STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF WILL	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JODY PANEGA,

Petitioner,

vs. NO: 15 WC 14055

MR. BULT'S INC., **19IWCC0001**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b-1) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of penalties, attorney's fees, "Interest on unpaid medical bills," causation, medical expenses, temporary disability, and "Fee schedule of unpaid medical award," and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Commission generally affirms the Arbitrator's decision regarding causation but, to the extent that the decision isn't clear, we find that Petitioner's right knee condition of ill-being, if any, is no longer causally related to his work injury. We find that Petitioner's right knee injury resolved as of June 4, 2015.

Under "Prospective Medical Treatment," the Arbitrator awarded the "optometry referral to Dr. Marini as ordered by Dr. McManus as well as the two-level anterior cervical discectomy with fusion at C5-6 and C6-7 and associated post-operative medical treatment ordered by Dr. Templin." However, we note that the fusion surgery was already performed on March 5, 2018, so the only prospective treatment related to the cervical condition is the post-surgical follow up, which is hereby awarded. Similarly, Petitioner already had the optometry evaluation by Dr. Marini on April

7, 2015, so this is not prospective either. The question remains, however, whether Dr. Marini's recommendation for vision therapy is still reasonable and necessary. At the hearing on July 12, 2018, Petitioner did not testify regarding any continued headaches or vision problems. And, considering that Petitioner was able to return to work driving a truck on September 1, 2017, for a different employer, we find that the recommendation for vision therapy is stale. Therefore, we award the one visit with Dr. Marini on April 7, 2015, but find that Petitioner failed to prove that Dr. Marini's treatment recommendations are currently valid.

At oral arguments, the parties stipulated that the outstanding medical bills, after being reduced pursuant to the fee schedule in §8.2 of the Act, equal $123,695.84. The Commission hereby modifies the medical award under §8(a) of the Act to conform to this stipulation.

Although not addressed in the Arbitrator's decision, Petitioner's claim for interest on the outstanding medical bills, under §8.2(d)(3), is hereby denied. Section 8.2(d) of the Act states, "When a patient notifies a provider that the treatment, procedure, or service being sought is for a work-related illness or injury and furnishes the provider the name and address of the responsible employer, *the provider shall bill the employer directly*." *Emphasis added.* The Commission finds that there is no proof of service in the record to show that the medical providers billed Respondent directly, as required by the statute. Therefore, we find that Petitioner's claim for interest under §8.2(d)(3), is denied.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $686.95 per week for a period of 112 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b-1) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $15,930.52 in temporary partial disability benefits under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $123,695.84 for medical expenses under §8(a) of the Act, which, as stipulated by the parties, has already been reduced pursuant 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.

19IWCC0001

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

DATED: JAN 2 - 2019

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

SE/
O: 11/14/18
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19 (b-1) ARBITRATOR DECISION

PANEGA, JODY
Employee/Petitioner

Case# **15WC014055**

MR BULT'S INC
Employer/Respondent

19IWCC0001

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.

Unless a party does the following, this decision shall be entered as the decision of the Commission:

1) Files a Petition for Review within 30 days after receipt of this decision; and

2) Certifies that he or she has paid the court reporter $ 754.80 for the final cost of the arbitration transcript and attaches a copy of the check to the Petition; and

3) Perfects a review in accordance with the Act and Rules.

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:

0274 HORWITZ HORWITZ & ASSOC LTD
ZBIGNIEW J BEDNARZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
KYLE P CARLSON
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b-1)

Jody Panega
Employee/Petitioner
v.
Mr. Bult's Inc.
Employer/Respondent

Case # **15** WC **14055**

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. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **July 11, 2018**. Respondent filed a *Response* on **July 11, 2018**. The Honorable **Barbara N. Flores**, Arbitrator of the Commission, held a pretrial conference on **June 19, 2018**, and a trial on **July 12, 2018 and August 23, 2018**, in the cities of **New Lenox and Ottawa**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of 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] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[x] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Prospective medical treatment plan of Dr. Cary Templin including surgery performed on 3/5/2018 and its sequelae. Respondent disputes the medical necessity of this treatment, in addition to causal relation, per its Section 12 opinions and UR non-certification opinion for the optometry referral.**

FINDINGS

On the date of accident, March 5, 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 $11,128.62; the average weekly wage was $1,030.43.

On the date of accident, Petitioner was 44 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 $19,364.29 for TTD, $1,519.18 for TPD, $0 for maintenance, and $7,253.84 for other benefits (i.e., disputed temporary total disability and temporary partial disability payments and permanent partial disability advances), for a total credit of $28,137.31.

Respondent is entitled to a credit of $13,812.50 under Section 8(j) of the Act.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work.

Medical Benefits

Respondent shall pay reasonable and necessary medical services that remain unpaid as reflected in Petitioner's Exhibit 30 totaling $138,068.29, reduced pursuant to the fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit of $13,812.50 under Section 8(j) of the Act.

Temporary Total Disability & Temporary Partial Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of $686.95/week for 112 weeks, commencing March 6, 2015 through October 18, 2015, commencing August 13, 2016 through September 1, 2017, and commencing March 5, 2018 through August 23, 2018 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits for a total of 39 & 5/7th weeks in the amount of $15,930.52 commencing October 19, 2015 through August 12, 2016 (minus the three weeks of February 26, 2016, July 15, 2016 and August 12, 2016) as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner the temporary total disability and temporary partial disability benefits that have accrued from March 5, 2015 through August 23, 2018, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $19,364.29 for temporary total disability benefits and a credit of $1,519.18 for temporary partial disability benefits that have been paid. Respondent shall also be given a credit totaling $7,253.84 for other benefits (i.e., disputed temporary total disability and temporary partial disability payments and permanent partial disability advances) as agreed by the parties.

Prospective Medical Treatment

As explained in the Arbitration Decision Addendum, the Arbitrator awards the medical treatment ordered in the form of an optometry referral to Dr. Marini as ordered by Dr. McManus as well as the two-level anterior cervical discectomy with fusion (ACDF) at C5-6 and C6-7 and associated post-operative medical treatment ordered by Dr. Templin pursuant to Section 8(a) of the Act.

Penalties

As explained in the Arbitration Decision Addendum, Petitioner's claim for penalties and attorney's fees pursuant to Sections 16, 19(k) and19(l) of the Act is denied.

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

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporters $754.80 or the *final* cost of the arbitration transcript and attaches a copy of the check(s) to the *Petition*; and 3) perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 29, 2018
Date

AUG 2 9 2018

secured, he would walk around the trailer to inspect it, and then would proceed to the landfill. Tr. at 20. The drive to the landfill was typically between 90 minutes and two hours. Tr. at 21. Once he arrived at the landfill, he would back the semi-tractor onto a tipper, which would lift the entire truck on an angle so that the waste could slide out the back of the trailer. Tr. at 21.

His shifts would typically last about 12 hours; he would start at 6:00am and finish between 6:00pm and 7:00pm. Tr. at 22. In a typical shift, he would usually make two round trips transporting waste. Tr. at 24. He would typically work five days a week, and rarely would work a sixth. Tr. at 22-23. He was paid every week, and never worked anywhere else while employed with Respondent. Tr. at 24.

Accident

On March 5, 2015, Petitioner was involved in a violent high speed trucking accident. Tr. at 25, PX3 at 1-30. He was stopped at red light in his work truck when he was rear-ended by another semi-tractor trailer traveling at a high rate of speed. Tr. at 25-26. The force of the impact caused Petitioner's semi-tractor trailer to be pushed through the entire intersection. Tr. at 26. As he was being pushed through the intersection, his vehicle came into contact with a third vehicle: a pickup truck. Tr. at 26. Post-accident photographs were admitted into evidence as Petitioner's Exhibit 3. PX3 at 1-30, Tr. at 28-31. Prior to this accident, Petitioner did not seek any medical treatment related to his neck; he suffered from no significant pain, and lost no time from work. Tr. at 31-32.

On cross-examination, Petitioner acknowledged that he had a prior work accident with Respondent involving a sprained ankle. Tr. at 69-70. He further clarified that he started working for Respondent in 2006, but worked for himself around 2012 and 2013. Tr. at 70. When he returned in 2014, he was re-hired by John Holleman. Tr. at 71. He admitted he has worn glasses for over 10 years, but indicated that he never had problems with double vision or blurry vision prior to the accident. Tr. at 71. As far as his right knee was concerned, he denied any significant complaints at the time of trial. Tr. at 72. He admitted that he suffered from periodic headaches for which he never sought medical care prior to his accident, but indicated that his headaches increased in both frequency and intensity after the accident, causing him to seek medical care. Tr. at 73, 90.

Medical Treatment

Petitioner was transported by ambulance from the scene of the accident to St. James Hospital in Chicago Heights. Tr. at 31, PX5 at 2. Upon arrival at the emergency room, Petitioner presented with complaints of head pain and right knee pain. Tr. at 32, PX6 at 11. The records reflect that Petitioner struck the back of his head on a window that was behind his seat; however, Petitioner clarified that there was no such window and instead there was hard plastic behind his seat. Tr. at 32, PX6 at 11. Petitioner explained that the back of his head hit the plastic because of a whiplash effect resulting from the accident. Tr. at 32. He underwent an x-ray of his knee, a CT scan of his head, and was directed to seek follow-up treatment with his own doctor. Tr. at 33, PX6 at 14, 21, 25.

Respondent then directed Petitioner to seek treatment with Ingalls Occupational Health; he was first examined there on March 9, 2015. Tr. at 33, PX10 at 7. He presented with complaints of back and neck pain, along with pain in both knees, his right heel, and his head. Tr. at 33, PX10 at 7-8. He was recommended physical therapy and additional diagnostic scans for the various body parts. Tr. at 33, PX10 at 10-11. He was also given work restrictions and referred to Dr. Tim McManus for complaints of dizziness. Tr. at 34, PX10 at 10, 17. He underwent those diagnostic scans and began physical therapy. Tr. at 34, PX9 at 6-14. He returned to Ingalls on March 17, 2015 with the same complaints, including neck pain. Tr. at 34, PX10 at 27-28. At this visit, he also noted an onset of pain radiating from his neck down into his left arm. Tr. at 34, PX10 at 27. He was again recommended physical therapy and restricted from work. Tr. at 35, PX10 at 32. He returned on March 24, 2015,

again with the same complaints of neck pain radiating into the left arm. Tr. at 35, PX10 at 33. He was again recommended physical therapy and restricted from work. Tr. at 35, PX10 at 38.

A few days later, on March 26, 2015, he was first examined by Dr. Tim McManus. Tr. at 35, PX8 at 2. He presented with complaints of headaches, but acknowledged that his dizziness and double vision had improved somewhat. Tr. at 35-36, PX8 at 2. Dr. McManus diagnosed Petitioner with a neuro cognitive disorder secondary to a brain injury. Tr. at 36, PX8 at 3. Dr. McManus removed him from work and referred him to an optometrist, Dr. Robert Marini, to address his vision issues. Tr. at 36, PX8 at 3-4.

Petitioner subsequently returned to Ingalls on March 30, 2015. Tr. at 36-37, PX10 at 40. He presented with some improvement in his overall complaints, but continued to suffer from pain radiating from the neck into his left arm. Tr. at 37, PX10 at 40. At this stage, Petitioner was sent for MRIs of his brain and neck, along with continued physical therapy. Tr. at 37, PX10 at 45-47. Petitioner underwent both MRIs on April 2, 2015. Tr. at 37, PX9 at 25-27. He was then examined by Dr. Robert Marini on April 7, 2015 for his vision issues. Tr. at 37, PX7 at 4-7. He presented with complaints of double vision and light sensitivity, along with headaches and dizziness. Tr. at 37, PX7 at 5. Dr. Marini examined Petitioner and recommended vision therapy. Tr. at 37, PX7 at 6-7.

He returned to Ingalls on April 16, 2015, still with complaints of neck pain radiating into the left arm. Tr. at 38, PX10 at 56. They reviewed the MRIs of the cervical spine and brain and noted the cervical MRI showed evidence of abutment of the cord and neuroforaminal stenosis. Tr. at 38, PX10 at 58. At this stage, Petitioner was referred to a pain management doctor and recommended additional therapy. Tr. at 38, PX10 at 58.

On May 6, 2015, Petitioner was examined by the first Section 12 examiner in this case: Dr. Ibrahim Sadek, an occupational medicine specialist. RX1 at 127-28. Dr. Sadek opined that Petitioner could return to work without restrictions and that he suffered nothing more than a sprain of his cervical spine in the work accident. RX1 at 21. Respondent began disputing Petitioner's benefits at this stage.

He returned to Ingalls again on May 14, 2015 still with the same complaints of neck pain radiating into the left arm. Tr. at 38, PX10 at 66. Still none of the treatment for the vision issues or the pain management had been approved. Tr. at 39. He was again recommended for pain management, and referred to Dr. Zaki Anwar. Tr. at 39, PX10 at 68. He was also still having complaints of right knee pain, so an MRI of the right knee was also ordered. Tr. at 39, PX10 at 68. He again returned to Ingalls on June 4, 2015, again with the same complaints of neck pain radiating into the left arm. Tr. at 39, PX10 at 74. Neither the pain management with Dr. Anwar, nor the MRI of the right knee, had been approved at this stage. Tr. at 39-40.

Nevertheless, Dr. Anwar examined Petitioner on June 18, 2015. Tr. at 40, PX18 at 17. He presented to Dr. Anwar with complaints of neck pain radiating into his left arm. Tr. at 40, PX18 at 17. Dr. Anwar diagnosed Petitioner with cervical radiculitis resulting from whiplash. Tr. at 40, PX18 at 19-20. He recommended a series of injections into the cervical spine, and recommended Petitioner stop physical therapy. Tr. at 40, PX18 at 19-20. At this point, Petitioner sought a second opinion from a neurosurgeon, Dr. Pelagia Koulomberis, on July 1, 2015. Tr. at 40-41, PX15 at 58. He presented to Dr. Koulomberis with neck pain and headaches, and she recommended a CT scan of the cervical spine. Tr. at 41, PX15 at 58-59. Petitioner subsequently underwent the first of the cervical injections recommended by Dr. Anwar on July 23, 2015. Tr. at 41, PX18 at 30.

He returned to Dr. Anwar for an examination on August 3, 2015. Tr. at 41, PX18 at 33. He reported some improvement in the neck and arm pain after the injection. Tr. at 41, PX18 at 33. Dr. Anwar then performed another injection on August 7, 2015. Tr. at 41, PX18 at 36. He returned to Dr. Anwar on August 27, 2015 and noted some improvement in his neck and left arm complaints. Tr. at 41, PX18 at 39. Dr. Anwar recommended

another injection, which Petitioner underwent on September 2, 2015. Tr. at 42, PX18 at 40, 43. He returned on September 14, 2015, again noting ongoing neck and left arm symptoms, but some improvement after the cervical injection. Tr. at 42-43, PX18 at 46. On October 15, 2015, Dr. Anwar performed bilateral occipital nerve injections to treat Petitioner's headaches. Tr. at 43, PX18 at 52-53. On November 5, 2015, he noted significant improvement in his headaches, but continued to have neck and left arm pain, as well as low back pain, which is corroborated by the medical records. Tr. at 43, PX18 at 56. At that time, Dr. Anwar recommended an MRI of the lumbar spine, which was performed on November 12, 2015. Tr. at 43-44, PX18 at 57, 60-61.

Petitioner returned to Dr. Anwar on November 25, 2015 with continued complaints of neck pain. Tr. at 44, PX18 at 65. Dr. Anwar reviewed the MRI and diagnosed Petitioner with lumbar radiculitis. Tr. at 44, PX18 at 65. Dr. Anwar performed lumbar spine injections on January 13 and 27, and February 10, 2016. Tr. at 44, PX18 at 66, 71-72, 74-75, 77-78. He returned on February 22, 2016 and again Dr. Anwar recommended an injection in the lumbar spine. Tr. 44-45, PX18 at 80-81. That injection was performed on April 27, 2016; the following day Petitioner felt a sudden onset of chest pain while driving at work and took an ambulance to Franciscan Health Hammond Hospital. Tr. at 45-46, PX13 at 6, PX14 at 10. He was administered a battery of tests, but was ultimately discharged with a diagnosis of non-cardiac chest pain. Tr. at 46, PX14 at 14.

Petitioner subsequently returned to Dr. Anwar on May 2, 2016. Tr. at 46, PX18 at 87. He continued to have complaints of low back pain, as well as neck pain extending into the left arm. Tr. at 46, PX18 at 87. They also discussed the chest pain episode; Dr. Anwar recommended a thoracic MRI to investigate those complaints. Tr. at 46-47, PX18 at 88. The thoracic MRI was done that same day, May 2, 2016. Tr. at 47, PX18 at 96-97.

A few weeks later, on May 25, 2016, Petitioner underwent a DOT physical. Tr. at 47, PX11. A DOT physical is an examination performed by a physician that authorizes an individual to operate a commercial vehicle. Tr. at 47. Petitioner failed the DOT physical due to his injuries and was directed to obtain clearance from his primary care physician and a neurologist. Tr. at 47, PX11 at 8.

Petitioner then returned to Dr. Anwar on June 16, 2016, again complaining of neck pain. Tr. at 47-48, PX18 at 100. Dr. Anwar recommended lumbar and thoracic injections, which were performed on August 3, 2016 and August 17, 2016 respectively. Tr. at 48, PX18 at 107, 110. He then returned to Dr. Anwar again on September 6, 2016; still with the same complaints of neck pain extending into the left arm. Tr. at 48, PX18 at 113. Dr. Anwar referred Petitioner to an orthopedic surgeon, Dr. Cary Templin. Tr. at 48, PX18 at 115.

Petitioner was first examined by Dr. Templin on October 13, 2016. Tr. at 48-49, PX19 at 4. Dr. Templin discussed potential surgical options with Petitioner, but indicated that he wanted to review the MRI images before he could definitively recommend anything. Tr. at 49, PX19 at 6. Petitioner returned with the MRIs on October 25, 2016. Tr. at 49, PX19 at 7. Dr. Templin reviewed the MRIs and recommended a two-level anterior cervical discectomy with fusion (ACDF) at C5-6 and C6-7. Tr. at 49-50, PX19 at 8. Petitioner wanted to think about surgery and come back to see Dr. Templin when he decided. Tr. at 50, PX19 at 8. On November 9, 2016, Dr. Templin referred Petitioner to another neurosurgeon, Dr. Sean Salehi, for a second opinion on that surgery. Tr. at 50, PX19 at 9.

In the interim, Petitioner returned to Dr. Anwar for another follow-up on January 26, 2017. Tr. at 50, PX18 at 118. He continued to have the same complaints of neck pain extending into the left arm, and Dr. Anwar again recommended a series of cervical injections. Tr. at 50, PX18 at 118-20. Petitioner was then examined by Dr. Salehi on February 24, 2017. Tr. at 50-51, PX22 at 4. Dr. Salehi reviewed the MRI and agreed with Dr. Templin's assessment that a cervical spine fusion was indicated and reasonable. Tr. at 51, PX22 at 7.

Petitioner returned to Dr. Anwar on April 26, 2017, again with ongoing complaints of neck pain extending into the left arm. Tr. at 51, PX18 at 123. Dr. Anwar again recommended cervical injections, which were performed on May 3 and May 18, 2017. Tr. at 51, PX18 at 123-25, 127-28. He returned to Dr. Anwar on June 5, 2017, at which time Dr. Anwar recommended a lumbar injection and performed the same on June 21, 2017. Tr. at 52, PX18 at 133, 136. He returned again to Dr. Anwar on July 3, 2017 and July 24, 2017, still with the same complaints of neck pain into the left arm. Tr. at 52, PX18 at 139, 144. Dr. Anwar continued the same recommendations, and Petitioner continued to follow-up with him throughout the rest of 2017. Tr. at 52-53, PX18 at 153, 158, 164, 168, 171.

By the beginning of 2018, it was becoming apparent to Petitioner that his cervical pain complaints were not subsiding, even with the air-ride equipped truck. Tr. at 84-85. He returned to Dr. Templin on February 22, 2018 to submit for the prescribed surgery. Tr. at 54, PX19 at 10.

Dr. Templin performed the anterior cervical spine discectomy and fusion (ACDF) at C5-6 and C6-7 at St. Joseph Medical Center on March 5, 2018. Tr. at 54, PX19 at 12, PX16.

Petitioner returned to Dr. Templin post-operatively on April 24, 2018 and presented with continued pain in his neck but noted resolution of some of his left arm complaints. Tr. at 54, PX19 at 17. Dr. Templin recommended a course of physical therapy, which Petitioner started at ATI Physical Therapy. Tr. at 54-55, PX19 at 18, PX24 at 17. He returned to Dr. Templin on June 19, 2018 and presented with much improved pain complaints. Tr. at 55, PX19 at 30. Dr. Templin recommended continued physical therapy. Tr. at 55, PX19 at 31. At the time of his testimony, Petitioner was still undergoing physical therapy and was scheduled to return to Dr. Templin on July 17, 2018. Tr. at 55-56.

Petitioner testified that his neck complaints were significantly better. Tr. at 56. He was still having complaints in his neck and left shoulder, but the pain extending into his left arm that had been there since the accident had resolved following Dr. Templin's surgical treatment of his neck. Tr. at 56.

Utilization Review

Respondent obtained a utilization review of Dr. McManus's referral to Dr. Marini. RX1 at 346-48. The UR report was prepared by an ophthalmologist, Dr. Robert Shapiro, and a nephrologist, Dr. James Wood (hereafter "UR doctors"). RX1 at 347. The report is signed by both doctors, but it is unclear which drafted the report. RX1 at 347. Both doctors appear to be licensed in California. RX1 at 348. In preparing the report, the UR doctors note that they reviewed Dr. McManus's March 26, 2015 report, among other medical records. RX1 at 346. The report opines that Dr. McManus's referral to an optometrist is not medically appropriate or indicated. RX1 at 346. The specific rationale for the denial is that the Petitioner "has not been aware of and has not reported any change in his vision since the time of the accident. He specifically denies having diplopia or double vision. Visual fields, by confrontation, were reported to be full and intact." RX1 at 346.

Section 12 Examination & Deposition Testimony – Dr. Landre

Dr. Nancy Landre testified by way of an evidence deposition on November 8, 2016. RX1 at 77. Dr. Landre testified that she is a Licensed Clinical Psychologist who is board certified and practices in the field of neuropsychology. RX1 at 79. Dr. Landre indicated that she examined Petitioner on July 24, 2015. RX1 at 79. Dr. Landre reported Petitioner's complaints during that examination included headaches, dizziness, neck pain with certain movements, and forgetfulness. RX1 at 80. Dr. Landre also noted that Petitioner reported irritability and a decrease in his energy levels. RX1 at 80. Petitioner had endorsed 9 of 12 symptoms on her written questionnaire

indicated symptoms of difficulty concentrating, dizziness, fatigue, light sensitivity, and blurry and double vision. RX1 at 80-81.

Dr. Landre reported that as part of her examination, she performed performance and symptom validity tests on Petitioner. RX1 at 81. Based on that testing, Dr. Landre indicated that she believed that Petitioner had not provided sufficient effort during the cognitive portion of her testing. RX1 at 81. She employed both embedded validity tests and standalone performance validity tests. RX1 at 81. Embedded validity tests look for peculiar patterns of results that may indicate a person is not actually trying. Standalone performance validity tests are specifically developed to measure effort and typically have "cut scores" below which an individual is deemed to have not provided sufficient effort. RX1 at 81. Petitioner failed at least three of the performance validity tests which indicated he was responding in an exaggerated manner and over-reporting his injury-related symptomology, particular his somatic (i.e. physical) and cognitive symptoms. RX1 at 82. Dr. Landre's testing consisted of a full day of testing. RX1 at 82.

