr. Kelly Holtkamp along with all associated reasonable and necessary post-operative 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

July 23, 2018
Date

ICArbDec19(b)

JUL 24 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jason Kleich,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 17 WC 2146
	)	
G.M. Sign, Inc.,	)	
	)	
Respondent.	)	

STATEMENT OF FACTS

Testimony of Petitioner, Jason Kleich

Petitioner worked for Respondent as a fabricator/welder for a period of 23 years. Transcript of Arbitration, hereinafter referred to as "R", 8. As a fabricator/welder Petitioner's responsibilities included welding signs, pulling materials such as steel and aluminum, cutting metal, and drilling. R 8-9. These pieces of metal were typically pieces of sheet metal approximately 5 feet by 8 feet that he would manually move in order to fabricate a sign. R 10. Petitioner would utilize tools such as rivet guns, drills, saws, welders, and hand clamps. R 9, 12. Petitioner worked this job for eight hours per day with overtime, 5 days per week, for 23 years. R 9. Petitioner was working for Respondent as a sign fabricator on July 26, 2016. R 10-11. At approximately 3:00 PM on that date Petitioner was using a hand clamp and applying gripping force with his right hand when his right hand curled in and cramped. R 11-12. Petitioner is right handed. R 12. Petitioner would use hand clamps "almost all day". R 26. Petitioner testified that he had prior issues with both hand being "asleep" when he had woken up, but that he was able to perform his full duty job prior to this date. R 13-14. Petitioner did not receive medical care on that date. R 14.

Petitioner testified that the next day he still could not operate his hand and he attempted to make an appointment with Dr. Kelly Holtkamp. R 15. A medical note contained in Petitioner's medical records dated August 3, 2016 indicates that Petitioner had telephoned the doctors' office and reported sudden right wrist pain from a July 26, 2016 work injury when tightening a clamp. Pet. Ex. #1. Petitioner saw Dr. Kelly Holtkamp on August 4, 2016. *Id.* Petitioner's medical records indicate that Petitioner had injured his right hand while tightening a clamp at work on July 26, 2016. *Id.* Petitioner hand had "cramped up and experienced pain." *Id.* It was noted to be a sudden onset of an "electrical shock" and some numbness in the finger tips. *Id.* Dr. Holtkamp noted a positive Tinel's sign at the right wrist, a positive carpal tunnel compression test, and a positive Phalen's test. *Id.* Dr. Holtkamp recommended an EMG and placed Petitioner off work. *Id.*, R 16.

An EMG performed on September 3, 2016 at Greenleaf EMG revealed mild right carpal tunnel syndrome (Px 2).

Petitioner saw Dr. Holtkamp on September 15, 2016 (Px 1). Dr. Holtkamp noted pain that waxed and waned between 2 and 7 on a scale of 10. *Id.* After reviewing the EMG Dr. Holtkamp recommended an open carpal tunnel release and prescribed Petitioner to be off work for 3 days, then to return to work with a restriction of no lifting greater than 5 lbs. *Id.* Dr. Holtkamp noted in the medical record that, "It is my opinion within a reasonable degree of medical and surgical certainty that the right carpal tunnel syndrome is causally related to work secondary to history of injury." *Id.* Petitioner testified that there was never light duty offered to him by Respondent. R 17. Petitioner physically presented for light duty to his supervisor, Garrett, but was not accommodated. R 68.

Respondent sent Petitioner for an IME with Dr. Craig Phillips at the Illinois Bone and Joint Institute on December 6, 2016. Resp. Ex. #3. Dr. Phillips noted that Petitioner injured his right hand on July 26, 2016 while tightening a clamp at work. *Id.* He further notes that he reviewed a Form 45 that noted that Petitioner's right hand cramped up while tightening a claim on July 26, 2016 at work. *Id.* Dr. Phillips also reviewed a job description forwarded by Respondent. *Id.* Dr. Phillips diagnosed Petitioner with right-sided carpal tunnel syndrome, but opined that it was a long-standing condition that was not an acute injury. *Id.* He believes that the July 26, 2016 incident only caused Petitioner pain. *Id.* He further opined that Petitioner requires surgery for his carpal tunnel syndrome, but does not believe that it is related to his July 26, 2016 work injury. *Id.*

Petitioner last saw Dr. Holtkamp on February 23, 2017 (Px)1. Dr. Holtkamp noted pain in Petitioner's left hand that was from a work injury nearly 1.5 years prior but that treatment was being pursued through personal health insurance. *Id.*