Based on this, Dr. Landre opined that Petitioner was "likely functioning at or near his baseline" and was at "his usual level of functioning." RX1 at 82. However, Dr. Landre also testified that the neuropsychological testing she performed indicated that Petitioner was "impaired on a number of indices" and displayed difficulty with general knowledge, new learning, and memory. RX1 at 82-83. Dr. Landre also believed Petitioner to be over-reporting his symptoms based on the results of the emotional functioning test she performed, and that as it regarded his symptoms, Petitioner's "word is lacking." RX1 at 83. Dr. Landre felt her examination of Petitioner indicated either a somataform disorder ("where the person thinks there's something physically wrong with them, but there really isn't; but they believe that there is") or intentional exaggeration/malingering. She diagnosed Petitioner has having sustained an uncomplicated concussion and that he had a possible somatoform disorder, and she testified that Petitioner's cognitive complaints at the time of her examination were unrelated to the March 2015 accident. RX1 at 84. She testified that "the natural course of recovery from a concussion is well documented, and an individual of this age with these injury characteristics, there's no reason to expect that he would still be symptomatic to this degree at this point post-injury." RX1 at 84. Dr. Landre recommended that Petitioner should return to work, starting with a light duty status consisting of restricted/part-time hours and then return to full duty status within one to two months based increasing five hours per week until he reached full duty. She also testified it was appropriate to start him with office work instead of driving a truck. RX1 at 84-85.

On cross-examination, when asked about the neuropsychological testing of Petitioner, Dr. Landre admitted that the tests that had been performed were administered by a technician and that she did not personally administer the tests herself. RX1 at 86. She testified that this is standard practice for neuropsychologists "[j]ust like a surgeon would not do his own MRI." RX1 at 86. Dr. Landre also acknowledged that she believed that Petitioner may have the headache symptoms and some of the other symptoms he reported, but she could not attribute them to the March 2015 accident. RX1 at 87. She disagreed with the treating physicians that Petitioner demonstrated double-vision. RX1 at 87. She admitted to possessing no training in eye treatment, but testified "I have lots of training in concussions, and I know how – I have seen a lot of patients with legitimate diplopia, and I know how that affects them functionally, and it's incompatible with the way this gentleman was living his life." RX1 at 87.

It was Dr. Landre's opinion that Petitioner began somatizing the knee, head, and neck pain that he reported on March 5, 2015 and that he was either "overreacting" or "exaggerating consciously." RX1 at 87-88. Dr. Landre noted that she had earned a Ph.D while treating physician Dr. McManus was a Psy.D., which was a less selective degree program in which to obtain admission. RX1 at 89-90. Psychologists with Ph.Ds are trained to perform research whereas Psy.Ds are purely clinicians. RX1 at 90. Dr. Landre noted that she was suspicious of all treatment records reflecting non-verifiable subjective symptoms because research has shown very low inter-rater reliability between people make those sorts of judgment calls. RX1 at 90-91. She noted pain is always a

subjective symptom and that there is very poor correlation between diagnostic testing and individual's subjective reports of pain. RX1 at 91. Dr. Landre testified that Petitioner was "either one of these people who is on the high end of the spectrum who is trying to overreact to normal bodily sensations and misattribute them, or he's actively exaggerating his symptoms." RX1 at 91.

Dr. Landre did not agree that a somatoform disorder could originate from trauma, and also noted she did not review any records from before the accident. RX1 at 91. Dr. Landre indicated that Petitioner did not fail his validity tests with her because of anxiety. Rather she testified:

> ...there's a large body of research that shows that anxiety, depression, pain, fatigue do not result in this level of performance. You have to fail these – the performance validity measures that he failed, you have to really try to fail those... people with dementia and with other established neurological conditions, with severe brain injuries, can pass them with ease. So when someone fails those, especially several of them, it implies that there is some intentionality there; that the person is actually suppressing their level of effort on examination.

RX1 at 92. Dr. Landre noted that it was her opinion that Petitioner displayed a somatoform component to all of his physical symptoms, but also noted that physical injury could be present at the same time. RX1 at 94. Dr. Landre also testified that she believed that Petitioner's headache and post-concussive symptoms should have resolved by the time she saw him. RX1 at 94-95. Dr. Landre further noted that she disagreed with Dr. McManus's diagnosis of neurocognitive dysfunction secondary to the work injury, as well as Petitioner's optometrist's opinion regarding diplopia. RX1 at 95. Dr. Landre admitted that she is not an optometrist. RX1 at 95.

Dr. Landre acknowledged that she was not providing any opinions as to the pathology in Petitioner's neck pain and the symptoms radiating into Petitioner's left arm. RX1 at 87. She acknowledged that the neck complaints were "outside [her] area of expertise" and that she would have to "defer to other experts" as to the cervical spine. RX1 at 93-94.

Deposition Testimony – Dr. Sadek

Dr. Ibrahim Sadek testified by way of an evidence deposition on November 16, 2016. RX1 at 120. Dr. Sadek testified that he is an occupational medicine specialist who practices in the field of workplace safety and health. RX1 at 123-25. Dr. Sadek testified that he performed a Section 12 examination on Petitioner on May 6, 2015. RX1 at 125. Dr. Sadek noted that at the time of his examination, Petitioner reported headaches to the back of his head, neck pain, shoulder pain, on-and-off low back pain, on-and-off bilateral knee pain, and numbness in the left arm and hand. RX1 at 128.

Dr. Sadek had personally reviewed Petitioner's cervical CT scan. He testified the CT was "essentially negative" with the exception of some osteophytes in some of the cervical disc spaces. RX1 at 129. He testified osteophytes are generally degenerative findings that develop over the course of many years. RX1 at 129. He did not believe the CT scan showed any acute findings. RX1 at 130. Dr. Sadek also reviewed the April 2015 cervical MRI report. He interpreted it to also show disk osteophytes and multiple levels without any acute findings. RX1 at 130. Dr. Sadek reviewed the report of the MRI of the brain, which was unremarkable.

Dr. Sadek reported that his examination of Petitioner's head and neck was "essentially negative" and that Petitioner's musculoskeletal examination was "completely normal." RX1 at 132. He found no abnormalities of the knees or spine. RX1 at 133-134. Based on this, Dr. Sadek opined that Petitioner required no further treatment and had reached maximum medical improvement. RX1 at 137, 139. He performed a basic neurological examination that was also "essentially normal." RX1 at 135. He testified that his diagnosis of Petitioner was a

head contusion and neck strain, now resolved. RX1 at 135. He was unable to find any objective evidence of any ongoing effects of an acute injury; Petitioner's complaints all reflected purely subjective symptoms. RX1 at 135-136. Dr. Sadek did not record or recall Petitioner complaining of double-vision at the time of his examination. RX1 at 138. Dr. Sadek testified that as of his examination, Petitioner was not in need of any further medical treatment whatsoever, that he had achieved MMI, and that could return to full duty work without restrictions. RX1 at 138.

On cross-examination, Sadek performed DOT physicals as part of his practice, such as those required to obtain a CDL for Truck Drivers. RX1 at 150. Dr. Sadek testified that the examination of Petitioner lasted for 45 minutes. RX1 at 152. Dr. Sadek also attributed the lack of recorded neck pain in his report when compared to the presence of recorded neck pain in the reports of Petitioner's treating physicians at Ingalls to the symptom of pain being a subjective complaint. RX1 at 155-56. He did not believe that necessarily meant there was a disagreement on objective findings upon physical examination. RX1 at 155. He did admit there were differences between his examination and Dr. Bakston's examinations at Ingalls in April and May 2015. RX1 at 157. Regarding Petitioner's knee pain, Dr. Sadek indicated that he was unaware of an anatomical structure known as the iliotibial band or iliotibial tendon. RX1 at 158-59.

Regarding Petitioner's April 2015 cervical MRI, Dr. Sadek admitted that the findings on that MRI of bilateral neuroforaminal stenosis could be consistent with some of Petitioner's reported pain complaints, as well as the numbness in his arm if that conclusion had been supported by objective examination findings, which it was not. RX1 at 161. Dr. Sadek also noted that he was not supplied with any records indicating complaints of pain prior to the reported work injury, but nevertheless felt that the findings on MRI were unrelated to the work injury. RX1 at 162-63, 171. Dr. Sadek noted the Ingalls examinations shortly before his own indicated Petitioner's pain was improving, and that at the time of his examination, he did not elicit any objective findings. RX1 at 166.

On re-direct, Dr. Sadek testified that tenderness in response to palpation could be different between different physician's examinations at different times based on the area palpated, the depth of the palpation, and secondary gain motives from the patient/examinee. RX1 at 167. He testified that subjective findings such as headache, or pain, or numbness, etc. cannot necessarily be independently verified by different examiners. RX1 at 168. Dr. Sadek testified he was qualified as a physician who performs DOT physicals regularly as part of his practice to determine whether Petitioner was safely capable of returning to work full duty. RX1 at 170.

Dr. Sadek also indicated that Petitioner's treaters found abnormal findings during their right knee examinations, but that he found a normal right knee. RX1 at 172. Dr. Sadek confirmed the MRI and CT findings were both chronic by his interpretation and that Petitioner may have been experiencing the same types of pain before and after the accident. RX1 at 173. He could agree it was probable that Petitioner's pain complaints were triggered by the March 2015 accident given his normal physical examination at the IME. RX1 at 174-175.

First Section 12 Examination & Deposition Testimony – Dr. Stanley

Respondent obtained two Section 12 examinations from an orthopedic surgeon, Dr. Tom Stanley. RX1 at 5-7, 198-200. The first was performed on January 14, 2016. RX1 at 198-200. Dr. Stanley opined that Petitioner suffered merely a sprain of his cervical and lumbar spine. RX1 at 209, 216. He opined that no treatment was necessary beyond physical therapy, he could return to work without restrictions, and had already reached MMI by the time Dr. Stanley examined him. RX1 at 217, 220-22.

Dr. Stanley testified twice by way of an evidence deposition, first on May 6, 2016. RX1 at 195. Dr. Stanley noted that he is an orthopedic spine surgeon and had examined Petitioner on January 14, 2016 during a Section 12

examination. RX1 at 198-200. Dr. Stanley noted that Petitioner had described a history of injury that stemmed from a motor vehicle accident occurring on March 5, 2015, in which the semi-truck he was driving was rear-ended by another semi-truck, and that Petitioner had sustained injuries to his spine, with radiating pain in his neck, left arm, and lower back. RX1 at 202. Dr. Stanley also noted that Petitioner described his medical condition prior to the accident as being one of good health, with none of the pain that he reported during the exam. RX1 at 202. After the accident, Petitioner reported to Dr. Stanley he had experienced neck pain radiating into his left arm and low back pain. He denied weakness. He had primarily pain symptoms and also the numbness radiating down his left arm. RX1 at 202. At the time of his examination, Petitioner told Dr. Stanley that the radiating left arm pain was gone and that his neck pain was primarily radiating towards the shoulders without any ongoing weakness, numbness, or tingling. RX1 at 202-203. Petitioner reported his neck pain was 80% better and that the neck injections had been helpful. Petitioner told Dr. Stanley the low back pain was only 20% improved despite an injection. RX1 at 203.

Dr. Stanley also noted that after the accident, Petitioner had undergone an MRI of the neck April 2, 2015, which revealed "varying degrees of foraminal stenosis at multiple levels." RX1 at 207. Dr. Stanley's opinion was that this stenosis was preexisting, age-appropriate degeneration and did not indicate an acute injury to the spine. RX1 at 207-208. Dr. Stanley testified that if spinal stenosis was causing Petitioner's complaints, he would have anticipated finding a more consistent history of complaints in a recognizable dermatomal distribution. He did not see any evidence of radiculopathy in this case. RX1 at 208-209. Dr. Stanley attributed Petitioner's symptoms to nonspecific neck and low back pain emanating from chronic cervical and lumbar sprains, based on his examination and review of Petitioner's medical records. RX1 at 209, 216. Dr. Stanley did not find any evidence of nonorganic pain, but his diagnosis of nonspecific low back and neck pain was based purely on Petitioner's subjective symptoms and that there were no objective findings upon his examination. RX1 at 210-212. Dr. Stanley noted Dr. Kouloumberis's records indicated that Petitioner's complaints of numbness were in a non-dermatomal distribution. RX1 at 211-212. Dr. Stanley testified that he believed that the only treatment necessary for Petitioner's condition was physical therapy for a couple of months. RX1 at 217, 221. Dr. Stanley also noted that he believed epidural steroid injections were unnecessary in light of the absence of radicular pain during his examination of Petitioner and that diagnostic facet injections at two levels are not appropriate to address arthritic findings present in nearly every level of a cervical spine. RX1 at 212, 218. Dr. Stanley also did not believe that Petitioner required any work restrictions and that he had reached maximum medical improvement on or about the May 2015 IME examination by Dr. Sadek at which time Dr. Sadek had indicated the cervical strain was resolved. RX1 at 220-22. Dr. Stanley also testified that Petitioner's AMA impairment rating was zero percent for both the cervical and lumbar spine conditions because the cervical and lumbar strains carried a default rating of zero impairment. RX1 at 224-25.

On cross-examination, Dr. Stanley testified that he was hired by Respondent to perform his examination of Petitioner. RX1 at 226-27. Dr. Stanley noted that the records he reviewed prior to his examination of Petitioner came to him from a company called Integrity, and that he had not been provided any records from any other sources. RX1 at 239-40. Dr. Stanley admitted that the first record he received was from March 5, 2015, and that he had none of Petitioner's records from prior to that date. RX1 at 240. Dr. Stanley also reported that his examination of Petitioner lasted between 15 and 30 minutes. RX1 at 244. Dr. Stanley did not dispute, however, that Petitioner sustained injuries to his cervical and lumbar spine in March 2015. RX1 at 244. Dr. Stanley also acknowledged that his review of the records indicated that Petitioner had additionally been evaluated at the time of the initial injury for head and knee trauma, but that he had no opinions on those conditions. RX1 at 245. Dr. Stanley did note that he had seen Petitioner nine months after his initial injury, and that by that time, Petitioner had already undergone several epidural steroid injections, and he had also returned to work. RX1 at 245-46.

When asked about the April 2015 MRI report that he reviewed, Dr. Stanley again noted the findings of foraminal stenosis, as well as a diffuse disc osteophyte at C5-6. RX1 at 249. Dr. Stanley also admitted that this type of

foraminal stenosis could correlate with radiating arm pain and numbness and agreed that not everyone in the world is going to follow the same dermatomal pattern. RX1 at 250. However, Dr. Stanley testified that the presence of an osteophyte abutting the spinal cord "is not clinically relevant. What matters is stenosis." RX1 at 251. Dr. Stanley admitted there was stenosis at C6-7 and C4-5 per the MRI impressions. RX1 at 251. Dr. Stanley also noted the difference of opinion between himself and Dr. Koulomberis, Petitioner's neurosurgeon, who believed that Petitioner would benefit from additional treatment to the neck in the form of facet injections. RX1 at 254, 256. He believed if Dr. Koulomberis had believe Petitioner had radiculopathy, the appropriate treatment recommendation would have been epidural steroid injections rather than facet injections. RX1 at 254. Nevertheless, Dr. Stanley acknowledged that Petitioner's medical records indicated substantial improvement in his pain levels after undergoing injections – although he pointed out these were not the injections Dr. Koulomberis had recommended. RX1 at 256-257. Dr. Stanley admitted that he found no records indicating that Petitioner had any neck or back pain prior to the accident he reported; but since that time, complaints of both neck and back pain appeared in the records he reviewed. RX1 at 258-59. Dr. Stanley agreed work restrictions were initially reasonable following the accident. RX1 at 259. Dr. Stanley had no reason to believe that Petitioner was lying about any of his self-reported subjective symptoms at the time of his examination. RX1 at 261. Dr. Stanley considers somatoform disorders to be a variance on his terminology of "nonorganic pain." RX1 at 261. Dr. Stanley testified there was no basis except for Petitioner's subjective complaints, which Dr. Stanley believed were invalid based on his nonorganic pain, to assign any work restrictions. RX1 at 262-266. Dr. Stanley again testified that he believed that Petitioner's condition was not related to his March 5, 2015 work injury. RX1 at 266.

Second Section 12 Examination & Deposition Testimony – Dr. Stanley

Dr. Stanley performed a second Section 12 examination of Petitioner on October 11, 2016. RX1 at 5-7. He largely confirmed his prior opinions regarding diagnosis, medical treatment and work restrictions. RX1 at 13, 16, 19.

Dr. Stanley testified a second time by way of an evidence deposition on February 14, 2017. RX1 at 5-7. At that time, he testified that Petitioner reported "ongoing headaches, neck pain, left shoulder pain, left chest wall pain, and low back pain." RX1 at 7. Dr. Stanley noted that Petitioner reported a new symptom of left chest wall pain that suddenly began while driving at work. RX1 at 7-8. He noted the heart workup had ruled out a heart attack and testified that Petitioner reported that since that time he had persistent subjective pain on his left chest wall. RX1 at 8. Again, Dr. Stanley noted that he found no objective findings during his examination of Petitioner and that his evaluation was that of non-dermatomal / non-focal pain. RX1 at 8-10. Dr. Stanley did not feel that Petitioner had an ongoing work-related injury related to the March 2015 work accident. RX1 at 13. Dr. Stanley reiterated that Petitioner's work-related condition was that of a cervical and lumbar strain. RX1 at 13. Dr. Stanley opined that Petitioner had a non-organic pain syndrome which was unrelated to the March 2015 accident. RX1 at 14. Significant to Dr. Stanley for the diagnosis of non-organic pain syndrome were Petitioner's complaints of pain throughout multiple body parts that were non-focal. RX1 at 15. Dr. Stanley again reiterated his opinion that the course of physical therapy Petitioner completed on April 16, 2015 was the only required treatment for Petitioner's complaints and that his other opinions regarding Petitioner were unchanged since his first examination and deposition. RX1 at 16, 19.

On cross-examination, Dr. Stanley admitted that Petitioner's reports of a 90 percent reduction in pain after undergoing the epidural steroid injections would be evidence of an organic component to his pain if he started with the assumption that radiculopathy was present due to spinal stenosis. RX1 at 36-37. Dr. Stanley admitted that he did not record that Dr. Zaki Anwar indicated that Petitioner had received significant benefit from the thoracic injections he underwent on June 16, 2016. RX1 at 45-46. Dr. Stanley further testified that the August 17, 2016 record he reviewed indicating complete relief of pain after one of the injections was diagnostic evidence that

Petitioner's pre-existing spinal arthritis was a source of Petitioner's pain. RX1 at 47-48. Dr. Stanley confirmed he had seen no records or evidence that Petitioner complained of any non-organic pain, low back pain, or cervical spine pain prior to the March 2015 accident. RX1 at 49.

Deposition Testimony – Dr. Templin

Dr. Templin testified by way of an evidence deposition on September 5, 2017. PX20. Dr. Templin is an orthopedic spine surgeon employed at Hinsdale Orthopedics since 2007. PX20 at 5. He performs between 300 and 500 spinal surgeries per year. PX20 at 5.

Dr. Templin testified that he had first examined Petitioner on October 13, 2016, at which time he reported a history of injury occurring on March 5, 2015 when the semi-truck he was driving was rear-ended by another semi-truck. PX20 at 6-7. He noted that Petitioner had reported neck and lower back pain, as well as pain extending into the left arm. PX20 at 7. He had undergone physical therapy and injections into both the cervical and lumbar regions. PX20 at 7. Dr. Templin testified that during his examination of Petitioner, he noted a positive Spurling's test, which indicated the possible presence of foraminal stenosis impinging on a nerve root. PX20 at 10. Dr. Templin also noted his reviews of Petitioner's cervical and lumbar MRIs, which demonstrated foraminal stenosis in both the neck and lower back. PX20 at 11-12. Based upon these results, the history, and his examination, Dr. Templin concluded that Petitioner's diagnosis was that of cervical and lumbar strain, possible exacerbation of cervical spondylosis with left-sided radiculopathy, and aggravation of lumbar degenerative changes with foraminal stenosis at L5-S1. PX20 at 12. Dr. Templin believed this diagnosis to be consistent with Petitioner's reported history of injury, his examination, and radiographic studies. PX20 at 12-13.

Dr. Templin next saw Petitioner on October 23, 2016, when he reviewed MRI films that demonstrated severe left-sided neuroforaminal stenosis at C5-6 and moderately severe neuroforaminal stenosis at C6-7. PX20 at 13-14. Additionally, Dr. Templin noted central canal narrowing at each of these levels. PX20 at 14. Based on these results, Dr. Templin believed that Petitioner required an anterior cervical discectomy and fusion in his neck. PX20 at 14.

Dr. Templin also disagreed with the conclusions reached by Respondent's Section 12 examiner, Dr. Stanley. PX20 at 21. Dr. Templin noted that Petitioner's history of radiating pain documented in his medical records, as well as the relief provided by the epidural injections that Petitioner received, was inconsistent with Dr. Stanley's diagnosis of non-organic myofascial pain syndrome. PX20 at 21-22. Dr. Templin further disagreed with the opinions of both Dr. Stanley and Dr. Sadek diagnosing Petitioner with lumbar and cervical strains explaining that strains do not produce radiating arm pain, and while Petitioner may have suffered a lumbar strain as a result of the accident, he also suffered aggravation of lumbar degenerative changes. PX20 at 22. Dr. Templin noted that the findings of foraminal stenosis on Petitioner's cervical MRI were objective findings. PX20 at 22-23. Dr. Templin testified that it was his belief that the March 2015 accident resulted in an aggravation of Petitioner's preexisting cervical spondylosis, radiculopathy, as well as an aggravation of his preexisting lumbar disc degeneration. PX20 at 23.

Dr. Templin further opined that the treatment Petitioner had received to date had been reasonable and necessary to treat the effects of the March 2015 work accident. PX20 at 24-26. He opined that the recommended cervical surgery was needed to treat the effects of the work injury. PX20 at 24-26. Regarding the lumbar spine, Dr. Templin opined that non-operative care should first be exhausted before considering surgery. PX20 at 26. On cross examination, Dr. Templin testified that an EMG would be unnecessary based on the documented MRI findings and the fact that Petitioner's complaints were consistent with those findings. PX20 at 41.

Work Restrictions

From March 5, 2015 until October 18, 2015, Petitioner was restricted from work by the physicians at Ingalls as well as Dr. Anwar. Tr. at 56, PX10, PX18. Respondent was not providing an accommodated position during this period. Tr. at 56. Beginning on October 19, 2015, Respondent offered Petitioner a light duty job doing clerical work in the office. Tr. at 57. He did the clerical job through August 12, 2016; at that time Respondent stopped accommodating his restrictions. Tr. at 57. As a result, beginning on August 13, 2016, Petitioner was restricted from work by Dr. Anwar but was not working for Respondent. Tr. at 58, PX18 at 103, 116. Sometime after this, Petitioner found a new job working as a freight broker for a trucking company called Landstar. Tr. at 58. As a freight broker, Petitioner attempted to contact shipping companies to arrange transportation services provided by Landstar. Tr. at 58. Petitioner described this as a sales job for a trucking company. Tr. at 58. Compensation was strictly commission based; in other words, he would only get paid if he made a sale. Tr. at 59. He had to complete approximately 2 months-worth of online training in order to start this job. Tr. at 59, 81. Upon completing the training, he worked as a freight broker for a few months but unfortunately did not make any sales or income. Tr. at 59-60. Beginning on September 1, 2017, Petitioner began another job working at DNJ Trucking driving a commercial truck. Tr. at 60. He leased-purchased a truck equipped with an air-ride suspension system, a sleeper cab, and a longer wheel base, all of which resulted in a smoother ride than the trucks he drove for Respondent. Tr. at 60-61. He could tolerate driving a truck with an air-ride system even though he still had ongoing symptoms from the accident. Tr. at 61-62, 84. Petitioner worked the job at DNJ until his pre-surgical follow-up with Dr. Templin on February 22, 2018. Tr. at 62-63.

Petitioner testified that he was no longer employed with Respondent. Tr. at 63. He accessed an employee portal on the company website that indicated he was terminated on February 3, 2017. Tr. at 63-64, PX27.

Petitioner testified that the neck pain radiating into his left arm was fairly constant, but the intensity of the pain would vary. Tr. at 74-75. Additionally, the weakness in his left arm was getting progressively worse. Tr. at 75. He testified that these complaints subsided temporarily with the cervical injections. Tr. at 75.

Petitioner admitted that while working the light duty position for Respondent, he was asked to gradually increase the hours he worked. Tr. at 77. He declined to do that because pain and fatigue limited how much he could do in a day. Tr. at 77-78. He indicated that these complaints were worst when driving in the bouncy truck; he acknowledged that he likely could have done more office work. Tr. at 78. He also admitted that he did ultimately pass a DOT physical prior to starting his job at DNJ. Tr. at 80.

Petitioner clarified the circumstances of the lease-purchase of the air-ride equipped truck he used at DNJ. Tr. at 82-83. He paid a down payment of $2,500 out of his savings to initiate the lease purchase; the truck came ready with all of the options and modifications he described. Tr. at 83, 93. While working for DNJ, he would work 10 hour shifts and transported shipping containers containing consumer products. Tr. at 83. He acknowledged the truck had a manual transmission. Tr. at 84.

On re-direct, Petitioner described several differences between his work at DNJ and his work for Respondent. Tr. at 93. He indicated that he would not have to do any lifting at DNJ, whereas at Respondent he would lift the heavy tarp and occasionally move the waste around so that it fit in the trailer. Tr. at 93. Likewise, at DNJ he did not have to walk over the uneven waste like he did when he was tarping his load at Respondent. Tr. at 94.

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Text Messages

Petitioner admitted that the text message conversations admitted by Respondent were accurate. Tr. at 87, RX1 at 400-06. However, he clarified that the "surgery" he referenced in those text messages was an injection, not an actual surgery. Tr. at 92-93. He also acknowledged that he received unemployment benefits after being terminated from his employment by Respondent. Tr. at 88-89.

Surveillance

Respondent submitted surveillance footage of Petitioner from August 6, 2015. RX1 at 319. The video showed Petitioner in front of his home, moving a car seat from one vehicle to another; he testified the car seat weighed between 10 and 12 pounds. Tr. at 65. The video also showed him driving his personal vehicle, a Nissan Ultima 4-door sedan, to a nearby Jewel Osco grocery store. Tr. at 65-66. He testified that the store is approximately 5-10 minutes from his home. Tr. at 66. Petitioner also explained the differences between driving a passenger vehicle and a commercial truck. Tr. at 66. He could drive a passenger vehicle to the store for 15-minute round-trip, whereas a normal shift at Respondent would be 10 hours or more. Tr. at 67. Furthermore, the passenger vehicle was an automatic transmission whereas the commercial truck was a manual transmission. Tr. at 67-68. The manual transmission would require him to always keep his left arm on the wheel so he could change gears with his right arm. Tr. at 68. This was problematic in light of his persistent left arm radicular complaints prior to Dr. Templin's surgery. Tr. at 68-69.

John Holleman

John Holleman (Mr. Holleman) is a Terminal Manager at the Chicago yards for the Respondent. Tr. at 96. He first met Petitioner in 2006 while Mr. Holleman was working as a dispatcher for the Respondent. Tr. at 96-97. Several years later, Mr. Holleman hired Petitioner back when he returned in 2014 after his brief hiatus. Tr. at 96-97. Thereafter, Mr. Holleman was working as Petitioner's direct supervisor. Tr. at 97. He testified that he agreed with Petitioner's description of his job duties. Tr. at 97-98. He provided additional detail, however, by indicating that it takes very little force to pull on the bungee cords to tarp down a load. Tr. at 98.

He testified that the Respondent did offer Petitioner work beyond 20 hours a week. Tr. at 99. He would defer to the text messages for that timeline. Tr. at 99, RX1 at 400-06. The Arbitrator notes that a review of the text messages reveals that Mr. Holleman made one offer of work on December 10, 2015. RX1 at 401. Mr. Holleman offered work for 50 hours that week, consistent with the IME doctor's opinions that Petitioner could return to full duty work. RX1 at 401. Petitioner responded by indicating that he would instead follow his own doctor's recommendations that he remain on light duty. RX1 at 401. The Arbitrator finds no indication in the text messages of a gradual return to full duty work. RX1 at 400-06.

Mr. Holleman agreed that Petitioner made complaints of pain and fatigue when he returned to light duty work. Tr. at 101. He also agreed that Petitioner provided him doctor's notes substantiating the restrictions. Tr. at 101.

On cross-examination, Mr. Holleman agreed that Petitioner was a good employee and he made the determination that he wanted him back when he was re-hired. Tr. at 102-03. He also admitted that, while it did not take much effort to secure the bungee cords, often a driver would need to reach over his head in order to grab some of the cords. Tr. at 104-05.

Additional Information

Petitioner admitted that the surgery he underwent with Dr. Templin, and the subsequent therapy, improved his functionality. Tr. at 85. However, he indicated he was not sure how he would be at work as he has not had an opportunity to try working since the neck surgery. Tr. at 85. If he does get released to full duty work following the neck surgery, he is interested in returning to work in the transportation industry. Tr. at 85-86.

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 Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

It has long been recognized that, in pre-existing condition cases, recovery will depend on the employee's ability to show that a work-related accident aggravated or accelerated the preexisting disease 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. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 204-05 (2003). It is axiomatic that employers take their employees as they find them; even when an employee has a pre-existing condition which makes him more vulnerable to injury, recovery for an accidental injury will not be denied so long as it can be shown that the employment was a causative factor. *Id.* at 205. An employee need only prove that some act or phase of his employment was a causative factor of the resulting injury, the mere fact that he might have suffered the same disease, even if not working, is immaterial. *Twice Over Clean, Inc. v. Indus. Comm'n*, 214 Ill.2d 403, 414 (2005). Furthermore, it has long been held that "a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *Int'l Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64 (1982). "When the claimant's version of the accident is uncontradicted and his testimony is unimpeached, his recital of the facts surrounding the accident may be sufficient to sustain an award. *Id.* at 64.

In consideration of the totality of the evidence, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his injury at work. In so concluding, the Arbitrator notes that the primary dispute between the parties involves Petitioner's cervical spine condition and addresses that condition first.

Petitioner was asymptomatic in the cervical spine prior to his accident at work. He gave uncontroverted testimony to this effect. The mechanism of injury relative to Petitioner's claimed cervical spine condition is notable. Petitioner was involved in a violent motor vehicle accident in which his truck he was rear-ended by another vehicle. The accident resulted in direct injury to Petitioner's neck prompting immediate evaluation and treatment of the cervical spine. Petitioner's testimony regarding the force of the motor vehicle accident, and photographs documenting the remnants of his semi-truck and trailer after he was rear-ended, establish that the truck was pushed through an entire intersection leaving mere truck parts and debris scattered over the road. Petitioner explained that he suffered a "whiplash effect" in the accident when the back of his head struck the plastic behind his seat, which did not have a head rest. This mechanism of injury is corroborated by contemporaneous emergency room records.

The medical records during contemporaneous treatment beginning immediately after the injury also correlate pathology in the cervical spine to Petitioner's subjective complaints in the neck and radiating down his left arm. Less than one month post-accident, Petitioner underwent his first cervical MRI which revealed pathology in the neck. The interpreting radiologist noted "moderate to severe left and moderate right neuroforaminal stenosis" at C5-6 and "moderate bilateral neuroforaminal stenosis" at C6-7. Subjectively, Petitioner began reporting radicular pain into the left arm beginning less than two weeks after his accident, as early as March 17, 2015, and consistently did so throughout nearly every medical visit. Petitioner eventually underwent cervical injections providing him with some relief from these symptoms, which his treating physician, Dr. Templin, explained "tells you that you're dealing with the correct problem."

Several physicians offered opinions regarding the relatedness, if any, of Petitioner's current condition of ill-being to the accident at work. Petitioner's treating physician, Dr. Templin, recommends surgery to the cervical spine and opined that it was necessary to relieve Petitioner of the effects of his injury at work. In so concluding, he noted the cervical spine pathology reflected in Petitioner's April 2, 2015 MRI and Petitioner's consistent complaints of radiculopathy into the left arm beginning after the accident. Dr. Templin also noted that Petitioner had no prior complaints related to the neck prior to his accident at work. He opined that Petitioner's accident resulted in an aggravation of his preexisting cervical spine degeneration causing post-accident symptomatology. As a result, Dr. Templin believed that Petitioner required an anterior cervical discectomy and fusion in his neck. Petitioner was also examined by Dr. Salehi on February 24, 2017 who reviewed the MRI and agreed with Dr. Templin's assessment that a cervical spine fusion was indicated and reasonable.

In contrast, Respondent's offered the opinions of its Section 12 examiner, Dr. Stanley, an orthopedic spine surgeon. Dr. Stanley opined that Petitioner's April 2, 2015 MRI revealed only pre-existing degeneration in the cervical spine without indication of an acute injury to the spine. He also found no radicular symptoms at the time of his first examination of Petitioner, leading him to conclude that further treatment was unnecessary. Notwithstanding, Dr. Stanley admitted that the type of foraminal stenosis reflected in Petitioner's MRI could correlate with radiating arm pain and numbness. He also admitted that he found no medical evidence that Petitioner was symptomatic in the cervical spine or had associated radicular complaints prior to his accident at work, and that Petitioner underwent no related medical treatment prior to the rear-end collision at work.

Respondent also offered the opinions of its Section 12 examiner, Dr. Sadek, an occupational medicine specialist. He opined that Petitioner's April 2, 2015 MRI was essentially unremarkable and that Petitioner's cervical spine condition was not causally related to his accident at work. Like Dr. Stanley, Dr. Sadek determined that Petitioner exhibited no radicular symptoms at the time of their respective examinations. However, Petitioner's treatment records confirm Petitioner's radicular symptoms beginning shortly after his accident throughout his treatment and Dr. Sadek acknowledged that Petitioner's MRI findings could explain some of his left arm symptoms and left-sided complaints.

In consideration of the record as a whole, the Arbitrator finds the opinions of Petitioner's treating orthopedic surgeon, Dr. Templin, to be more persuasive than the opinions of Respondent's Section 12 examiners in this case. There is no evidence in the record that Petitioner underwent treatment to the cervical spine or that he had symptoms in the neck or down the left arm before the accident at work. His post-accident MRI confirms age-appropriate degeneration in the cervical spine including varying degrees of pathology. However, the mechanism of injury, which involved whiplash caused by a violent rear-end motor vehicle accident, is consistent with Petitioner's subjectively reported, new symptomatology thereafter. The medical records reflect Petitioner's immediate and consistently reported symptoms in the neck and down the left arm within days of the accident. Moreover, the objective findings of physicians and other medical providers confirm Petitioner's subjectively reported symptoms in the neck and down the left arm. Finally, Petitioner obtained temporary relief from

diagnostic cervical injections, further support a finding that Petitioner's cervical condition was aggravated by his work accident. The opinions of Respondent's Section 12 examiners are not persuasive given the foregoing and are accorded no weight in this case.

Respondent also offered surveillance video into evidence reflecting Petitioner engaged in various daily activities. However, in consideration of the medical evidence and the opinions of all the physicians in this case, the Arbitrator finds nothing in the surveillance that mitigates against Petitioner's injury or a causal connection between his current condition of ill-being and the accident at work.

While the parties' primary dispute relates to Petitioner's cervical spine condition, it is notable that Petitioner experienced other symptoms and necessitated medical treatment for other conditions throughout the body only after the rear-end collision related to headaches, vision disturbances, the lumbar spine and the right knee.

Petitioner was referred very early on for a neurocognitive evaluation with Dr. Tim McManus by Respondent's choice of provider, Ingalls, due to his headaches and dizziness. He diagnosed Petitioner with a neurocognitive disorder secondary to a brain injury and recommended an evaluation with Dr. Robert Marini for his visual deficits, and prescribed a soporific. Neither of these treatments were approved by Respondent; likewise, Petitioner did not pursue any substantial treatment for the dizziness or headaches. Nevertheless, Petitioner testified that he continues to experience headaches to a much greater extent than he did prior to the work accident. The mechanism of injury described in the ER records and Petitioner's testimony, specifically that he struck the back of his head on the inside of his truck in the accident, could cause the brain injury Dr. McManus described. Petitioner was eventually examined by Dr. Marini to address his vision issues and he recommended a course of neurorehabilitive vision therapy. This course of treatment was not approved by Respondent and, likewise, Petitioner did not pursue substantial treatment related to his vision issues. Petitioner also did not testify at the time of the hearing to any ongoing visual disturbances.

Respondent offered the opinions of its Section 12 examiner, Dr. Landre, a clinical psychologist, relating to Petitioner's headaches. She opined that Petitioner's condition was unrelated to the accident based on findings during neuropsychological testing performed by one of her technicians and her findings during the one-time examination that Petitioner either suffered from a somataform disorder ("where the person thinks there's something physically wrong with them, but there really isn't; but they believe that there is") or due to intentional exaggeration/malingering. The record as whole does not support a finding that Petitioner malingered throughout his treatment for any condition, including his headaches or vision disturbances. Indeed, Respondent's Section 12 examiners, Dr. Stanley and Dr. Sadek, found no evidence that Petitioner was malingering in their evaluations. Moreover, the medical records reflect consistent complaints, as well as notable improvements in his condition, throughout his medical treatment, which is incongruent with Dr. Landre's conclusion that Petitioner malingered.

Respondent also offered the opinions of an ophthalmologist, Dr. Robert Shapiro, and a nephrologist, Dr. James Wood, via a utilization review report. They determined that Petitioner "has not been aware of and has not reported any change in his vision since the time of the accident. He specifically denies having diplopia or double vision. Visual fields, by confrontation, were reported to be full and intact." The medical records, however, reflect otherwise. Dr. McManus noted Petitioner's complaints of diplopia in his March 26, 2015 examination, and his visual acuity testing found "an abnormal response to a screen for visual convergence insufficiency." Moreover, neither Dr. Shapiro nor Dr. Wood had the opportunity to physically examine and perform diagnostic testing on Petitioner, as did Dr. McManus.

Thus, based on the totality of the record the Arbitrator finds the opinions of Dr. Landre, Dr. Shapiro and Dr. Wood to be unpersuasive and finds that Petitioner's headaches and vision disturbances are causally related to his accident at work.

Finally, considering Petitioner's claimed right knee and lumbar spine conditions are concerned, it is notable that he was involved in a violent motor vehicle accident followed by immediate emergency room care and medical treatment. The medical records reflect Petitioner's subjectively reported complaints of back and right knee pain beginning with the first emergency room visit and the first visit to Ingalls Occupational clinic a few days later. The physicians and medical providers that examined Petitioner post-accident clinically correlated Petitioner's subjectively reported complaints to their objective findings. Petitioner underwent minimal treatment related to his right knee and lumbar spine, and at the hearing Petitioner testified that his right knee condition had significantly improved, but the evidence supports the conclusion that Petitioner's right knee and lumbar spine condition post-accident are causal related to the accident at work. As with Petitioner's cervical spine condition, the record if devoid of evidence that Petitioner had any significant symptomatology in the right knee or low back prior to the accident or that he underwent medical treatment prior to the rear-end collision.

Thus, the Arbitrator finds that Petitioner's claimed current condition of ill-being is causally related to the accident at work. A determination regarding the nature and extent of Petitioner's injuries is not yet ripe for determination.

In support of the Arbitrator's decision relating to Issue (G), Petitioner's earnings, the Arbitrator finds the following:

Based on the record as a whole, the Arbitrator finds that Petitioner's average weekly wage was $1,030.43 and that his earnings pursuant to Section 10 of the Act in the year preceding the injury was $11,128.62. Section 10 of the Act "provides four different methods for calculating average weekly wage: (1) "actual earnings" during the 52 week period preceding the date of injury, illness or disablement, divided by 52; (2) if the employee lost five or more calendar days during that 52-week period, "whether or not in the same week," then the employee's earnings are divided not by 52, but by "the number of weeks and parts thereof remaining after the time so lost has been deducted[;]" (3) if the employee's employment began during the 52-week period, the earnings during employment are divided by "the number of weeks and parts thereof during which the employee actually earned wages[;]" and (4) if the employment has been of such short duration or the terms of the employment of such casual nature that it is "impractical" to use one of the three above methods to calculate average weekly wage, "regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer." *Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 230-31 (2001.

Petitioner's average weekly wage should be calculated according to the third method for calculating wages and his earnings should be divided by the number of weeks and parts thereof he actually worked. A record of Petitioner's earnings was admitted into evidence as Petitioner's Exhibit 28. Petitioner worked 10.8 weeks and earned a total of $11,128.62 in the 52-week period prior to his work accident. PX18 at 1, 3. Petitioner testified that he averaged about 10 to 12 hours per day, and that he typically worked 5-day weeks, which is corroborated by the records of his earnings. Tr. at 22, 67. In light of this information, the Arbitrator finds that Petitioner's average weekly wage should be based on $11,128.62 earned in the year preceding his injury divided by the 10.8 weeks actually worked resulting in an average weekly wage of $1,030.43.

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

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001). Moreover, Section 8(a) of the Act provides that an "employer shall provide and pay the negotiated rate, if applicable, or the less of the health care provider's actual charges or according to a fee schedule, subject to 8.2 . . . for all necessary first aid, medical and surgical services, an all necessary medical, surgical and hospital services thereafter incurred . . ." 820 ILCS 305/8(a).

As explained more fully above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his injury at work based on the totality of the record and relying on the opinions of Petitioner's treating physicians. The medical evidence establishes that the treatment rendered to Petitioner to date has been both reasonable and necessary to alleviate Petitioner from the effects of his injuries caused by the rear-end collision at work, including an optometry referral to Dr. Marini ordered by Dr. McManus as well as the two-level anterior cervical discectomy with fusion (ACDF) at C5-6 and C6-7 and associated post-operative medical treatment ordered by Dr. Templin, for which Respondent has denied liability.

Thus, the Arbitrator finds that the Respondent is responsible for the medical bills submitted into evidence as Petitioner's Exhibit 30 totaling $138,068.29 reduced pursuant to the fee schedule pursuant to Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision relating to Issues (K) and (O), Petitioner's entitlement to prospective medical care, the Arbitrator finds the following:

As explained above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his accident at work as claimed. Respondent denied authorization for the medical treatment in the form of an optometry referral to Dr. Marini as ordered by Dr. McManus as well as the two-level anterior cervical discectomy with fusion (ACDF) at C5-6 and C6-7 and associated post-operative medical treatment ordered by Dr. Templin. The opinions of Dr. Landre, and Respondent's utilization review physicians, who did not have the opportunity to examine Petitioner, are unpersuasive, as are the opinions of Respondent's Section 12 examiners, Dr. Sadek and Dr. Stanley. Petitioner's condition has not improved after his accident at work.

Thus, in consideration of the record as a whole, the Arbitrator awards the medical treatment ordered in the form of an optometry referral to Dr. Marini as ordered by Dr. McManus as well as the two-level anterior cervical discectomy with fusion (ACDF) at C5-6 and C6-7 and associated post-operative medical treatment ordered by Dr. Templin pursuant to Section 8(a) of the Act as such care is reasonable and necessary to alleviate Petitioner from the effects of his accident at work.

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

"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 first period of temporary total disability began on March 6, 2015, the day after Petitioner's initial visit to the emergency room at St. James Hospital. That period ended on October 18, 2015. The following day Petitioner began working a light-duty accommodated position with the Respondent through August 12, 2016.

The second period of temporary total disability began on August 13, 2016, the day after the last day the Respondent accommodated Petitioner's restrictions. Beginning on August 13, 2016, Petitioner was removed from work and was not accommodated by Respondent. On September 1, 2017, Petitioner returned to work as a truck driver at another company, DNJ Trucking. Petitioner testified that he worked as a freight broker for Landstar during this period, but did not earn any income doing this work. Thus, the evidence establishes that Petitioner was unable to work and did not have any income-generating employment outside of the work restrictions imposed by his physicians.

The third period of claimed temporary total disability began on March 5, 2018, the date of Petitioner's surgery performed by Dr. Templin. Although Petitioner testified that he stopped working for DNJ on or about February 22, 2018 (the last visit with Dr. Templin prior to the surgery on March 5, 2018), Dr. Templin's February 22, 2018 note is silent on work restrictions.

Based on the foregoing, the Arbitrator finds that Petitioner has established entitlement to temporary total disability commencing on March 6, 2015 through October 18, 2015, commencing on August 13, 2016 through September 1, 2017, and commencing on March 5, 2018 through August 23, 2018.

"When the employee is working light duty on a part-time basis or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits. Temporary partial disability benefits shall be equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of his or her duties in the occupation in which he or she was engaged at the time of accident and the gross amount which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working." 820 ILCS 305/8(a) (LEXIS 2011).

Having found that Petitioner's medical condition and restrictions are causally connected to his accident, the Arbitrator also finds that Petitioner is due temporary partial disability benefits for the period of October 19, 2015 through August 12, 2016. Petitioner began working a light-duty accommodated position with Respondent on October 19, 2015 ending on the last date through which those accommodations were provided on August 12, 2016. Petitioner's earnings during this period were admitted as Petitioner's Exhibit 31, which indicate that Petitioner primarily earned less than what he "would be able to earn in the full performance of his duties." There are three

weeks during which Petitioner earned more than he would be earning in the full performance of his duties in excess of $1,030.43 on the pay dates listed as February 26, 2016, July 15, 2016 and August 12, 2016. As a result, the Arbitrator excludes those weeks from the claimed temporary partial disability period.

Based on the foregoing, the Arbitrator finds that Petitioner has established entitlement to temporary partial disability benefits[3] commencing on October 19, 2015 through August 12, 2016 minus a three-week period.

In support of the Arbitrator's decision relating to Issue (M), whether penalties or fees should be imposed upon Respondent, the Arbitrator finds the following:

Given the facts presented in this case, and after considering the record as a whole, the Arbitrator finds that Respondent had a reasonable dispute as to whether Petitioner's injuries subsequent to the accident at work. Respondent repeatedly required Petitioner to submit to Section 12 examinations throughout Petitioner's treatment, obtained video surveillance from which a physician could have concluded that some claimed condition of ill-being was not causally related to the accident at work, and obtained utilization review opinions relating to the reasonableness of recommended medical treatment. Respondent's conduct was not unreasonable, vexatious and/or in bad faith. Thus, Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act is denied.

[3] Temporary partial disability benefits were calculated utilizing the earnings reflected in Petitioner's Exhibit 31 and Petitioner's average weekly wage.

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

ANTONIO RODRIGUEZ,

Petitioner,

vs. NO: 11 WC 18016

CONAGRA FOODS,

Respondent.