On June 26, 2017 Dr. Holtkamp authored a narrative report answer certain questions from Petitioner's counsel (Px 3). Dr. Holtkamp wrote that she believes that Petitioner's current condition is related to his job duties. *Id.* She wrote that she believes that the injury from 7/26/2016 was an aggravation of an underlying condition. *Id.* She confirmed that she believes that Petitioner requires an open right carpal tunnel release. *Id.*

Petitioner testified that he did received TTD benefits initially but that they were delayed. R 20. He further testified that his medical bills have been paid. R 20. Petitioner wishes to have surgery and would have it performed immediately if the Arbitrator were to award it. R 21-22. Petitioner testified that he was terminated by Respondent in February 2017. R 22. Petitioner has not worked since the accident and has been on State medical insurance and was receiving food

stamps for a period of time. R 23. Petitioner denies any other accidents to his right hand since July 26, 2016. R 22-23. Petitioner admits that prior to July 26, 2016 he had some bouts of numbness, but was able to fully perform his job duties. R 24. Petitioner was wearing wrist splints as recommended by Dr. Holtkamp on the day of trial. R 25.

Petitioner testified on cross-examination that he had previously sought emergency room treatment when he was unable to get his "hand awake." R 29 Petitioner testified that he underwent a cardiac work up and was discharged without follow up. R 31. Petitioner testified that despite having previous issues, he had never had feelings like what was experienced after this accident. R 73. Petitioner testified that he used to lift weights in his home. R 43. He testified that he has not worked out since approximately 2010. R 76. Petitioner applied for unemployment benefits subsequent to being terminated, but those benefits were denied and no appeal was taken. R 39.

Petitioner testified that he owns two guns and used to shoot at a gun range in Waukegan prior to his accident. R 57-58. When Petitioner went to the range he would fire twenty rounds as he would split a box of ammunition with his girlfriend. R 66. Petitioner has been unable to fire a weapon since his work accident. R 77. Petitioner had a car accident in 1993 in which he sustained cracked ribs, but no injury to his right hand. R 72.

Testimony of Mr. George Matiasek

Respondent called Mr. George Matiasek to testify. R 82. Mr. Matiasek is President of the Respondent, G.M. Sign, Inc., and has been with the Respondent for 37 years. R. 83. Mr. Matiasek testified that the Respondent's business is custom sign manufacturing. R 84-85. Mr. Matiasek that Petitioner was employed as a sign fabricator. R 85. Mr. Matiasek testified that the

clamp that Petitioner was using was force dependent, or held as hard as someone squeezed. R 104, 108. He testified that using a clamp as a sign fabricator is reasonable. R 102. Mr. Matiasek testified that Petitioner's job did not require repetitive work, repetitive forceful gripping, and repetitive heavy gripping. R 93-94. Mr. Matiasek reviewed and signed off on a job description for Respondent. R 100.

On cross-examination Mr. Matiasek testified that he received a form for Petitioner's light duty, but that light duty was not available. R 102-103. Mr. Matiasek confirmed that Petitioner was terminated by Respondent. R 103.

Testimony of Ms. Denise McNicholas

Respondent called Ms. Denise McNicholas to testify. R 110. Ms. McNicholas is employer by Comp Alliance Managed Care in vocational case management. R 113-114. Ms. McNicholas performed a job analysis in conjunction with Petitioner's job. R 116. Ms. McNicholas testified that she performed measurements related to the job of sign fabricator and measured forces involved with the job duties. R 119-120. Ms. McNicholas also videotaped work activities related to the position of sign fabricator and the video was admitted as Respondent's Exhibit #10. R 123. In conjunction with the video analysis, Ms. McNicholas also issued a written job analysis, admitted as Respondent's Exhibit #6. R 125. Ms. McNicholas played part of the video job analysis for the Court and the Arbitrator noted that he observed a device being used that looked like "an oversized vice grip." R 131. Ms. McNicholas testified that according to her measurements the force required to open/close the clamp in question was between 10 and 20 pounds. R 134. She testified that the range was due to individuals' build and strength. R 134-135.

On cross-examination Ms. McNicholas testified that it is possible to use over 20 pounds of force when using the vice clamp in question. R 142. Ms. McNicholas testified that she referred to the use of vice grips as "frequently" in her report, but testified that sign fabricators only "occasionally" use the vice clamps. R 145. She clarified this point by testifying that her narrative report is less accurate. R 145-146.