19IWCC0002

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both parties herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary disability and permanent disability and being advised of the facts and law, 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 disputed issues argued in the arbitration hearing that resulted in the controlling Decision of the Arbitrator were causal connection, the reasonableness and necessity of the provided medical services, entitlement to temporary total disability benefits, and the nature and extent of Petitioner's permanent disability. The presiding Arbitrator found for Petitioner on each of the disputed issues though $438.00 in medical expenses were denied as those medical expenses were deemed unrelated to Petitioner's accident. The Commission views the evidence differently and, as such, arrives at different conclusions than did the Arbitrator.

The Arbitrator found Petitioner's current condition of ill-being to be causally related to his October 22, 2009 accident. The Commission concludes the Arbitrator did not appreciate the suspiciously evolving histories as laid out in Petitioner's medical records as well as the gaps in treatment. For reasons expressed below, the Commission finds Petitioner's current condition of ill-being to be unrelated to his October 22, 2009 accident.

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Petitioner presented to Concentra Medical Center on October 23, 2009 where he was seen by Dr. Shewar Kahn. A patient statement is part of the record of that visit and quoted Petitioner as stating, "while lifting a pallet about 50-60lbs I felt a pull to my right back and I also have pain to my right leg." The physical examination revealed tenderness to palpation about the sacral coccyx region and moderate pain upon range of motion testing. The physical examination of Petitioner's lower extremities was unremarkable. Dr. Khan diagnosed Petitioner with a sacrum strain and a coccyx sprain.

Per Dr. Khan's October 23, 2009 order, Petitioner returned to see him on October 26, 2009. On that day, he presented to Dr. Khan with some improvement but still with pain in his right lower back, lumbar region, sacral region and coccyx region. He now also complained of intermittent numbness in his right leg. The physical examination performed that day noted tenderness to palpation to the right lumbar region, sacrum and coccyx, mild spasms in the lumbar region, and a decreased range of motion of the lumbar spine with complaints of pain. Once again, despite another complaint involving Petitioner's right leg, the examination of it found it to be unremarkable. Dr. Khan again diagnosed Petitioner with a sacrum strain and a coccyx sprain. Petitioner was to return for a reevaluation on October 30, 2009 but did not return to Concentra Medical Center until June 30, 2011.

Between Petitioner's October 26, 2009 and June 30, 2011 presentments to Concentra Medical Center, Petitioner was seen by his primary care physician, Dr. Luis Luna, at St. Alexius Medical Center, at New Life Medical Center, and at Illinois Neurospine Institute, with his complaints evolving over time.

Petitioner treated at Concentra Medical Center for complaints involving his low back and right leg but presented to Dr. Luna, his primary care physician, on January 29, 2010 with complaints involving numbness from his hip into his foot. Dr. Luna prescribed Petitioner undergo x-rays of his lumbosacral spine, left hip, left knee, and left foot. PX2, p5. Dr. Luna did not record any history as to how Petitioner's left lower extremities came to be symptomatic.

Following Dr. Luna's order, Petitioner presented to St. Alexius Medical Center on March 26, 2010 where he underwent x-rays of his lumbar spine, left pelvis/hip, left ankle, left knee, and left foot. The histories recorded in each radiology report merely mentioned either simply pain or pain to the corresponding body part. Petitioner followed up with Dr. Luna only once after these x-rays were taken, on April 7, 2010, but it was for complaints that came to be diagnosed as dypslipidina, hematuria, liver failure, high blood pressure, and obesity.

More than a year after he was seen by Dr. Luna, Petitioner presented to New Life Medical Center. The complaints he made at that time, on May 12, 2011, were of back pain as well as pain bilaterally in his lower extremities. Whereas he treated at Concentra Medical Center for complaints of low back and right lower extremity pain and with Dr. Luna for low back pain and left extremity numbness, Petitioner was now treating at New Life Medical Center for low back and bilateral lower extremity pain. The history Petitioner provided to New Life Medical Center was of experiencing low back pain with radiation of pain into the legs since October 5, 2011. This is the first time Petitioner claimed bilateral lower extremity pain had been present since the onset of his low back pain. Previously, it was either right lower extremity pain or left

lower extremity numbness.

Petitioner was seen at Illinois Neurospine Institute on June 20, 2011, a little more than a month after he was seen at New Life Medical Center and provided a history that had not been previously revealed. On this occasion, Petitioner told of experiencing low back pain and left lower extremity pain at the time of his injury and then, six months later, experiencing pain in his right lower extremity.

The only commonality among the histories Petitioner provided to Concentra Medical Center, Dr. Luna, St. Alexius, New Life Medical Center, and Illinois Neurospine Institute is low back pain. Petitioner's pain symptom was initially only present in his low back and right lower extremity. He then had pain in his low back and numbness in his left lower extremity. He next had pain in his lower back and in both extremities with a simultaneous onset of those pains. His final history of his symptomology was of low back pain and pain, first, in the left lower extremity and then later in the right lower extremity. Petitioner's histories are notable not only for the evolution of the symptomology but also in that not once was the same history repeated to a provider. Each provider was given their own unique history.

The Commission finds the serial abandonment of treatment and as well as the changing nature of Petitioner's histories and complaints when treatment is resumed makes it impossible for it to find Petitioner's current condition of ill-being to be related to his October 22, 2009 accident. Instead, the Commission finds the duration of Petitioner's condition of ill-being of his low back was related to that accident only through October 26, 2009 recognizing Petitioner's subsequent complaints of low back pain to be new insults to his low back and lower extremities. The Commission simply cannot ignore Petitioner inexplicably abandoning treatment for three months and then presenting for treatment from a new medical provider.

The Commission, having found Petitioner's condition of ill-being related to his October 22, 2009 to have resolved no later than October 26, 2009, also finds Petitioner was not temporarily totally disabled within that timeframe and, as a result, is not entitled to compensation for being so under Section 8(a). Petitioner's documented period of being temporarily totally disabled, from June 28, 2011 through May 8, 2015 is not the sequela of his October 22, 2009, accident but of an undisclosed event that caused Petitioner to present to New Life Medical Center on May 12, 2011.

Not only does the Commission find Petitioner's October 22, 2009 accident did not result in him becoming temporarily totally disabled for any period of time, the Commission also finds the same accident caused Petitioner to suffer no permanent disability. Again, the Commission relies on his staggered treatment history to conclude as much. Petitioner did not return to Concentra Medical Center as scheduled on October 30, 2009 nor did he seek treatment from any other physician or medical provider until January 29, 2010 when he presented to Dr. Luna. He then abandoned Dr. Luna after that single visit and did not seek further treatment until May 12, 2011, when he presented to New Life Medical Center. It was there he offered a twist on the histories he had provided to Concentra Medical Center. This time, he had pain in both lower extremities whereas it had only been previously in his right leg. The history he provided about pain in his low back was consistent with the previously proffered histories, but his not seeking

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treatment for any low back pain for more than a year calls into question whether it had remained painful over all that time. The Commission concludes, based on the gap in treatment, that it did not and his renewed treatment at New Life Medical Center to be the result of a new insult to his low back; hence, the new symptomology.

Notwithstanding the positions the Commission takes with regard to temporary total disability and permanent partial disability, even if the Commission reached opposite conclusions on those issues, it would still have modified the Arbitration Decision regarding choice of physicians under §8(a). The Arbitrator concluded that Petitioner did not exceed his choice of physicians. The Commission disagrees.

The Arbitrator, in excluding Dr. Luna as one of Petitioner's choice of physicians, noted that Petitioner went to Dr. Luna for complaints unrelated to his work activities as well as Petitioner's testimony that Dr. Luna did not treat his complaints of low back pain because he did not handle workers' compensation complaints. The Arbitrator appears to have misinterpreted Dr. Luna's treatment records and, in doing so, placed too great a reliance on Petitioner's testimony about his treatment with Dr. Luna.

There is no evidence that corroborates Petitioner's testimony that Dr. Luna declined to treat his low back complaints. Dr. Luna, as a result of his examination of Petitioner on January 29, 2010, referenced Petitioner being seen at Concentra Medical Center and prescribed Motrin and x-rays to be taken of Petitioner's lumbosacral spine, left hip, left knee and left foot. Dr. Luna also indicated that Petitioner was to return in 15 days. The Commission finds nothing in the record of this visit indicating Dr. Luna treated and had a plan to treat Petitioner's complaints save for his low back. Without evidence to the contrary, Dr. Luna is found to have treated the low back complaints that originated with Petitioner's October 22, 2009 accident and, in so doing, was one of Petitioner's treating physicians for the purposes of Section 8(a) of the Act.

Reinforcing the Commission's finding that Petitioner sought treatment from Dr. Luna regarding his October 22, 2009 accident is the fact Petitioner sought payment for that treatment under Section 8(a) of the Act. Not only did Petitioner seek to hold Respondent liable for the January 29, 2010 visit to Dr. Luna but also for two subsequent visits to Dr. Luna, neither of which addressed Petitioner's low back complaints. Though the Arbitrator declined to award any of the expenses incurred by Petitioner's treatment with Dr. Luna, Petitioner, by submitting these bills for payment under Section 8(a), represented that those bills were causally related to the alleged work accident. Subject to adjustment under the fee schedule, Respondent would be liable only for the $175.00 charged to Petitioner for the January 29, 2010 visit to Dr. Luna. The other two visits Petitioner made to Dr. Luna were not shown to be related to his October 22, 2009 and, therefore, not billable to Respondent.

After finding Dr. Luna to not be a treating physician under Section 8(a), the Arbitrator found Dr. De Borroto to be Petitioner's first choice for a treating physician under Section 8(a). For the above-expressed reasons, the Commission finds Dr. De Borroto to be Petitioner's second choice for a treating physician under Section 8(a). The Commission also finds Petitioner's choice of physicians under Section 8(a) was exhausted once he abandoned treatment with Dr. De Borroto.

The Arbitrator wrote that Dr. De Borroto referred Petitioner to "a neurosurgeon." Such a blanket referral would allow Petitioner to seek treatment from any neurosurgeon and that self-selected neurosurgeon would be within Dr. De Borroto's chain of referral as would any subsequent referral that neurosurgeon made. In this case, however, the Arbitrator erred in concluding that Dr. De Borroto provided Petitioner with a blanket referral. On June 26, 2010, Dr. De Borroto referred Petitioner to a particular neurosurgeon, Dr. Epsion. Rather than treating with Dr. Epsion, Petitioner ultimately came to treat with another neurosurgeon, Dr. Michael. His seeing Dr. Michael came from a referral made by Dr. Carrion. As neither Dr. Carrion nor Dr. Michael were within Dr. De Borroto's chain of referral, Respondent is not held liable for charges related Petitioner's treatment with either Dr. Carrion or Dr. Michael.

The Commission's interpretation of the Petitioner's medical history is buttressed by Petitioner's testimony. After testifying on direct examination about treating with Dr. Luna for unrelated conditions, Petitioner, while still on direct examination, was not asked about his treatment with Dr. De Borroto. On cross-examination, Petitioner acknowledged that he treated with Dr. DeBorroto and would not challenge Dr. DeBorroto's records if they indicated that he treated with other doctors. Petitioner testified that Dr. Luna was one of those doctors. By virtue of the testimony alone, Petitioner acknowledged that he treated his claimed injuries with Dr. Luna. No attempt was made to rehabilitate Petitioner's testimony. Similarly, no attempt was made to elicit from Petitioner the name or names of any doctor or doctors that Petitioner saw in response to a referral from Dr. DeBorroto.

In modifying the Arbitration Decision, the Commission finds Petitioner sustained an accident on October 22, 2009 that arose out of and in the course of his employment and resulted in an injury to his low back. Petitioner's abandonment of treatment on October 26, 2009, and his resumption of treatment months later, but with new complaints as well as of low back pain, leads the Commission, however, to conclude that the October 22, 2009 accident resulted in a strained sacrum, as diagnosed at Concentra Medical Center on October 23, 2009, a condition that resolved in such short order, that Petitioner did not return after his October 29, 2009, checkup or require Petitioner to seek any further treatment until January 29, 2010, when he presented to Dr. Luna. The Commission, therefore, finds any claim for treatment or last time made by Petitioner after October 26, 2009, together with any alleged current condition of ill-being is not related to the October 22, 2009 accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the May 9, 2017, Order ordering Respondent to pay Petitioner temporary disability benefits under §8(b) of the Act is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the May 9, 2017, Order ordering Respondent to pay Petitioner permanent partial disability benefits, as provided in §8(d)2 of the Act, is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the May 9, 2017, Order ordering Respondent to pay Petitioner's medical expenses under §8(a) of the Act is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is to receive

credit for medical expenses paid under §8(j); Respondent shall not have to indemnify Petitioner for medical expenses incurred after October 26, 2009 as those expenses are found to be unrelated to Petitioner's October 22, 2009, accident.

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 for removal of this cause to the Circuit Court is required as the Commission has not entered an award for the payment of money. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 3 - 2019
KWL/mav
O: 11/5/18
42

Kevin W. Lamborn

Michael J. Brennan

DISSENT

I respectfully dissent from the opinion of the majority and would modify the Arbitrator's Decision regarding causation, medical bills, and permanent partial disability. I view the evidence much differently than the majority and believe Petitioner clearly met his burden of proving not only that his current condition of ill-being is causally related to his work injury, but also that he sustained a 50% loss of use of the person as a whole.

Petitioner sustained a significant traumatic injury to his low back when he tried to lift a pallet that weighed approximately 140 lbs. Petitioner sought treatment the very next day and reported pain in his lower right back radiating into his right leg. The medical evidence shows that Petitioner consistently reported ongoing and severe low back pain with radiation into his legs to various doctors from October 23, 2009 through May 12, 2012, the date of MMI. He eventually underwent a lumbar fusion surgery at L5-S1 in December 2011 and reported a 60% improvement in his condition post-surgery.

Despite the substantial evidence corroborating Petitioner's consistent ongoing complaints, the majority found that the fusion surgery is not causally related to Petitioner's work accident. This conclusion is baffling given the totality of the evidence. Contrary to the majority, I do not believe the utilization reviews submitted by Respondent are more credible than the opinions of Petitioner's treating physicians. The treating physicians are in the best position to assess Petitioner's condition and determine the most appropriate course of treatment. This is particularly true in this case, where the utilization reviews often contradict the treatment notes and diagnostic studies. In my opinion, the majority's conclusion that Petitioner's lumbar fusion is not causally related to the work accident is not supported in any way by the Petitioner's credible testimony and the entirety of the medical evidence. Petitioner more than met his burden

of proving that his treatment—including the lumbar fusion—and ongoing complaints are directly connected to his work injury. As such, Petitioner is entitled to all reasonable, necessary, and related medical expenses, including expenses related to his fusion surgery.

Finally, I vehemently disagree with the majority's conclusion that Petitioner sustained only a 20% loss of use of the person as a whole. This permanent partial disability award drastically undervalues the extent of Petitioner's injury, including his significant ongoing complaints, and his reduced capacity to work as a result of his injury. Petitioner credibly testified that he continues to take over the counter pain medications up to four times each day. In addition to the over the counter medications, Petitioner continues to take two pain pills daily that help to further reduce his significant and constant low back pain. Petitioner's lifestyle has also suffered because he is no longer able to partake in activities such as dancing and playing baseball due to his ongoing symptoms. Additionally, the totality of the evidence supports a finding that Petitioner is unable to return to his original job as a cleaner because he can no longer perform heavy duty labor. There is no question that Petitioner's original job qualifies as heavy demand. After all, he sustained his injury while trying to lift a pallet weighing 140 lbs. Notably, even Dr. Kahan, Respondent's vocational expert, opined that Petitioner could only work up to a medium demand level or lower. Petitioner met his burden of proving he sustained at a minimum a loss of occupation due to his lumbar spine injury. Given Petitioner's significant residual complaints and loss of his usual occupation, I believe Petitioner sustained a 50% loss of use of the person as a whole.

For the forgoing reasons, I would modify the Arbitrator's Decision and find that Petitioner's current condition is related to his work injury. As such, Respondent is liable for all reasonable, necessary, and related medical bills. Finally, I would modify the Arbitrator's permanent partial disability award as Petitioner proved he sustained a 50% loss of use of the person as a whole.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RODRIGUEZ, ANTONIO Case# **11WC018016**
Employee/Petitioner

CONAGRA FOODS **19IWCC0002**
Employer/Respondent

On 5/9/2017, 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 1.01% 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:

0293 KATZ FRIEDMAN EAGLE ET AL
MATTHEW A WRIGLEY
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

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

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

Antonio Rodriguez
Employee/Petitioner

v.

ConAgra Foods
Employer/Respondent

Case # 11 WC 18016

Consolidated cases: N/A

19IWCC0002

An *Application for Adjustment 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**, on **February 24, 2017 & March 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. [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 October 22, 2009, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $30,632.82; the average weekly wage was $589.09.

On the date of accident, Petitioner was 53 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 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 or for all benefits paid as agreed by the parties. *See* AX1.

Respondent is entitled to a credit for all bills paid by the group insurance carrier under Section 8(j) of the Act. *See* AX1.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $392.73/week for 45 & 1/7th weeks, commencing June 28, 2011 through May 8, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from October 22, 2009 through March 9, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Medical Bills

As explained in the Arbitration Decision Addendum, Respondent shall pay the reasonable and necessary medical services for bills submitted in Petitioner's Exhibits as provided in Sections 8(a) and 8.2 of the Act to the extent certified in the utilization reviews for services from the following providers:

- Metro South Medical Center
- Illinois Neurospine Institute
- Hind General Hospital
- M&R Rudra New Life Medical Center
- St. Alexius Medical Center
- BI Anesthesia
- Prime Medical Resources
- Western Open MRI & Imaging
- Lakeshore Open MRI and CT
- Advanced Imaging Center
- EQ-Med

Petitioner's claim for payment of medical bills of $40.00 from Sanuka Medical Center and $398.00 from Dr. Luis E. Luna are denied because the treatment was not related to this accident.

Permanent Partial Disability: Person as a Whole

Respondent shall pay Petitioner permanent partial disability benefits of $353.45/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

May 1, 2017
Date

MAY 9 - 2017

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Antonio Rodriguez
Employee/Petitioner

Case # 11 WC 18016

v.

Consolidated cases: N/A

ConAgra Foods
Employer/Respondent

FINDINGS OF FACT

The issues in dispute at this hearing include whether there is a causal connection between Petitioner's current condition of ill-being and accident at work, Respondent's liability for payment of certain medical bills, Petitioner's entitlement to a period of temporary total disability benefits commencing June 28, 2011 through May 8, 2012, 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

Antonio Rodriguez ("Petitioner") testified that he was employed as a "cleaner" by ConAgra (Respondent), a nutrition processing company. Petitioner explained that his job duties included working in recycling and putting paper and other items in a compressor.

On October 22, 2009, Petitioner was involved in an undisputed[2] accident at work. AX1. Petitioner testified that when he arrived to work that day, he did not have any pain in his body. However, while working, he sustained an injury to his back. Petitioner explained that after he finished putting a carton into a machine he then had to pick up the pallets, one of which had very heavy material. Petitioner testified that when he lifted this pallet, he experienced a sudden low back pain. Petitioner testified that the pallet was weighed by his manager and an assistant, and it was 140 pounds.

Petitioner reported the injury to Tim Farmer (Mr. Farmer), his manager. He explained that he had pain extending all the way down into his leg. Petitioner testified that he went to the clinic with Mr. Farmer and the doctor sent Petitioner back to work.

Medical Treatment

The following day, on October 23, 2009, Petitioner went to Concentra Medical Center and saw Shehwar Khan, M.D. (Dr. Khan). PX1 at 8-10; RX12. Petitioner reported that he was injured on October 22, 2009 "while I was lifting a pallet about 50-60 lbs I felt a pull to my right back and I also have pain to my right leg." *Id.* Dr. Khan

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[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.

[2] The parties do not dispute Petitioner's date of accident. However, the record reflects that Petitioner filed an initial Application for Adjustment of Claim on May 10, 2011 dated May 9, 2011. RX13. The Application asserted a loss date of October 5, 2010 while stacking boxes. *Id.* On cross examination, Petitioner testified the signature affixed to the form was not his signature. An Amended Application for Adjustment of Claim was dated and filed on May 9, 2014. RX14. This Amended Application contained an asserted loss date of October 22, 2009 while stacking boxes. *Id.* Petitioner testified this form reflected his signature.

noted the pain was located in the sacral region, the coccyx, and also the right ischial tuberosity region. *Id.* He diagnosed Petitioner with a sacrum strain and a coccyx sprain, prescribed pain medication, and advised him to follow up in three days. *Id.*

Petitioner returned to Dr. Khan on October 26, 2009. PX1 at 11-12; RX12. Dr. Khan noted that Petitioner was taking his medication and had some improvement, but he continued to have pain in the right lower back with intermittent right leg numbness. *Id.* Dr. Khan ordered continued medication use and scheduled a follow up evaluation in four days. *Id.* Petitioner did not return for follow up at that time. *Id.*

Petitioner testified that he continued to work for Respondent from October 26, 2009 through June 30, 2011 performing the same type of work, and more work because there was more work to be done. Petitioner noted that his back pain was substantial and he could not walk around in the morning, which is why he needed to go back to the doctor.

Petitioner then presented to his primary care physician, Luis Luna, M.D. (Dr. Luna), on January 29, 2010 for a number of complaints. Dr. Luna's medical records note a number of complaints on January 29, 2010 including Petitioner's report that he "fell 1 y. ago at work [illegible] over [left] foot [illegible] pain [left] hip to feet got numbness (no hx) [illegible] seen by company MD Dx sprain [left] foot no swelling ± pain???" PX2 at 5; RX8. Dr. Luna ordered x-rays of the lumbar spine, left hip, left knee, and left foot. *Id.* Petitioner testified that he complained of back pain at this visit. As recommended, Petitioner underwent lumbar spine, left hip, left ankle, left knee, and left foot x-rays on March 26, 2010 at St. Alexius Medical Center. PX3 at 10-14. With regard to the lumbar spine, the interpreting radiologist noted degenerative changes with grade 1 spondylolisthesis of L5 on S1 with spondylosis. *Id.* Petitioner testified that Dr. Luna was treating him for high blood pressure and he did at some point mention problems with his back. However, Petitioner testified that Dr. Luna told him that he did not treat low back cases.

Petitioner returned to Dr. Luna on April 7, 2010. PX2 at 6; RX8. However, Petitioner testified that he continued medical treatment with H.R. Perez De Borroto (Dr. De Borroto) because Dr. Luna would not accept workers' compensation claims.

On May 15, 2010, Petitioner sought treatment with Dr. De Borroto at Clinic Medical. RX9. His chief complaint at that visit was pain in his legs and lower back. *Id.* He noted these complaints had been ongoing since "lifting something heavy 4 to 5 months ago." *Id.* Dr. De Borroto diagnosed Petitioner with low back pain syndrome. *Id.* On cross examination, Petitioner testified that he saw Dr. De Borroto at this visit for low back pain. He explained that Dr. Luna wanted to have nothing to do with workers' compensation. Petitioner continued to complain of low back pain on June 8, 2010 to Dr. De Barroto. *Id.*

Petitioner underwent the recommended a lumbar MRI, which was completed on June 9, 2010 at Western Open M.R.I. & Imaging. PX10; PX13. The interpreting radiologist noted the following: (1) no compression fractures, but some loss of lumbar lordosis consistent with muscle spasm; (2) degenerative changes at L3-L4 intervertebral disc with a moderate-sized broad based left paracentral and foraminal disc protrusion; (3) degenerative changes at L4-L5 and L5-S1with minimal diffuse bulging and no focal compressive disc herniation; (4) moderately severe degenerative changes in the facet joints seen at L4-L5 and L5-S1; and (5) no abnormal enhancement. *Id.*

At his June 26, 2010 follow up visit, Dr. De Borroto referred Petitioner to a neurosurgeon for evaluation and treatment. *Id.*

Petitioner then sought treatment at Sanuka Medical Center on September 11, 2010. PX13; RX11. His chief complaints were obesity and blood pressure. *Id.* Petitioner testified he also mentioned his back pain to the doctor at Sanuka Medical Center; however, it does not appear in the records that he received any treatment for back pain. *Id.*

Petitioner testified that he then began treatment at New Life Medical on May 12, 2011. He explained that he went to New Life because he understood that they did physical therapy for his low back and legs. Petitioner testified that he did not sustain any other back injury between October 26, 2009 and his first treatment with New Life Medical on May 12, 2011. Petitioner testified that he saw Dr. Carrion and told him about his accident. He testified that he also told Dr. Carrion that he continued to work for Respondent to which Dr. Carrion responded that he could not go on working.

The medical records reflect that Petitioner saw a chiropractor, Aldrin Carrion, D.C. (Dr. Carrion) at his initial visit on May 12, 2011. PX4 at 21-24. Dr. Carrion noted that Petitioner was there that day "for examination and treatment for repetitive work injuries sustained at work aggravated on 10-05-2010." *Id.* Petitioner advised Dr. Carrion that his job required him "...to perform constant bending, twisting, and lifting." *Id.* Dr. Carrion also noted that Petitioner had been asking his supervisor Tim to do a report of his injuries, but so far had not been helped. *Id.* Petitioner also reported that he had an injury to his back in 2009 for which he was sent to a company doctor and released with pain medications. *Id.* Dr. Carrion recommended an eight week course of therapy consisting of chiropractic manipulation for the lumbar area. *Id.* He also imposed work restrictions including no lifting over fifty (50) pounds and no repetitive overhead reaching. *Id.*

Dr. Carrion advised Petitioner to undergo another lumbar MRI, which was completed on June 11, 2011 at Lakeshore Open MRI and CT. PX11. The interpreting radiologist noted changes of degenerative disc disease and facet arthropathy primarily involving the L3-L4 through L5-S1 levels, significantly improved degenerative disc disease at L3-L4 with only mild central canal narrowing and no central canal stenosis. *Id.* He also noted varying degrees of neural foraminal stenosis most significant at L3-L4 through L5-S1 levels on the left. *Id.*

At his June 20, 2011 follow up, Dr. Carrion recommended Petitioner undergo an NCV/EMG test, which was completed that same day by Gregory Thurston, D.C. (Dr. Thurston). PX11 at 39-40, 130-139. Petitioner reported a work injury of October 5, 2010. *Id.* Petitioner explained that he worked in a warehouse performing repetitive duties and no specific incident, but many episodes of low back pain over many weeks/months to the point that it became severe and he reported it to his supervisor "[s]ometime in 03/2009" and he was referred to the company clinic. *Id.* Thereafter, Petitioner reported medical treatment with his primary care physician, Dr. Jorge Martinez, "who diagnosed him with strained low back muscles and prescribed medication for pain and inflammation." *Id.* Dr. Thurston's impression was right L5 neuropathy, left L4, L5 radiculopathy with proximal axonopathy and denervation. *Id.*

Petitioner testified that Dr. Carrion referred him to Ronald Michael, M.D. (Dr. Michael) at Illinois Neurospine. Petitioner first saw Dr. Michael on June 20, 2011. RX5 at 9-10. Dr. Michael noted the following history in pertinent part:

> This 55-year-old, Hispanic male suffered a work-related injury on October 5, 2010. He was lifting a skid, which weighed 120-130 pounds. He had immediate low back pain. He had left lower extremity pain down to the posterior thigh. The following day, and worsened to the point where he was not able to work well. He presented to the company clinic. He complained, at that time, low back pain much, much

> worse than left leg pain. Six months later, he had onset of right leg pain. He had right hip and groin pain. Left leg pain courses down to the foot. The left leg pain is worse than the right. The pain is most severe sitting and standing. There is left lower extremity numbness and tingling. He has weakness bilaterally equal the 2 sides. He has bouts of bladder incontinence every 2-3 days. Physical therapy for 4 weeks failed to gain him any relief. Two local steroid injections failed to gain him any relief.

Id. Dr. Michael diagnosed Petitioner with nonspecific lumbar radiculitis pending formal review of his MRI. *Id.* He advised Petitioner to return in two weeks and prescribed medications. *Id.*

On cross examination, Petitioner testified that he does not remember dates, but acknowledged that he could have reported an accident on October 5, 2010. On re-direct examination, Petitioner testified that he did not suffer any other accident lifting a skid of about 120 pounds.

In the interim, Petitioner continued to see Dr. Carrion for chiropractic care. PX4. On June 28, 2011, Dr. Carrion noted that Petitioner had increased pain due to work and he placed him off of work. PX4 at 41. Petitioner testified that he did not return to work for Respondent as of this date.

Petitioner then returned to Concentra on June 30, 2011 and saw Timothy Boersma, M.D. (Dr. Boersma). PX1 at 13-15. Dr. Boersma noted Petitioner's history of accident and medical treatment through New Life Clinic. *Id.* Petitioner reported pain radiating from the lumbar spine into both legs. *Id.* Dr. Boersma diagnosed Petitioner with lumbar radiculopathy, lumbar pain and herniated discs by history. *Id.* He also imposed light duty work restrictions and indicated that Petitioner should return in two weeks if no specialist appointment had been scheduled. *Id.*

Petitioner returned to Dr. Michael on July 13, 2011 reporting that his low back pain was not improved, although his leg pain was improved and he had bilateral leg pain, worse on the left. PX5 at 11. He also reported inability to walk more than 10 minutes without severe pain. *Id.* Dr. Michael reviewed the MRI and diagnosed Petitioner with disk protrusions at L3-L4 and L5-S1. *Id.*

On August 30, 2011, Dr. Michael performed the first lumbar epidural steroid injection at Hind General Hospital. PX5 at 12-13; PX8. The second and third epidural injections were performed on September 13 and 27, 2011. *Id.*, at 14-15.

After the series of injections, Petitioner returned to Dr. Michael for a follow up visit on October 10, 2011 reporting no improvement in his low back pain, rather worsening low back pain. PX5 at 16. Dr. Michael noted little improvement from the injections and recommended lumbar disckography to "find the pain generator." *Id.*

Dr. Michael performed the discography himself on October 25, 2011 at Hind General Hospital. PX5 at 17-18. He noted that "... the L5-S1 disc was clearly pathologic on tension, morphologic, and pain provocation grounds. The L3-L4 and L4-L5 discs were also pathologic, but only on tension and morphologic grounds." *Id.* Dr. Michael sent Petitioner for a post-discography CT scan, which was completed that same day at Advanced Imaging Center. *Id.*, at 36-37; PX12.

Petitioner returned to Dr. Michael on October 31, 2011. PX5 at 19. He reported severe leg and low back pain and inability to walk. *Id.* Dr. Michael diagnosed Petitioner with L3-4 through L5-S1 protrusions and L5-S1 discogenic pain. *Id.* He recommended a posterior lumbar fusion. *Id.* Dr. Michael also stated that "[t]here is clearly a causal relationship between his current condition of ill being and the previously reported work injury."

Id. Dr. Michael further stated that Petitioner's post-discogram CT scan, lumbar discogram, and lumbar MRI all "demonstrated and corroborated disc pathology." *Id.* Petitioner returned to Dr. Michael on November 28, 2011 at which time he maintained Petitioner's diagnoses and the surgical recommendation. *Id.*, at 20.

On December 26, 2011, Petitioner underwent the recommended lumbar fusion surgery at L5-S1 at MetroSouth Medical Center. PX5 at 21-23; PX9. Dr. Michael diagnosed Petitioner with a herniated nucleus pulposus at L5-S1 and discogenic pain at L5-S1. *Id.* He also performed the following procedures: (1) L5-S1 discectomy; (2) L5-S1 discogram; (3) L5-S1 discogram him supervision and interpretation; (4) L5-S1 posterior lumbar interbody fusion; (5) L5-S1 prosthetic interbody device; (6) L5-S1 posterior/arthrolateral arthrodesis; (7) L5-S1 posterior instrumentation with pedicle screw and rod construct bilaterally; (8) L5-S1 interspinous process plate posterior instrumentation as a separate construct; (9) intraoperative electroencephalogram; (10) intraoperative evoked and running electromyography; (11) intraoperative upper and lower extremity somatosensory-evoked potential monitoring; (12) intraoperative fluoroscopy; (13) morselized allograft for above arthrodesis; and (14) bone marrow aspiration for stem cell harvest for above arthrodesis. *Id.*

At his January 23, 2012 post-operative visit, Petitioner reported 50% improvement with continued low back pain and leg pain. PX6 at 12. On February 7, 2012 Petitioner reported low back pain, but no leg pain except after prolonged walking. PX5 at 24; PX6 at 15. Dr. Michael noted 50-60% improvement versus preoperatively. *Id.* On March 20, 2012, Petitioner reported improving right leg pain and some low back pain. PX6 at 16. Dr. Michael ordered physical therapy. *Id.*

At his last visit on May 8, 2012, Petitioner reported bilateral leg pain, worse on the left than on the right, and some low back pain. PX6 at 17. Dr. Michael placed Petitioner at maximum medical improvement. *Id.* He also stated "[h]e is at this point totally permanently disabled." *Id.* Petitioner testified that this was his last visit with Dr. Michael.

Section 12 Examination Report and Addendum Report – Dr. Graf

On July 20, 2012, Petitioner submitted to a medical evaluation with Carl Graf. M.D. (Dr. Graf) at Respondent's request. RX6. Dr. Graf noted the following history in pertinent part:

> Mr. Antonio Rodriguezis a 56-year-old male who works for Conagra Foods. He states he works in the sanitation department cleaning the machines and has done so for the past four years. I questioned Mr. Rodriguez regarding the date of injury for which he cannot remember the date. He states that when he got hurt first he was taken by the manager to the company clinic. He notes two weeks later he began to have pain in the left leg once again noting "they didn't pay attention to us." He notes that he worked for another six months "until I couldn't really do it" stating he reported the injury once again and was told to go see his primary care physician. Mr. Rodriguez states his primary care physician would not see him because this was Workers Compensation noting finally he obtained an attorney and was referred to Dr. Ronald Michael. Mr. Rodriguez states he underwent physical therapy for five to six months and had no improvement. He also notes he underwent three epidural steroid injections. Mr. Rodriguez states that on December 6, 2011 he underwent surgery though he does not know exactly what was done. He notes postoperatively he was in a brace for three months and then placed in physical therapy. He notes he could not do much and he underwent continued therapy for three months. He states he was ultimately told by Dr. Michael "that's all I can do for you." She states he was also told by Dr. Michael he would not be able to return to work.

> I questioned Mr. Rodriguez his pain, she notes initially his pain was in his low back to his left leg though he states he cannot remember the date. He states it was approximately 5/10 noting that it was "not that bad." Then he notes the pain progressed to the point where it was 10/10 preop. Currently Mr. Rodriguez notes that his pain postop is a 10/10 and described her as being in the low back into the left leg. He notes in addition he now has pain in the inside/medial aspect of the leg in addition which he did not have postop. I questioned Mr. Rodriguez if he felt that the surgery helped him for which he notes that his legs felt stronger and not swollen though the back pain remained the same.
>
> I further questioned Mr. Rodriguez regarding the plan for his care and treatment. He again reiterated that he was informed by Dr. Michel that there was nothing else that he could do for him.

Id.

Dr. Graf performed a physical examination, reviewed various medical records from Petitioner's physicians, and rendered conclusions regarding the relatedness, if any, of Petitioner's condition of ill-being to any accident at work. RX6. Specifically, he noted that Petitioner could not recall the date of injury, though it was provided to him as October 22, 2009. *Id.* Dr. Graf noted that he had minimal medical records with only one from Concentra on October 26, 2009 and another one on May 12, 2011. *Id.* He indicated that among Petitioner's diagnostic tests, Petitioner's discogram of October 25, 2011 was "invalid" as the report notes 3 cc injected, though there were no pressure recordings documented. *Id.* Dr. Graf noted that he had no records beyond December of 2011, and he requested additional medical records. *Id.* Notwithstanding, he diagnosed Petitioner with degenerative lumbar disease at L3-L4, L4-L5, and L5-S1. *Id.*

On cross examination, Petitioner testified that Dr. Graf offered him the services of a professional interpreter and he declined. Petitioner testified that he understands English but at times he cannot sustain a conversation. Petitioner testified that he has a GED, but he completed it in Spanish. Petitioner went to Truman and took computer classes. Petitioner has a valid Illinois Driver's License.

On September 10, 2014, Dr. Graf authored an addendum report after reviewing additional medical records. RX7. Dr. Graf noted that he was unable to opine previously on causation given the lack of medical records, but that he now received those. *Id.*

Dr. Graf noted that Petitioner was unable to remember the date of accident when he initially examined him. RX7. He also noted that Petitioner's medical records reflected that Petitioner received medical treatment and showed improvement followed by discharge from care. *Id.* Dr. Graf also indicated a three month gap in treatment noting an accident date from Petitioner's primary care physician "in May of 2010 that he began to have leg pain 'after lifting something heavy four to five months ago.'" *Id.* He further noted the date of accident discrepancies indicated in Petitioner's treatment records including a correction in Dr. Carrion's records due to "an apparent 'communication from the lawyer.'" *Id.*; *see also* PX4. Dr. Graf stated:

> Regarding causation, when reviewing the medical records, Mr. Rodriguez appears to claimed injury in October of 2009. He underwent a short amount of treatment and was released with a large gap in treatment. He then presented with complaints of pain dating back one year prior to the reported date of injury. Again, there was another large gap in treatment with Mr. Rodriguez ultimately claiming an injury in October of 2010 in addition to January of 2010. It is not until two years later that Mr. Rodriguez indicate that date of injury of October 22, 2009, ultimately documented by his chiropractor nearly 5 years after the injury in question. Given such, to a reasonable degree of medical and surgical certainty, I am unable to causally connect the claimed injury from October 22, 2014 to his complaints and ultimate treatment years thereafter. This opinion is clearly supported by the various vague claimed dates of

> injury, multiple different claimed mechanisms of injury, etc. ultimately reported many years after the supposed occurrence.

Id. Regardless of causation. Dr. Graf opined that Petitioner was not an appropriate candidate for a lumbar fusion. *Id.*

Vocational Rehabilitation

Petitioner also met with Lawrence Kahan, Ph.D., C.R.C (Mr. Kahan), a vocational rehabilitation expert, on March 15, 2016 for an initial vocational evaluation. RX4. Mr. Kahan found Petitioner capable of returning to work at a medium demand level or below. *Id.* Petitioner possessed a valid Illinois driver's license. *Id.* He also told Mr. Kahan that he could work as a forklift operator and had applied for a forklift position at a Toys-R-Us "within the last year because he felt he could do this type of work." *Id.* Mr. Kahan noted that Petitioner spoke "excellent" English and was bilingual. *Id.* Petitioner completed his GED certification at the age of 22 while attending Truman Community College. *Id.* With regard to this, Petitioner testified that he attained his GED in Spanish. Mr. Kahan also noted that Petitioner received instruction in computers and owned a computer tablet through which he had access to the internet. *Id.* Petitioner's work history included employment as a sanitation department worker, forklift operator, owner-operator of a beauty salon, and an inventory control specials managing product acquisition. *Id.* Pursuant to a transferrable skills analysis Mr. Kahan found Petitioner capable of finding employment as an assembler/light assembly, forklift operator, counter clerk/cashier, sales representative, or unarmed security guard. *Id.* Mr. Kahan noted this sampling of occupations should not be considered an exhaustive list. *Id.*

Mr. Kahan composed a labor market survey report dated April 6, 2016. RX5. Eighteen different employers located close to Petitioner's home were identified as potential employers with job openings for Petitioner with wages from $12.00 per hour to $20.00 per hour. *Id.*

Utilization Reviews

The record reflects that Respondent obtained various utilization reviews dated August 4, 2014. RX15. The review certified as medically necessary the lumbar MRI completed on June 9, 2010, the lumbar x-ray completed on March 26, 2010, the lumbar MRI completed on March 31, 2011, the ESI completed on August 30, 2011, twelve (12) physical therapy visits starting May 12, 2011, thirteen (13) physical therapy sessions starting March 27, 2012, and the lumbar MRI completed on June 11, 2011. *Id.* The utilization review did not certify as medically necessary the cervical MRI completed on March 31, 2011, the ESIs completed on September 13, 2011 and September 27, 2011, the lumbar fusion surgery completed on December 16, 2011, the lumbar discogram completed on October 25, 2011, or the fifty-six (56) physical therapy sessions starting May 12, 2011. *Id.* Finally, the utilization review partially certified the EMG/NCV completed on June 20, 2011. *Id.*

Additional Information

Petitioner testified that since Dr. Carrion placed him off of work in June of 2011, he has not worked for any employer. He also testified that he has not sustained any other accidents involving the low back since October 22, 2009.

Regarding his current condition, Petitioner testified that he continues to have pain in the low back. Petitioner also testified that he does not have strength in his legs. He testified that he takes Advil and over-the-counter

medications for pain four times per day. Petitioner explained that his pain reduces somewhat and he goes out to walk around the block, but he experiences pain. Petitioner also testified that he experiences increased pain when he walks a lot. Outside of walking, Petitioner testified that he does not have other hobbies. Prior to his accident, Petitioner testified that he liked to dance and play baseball. Petitioner testified that he no longer dances because he cannot move his legs and he does not play baseball because he cannot run anymore.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's claimed current condition of ill-being in the low back is causally related to the injury sustained at work on October 22, 2009. In so finding, the Arbitrator finds Petitioner's testimony to be credible and notes the general consistency of his testimony with the medical records submitted into evidence.

There is evidence in the record to support the conclusion that Petitioner had pre-existing degeneration in the spine at the time of his accident. Given Petitioner's age and body habitus alone, there is sufficient evidence to establish as much, but Petitioner's diagnostic tests also reveal degeneration. A claimant may still recover in a preexisting condition case by establishing a causal connection between his work-related injury and claimed current condition of ill-being with a showing that the 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)). "[R]ecovery 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)).

In this case, there is no evidence to suggest that Petitioner had any prior injury to or symptomatology in his low back or radiculopathy prior to October 22, 2009 that prevented him from performing his job duties, engaging in activities of daily living, or necessitated any medical treatment. There is also sufficient and consistent evidence that Petitioner sustained a traumatic event at work causing an immediate onset of low back pain and radicular symptoms after lifting a heavy pallet at work on October 22, 2009.

Petitioner's Amended Application for Adjustment of Claim reflects an accident date of October 22, 2009. Petitioner testified that he was taken to Concentra by his supervisor, Mr. Farmer, on the following day for medical treatment. The medical records submitted into evidence from Concentra confirm Petitioner's testimony about the accident lifting a heavy skid the day before as well as an immediate onset of pain in the low back necessitating immediate medical treatment. Petitioner testified that he felt an onset of leg pain shortly thereafter, which is also corroborated by the medical records. Petitioner was discharged from the company clinic, Concentra, after a period of treatment. He was referred to a physician, Dr. Khan, but did not seek care with him. Instead, Petitioner followed up with his primary care physician, Dr. Luna, three months later reporting low back pain. Petitioner testified that Dr. Luna did not handle workers' compensation claims and he

engaged in extensive and consistent medical treatment with a chiropractor. During this treatment, Petitioner saw Dr. DeBarroto as well as Dr. Michael, the surgeon that eventually performed his low back surgery.

In his report, Dr. Graf, Respondent's Section 12 examiner, repeatedly referenced large gaps in treatment and inconsistencies in Petitioner's reported date of accident throughout the medical records that he reviewed. Petitioner testified that he did not have a very good memory for dates, but he did not sustain any other accident at work involving lifting a heavy pallet or skid. The medical records do reference Petitioner's reports that he had experienced low back pain while engaged in his work previously. However, only one instance of a traumatic onset of low back and leg pain is described—while lifting a heavy pallet at work—and that is consistent with Petitioner's testimony at the hearing, his reports to doctors, and his report to Dr. Graf.

Indeed, Dr. Graf's addendum report of September 10, 2014 is an example of the ease with which mistakes can be made by physicians in recording accident dates whether obtained directly from the patient, taken from other records, or simply due to a scrivener's error. Dr. Graf makes much of the different dates of accident noted throughout Petitioner's medical records—and the improper correction made by Petitioner's chiropractor to the date of accident after being contacted by Petitioner's counsel—but then erroneously concludes that "[g]iven such, to a reasonable degree of medical and surgical certainty, I am unable to causally connect the claimed injury from **October 22, 2014** to his complaints and ultimate treatment years thereafter. This opinion is clearly supported by the various vague claimed dates of injury, multiple different claimed mechanisms of injury, etc. ultimately reported many years after the supposed occurrence." RX7 (**emphasis** added). Based on the totality of the evidence, the Arbitrator does not find the opinions of Dr. Graf regarding causation to be persuasive in this case.

Thus, the Arbitrator finds that Petitioner's claimed current condition of ill-being is causally related to the injury sustained at work on October 22, 2009 as claimed.

<u>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:</u>

Petitioner claims entitlement to payment of reasonable and necessary medical bills from medical providers that administered care after his accident at work. As explained above, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work, and does not find the opinions of Dr. Graf regarding causal connection to be persuasive given the record as a whole. However, the opinions of Dr. Graf regarding the reasonableness and necessity of Petitioner's medical treatment taken in conjunction with the utilization reviews addressing the reasonableness and necessity of the entirety of Petitioner's medical treatment establish that some of the treatment rendered to Petitioner was not reasonable or necessary.

As an initial matter, the Arbitrator finds that Petitioner did not exceed his allotted choices of physicians pursuant to Section 8(a) of the Act which provides that an employer is liable to pay for two chains of medical services as selected by the employee with exception of first aid and emergency treatment. Specifically, Section 8(a) states in pertinent part:

> [T]he employer's liability to pay for ... medical services selected by the employee shall be limited to:
>
> (1) all first aid and emergency treatment; plus

> (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent service provider of medical services in the chain of referrals from said initial service provider; plus
> (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider. 820 ILCS 305/8(a) (LEXIS 2008).

Petitioner initially went to Concentra as directed by Respondent and does not constitute a choice of physician made by Petitioner. He then went to his primary care physician, Dr. Luna, for complaints related to non-occupational diseases. Dr. Luna's records also reflect that he reported his accident at work and subsequent low back pain. Petitioner testified that Dr. Luna did not treat his complaints of low back pain because he did not accept workers' compensation claims. Petitioner testified that he then went to see Dr. De Borroto who referred him to a neurosurgeon. This constitutes Petitioner's first choice of physician. Petitioner's second choice was Dr. Carrion, a chiropractor, at New Life Medical. Petitioner testified that he understood that Dr. Carrion treated low back pain. Dr. Carrion's records reflect that he referred Petitioner to Dr. Michael. Thus, Dr. Michael is within Petitioner's second chain of referrals. Based on all of the foregoing, the Arbitrator finds that Petitioner stayed within his allowable choices and the subsequent chains of referral.