Deposition of Dr. Kelly Holtkamp

Dr. Kelly Holtkamp testified by way of evidence deposition (Px 4). Dr. Holtkamp testified that she is a board certified hand surgeon. *Id.* at 4-5. Dr. Holtkamp testified that Petitioner reported to her that he had injured his right hand while using a clamp at work on July 26, 2016. *Id.* at 7-8. Her physical examination of Petitioner on that date revealed a positive carpal tunnel compression test and a positive Phalen's test, both indicative of carpal tunnel syndrome on the right. *Id.* at 8-9. After recommending an reviewing an EMG, Dr. Holtkamp diagnosed Petitioner with carpal tunnel syndrome and recommended an open right carpal tunnel release. *Id.* at 9-11. She testified that she is familiar with the Petitioner's job duties and understands that Petitioner was forcefully gripping a clamp when he was injured. *Id.* at 13-14. She testified that Petitioner is not female and does not have any conditions that would result in a predisposition of developing carpal tunnel syndrome. *Id.* at 14-15. She testified that she believes that Petitioner's current condition is causally related to his work injury as that incident was an aggravation of his pre-existing carpal tunnel syndrome. *Id.* at 16. She believes that Petitioner had carpal tunnel syndrome and then had a work injury that caused it to manifest itself. *Id.* at 16-17. On cross-examination Dr. Holtkamp testified that she had not seen a formal job description. *Id.* at 27.

Deposition of Dr. Craig Phillips

Dr. Craig Phillips testified by way of evidence deposition (Rx 1). Dr. Phillips is a board certified orthopedic surgeon with an added qualification in hand and upper extremity surgery. *Id.* at 7-8. Dr. Phillips performs approximately 150 IMEs per year. *Id.* at 10. Dr. Phillips reviewed Petitioner's prior medical records, injury report, EMG, a job analysis report, and job video. *Id.* at 13. Dr. Phillips took a history from Petitioner and interviewed him, revealing that Petitioner enjoys shooting a gun and shoots about 1000 rounds at a time, and that Petitioner likes to work out but has not done so in 2 years. *Id.* at 18. Dr. Phillips related that Petitioner reported that he injured his right hand while turning and tightening a clamp on Jily 26, 2016 at work. *Id.* at 20. Dr. Phillips then described the job duties of a sign fabricator based on the job description provided to him. *Id.* at 23-28. Dr. Phillips testified that the examinations and tests that he performed on Petitioner had results that he could not explain, and caused him to believe that Petitioner was exaggerating his condition. *Id.* at 30-36. Dr. Phillips diagnosed Petitioner with bilateral carpal tunnel syndrome and symptom magnification. *Id.* at 40. He does not believe that the tightening of the clamp by Petitioner on July 26, 2016 played any role in Petitioner's condition. *Id.* at 41. He believes that Petitioner's carpal tunnel is pre-existing and was not aggravated by the July 26, 2016 work accident. *Id.* at 42-43. He felt Petitioner was capable of returning to work full duty. *Id.* at 49.

On cross-examination Dr. Phillips testified that Petitioner had pre-existing carpal tunnel syndrome, by he reviewed no medical records pre-dating the work accident. *Id.* at 49-50. Dr. Phillips confirmed that Petitioner did have a positive Tinel's sign on examination. *Id.* at 54.

(C) Did an accident occur that arose out of and in the course of Petitioner's employment by the Respondent?

Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, are generally deemed to have been received "in the course" of the employment. *Caterpillar Tractor Co. v. Indust. Comm'n.*, 129 Ill.2d 52, 57 (1989) The "arising out of" component refers to the origin of cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Id.* at 58. There is no dispute that Petitioner was working as a sign fabricator for Respondent on July 26, 2016. On that date he was using a hand clamp when his right hand cramped up and froze. There is also no dispute and ample evidence from every witness in this case that the use of this claim is reasonable and foreseeable in the position of sign fabricator. This is an action that arises out and in the course of Petitioner's employment by Respondent.

The inquiry in this case is therefore whether the accident occurred. The Arbitrator finds that it did. Petitioner testified credibly that he was squeezing and tightening a clamp with his right hand at work on July 26, 2016 when his hand cramped up and he was unable to use it. R 11-12. Petitioner's telephone call to his doctor's office on August 3, 2017 records the exact same history and mechanism of injury (Px 1). Petitioner's initial medical record from Dr. Holtkamp on August 4, 2016 records the exact same history and mechanism of injury (Px 1). The From 45 injury report (that was not offered into evidence at trial) that Dr. Craig Phillips

reviewed in conjunction with his IME records the exact same history and mechanism of injury. (Rx 3).

Based on the above, the Arbitrator finds that the preponderance of credible evidence establishes that Petitioner injured his right hand and wrist in an accident that arose out of and in the course of his employment by Respondent on July 26, 2016 while tightening a clamp.

(F) Is petitioner's current condition of ill-being causally related to the injury?