Next, the Arbitrator finds that not all of the treatment rendered to Petitioner is reflective of reasonable or necessary medical treatment to alleviate him of the effects of the injury he sustained. Petitioner testified that the chiropractic care rendered to him was not entirely helpful in alleviating him from his low back pain or radicular symptoms. The extensive chiropractic treatment clearly did not alleviate Petitioner of his symptoms, as he required surgical intervention later. Moreover, the chiropractic care rendered was beyond that recommended by standards in the field as indicated in the utilization review.

Additionally, the utilization reviews did not certify other medical treatment as necessary. In particular, the discogram initially performed by Dr. Michael was not found to be necessary by the utilization review noting the standards in the field. Dr. Michael took exception during questioning at his deposition regarding the use of discography. He explained that they were not controversial if used appropriately. Dr. Graf noted that pressure recordings were not made by Dr. Michael in the discogram report, which was the standard, thus invalidating the discogram results in his opinion. No appeals were taken from the utilization reviews by the prescribing physicians. Notwithstanding, the utilization reviews did certify much of the treatment rendered to Petitioner as being medically necessary as a result of the October 22, 2009 accident, including the decompression portion of his surgery.

Based on the totality of the record, and in reliance on the utilization reviews, which support limited opinions of Dr. Graf regarding Petitioner's medical treatment, the Arbitrator finds that the medical treatment rendered to Petitioner was reasonable and necessary to the extent indicated in Respondent's utilization reviews. Thus, the Arbitrator finds that any medical treatment rendered beyond that certified in the utilization reviews by the following providers is not reasonable, necessary, or related to the work accident and Petitioner's claim for payment of such bills is denied:

- Metro South Medical Center
- Illinois Neurospine Institute
- Hind General Hospital
- M&R Rudra New Life Medical Center
- St. Alexius Medical Center
- BI Anesthesia
- Prime Medical Resources
- Western Open MRI & Imaging
- Lakeshore Open MRI and CT
- Advanced Imaging Center
- EQ-Med

The awarded medical bills shall be paid by Respondent as provided in Sections 8(a) and 8.2 of the Act. Petitioner's claim for payment of the bills of $40.00 from Sanuka Medical Center and $398.00 from Dr. Luis E. Luna are denied because the treatment was not related to this accident.

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

"The 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.*, 201 Ill. App. 3d 880, 886, 559 N.E.2d 526 (1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Mechanical Devices v. Industrial Comm.*, 344 Ill. App. 3d 752, 760, 800 N.E.2d 819 (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).

Petitioner claims entitlement to temporary total disability benefits commencing June 28, 2011 through May 8, 2012. AX1. The medical records reflect that Petitioner was placed off work by his physicians for medical treatment due to symptoms for his low back pain and related radicular complaints. Based on the foregoing, the Arbitrator finds that Petitioner has established his entitlement to temporary total disability benefits for the claimed period from June 28, 2011 through May 8, 2012. Respondent shall receive a credit as stipulated by the parties for any temporary total disability benefits paid. *Id.*

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

The record contains an opinion from Petitioner's treating physician, Dr. Michael, that Petitioner is permanently and totally disabled. Dr. Michael did not explain how he came to such a conclusion or the medical basis for that conclusion. "Expert opinions must be supported by facts and are only as valid as the facts underlying them." *Gross v. Ill. Workers' Comp. Comm'n*, 2011 IL App (4th) 100615WC, *16-17, 960 N.E.2d 587, 594 (4th Dist. 2011) (*citing In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003)). While there is evidence to support the conclusion that Petitioner sustained permanent disability as a result of his injury at work, there is no support in the record for Dr. Michael's unexplained conclusion that Petitioner is permanently and totally disabled. Thus, the Arbitrator finds Dr. Michael's opinion in this regard to be unpersuasive and accords it no weight.

"To qualify for a wage differential award, a claimant must prove (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings." *Wood Dale Electric*, 2013 IL App (1st) 113394WC, *15-16 (*citing* 820 ILCS 305/8(d)(1)). "Instead, a wage differential award is determined by comparing the claimant's prior earning capacity to the amount he 'is earning or is able to earn in some suitable employment or business after the accident.'" *Id.*

The vocational rehabilitation assessment reports of Mr. Kahan found Petitioner capable of returning to work at a medium demand level or below. Mr. Kahan also noted Petitioner's report that he could work as a forklift operator and had applied for a forklift position at a Toys-R-Us "within the last year because he felt he could do this type of work." Pursuant to a transferrable skills analysis Mr. Kahan found Petitioner capable of finding employment as an assembler/light assembly, forklift operator, counter clerk/cashier, sales representative, or unarmed security guard. Given Petitioner's prior earnings for Respondent and the positions available to him as identified in the labor market survey, the Arbitrator finds no evidence to support the conclusion that Petitioner suffered impairment in earnings such that a wage differential award is appropriate. Moreover, the vocational rehabilitation reports do not suggest that Petitioner has sustained a loss of trade as a "cleaner."

However, the totality of the evidence establishes that Petitioner was 53 years of age at the time of his injury with no prior low back pain or radiculopathy in the legs. To alleviate approximately 60% of his symptoms as reflected in Dr. Michael's records, Petitioner underwent a discectomy and fusion at L5-S1 followed by post-operative care with subsequent ongoing low back pain and bilateral leg pain. After undergoing extensive medical treatment, Petitioner testified that he continues to experience low back pain and he also has difficulty with activities of daily living and inability to engage in certain recreational activities. The vocational rehabilitation report confirms that, while Petitioner can work, he would have certain limitations.

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 person as a whole pursuant to §8(d)2 of the Act.

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF COOK	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES ALEVIZOS,

Petitioner,

vs. NO: 96 WC 01261

RELCO ELECTRIC CO.,

19IWCC0003

Respondent.

DECISION AND OPINION UNDER SECTION 19(h) and 8(a) of the Act

This matter comes before the Commission pursuant to a Petition for Review under Section 19(h) and 8(a) of the Act filed by Petitioner on May 11, 2007. A motion under Section 8(a) of the Act and a Petition for Review under Section 19(h) were subsequently filed by Petitioner on October 15, 2009 and on November 4, 2009, respectively. Both petitions and the motion relate back to Petitioner's December 1, 1995 accident as well as the subsequent July 7, 2004 arbitration decision and the May 24, 2007, Commission Decision and Opinion on Review. After repeated continuances at the behest of the parties, the matter came to be heard by the Commission on October 23, 2018. The Commission, after considering the evidence submitted by the parties and pertinent case law, finds Petitioner did not demonstrate that his physical condition subsequent to his April 28, 2004 arbitration hearing is causally related to his December 1, 1995 accident.

"In resolving questions of fact, it is within the province of the Commission to assess the credibility of the witnesses, resolve conflicts in evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Hosteny v. Illinois Workers' Comp. Comm'n*, 397 Ill.App.3d 665, 674, 928 N.E.2d 482, 340 Ill. Dec. 475 (1st Dist. 2009). In this instant case, the Commission found neither Petitioner nor his treating physician, Dr. Gregory Carlson, to be credible. More significantly, the Commission found Petitioner's medical records to be of questionable completeness.

Not insignificantly, the presiding arbitrator questioned Petitioner's veracity in the controlling arbitration decision, noting, "All in all, both the videotapes as well as Petitioner's physical appearance at arbitration – well tanned and physically fit – would belie his claim that he [is] unable to return to work as an electrician." It was this presentation, in part, that precluded a finding that Petitioner was entitled to a wage differential under §8(d)1.

The Commission takes notice that said arbitration decision did not discuss any complaints Petitioner had at the time of the arbitration hearing and, instead, relied on the medical records to arrive at the conclusion that Petitioner's December 1, 1995 accident resulted in injuries that left him with a 25% loss of use of his right foot and a 60% loss of use of the person as a whole. Although the Commission came to affirm and adopt the arbitration decision, the Commission, revisiting the record, receives those awards were as generous as Petitioner had not sought any medical treatment in more than fourteen months before the arbitration hearing.

Three years, four months, and nineteen days passed between Petitioner's last medical treatment related to his December 1, 1995 accident and two years, two months, and two days after Petitioner's April 28, 2004 arbitration hearing before Petitioner again sought treatment for what he claims are complaints traceable to his December 1, 1995 accident. On June 29, 2006, Petitioner presented to Dr. Gary Bennett of Chapman Medical Center with complaints of severe low back and right leg pain. The Commission notes these are the body parts Petitioner injured on December 1, 1995 but is not convinced that Petitioner's presentment to Dr. Bennett on that day can be related back to his accident on December 1, 1995.

Petitioner's sudden resumption of medical treatment after more than three years after last treating his compensable injury gives the Commission pause to believe that Petitioner's condition had steadily worsened over that time until it became necessary for him to present to Dr. Bennett on June 26, 2006. The absence of any medical record from February 11, 2003 until June 29, 2006, particularly given Petitioner's presenting to Dr. Bennett in severe pain on June 29, 2006, would imply an acute injury rather than a gradual worsening of any preexisting injury.

The Commission does read Dr. Bennett's June 29, 2006 record as indicating that Petitioner presented to him with "persistent severe low back and right leg pain" but is left with the question as to when Petitioner's "persistent" pain began. Dr. Bennett, who had treated Petitioner prior to his arbitration hearing, did not offer any indication that these pains were related to his accident of December 1, 1995 though he certainly was familiar enough with Petitioner and his medical history to do so. In the absence of such attribution, the Commission finds Dr. Bennett's silence as to the causation of Petitioner's then-complained-of pain telling.

What the Commission finds more telling is that Dr. Bennett's June 29, 2006 record indicates Petitioner had been referred to him by Dr. James Alevizos. Contained within the medical records Petitioner tendered in support of his motion and petition is no record of Petitioner ever being seen by Dr. Alevizos. Without a record from Dr. Alevizos, there is no history to explain why Petitioner was referred to Dr. Bennett. It is noted by way of Petitioner's testimony and repeatedly in Petitioner's medical records that Dr. Alevizos is Petitioner's brother, occasionally his primary care physician, and the coordinator of all of his medical care.

Despite Petitioner's complaint of "persistent severe low back and right leg pain" and Dr. Bennett recommending on June 29, 2006 that Petitioner undergo conservative treatment, including epidural and transforaminal steroid injections, Petitioner appears not to have sought further medical care until he presented to Dr. Kamrom Aflatoon of Southern California Spine and Orthopedic Oncology on February 28, 2007, more than six months later. No explanation was given to explain the delay between when Petitioner was seen by Dr. Bennett and when he was seen by Dr. Aflatoon.

Petitioner's presentment to Dr. Aflatoon for a "lumbar spine consultation" on February 28, 2007, like that of his to Dr. Bennett, indicated no worsening of his condition related to his December 1, 1995 accident. Dr. Aflatoon noted only that Petitioner had been living with weakness, pain, and urinary incontinence since he underwent a decompression at L5-S1 and a fusion of those discs. It is noted that, per the arbitration decision, these surgeries occurred on February 22, 2000. As related to Dr. Aflatoon, Petitioner's condition had not worsened but had stayed static from 2000 until at least February 28, 2007.

Dr. Aflatoon, on May 16, 2007 and for a reason unknown, authored an addendum to his February 28, 2007, Lumbar Spine Evaluation report in which he noted Petitioner's continued low back pain to be causally related to Petitioner's December 1, 1995 accident. Still not discussed by Dr. Aflatoon in this addendum was Petitioner complaining of or any objective finding of any worsening of Petitioner's condition. The Commission notes Dr. Aflatoon's addendum would not satisfy the requirement for additional compensation under Section 19(h) that the condition must have worsened not merely be attributable to.

Given that the Commission is permitted to draw reasonable inferences from the evidence before it, the Commission infers Petitioner presenting to Dr. Bennett with severe back and leg on June 29, 2006 following a referral from Dr. Alevizos was the result of an acute injury rather than the slow and steady worsening of pain over three years since Petitioner last treated his compensable injury. The Commission, therefore, finds Petitioner's treatment with Dr. Bennett on June 29, 2006 and all the medical treatment Petitioner received thereafter is attributable to an undisclosed injury that occurred sometime after Petitioner's April 28, 2004 arbitration hearing.

As noted above, the Commission is empowered to assess the credibility of witnesses and, in so doing, finds Petitioner to lack the credibility to believe that his condition as of June 29, 2006 was relatable to his December 1, 1995 accident. Revisiting the controlling arbitration, the Commission finds two instances that call into question Petitioner's veracity. The first is the presiding arbitrator's conclusion that Petitioner's physical appearance, being well-tanned and physically fit, belied Petitioner's claim that he could not return to work as an electrician. The second instance is the referenced video surveillance footage that showed Petitioner capable of repeatedly lifting weights in excess of 100 pounds doing so while on a medically-imposed restriction against lifting no more than 30 pounds. The Commission concludes, based on the record, that Petitioner never sought to revisit his lifting restrictions based on his demonstrated ability to safely lift more than 30 pounds and, in doing so, misrepresented the true nature of his condition.

Petitioner's testimony, itself, calls into question his veracity. On direct examination, he was able to give definitive answers to the posed questions. On cross-examination, forty-four times he answered the questions with indications that he did not recall or did not remember the incident, activity, or conversation he was being asked about. It is his failure to recall the histories he provided to Dr. Dominguez that illustrates why Petitioner's testimony is questioned.

Petitioner testified that he was a member of LA Fitness and acknowledged that he went there a few times over the past ten years to use the whirlpool. He related a few instances in which he got "stuck" in the whirlpool and those experiences led him to tell the gym employees that he wouldn't be back. He testified that he no longer goes to the gym. As Petitioner's testimony was given on May 18, 2017 and Petitioner's testimony implied that he only used the gym's whirlpools within the past ten years, the conclusion is that Petitioner did not engage in exercise activities at the gym since at least 2007. Petitioner began seeing Dr. Miguel Dominguez in 2008, after the time he purportedly stopped exercising. Between 2008 and 2011, many of Dr. Dominguez's records repeatedly included a social history indicating that Petitioner "usually exercised." The records did not state what exercises Petitioner engaged in or where the exercising took place, but these records contradict the implied inference that Petitioner stopped exercising in 2007.

Petitioner's demonstrated on-again, off-again pain mannerisms as shown in the video recording of his testimony and the apparent misrepresentation of his exercise regime gives the Commission pause to believe his testimony was completely truthful. Petitioner's witness, Dr. Gregory Carlson, does nothing to overcome the Commission's reservations. Dr. Carlson appears to be enabling Petitioner's workers' compensation claim as much as treating Petitioner's complaints.

Dr. Carlson first saw Petitioner on May 13, 2011, for a consultation concerning his low back condition and continued to see him thereafter as one of his treating physicians. On December 12, 2012, he completed a "Consulting Physician's Permanent and Stationary Report." He ultimately concluded Petitioner to be 100% disabled from performing any meaningful work, having noted earlier in the report that Petitioner had developed "significant mental health issues" that impede him from both returning to a functional lifestyle and coping with his pain. In the approximately twelve visits Petitioner had with Dr. Carlson between the May 13, 2011, consultation and Dr. Carlson authoring the Consulting Physician's Permanent and Stationary Report on December 12, 2012, Dr. Carlson not once made a diagnosis relative to Petitioner's mental health in any of the records memorializing those visits. The Commission finds Dr. Carlson's lack of positive significant psychiatric or psychological findings consistent with the records of Petitioner's previous treating physician, Dr. Dominguez, with whom Petitioner treated with from 2008 and 2011.

Dr. Dominguez authored a Pain Management Workers' Compensation Report following each visit and within each report was both a behavioral assessment and a cognitive assessment. These assessments noted Petitioner exhibited anxiousness and distress but, other than those findings, Dr. Dominguez detected no behavioral abnormalities and unremarkable cognitive assessments. It is found significant that Dr. Dominguez did not feel compelled to refer Petitioner to another physician to address his anxiousness and distress.

19IWCC0003

Dr. Albert Lai succeeded Dr. Dominguez as Petitioner's pain medication physician, treating Petitioner from 2011 into 2014. His records include a section entitled Review of Systems and listed among the reviewed systems was anxiety and depression. Dr. Lai's objective findings included only anxiety. Dr. Lai, like Dr. Dominguez before him, did not refer Petitioner to anyone to address either his anxiety and depression.

Petitioner's psychiatric/psychological condition was also assessed by Dr. R. Wayne Brown, the psychologist who examined Petitioner in conjunction with the spinal cord stimulator trial, on December 12, 2008. Dr. Brown concluded Petitioner had mild to moderate depression and anxiety. He noted Petitioner, himself, believed his depression to a "low level."

A review of Petitioner's medical records from 2008 through 2012 provides no indication of Petitioner's mental state demonstrating, as Dr. Carlson described, "significant mental health issues" at any time prior to him write as much in his Consulting Physician's Permanent and Stationary Report from December 12, 2012. That Dr. Carlson, despite that diagnosis, did not subsequently refer Petitioner for psychiatric or psychological care undermines his diagnosis.

Petitioner's mental health status was revisited by Dr. Khang Lai, the pain management physician with whom Petitioner has been treating with since September 14, 2016. The diagnoses Dr. Lai made of Petitioner's condition as a result of his examination of Petitioner that day included recurrent major depressive disorder. The Commission is at a loss as to how Dr. Lai arrived at that diagnosis given that neither Petitioner's chief complaints nor his recounted history included any complaints that touched upon his mental health. More significantly, the Review of Symptoms indicates Petitioner's mental status to be normal and without depression. Dr. Lai's subsequent visit records repeat the diagnosis of recurrent major depressive disorder and repeatedly recommends that Petitioner's primary care physician refer Petitioner for psychiatric/psychological treatment. As Petitioner testified to, his primary care physician is, in fact, his brother, Dr. John Avelizos, and Dr. Avelizos has coordinated his medical care ever since he moved to California in February 1999. There was no testimony or medical record in evidence that Dr. Avelizos ever made such a referral.

Dr. Carlson, on May 8, 2014, also authored a "To Whom It May Concern" letter in which he concluded that Petitioner was unable to take a four-hour flight to be present for the hearing in support of his 19(h) petition. He testified that "someone" asked him to write a letter but was unable to recall who that was. More troubling was his explanation as to how he knew Petitioner was unable to make such a flight. He testified that he knew Petitioner could not handle a four-hour flight because Petitioner's condition hadn't changed from the last time he saw him. Dr. Carlson's records indicate that last time he saw Petitioner prior to writing the "To Whom It May Concern" letter on May 8, 2014, was on August 21, 2013. Dr. Carlson did not offer an explanation as to how he knew what Petitioner's condition was on May 8, 2014, when he hadn't seen Petitioner for 261 days. How Dr. Carlson assessed Petitioner's ability to travel is consistent with how he came to assess Petitioner's mental health. Both were made in a vacuum without an examination or medical records that support his conclusions.

Petitioner could have satisfied his burden of demonstrating that his condition related to his December 1, 1995 accident had worsened by providing the Commission with medical records that illustrated that and/or with credible testimony. The Commission, after reviewing the medical records, is left with the impression that Petitioner is hiding something by not tendering any medical records that precede his presentment to Dr. Bennett on June 29, 2006, particularly if those medical records would evidence of a worsening of his condition. Also, the Commission, after reviewing the controlling arbitration decision and Petitioner's testimony in support of his Motion and Petitions, is left with the impression that Petitioner is not above engaging in misrepresentation. Simply stated, he is not credible. On that basis alone, the Commission is compelled to deny his claim for additional benefits under Section 19(h) and Section 8(a) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISION that Petitioner's May 11, 2007, Petition for Review under Section 19(h) and 8(a) of the Act, Petitioner's October 15, 2009 Motion under Section 8(a), and Petitioner's November 4, 2009 Petition for Review under Section 19(h) are denied.

No bond for removal of this cause to Circuit Court is fixed as no compensation was awarded. The party commencing the proceeding in the Circuit Court shell file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 4 - 2019
KWL/mav
O: 10/23/18
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

19IWCC0004

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 LAKE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gary Roberts,

Petitioner,

vs. NO: 16WC 39153

City of Zion,

Respondent.

19IWCC0004

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical, temporary total disability 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 5, 2017 is hereby affirmed and adopted.

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

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

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

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

DATED: JAN 4 - 2019
o121118
KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

ROBERTS, GARY
Employee/Petitioner

Case# **16WC039153**

CITY OF ZION
Employer/Respondent

19IWCC0004

On 10/5/2017, 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 1.19% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0152 LINN CAMPE & RIZZO LTD
JACK M LINN
215 N MARTIN L KING JR AVE
WAUKEGAN, IL 60085

0507 RUSIN & MACIOROWSKI LTD
EVAN KLUG
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Gary Roberts
Employee/Petitioner

Case # 16 WC 39153

v.

Consolidated cases: _____

City of Zion
Employer/Respondent

19IWCC0004

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Woodstock, Illinois**, on **September 6, 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] 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, **July 22, 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 $**59,922.08**; the average weekly wage was $**1,152.35**.

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 $**45,513.36** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**45,513.36**.

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 $768.23 per week for 74 and 1/7 weeks, from 11/2/15 through 4/3/17, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the Petitioner.

Respondent shall authorize and pay the reasonable and necessary costs associated with the repeat right shoulder surgery prescribed for the Petitioner by Dr. Pavlatos, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay to the medical providers pursuant to the fee schedule the amounts totaling $5,448.98 for reasonable and necessary medical services as determined and contained in Petitioners Exhibits 1-4 as provided in Section 8(a) and 8.2 of the Act.

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

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

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

Signature of Arbitrator

10/3/17
Date

ICArbDec19(b)

OCT 5 - 2017

In support of the Arbitrator's Decision relating to F (Causal Connection) and K (Prospective Medical Care), the Arbitrator finds as follows:

Petitioner, a 56 year old street maintenance worker in the public works department, has been employed by Respondent, City of Zion, since 2007. Petitioner testified that his duties as for Respondent involve regularly lifting and carrying trees during removal, snow plowing and snow shoveling. He further testified that the job requires regular climbing and overhead lifting. Petitioner testified that he has no other skills or training other than the ability to perform physical labor, and that he was a high school graduate.

It is undisputed that Petitioner sustained a work injury on July 22, 2015, when a step on his work truck snapped off while he was exiting the vehicle. Petitioner testified that he fell and landed on his outstretched right arm, and felt immediate pain in his right shoulder. Petitioner testified that he had never previously injured his right shoulder, and that he had never been seen by a doctor for right shoulder complaints.

Petitioner testified that he immediately notified his supervisor, Charlie Fisher, of the work injury. Petitioner stated that he tried to work through the pain for a day, but after it became too intense he discussed the possibility of seeking medical care with Supervisor Fisher. Supervisor Fisher agreed and drove Petitioner to Advocate Condell Immediate Care on July 24, 2015. This account was corroborated by Mr. Fisher at arbitration, when he was called as a witness for Respondent.

Petitioner received medical care at Advocate on July 24, 2015 and July 29, 2015. Petitioner was diagnosed with rotator cuff strain, prescribed medication and given light duty restrictions. (PX 10) Petitioner next sought the care of his primary care doctor, Dr. Alby Antoo, on August 4, 2015. (PX 11) Dr. Antoo prescribed an MRI, which when performed on August 12, 2015 at Alpha Imaging demonstrated a full-thickness tear within the anterior insertional fibers of the supraspinatus tendon, extending into the rotator cuff interval. (PX 7) Dr. Antoo referred Petitioner to Dr. Pavlatos for orthopedic care. (PX 11)

Petitioner presented to Dr. Pavlatos on September 28, 2015. After reviewing the previously taken MRI and performing an examination, Dr. Pavlatos administered a steroid injection and recommended therapy. Surgery was also discussed as an option. Following a short course of therapy at ATI, Dr. Pavlatos totally restricted Petitioner from working as of November 2, 2015 (PX 5) and prescribed surgery which was performed on November 30, 2015 at Hawthorn Surgery Center. (PX 6) Surgery consisted of a right shoulder arthroscopy, debridement of the labrum, arthroscopic subacromial decompression, arthroscopic distal clavicle resection, arthroscopic rotator cuff repair with arthroscopic biceps tenodesis onto the rotator cuff. The post-operative diagnosis was right shoulder impingement, acromioclavicular joint arthritis and pain, rotator cuff tear, high-grade partial tear of the biceps tendon. (PX6)

Post-operatively, Petitioner followed up monthly with Dr. Pavlatos. He remained restricted from working and received TTD benefits. Petitioner was regularly attending physical therapy at ATI, as prescribed by Dr. Pavlatos. At the March 9, 2016 office visit, Dr. Pavlatos noted Petitioner's right arm was experiencing weakness, pain, crepitation. He diagnosed an inflamed rotator cuff, and recommended a cortisone injection. (PX 5)

Petitioner testified that while in physical therapy at ATI on April 14, 2016, he was using bands to stretch and felt a pop and pain in his abdomen. He reported this to Dr. Pavlatos, who referred him to Dr. Ganshirt for a suspected inguinal hernia. (PX 8). After a consultation with Dr. Ganshirt on April 25, 2016, Dr. Ganshirt performed surgery to repair the hernia on May 14, 2016 at Lake Forest Hospital. (PX 9)

Following the hernia surgery, Dr. Pavlatos moved Petitioner from ATI to Creative Rehabilitation for the physical therapy on his right shoulder. Petitioner continued to follow up monthly with Dr. Pavlatos. He remained off work, and continued to receive TTD benefits.

At the October 13, 2016 office visit, Dr. Pavlatos noted Petitioner was still having discomfort, pain, and a diminished range of motion in the right shoulder. Dr. Pavlatos was concerned that Petitioner may have had a very inflamed rotator cuff repair. He indicated that the tear may have not healed properly. The doctor administered a cortisone injection and suggested a repeat MRI might be appropriate. (PX 5) Petitioner testified that he did not sustain an acute re-injury of the shoulder.

Petitioner underwent the repeat MRI at Alpha Imaging on November 17, 2016. The impression was full thickness tear seen within the mid and posterior fibers of the supraspinatus tendon. Also noted was high grade SLAP tear of the glenoid labrum with prominent separation of the torn portion. (PX 7)

Following the MRI, Petitioner returned to Dr. Pavlatos on December 9, 2016. Upon examination, the doctor wrote "clear weakness and positive impingement and supraspinatus sign is noted. His weakness is noted in the rotator cuff." (PX 5) Dr. Pavlatos prescribed an additional surgery. Dr. Pavlatos stated Petitioner "will need to have a revision rotator cuff repair because of his persistent symptoms. We cannot schedule this until he gets work comp approval." The doctor added, "As a result of the July 22, 2015 work injury, …a second work-related corrective surgery to his right shoulder has been prescribed." Petitioner's restricted work duty status was continued. (PX 5 – See 12/9/16 office note and prescription)

Petitioner underwent a Section 12 examination at the request of Respondent on October 26, 2016 by Dr. David Fetter. (RX 1) Dr. Fetter also issued addendum reports dated November 4, 2016 (RX 2) and December 7, 2016 (RX 3). Dr. Fetter opined in reports dated October 29, 2016 and November 4, 2016, that Petitioner experienced a right shoulder sprain on July 22, 2015, which should have resolved in eight weeks or by approximately September 28, 2015. Dr. Fetter wrote, "Unfortunately, the concept of "tear" is a misnomer regarding rotator cuff pathology. "Tear" implies/indicates a single, violent event to tissues. This is simply not the case…The "tear" of the rotator cuff is usually due to age, BMI, gender, biopsychosocial factors, diabetes, etc. The strongest evidence is regarding evidence is age, BMI and biopsychosocial factors, which indeed are present in this claim. In other words, rotator cuff defect, particularly in athletes, is due to attrition over time, rather than a single event. The concept of "tear" and "disc herniation" imply a single event which is not the case…Rotator cuff defects rarely would occur from an acute injury as demonstrated in athletes, wherein the most common cause of rotator cuff dysfunction is repetitive stress usage coupled with age-related degeneration, chronic mechanical impingement, and altered blood supply to the tendons…" The doctor also indicated that "Most individuals with full-thickness cuff defects are not only asymptomatic, but have minimal disability or dysfunction. The most excepted figure is 20 -30 percent." (RX 1) Dr. Fetter opined that Petitioner had preexisting degenerative rotator cuff defects that were not the result of the alleged work injury, and that treatment for the shoulder condition after September 28, 2015 was not causally related to work. Dr. Fetter opined Petitioner could have returned to work without restriction effective September 28, 2015, and Petitioner was capable of a return to regular work without restriction at the time of October 2016 examination. (RX 1)

In his December 7, 2016 addendum report, Dr. Fetter noted he reviewed the November 2016 MRI and updated progress notes. Dr. Fetter opined that the records did not support a recommendation for additional surgical intervention in a 57 year old individual with a degenerative shoulder condition, functional range of motion, good strength and status post reconstructive surgery. (RX 3)

Petitioner testified that following his examination with Dr. Fetter, he received notification from the workers' compensation carrier that TTD benefits would terminate on December 4, 2016.

Petitioner continued to follow up with Dr. Pavlatos monthly, awaiting approval for the right shoulder surgery. (See PX 5- 2/9/2017 Surgery Approval Request from IBJI to IPRF) At the March 30, 2017 office visit, Dr. Pavlatos noted that Petitioner was still in pain, lacked full range of motion, and experiencing weakness. Dr. Pavlatos recorded that Petitioner wanted "to go back to work, so he does not lose his job, so we will return him to full duty as tolerated." Dr. Pavlatos also provided that eventually, Petitioner would require a repeat arthroscopy for rotator cuff repair. (PX 5) Petitioner testified that Dr. Pavlatos was reluctant to give him a full duty release.

Petitioner testified that upon his return to work, he continued to experience pain in his right shoulder. He lacks strength in the shoulder and has mobility difficulties. Petitioner stated he primarily drives the truck to pick-up materials and he no longer performs tree trimming duties. He testified that he tries to limit the use of his right shoulder as best he can. Lastly, Petitioner testified that he has not experienced any new right shoulder injuries between the initial accident (July 22, 2015) and the date of arbitration.

Petitioner's supervisor Charles Fisher was called to testify on behalf of Respondent. Mr. Fisher testified that since returning to work, Petitioner only reported once incident, "about four (4) weeks ago," when Petitioner indicated "that once [he] gets more strength [he] could do more."

Petitioner credibly testified that he had no right shoulder problems prior to the undisputed accident on July 22, 2015. Petitioner's testimony is supported by the medical records submitted which support that his right shoulder condition of ill-being was asymptomatic until the accident.

Respondent's Section 12 examiner, Dr. Fetter, opined that Petitioner had preexisting degenerative rotator cuff defects that were not the result of the alleged work injury, and that the treatment for the shoulder condition after September 28, 2015 was not causally related to work. The doctor reasoned that "...the concept of "tear" is a misnomer regarding rotator cuff pathology. "Tear" implies/indicates a single, violent event to tissues. This is simply not the case...The "tear" of the rotator cuff is usually due to age, BMI, gender, biopsychosocial factors, diabetes, etc. The strongest evidence is regarding evidence is age, BMI and biopsychosocial factors, which indeed are present in this claim. In other words, rotator cuff defect, particularly in athletes, is due to attrition over time, rather than a single event. The concept of "tear" and "disc herniation" imply a single event which is not the case...Rotator cuff defects rarely would occur from an acute injury as demonstrated in athletes, wherein the most common cause of rotator cuff dysfunction is repetitive stress usage coupled with age-related degeneration, chronic mechanical impingement, and altered blood supply to the tendons...Most individuals with full-thickness cuff defects are not only asymptomatic, but have minimal disability or dysfunction. The most excepted figure is 20 -30 percent." The Arbitrator notes that Petitioner testified he is not (nor has he ever been) an athlete. Petitioner credibly testified he had no prior or intervening right shoulder injuries beyond his July 22, 2015 accident. Dr. Fetter opined that rotator cuff tears are by definition chronic, and that rotator cuff tears are rarely acute. The Arbitrator does not find Dr. Fetter's opinion persuasive.

On November 30, 2015, Dr. Pavaltos performed a right shoulder arthroscopy, debridement of the labrum, arthroscopic subacromial decompression, arthroscopic distal clavicle resection, arthroscopic rotator cuff repair with arthroscopic biceps tenodesis onto the rotator cuff. Post-operatively, Petitioner followed up monthly with Dr. Pavlatos with continual discomfort, pain, and a diminished range of motion in the right shoulder. Dr. Pavlatos was concerned that Petitioner may have had a very inflamed rotator cuff repair indicating a suspicion that the tear may have not healed properly. After obtaining a repeat MRI Dr. Pavlatos prescribed an additional surgery indicating Petitioner would need to have a revision rotator cuff repair because of his persistent symptoms The doctor specifically related Petitioner's condition to the July 22, 2015 work injury and that "...a second work-related corrective surgery to his right shoulder has been prescribed."

Based upon the credible testimony of Petitioner and the records and reports of Dr. Pavlatos, the Arbitrator finds that Petitioner's present right shoulder condition of ill-being is causally related to the July 22, 2015 work injury.

Having found the requisite causal relationship, the Arbitrator further finds that Respondent shall authorize the corrective surgery consisting of a right shoulder arthroscopy and revision of the rotator cuff repair, as prescribed by Dr. Pavlatos.

In support of the Arbitrator's Decision relating to J (were the medical services provided to Petitioner reasonable and necessary; has Respondent paid all appropriate charges), the Arbitrator finds as follows:

The Arbitrator's findings regarding Causal Connection and the stipulation to an undisputed work accident as noted above are incorporated herein.

Petitioner submitted outstanding medical expenses in the amount of $5,448.98:

PX 1 – Illinois Bone & Joint	$415.00
PX 2 – Creative Rehabilitation	$4016.00
PX 3 – Lake Forest Hospital	$426.98
PX 4 – Dr. Ganshirt	$591.00

In light of the Arbitrator's conclusion that Petitioner's present condition is causally related to the July 22, 2015 work accident, the Arbitrator finds that Respondent is liable for charges related to the treatment thereof.

Accordingly, Respondent shall pay to the respective medical providers pursuant to the fee schedule the bills submitted in Petitioner's exhibits 1-4 for reasonable and necessary medical services as provided in Section 8(a) and 8.2 of the Act.

In support of the Arbitrator's Decision relating to L (temporary total disability benefits), the Arbitrator finds as follows:

The Arbitrator's findings regarding Causal Connection and the stipulation to an undisputed work accident as noted above are incorporated herein.

Respondent disputed its obligation to pay temporary total disability benefits based upon their reliance on Dr. Fetter's opinion as stated in his October 29, 2016 Section 12 report (RX 1), November 4, 2016 Addendum (RX 2), and December 7, 2016 Addendum (RX 3).

Petitioner was initially restricted from working by Dr. Pavlatos on November 2, 2015. Petitioner remained restricted from work until April 3, 2017, when he requested a release to full duty as he was concerned about losing his job and inability to pay his bills. Dr. Pavlatos granted Petitioner's request and released him to full duty. Petitioner testified that he continues to work through arbitration, albeit with difficulty.

The Arbitrator, having found that Petitioner's right shoulder condition is causally related to the undisputed work injury, finds that Petitioner is entitled to temporary total disability benefits. The Arbitrator relying on Dr. Pavlatos' recommendations finds Petitioner was temporarily and totally disabled for the period of November 2, 2015 through April 3, 2017, or a period of 74-1/7 weeks.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tomasz Maj,

Petitioner,

vs. No. 18 WC 03176

Chris Home Remodeling, Inc. and
Krzysztof Cholko,

Respondents.

19IWCC0005

DECISION AND OPINION UNDER SECTION 4(d)

This matter comes before the Commission on Petitioner's petition pursuant to section 4(d) of the Workers' Compensation Act (the Act) (820 ILCS 305/4(d)). Petitioner seeks a finding that: Respondents were subject to the Act; Petitioner was an employee of Respondents on March 4, 2016; and Respondents knowingly failed to provide workers' compensation insurance which would have covered the injuries Petitioner sustained in an explosion at a job site. For the reasons that follow, the Commission grants the petition.

Petitioner's application for adjustment of claim alleges that on March 4, 2016, Petitioner sustained severe injuries to the hands, face, head and chest while working with a welding torch. Contemporaneously, Petitioner filed his petition pursuant to section 4(d) of the Act. On October 24, 2018, Commissioner Stephen Mathis held a hearing, with proper notice given. All parties appeared, and a record was made.

Petitioner testified through a Polish interpreter that he was an employee of Respondents for approximately ten years, mostly doing painting jobs. Petitioner used the tools and supplies provided by Respondents, including paint brushes and rollers, paint, tarps and ladders. Respondents paid Petitioner in cash. The owners of the properties never paid Petitioner. Respondents assigned the work for Petitioner to perform and determined what days he would work. Respondents could fire Petitioner from the project at any time.

Petitioner further testified that on March 4, 2016, Mr. Cholko gave him a ride to a residential job site. In the afternoon, Petitioner was painting a room addition on the second floor at the direction of Respondents. Respondents had provided the paint and told Petitioner what colors to use. Near the end of the workday, Mr. Cholko requested Petitioner's assistance with some plumbing work in the downstairs bathroom. The nature of the plumbing work required two people to work together. The explosion occurred when Petitioner used a welding torch, causing him to sustain significant burns and ultimately need treatment at the burn unit of Loyola University Medical Center.

Krzysztof Cholko, who appeared *pro se* on behalf of Respondents, testified that Chris Home Remodeling has been in the home remodeling business for over 20 years. The owners of the residence in question hired Chris Home Remodeling as a general contractor to perform significant remodeling work. Mr. Cholko knew that he was required to carry workers' compensation insurance if he had any employees. Mr. Cholko decided not to buy workers' compensation insurance because he considered everyone working on the project, except himself and his son, to be a subcontractor.[1] Respondents used Petitioner as a painting subcontractor because Petitioner was a good painter and charged only $400.00 per room. Respondents had the right to fire Petitioner at any time. According to Mr. Cholko, on March 4, 2016, Petitioner finished painting at 2 p.m. and wanted to leave early. However, Petitioner, who did not have a car, needed a ride home. At the same time, Mr. Cholko noticed a water leak that required immediate attention. Petitioner offered to help, so that they could leave sooner. Mr. Cholko repeatedly told Petitioner he did not need the help. Petitioner, nonetheless, grabbed a hammer and tried to hit the coupling between two pipes, striking the welding torch and causing an explosion. Mr. Cholko, like Petitioner, sustained significant burns as a result.

Erin Mitoraj, a court reporter, testified that she was present at the deposition of Mr. Cholko taken July 27, 2017. Mr. Cholko testified, among other things, that Chris Home Remodeling had a work truck and various construction tools. A homeowner would contact Chris Home Remodeling about the work that needed to be done and the price. Mr. Cholko would negotiate with the homeowner and enter into an agreement, which was the case with the residential project in question, where Chris Home Remodeling was the general contractor. Mr. Cholko used Petitioner for painting only. Respondents provided the painting tools and materials. Petitioner only worked four days on the residential project in question, on an as-needed basis. Petitioner did not work for Chris Home Remodeling continuously; he only came when Mr. Cholko instructed him to work. Respondents paid Petitioner in cash. On March 4, 2016, Petitioner painted two bedrooms on the second floor. Respondents provided the paint and painting tools and materials. The owner chose the color of the paint after talking to Mr. Cholko. While Petitioner was painting, Mr. Cholko was trying to seal a plumbing leak.

The Commission finds that Respondents engaged in an extra hazardous business, namely, the remodeling of any structure, and therefore were subject to the Act and required to provide workers' compensation insurance to their employees. See 820 ILCS 305/1, 3, 4. Petitioner was

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[1] A National Council on Compensation Insurance (NCCI) certificate in evidence confirms that Respondents did not carry a workers' compensation insurance policy on March 4, 2016.

an employee of Respondents on March 4, 2016, as Respondents provided the tools, materials, supplies and transportation to the job site, assigned the work for Petitioner to perform, determined what days and hours he would work, and could fire him from the project at any time—evidencing an employer-employee relationship under the *Roberson*[2] test. Respondents knowingly failed to provide workers' compensation insurance which would have covered the injuries Petitioner sustained in the explosion on the job site on March 4, 2016. As such, Respondents "are no longer entitled to the benefits and protections of the Act and may be sued in civil court." See *Keating v. 68th and Paxton L.L.C.*, 401 Ill. App. 3d 456, 466 (2010).

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's petition pursuant to section 4(d) of the Act is granted.

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

DATED: JAN 4 - 2019
SM/sk
44

Stephen Mathis

David L. Gore

Deborah Simpson

[2] *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 174-75 (2007).

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Summers,

Petitioner,

vs. NO: 16 WC 6546

Scheck Mechanical,

19IWCC0006

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent and Petitioner herein and notice provided to all parties, the Commission after considering the issues of causal relationship, temporary total disability benefits, medical expenses both incurred and prospective and permanent partial disability benefits, and being advised of the facts and the 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 the finding of a causal relationship between Petitioner's January 16, 2015 accident and his resulting condition of ill-being to his mid thoracic area based upon the opinions of Drs. Koth, Colle and Kube, which were more persuasive than those of Dr. deGrange. However, the Commission finds Petitioner reached maximum medical improvement as of September 28, 2016 and vacates the Arbitrator's award of temporary total disability benefits and medical expenses following September 28, 2016. Furthermore, the Commission increases the permanent partial disability award to 45% loss of use of the person as a whole pursuant to §8(d)2 of the Act. The Commission also corrects the clerical error regarding Petitioner's age in the Arbitrator's Decision on the face page under Findings and on Page 15 of the Decision to reflect Petitioner was 50 years-old at the time of the accident.

Maximum Medical Improvement

"The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) 'most importantly,' whether the injury has stabilized. [citations omitted]." *Mechanical Devices v. Industrial Commission (Johnson)*, 344 Ill. App. 3d 752, 760, 800 N.E.2d 819 (2003). Given the medical evidence, Petitioner's mid thoracic condition stabilized as of September 28, 2016, therefore this is the appropriate date for the establishment of MMI. On that date, Dr. Kube found Petitioner reached maximum medical improvement, recommended chronic medication management and discharged him from care. PX7.

Temporary Total Disability/Medical Expenses

"The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement. [citation omitted]. Once an injured employee's physical condition has stabilized, the employee is no longer eligible for TTD benefits because the disabling condition has become permanent. [citation omitted]." *Mechanical Devices* at 759. Based on the above finding of MMI, the Commission modifies the award of temporary total disability benefits. The Commission affirms the award of benefits from December 16, 2015 through January 28, 2016 and from August 10, 2016 through September 28, 2016, a total period of 13-3/7 weeks but vacates the award of benefits from September 29, 2016 through November 17, 2017. Respondent paid temporary total disability benefits of $36,853.48 and is entitled to credit for same. The Commission further modifies the award of medical expenses to include charges for treatment rendered through the September 28, 2016 date of maximum medical improvement.

Permanent Partial Disability

Pursuant to Section 8.1b of the Act, the Commission weighs the following five factors accordingly (*820 ILCS 305/8.1b(b)* (West 2014); *Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC, ¶ 52, 56 N.E.3d 1101):

Section 8.1b(b)(i) – level of impairment

Neither party obtained an impairment rating, so the Commission assigns no weight to this factor.

Section 8.1b(b)(ii) – occupation of the injured employee

Petitioner was employed as a boilermaker at the time of the January 16, 2015 accident and he has not returned to that position since May 2, 2015 or any other position. The Commission finds this weighs in favor of an increased permanence.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 50 years old on the date of accident. The Commission observes Petitioner has a lesser work life expectancy which will require him to manage the effects of his injury for a lesser period of time. The Commission finds this weighs in favor of a decreased permanence.

Section 8.1b(b)(iv) – employee's future earning capacity

Following his January 16, 2015 injury, Petitioner returned to his position as a boilermaker and worked for a period of time until he was laid off on May 2, 2015. Petitioner testified he has not worked in more than two years, however, on cross-examination he testified he has not made any attempts to seek employment since being laid off. He has not presented to the union hall to request placement, nor has he sought any other employment outside the union nor conducted any type of job search. T. 22-23, 26, 51-52. Petitioner is permanently restricted to light activity with frequent lifting of 10 pounds and limited lifting up to 30 pounds, limited bending and twisting and limited prolonged sitting or standing. PX7.

In effect, Petitioner has lost access to his trade, and his earning capacity is affected by the injury he sustained. The Commission places significant weight on this factor as being indicative of increased permanence.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

Following his January 16, 2015 accident, Petitioner complained of pain in the right thoracolumbar area. He was initially diagnosed with a thoracic paraspinal muscle spasm and strain by Dr. Patel. PX1. A thoracic MRI was performed. Dr. Koth reviewed the MRI, which evidenced multilevel degenerative changes and a small left-sided disc protrusion at T3-4, which touches the face of the spinal cord, but no significant central stenosis or cord compression is evident. PX2. Dr. Newell treated Petitioner with facet injections at T9-10, T10-11 and T11-12, as well as an epidural steroid injection at T11-12; Petitioner reported no significant benefit from these and physical therapy and aqua therapy provided him no sustained benefit. PX4. After reviewing the MRI, Dr. Colle felt no neurosurgical intervention was warranted and recommended pain management consultation for possible placement of a dorsal column stimulator. PX5. Dr. Kube performed a dorsal column spinal cord stimulator trial. Subsequently, Dr. Kube determined this was not successful and recommended chronic pain medication management. PX7. All treating physicians agree Petitioner is not a surgical candidate. T. 20. Petitioner's permanent restrictions are noted above. The Commission finds this weighs in favor of an increased permanence.

Based on the above factors and the record in its entirety, the Commission finds Petitioner sustained a 45% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's January 22, 2018 decision is modified for the reasons stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability benefits and medical expenses after September 28, 2016 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $981.03 per week for a period of 13-3/7 weeks, that being the period of temporary total incapacity for work pursuant to §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable, necessary and related medical expenses for treatment of Petitioner's mid thoracic back through September 28, 2016 pursuant to §8(a) of the Act, subject to the Medical Fee Schedule pursuant to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 225 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability of the person as a whole to the extent of 45%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. The Commission notes Respondent paid $36,853.48 in temporary total disability benefits.

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

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

DATED: JAN 10 2019

LEC/maw
o11/28/18
43

L. Elizabeth Coppoletti

Joshua D. Luskin

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SUMMERS, CHRISTOPHER
Employee/Petitioner

Case# **16WC006546**

SCHECK MECHANICAL
Employer/Respondent

19IWCC0006

On 1/22/2018, 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 1.60% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1167 WOMICK LAW FIRM CHTD
CASEY VANWINKLE
501 RUSHING DR
HERRIN, IL 62948

2795 HENNESSY & ROACH PC
JENNIFER WELLER
415 N 10TH ST SUITE 200
ST LOUIS, MO 63101

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

Christopher Summers
Employee/Petitioner

v.

Scheck Mechanical
Employer/Respondent

Case # **16** WC **6546**

Consolidated cases: **N/A**

19IWCC0006

An *Application for Adjustment 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 **Collinsville**, on **December 18, 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 ______________

FINDINGS

On **January 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, per the stipulation of the parties, the average weekly wage was **$1,471.54**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of **$36,853.48** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$36,853.48**.