Dr. Holtkamp and Dr. Phillips agree that Petitioner's right carpal tunnel condition pre-existed the July 26, 2016 work accident. The doctors have differing opinions regarding whether or not the July 26, 2016 accident aggravated Petitioner's pre-existing condition. Dr. Holtkamp believes that the accident of July 26, 2016 manifested and aggravated Petitioner's right carpal tunnel syndrome. Dr. Phillips believes that the July 26, 2016 "incident", as he describes it, did not play any role in Petitioner's condition. He opines that Petitioner could not have used an amount of force sufficient to have caused injury. However, the evidence at trial shows that the amount of force used on the clamp in question is determined by the user. Dr. Phillips could not possibly know the amount of force used by Petitioner on the day of accident. This medical opinion is not supported by the facts of this case. Immediately following the July 26, 2016 work accident Petitioner telephoned Dr. Holtkamp's office and related what had occurred and Petitioner's medical records establish that his right hand condition manifested immediately after the accident. Dr. Phillips's opinion is not supported by the evidence in this case.

Further, a causal connection between work duties and a condition may be established by a chain of events including petitioner's ability to perform the duties before the date of the

accident, and inability to perform the same duties following that date. Pulliam Masonry v. Industrial Comm'n., 77 Ill.2d 469, 471 (1979). In this case, Petitioner had pre-existing carpal tunnel in his right wrist that was asymptomatic. Petitioner did seek emergency medical care once in the years prior due to both of his hands being asleep, but never received ongoing medical care or any diagnostic testing for carpal tunnel syndrome. Prior to the accident of July 26, 2016, petitioner was pain and symptom free in his right hand and wrist and was not receiving any active medical treatment for this condition. Further, petitioner was able to perform all of his job functions prior to July 26, 2016. Petitioner had a quiescent condition that was rendered symptomatic on July 26, 2016 when he was using a clamp. Following that accident Petitioner was unable to perform his job duties, a diagnostic test confirmed a diagnosis of moderate carpal tunnel syndrome and surgery was recommended.

Based on all of the above, the Arbitrator finds a causal relationship between the petitioner's right hand condition and his accidental injuries of July 26, 2016.

(K) Is Petitioner entitled to any Prospective Medical Care?

Dr. Holtkamp and Dr. Phillips, both board certified orthopedic hand surgeons agree that Petitioner requires a right carpal tunnel release. There is no medical evidence to the contrary.

Based on the above including the Arbitrator's findings on the issue of causal relation, the Arbitrator finds that Petitioner is entitled to prospective medical care in the form of a right carpal tunnel release as recommended by Dr. Kelly Holtkamp along with all associated reasonable and necessary post-operative rehabilitative care.

(L) What Temporary Total Disability Benefits are in dispute?

Petitioner is claiming that he entitled to TTD from August 4, 2016 through the date of trial of May 24, 2018, a period of 94 1/7 weeks. Petitioner was initially taken off work by Dr. Holtkamp following his initial visit on August 4, 2016. On September 15, 2016 Dr. Holtkamp released Petitioner to return to work light duty with a 5 pound lifting restrictions. Petitioner testified that Respondent was unable to take him back to work. R 68. Further, Mr. Matiasek testified that he received a form for Petitioner's light duty, but that light duty was not available.

The Arbitrator notes the narrative report of Dr. Holtkamp of June 26, 2017. In that report, Dr. Holtkamp opines that the petitioner's "work capability is within his tolerance of activity" (Px 3). The Arbitrator further notes that petitioner last medical treatment of any kind was on February 23, 2017. The Arbitrator reviewed the progress notes of petitioner's visits with Dr. Holtkamp in February 2017. The Arbitrator finds no reference to Dr. Holtkamp's medical opinion in those progress notes regarding the petitioner's ability to work. In fact, under a section labeled "Current Work Status" are the words: "not working due to another problem". The Arbitrator notes there was no evidence offered by petitioner as to "his tolerance of activity". The Arbitrator believes that Dr. Holtkamp altered her opinion regarding the initial work restrictions she imposed. The Arbitrator further believes that the change in Dr. Holtkamp's opinion was likely based on her most recent medical examinations of the petitioner, the last of which occurred on February 23, 2017. The Arbitrator also notes the medical opinion of Dr. Philips who opined that petitioner could work without restrictions based on his independent medical exam of December 6, 2016.

Based on all of the above including the Arbitrator's findings on causal relation, the Arbitrator finds that the Petitioner proved he is entitled to TTD benefits from August 4, 2016 through February 23, 2017, a period of 29 weeks less the Respondent's stipulated credit of $15,802.96 for TTD benefits paid. Based on all of the above, the Arbitrator further finds that the petitioner failed to prove he is entitled to temporary total disability benefits after February 23, 2017.