Respondent is entitled to a credit for all medical bills paid under its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical services **as contained in Petitioner's Exhibit 10** as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to the provider(s). Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid under its group health plan under Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$981.03**/week for **72 4/7 weeks**, commencing **December 16, 2015 through January 28, 2016** and **August 10, 2016 through November 17, 2017**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$36,853.48** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$36,853.48**.

Respondent shall pay Petitioner the sum of **$735.37/week** for a further period of **175 weeks**, as provided in **Section 8(d)2** of the Act, because the injuries sustained caused **35% loss of use of the person-as-a-whole.**

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

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

Melinda M. Rowe-Sullivan
Signature of Arbitrator

1/19/18
Date

ICArbDec p. 2

JAN 22 2018

19IWCC0006

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Christopher Summers
Employee/Petitioner

Case # 16 WC 6546

v.

Consolidated cases: N/A

Scheck Mechanical
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he worked for Respondent as a pressure welder, construction worker and boilermaker and that he has done this type of work all his life or approximately since 1989. He testified that he has been doing this type of work full-time since 2000. He testified that on January 16, 2015, he was in the process of building an 18-foot square fab table and that in doing so, the concrete was off level and he had to crib the beams up with heavy dunnage, cribbing and railroad ties. He testified that he had stacked them on all four corners in a 25-foot radius. He testified that the plant personnel brought the ties over and dumped them in a pile in the center of the area where he was going to stage the cribbing. He testified that he was then required to move them by hand and that there were 12-14 of them that weighed 250-300 pounds apiece.

Petitioner testified that he was working with an apprentice that day helping him stage the ties around the 25-foot radius and that he was near the end of the project when he picked one up and went to the ground. He testified that he felt like somebody was stabbing something in his back, that it took his breath away and that he went straight to the ground. He testified that his initial complaints were pain in the middle of his back on the right side. He testified that he did not continue to work and that he eventually saw his family physician, Dr. Patel. He further testified that he first treated with the company doctor, and that it was when the company doctor requested medical information from his primary care doctor that Dr. Patel became involved.

Petitioner testified that he continued to work full duty until he was laid off on May 2, 2015, approximately four months later. He testified that he was on the job but was "grounded" and that Respondent did not want him climbing. On cross examination, Petitioner agreed that he worked overtime on March 27th, March 28th, March 31st, April 1st, April 2nd, April 4th, April 10th and April 11th. Petitioner further agreed on cross examination that it sounded accurate that he worked a total of 581 hours from the date of the injury until the project was completed.

Petitioner testified that he initially underwent physical therapy and that he underwent therapy for a long period of time. He testified that the therapy did help to eliminate some of the extreme pain, but that he still had complaints. He testified that he was then referred for pain management. He testified that his treatment included facet blocks and epidural steroid injections. He testified that he also obtained a TENS unit. He testified that he had seen several doctors including specialists, all of whom agreed he was not a surgical candidate. He also testified that underwent a trial dorsal column stimulator with Dr. Kube and that he was not a candidate to have a permanent implant.

Petitioner testified that he has not been back to work in over two years. He testified that he is unable to even do things around his own home. He testified that he has no source of income. He testified that he was able to withdraw some funds out of his union annuity which takes away from his retirement and that he is currently living on that money. He testified that it was his understanding he is on a 10-pound weight restriction from the doctor that performed his injections.

On cross examination, Petitioner agreed he had a prior injury to his neck and left shoulder in May of 2013 while working for InterFab. Petitioner denied receiving treatment following that injury for his cervical spine but testified the injury was to his left shoulder. He did, however, testify that he had an MRI of the cervical spine that showed several bulging discs. He testified that surgery was recommended for his left shoulder but, to date, he has not had it performed. He denied that surgery was ever recommended for his cervical spine.

On cross examination, Petitioner agreed that when he started working for Scheck Mechanical, he told Respondent - specifically Brad Mainer - about the prior injury and his ongoing complaints. Petitioner denied reporting to Scheck Mechanical upon his hire in March of 2014 that he had difficulty performing normal work activity as a result of the May 2013 injury or that he had ongoing pain from that prior injury. He did testify that at some point later in time, he told Scheck Mechanical that he had difficulty performing his normal work and that he had ongoing pain from the May 2013 injury. Petitioner confirmed that he had been receiving evaluation and treatment up until he began working for Scheck Mechanical in March of 2014 and that he was attending physical therapy. Petitioner agreed that in March of 2014 he called Dr. Davis, the physician with whom he was seeking treatment for the prior injury, to request a full duty release to return to work.

On cross examination, Petitioner agreed that he takes medication for diabetes, high blood pressure, cholesterol and seizures and that these medications were prescribed by Dr. Patel. He testified that he also takes medication for asthma, anxiety and depression. Petitioner admitted that he was taking Hydrocodone prior to January 2015 and that he was taking it for his neck and left shoulder pain following the May 2013 injury. He agreed that he has been taking Hydrocodone on a regular basis for about 10 years since 2005 when he was in a motor vehicle accident. He also agreed that he had a three-wheeler accident in April 2010 when it rolled over.

On cross examination, Petitioner agreed that he has not made any attempts to seek employment since he was laid off by Scheck Mechanical in May of 2015. He agreed that he has not presented to the union hall to request placement, nor has he sought any other employment outside of the union. He denied having any side jobs. He agreed that he has not participated in any type of job search.

On cross examination, Petitioner testified that he went back to see Dr. Kube in May of 2017. He testified that he did not undergo an MRI for his low back. He agreed that Dr. Kube recommended that he obtain a neurological evaluation. He testified that he had a tentative date for an evaluation with Dr. Woeltz in January.

The medical records of Dr. Bharat Patel were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that Petitioner was seen on March 2, 2016, at which time it was noted that he was complaining of pain in the mid back. The diagnosis was noted to be that of mid thoracic area and upper right side pain. It was noted that Dr. Newell wanted Petitioner to see a spine specialist in Chicago. At the time of the February 10, 2016 visit, it was noted that Petitioner still had back pain and muscle spasms. The assessment was noted to include degenerative joint disease of the spine with muscle spasm, among other issues. It was noted that Dr. Newell would try to make arrangements to send Petitioner to Chicago for a stimulator. At the time of the January 27, 2016 visit, it was noted that Petitioner had an

appointment with Dr. Newell the next day and that he had constant pain. The assessment was noted to be that of mid thoracic pain of the spine with muscle spasm, among other issues. (PX1).

The records of Dr. Patel reflect that Petitioner was seen on November 11, 2015, at which time it was noted that worker's compensation was sending him to a neurosurgeon in St. Louis and that he was complaining of back pain as usual. It was noted that Petitioner had been approved to be seen by Dr. Fleming in Carbondale. At the time of the December 7, 2015 visit, it was noted that Petitioner reported pain in the range of 4-8 on a scale of 1-10. The assessment was noted to be that of degenerative joint disease of the spine, among other issues. It was noted that Petitioner was to be seen by a neurosurgeon in St. Louis. At the time of the October 8, 2015 visit, it was noted that Petitioner had undergone another procedure two weeks ago that did not work and that he was referred to a neurosurgeon, Dr. Fleming, in Carbondale. The assessment was noted to be that of mid thoracic and neck pain with muscle spasm. At the time of the September 16, 2015 visit, it was noted that Petitioner was scheduled for an epidural on September 23, 2015 with Dr. Newell and that he was complaining of back pain as usual. The assessment was noted to be that of thoracic/mid muscle spasm/degenerative joint disease of the spine. It was noted that Petitioner was undergoing aquatherapy. (PX1).

The records of Dr. Patel reflect that Petitioner was seen on August 31, 2015, at which time it was noted that he was in physical therapy and that a TENS unit helped some. The assessment was noted to be that of thoracolumbar muscle spasm in the right paravertebral area. It was noted that Petitioner was following with Dr. Newell, a pain specialist, who was to perform an epidural. At the time of the August 12, 2015 visit, it was noted that Norco was helping to control Petitioner's pain and that his quality of life was better with Norco. The assessment was noted to be that of degenerative joint disease of the spine, muscle spasms and shoulder pain, among other issues. It was noted that a TENS unit was helping Petitioner's back. At the time of the July 10, 2015 visit, it was noted that Petitioner was complaining of pain as usual and that he had to get to Herrin Hospital to get shots in the back by Dr. Newell. The assessment was noted to be that of thoracolumbar muscle spasm in the right paravertebral area. It was noted that Petitioner was going through physical therapy and that the TENS unit was helping. At the time of the June 26, 2015 visit, it was noted that physical therapy wanted Petitioner to use a TENS unit twice a day. It was noted that Dr. Newell was going to give Petitioner an injection in the back. (PX1).

The records of Dr. Patel reflect that Petitioner was seen on June 11, 2015, at which time it was noted that his pain in the back at its worst was 6-9 on a 1-10 scale with medication. It was noted that Petitioner had been referred to Dr. Newell for pain management. It was noted that Petitioner's quality of life was better with Norco. It was noted that Petitioner had been seen by Dr. Koth. At the time of the May 12, 2015 visit, it was noted that Petitioner was going to Real Rehab in Vienna three days per week and that he stated that it was helping some. It was noted that Petitioner still had the same type of pain in the right thoracolumbar area. It was noted that Petitioner walked on his own and did not appear to be in distress and that he had difficulty picking up things from the floor. Petitioner was instructed to continue physical therapy and to see Dr. Kevin Koth. Included within the records of Dr. Patel was a note from Dr. Koth at The Orthopaedic Institute of Southern Illinois dated May 22, 2015, which noted that Petitioner complained of thoracic pain. It was noted that Petitioner described the pain as burning, throbbing and tender, that the symptoms were relieved by therapy and pain medications, that he stated that the pain was in the middle and radiated to the left side, that he stated that he had no quality of life and that he could be fine and then be hit with extreme pain out of nowhere. The impression was noted to be that of mid thoracic back pain. It was noted that both surgical and non-surgical options were discussed, that trigger point injections were discussed and that it was explained to Petitioner that the thoracic spine was the most difficult to operate on. It was noted that Petitioner had multiple levels of arthritis in his back, that he could try pain management, that he had no musculoskeletal problems and that he was to continue with therapy for core strengthening. (PX1).

The records of Dr. Patel reflect that Petitioner was seen on August 5, 2016 for medication renewal. It was noted that Petitioner was scheduled to see Dr. Kube on August 24th. At the time of the July 12, 2016 visit, it was noted that Dr. Colle wanted a functional capacity evaluation and a dorsal column stimulator implant evaluation. At the time of the July 26, 2016 visit, it was noted that Petitioner had back pain in the thoracic paraspinal area on the right side. It was noted that Petitioner was scheduled to see Dr. Kube on August 24th. At the time of the July 7, 2016 visit, it was noted that Petitioner wanted to be referred for a functional capacity evaluation and dorsal column stimulator evaluation. It was noted that Petitioner was complaining of pain in the legs with some jerking of the extremities. (PX1).

The records of Dr. Patel reflect that Petitioner was seen on April 22, 2015, at which time it was noted that the worker's compensation physician had recommended a Lidoderm patch. Petitioner was instructed to continue physical therapy with Real Rehabilitation. At the time of the March 30, 2015 visit, it was noted that Petitioner indicated that the steroid shot helped. The assessment was noted to be that of muscle spasm with degenerative joint disease of the spine, thoracic area/mid right thoracic area. At the time of the March 13, 2015 visit, it was noted that Petitioner complained of pain in the right thoracolumbar posterior flank area in the paraspinal area. It was noted that on January 16, 2015, Petitioner hurt his back while working. Petitioner was recommended to undergo x-rays of the right ribcage and thoracic spine. (PX1).

The records of Dr. Patel reflect that Petitioner was seen on September 11, 2014 for neck pain. At the time of the July 31, 2014 visit, Petitioner reported that his neck was bothering him, that his left shoulder was hurting a lot, that his hands were going numb and that his grip was weak. At the time of the January 28, 2014 visit, it was noted that Petitioner's surgery was cancelled because of a mix-up and that he was complaining of pain in the neck, cervical radiculopathy and left shoulder pain. At the time of the October 29, 2013 visit, it was noted that Petitioner was seen for clearance for surgery with Dr. Davis. At the time of the September 25, 2013 visit, it was noted that Petitioner was being followed by orthopedics for his left shoulder and that he had been off work since May 13th. At the time of the July 2, 2013 visit, it was noted that Petitioner was still having left shoulder pain going into the left arm. Petitioner was referred to neurosurgery and orthopedics. At the time of the June 12, 2013 visit, it was noted that Petitioner was in intense pain in the arm and neck on the left and that he was not sleeping at night. (PX1).

The records of Dr. Patel reflect that Petitioner was seen on May 21, 2013, at which time it was noted that on Friday he hurt his left shoulder at work and felt a pop in the left shoulder after grabbing ahold of a grab bar. It was noted that Petitioner was hurting from the left side of his neck down the left arm and that he had tingling in the left arm and decreased grip strength. At the time of the February 20, 2013 visit, it was noted that Petitioner's left shoulder pain was getting worse and that he had had it for several years. Petitioner was recommended to undergo an MRI of the left shoulder and referred to the Orthopaedic Institute of Southern Illinois. At the time of the August 16, 2012 visit, health maintenance was discussed. It was noted that Petitioner complained of back muscle spasms. At the time of the May 22, 2012 visit, it was noted that Petitioner complained of chest pain on the left side. At the time of the August 15, 2011 visit, it was noted that Petitioner complained of back pain. (PX1).

The records of Dr. Patel reflect that Petitioner was seen on September 16, 2010 for follow-up on his parethesias. The assessment was noted to be that of degenerative joint disease of the spine with radiculopathy. At the time of the September 15, 2010 visit, it was noted that Petitioner's arm was numb and tingling and that he needed a doctor's release. At the time of the November 3, 2009 visit, it was noted that Petitioner complained of back pain. It was noted that Petitioner was status post left shoulder surgery. At the time of the March 30, 2009 visit, Petitioner was seen for a left neck abscess. At the time of the March 31, 2008 visit, it was noted that Petitioner had been treated for pneumonia for five days and was feeling better. At the time of the September 13, 2006 visit, it was noted that Petitioner had a history of chronic left shoulder pain. At the time of the August 7, 2006 visit, it was noted that Petitioner had a history of chronic left shoulder pain. At the time of the February 18, 2005 visit, it was noted that the left shoulder

injection did not help. At the time of the January 17, 2005 visit, Petitioner complained of left cervical muscle pain/shoulder pain. At the time of the March 20, 2006 visit, Petitioner was assessed with chronic left shoulder pain. At the time of the December 8, 2005 visit, it was noted that Petitioner was cutting back on Lortab. At the time of the November 8, 2005 visit, the assessment was noted to be that of chronic pain, among other issues. At the time of the September 26, 2005 visit, Petitioner wanted clearance for a job and was noted to need pain medications. At the time of the June 8, 2005 visit, it was noted that Petitioner was still complaining of neck and shoulder pain. At the time of the April 7, 2005 visit, it was noted that Petitioner's left shoulder was getting better. At the time of the March 18, 2005 visit, it was noted that Petitioner was complaining of left shoulder pain and cervical muscle spasm. (PX1).

The medical records of Dr. Kevin Koth/The Orthopaedic Institute of Southern Illinois were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on April 10, 2015, at which time it was noted that he was lifting railroad ties while at work on January 16, 2015 when he felt a significant amount of pain in his back and was unable to continue. It was noted that Petitioner did "go down" and had been in and out of bed and that he was sent to his primary care physician, was seen and evaluated and was eventually sent to Dr. Koth's office for evaluation and management. It was noted that an MRI showed multilevel degenerative changes as well as a small disk protrusion, left-sided protrusion, at 3-4 and that it touched the face of the spinal cord. The assessment was noted to be that of (1) thoracic back pain; (2) degenerative disc disease; (3) herniated disk at 3-4. Petitioner was recommended physical therapy and core strengthening as well as medications. Petitioner was given work restrictions of a 20-pound lifting restriction. Included within the records of Dr. Koth was an interpretive report for an MRI of the thoracic spine performed at Massac Memorial Hospital on March 30, 2015, which was interpreted as revealing (1) thoracic spine moderate spondylosis, minimal facet arthropathy and multilevel degenerative disc disease; (2) multiple thoracic disc protrusions and cord flattening; no syrinx or myelomalacia; (3) thoracic spine mild central stenosis at T3-4; (4) benign hemangiomas at T4, T10, T12 and L1; (5) multilevel cervical degenerative disc disease and mild central stenoses. Included within the records of Dr. Koth was an interpretive report for x-rays of the thoracic spine performed at Massac Memorial Hospital on March 15, 2015, which were interpreted as revealing no acute osseous abnormality of the thoracic spine; mild degenerative disc disease. (PX2).

Included within the records of Dr. Koth was a Progress Evaluation from Real Rehabilitation dated July 7, 2015, which noted that on Petitioner was lifting railroad ties on a job when he developed pain in the mid back, that the ties were heavy and that he was moving it to the side in a buddy lift to the left side, that he could not drop the tie when he needed to and that he strained his back. It was noted that the pain was immediate and that Petitioner fell to his knees due to the pain, that he tried to continue working but the pain continued and that he worked two months until the pain was too severe. (PX2).

The medical records of SIH Brain & Spine Institute were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen on January 19, 2016, at which time it was noted that he was seen for consultation regarding his back pain. It was noted that Petitioner reported that he had had pain for the past year after lifting a heavy object at work, that he complained of pain in the thoracic region that radiated under the right shoulder blade and that he stated that the pain was constant, stabbing and moderate to severe. It was noted that bending and lifting aggravated the pain as did activity such as getting in and out of a truck or riding in a car and hitting a bump, and that he also stated that twisting aggravated the pain into the right scapula. It was noted that Petitioner had been through physical therapy and injections without significant relief and that he had a TENS unit which helped relieve the pain. The assessment was noted to be that of back pain and spondylosis, thoracic, without myelopathy. It was noted that Petitioner was neurologically intact with no signs of myelopathy, that he had no signs, symptoms or MRI findings to warrant surgical intervention and that he reported that he had an upcoming follow-up with Dr. Newell. (PX3).

The medical records of Rehab Physician Services were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen by Dr. Newell on July 8. 2015, at which time it was noted that he reported that he injured his back on January 16th and that they were moving railroad ties that day and by the end of the day, he had some increased pain in the back. It was noted that Petitioner reported to his safety person, that they sought him treatment through the company physician and that it initially was treated as a muscular strain. It was noted that Petitioner had been to quite a bit of physical therapy but was not seeing a lot of progress, that he had not had any injections and that he had had some success with using a TENS unit. It was noted that Petitioner had had previous injuries to the neck and shoulder about two years ago that were work-related and that he denied any previous troubles with his mid back. It was noted that Petitioner was a boilermaker at the power plant, that he continued working until May when he was taken off work and that Dr. Koth recommended that he be seen for treatment as there were no surgical indications. Petitioner was recommended thoracic facet joint injections for both diagnostic and therapeutic evaluation and was also recommended to continue in physical therapy but to progress to some aquatherapy. The records reflect that on July 31, 2015, Petitioner underwent right T9-10, T10-11 and T11-12 zygapophysial joint injections for an indication of right sided mid-back pain. (PX4).

The records of Rehab Physician Services reflect that Petitioner was seen by Lianne Anderson, APN, on August 18, 2015, at which time it was noted that the injections did not help except one day and that Petitioner had tried to mow the lawn one week afterwards but stopped halfway due to pain. Petitioner was recommended to undergo an epidural injection for pain relief from the disc protrusion and if no relief, he would need to maximize functional activity with physical therapy. (PX4).

The records of Rehab Physician Services reflect that Petitioner was seen by Dr. Newell on October 7, 2015, at which time it was noted that his pain had eased some but that he was still very functionally limited. It was noted that Petitioner stated that bouncing in the truck significantly aggravated his pain, that the injury was in February and that he continued to work for a few months. It was noted that Petitioner complained of leg aches in his thighs and radiating to his feet, that he stated that he was doing nothing at home, that he had run out of therapy visit and that he did all the aquatherapy. It was noted that Petitioner was using the TENS unit with some relief 4-5 times per day but was laying down when he used it and that he acknowledged that he was spending too much time in bed because of the pain. The assessment was noted be that of intervertebral thoracic disc disorder. Petitioner was recommended to undergo a surgical opinion and to also undergo a functional capacity evaluation as Dr. Newell did not think that there would be any indication for surgery. At the time of the December 16, 2015 visit with Dr. Newell, it was noted that Petitioner had no changes in his pain, that he was still hurting in the mid back and that it was radiating to the right side. It was noted that Petitioner had no benefit from previous injections and that he had completed his previous therapy. It was noted that Petitioner had another IME with Dr. DeGrange in St. Louis and that it sounded like he did not recommend any surgical intervention. It was noted that Petitioner was still exhibiting some pain behaviors and some mild symptom amplification, that he was tender in the right mid thoracic paraspinals, that his pain with rotation was worse to the right than the left and that there were no focal strength deficits. The assessment was noted to be that of intervertebral thoracic disc disorder. It was noted that Petitioner wanted another surgical opinion so they would try to set that up with Dr. Fleming. It was noted that an FCE would also be obtained as Dr. Newell did not think there would be any surgical interventions for him. It was noted that Petitioner was to continue sedentary work restrictions. (PX4).

The records of Rehab Physician Services reflect that Petitioner was seen by Dr. Newell on January 28, 2016, at which time it was noted that since he was last seen he had been "dropped" from his work comp and that he stated that he was stressed out because of this and his pain. It was noted that Petitioner was seeing his primary care physician for increased blood pressure and anxiety and had been placed at maximum medical improvement by the IME doctor. It was noted that Petitioner had had both epidural injection and

left-sided thoracic facet injections with no significant benefit and that he had been to physical therapy including aquatherapy with no sustained benefit. It was noted that Petitioner had not been able to return to work. The assessment was noted to be that of interverterbral thoracic disc disorder. Petitioner was recommended to undergo trial chiropractic for pain relief and was recommended a referral to a pain management program. (PX4).

The medical records of Dr. Kyle Colle/Regional Brain & Spine were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner was seen on May 10, 2016, at which time it was noted that the chief complaint was that of constant/severe back pain. It was noted that Petitioner was seen at the request of his attorney for an IME. It was noted that Petitioner described increased thoracic pain with prolonged sitting, standing, bending, lifting, walking and coughing or sneezing, and decreased pain with lying down. It was noted that Petitioner denied any absences or inability to perform his duties but described significant continued pain and that he reported midthoracic pain just below the bottom scapula with radiation to the left breast at times. It was noted that according to Petitioner, his safety manager, Brad Maynor, okayed him to continue working until he had to stop working on May 2, 2015. The impression was noted to be that of (1) disc disorder disc displacement (HNP) thoracic; (2) spondylosis thoracic; (3) obesity. It was noted that Dr. Colle opined that Petitioner had been experiencing his current complaints since a work-related injury on January 16, 2015, that the MRI showed multilevel degenerative changes and disc protrusions without compression of the thoracic cord and that it was not felt that neurosurgical intervention was warranted. It was noted that Petitioner was recommended to undergo consultation for pain management for possible dorsal column stimulator, pain pump or additional pain management modalities and an FCE for permanent restrictions. It was noted that from a neurosurgical standpoint, Petitioner was felt to be at maximum medical improvement but should undergo the recommended consultations for pain management and restrictions. (PX5).

The medical records of Herrin Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The records reflect that Petitioner underwent a T11-12 interlaminar epidural steroid injection on September 23, 2015 for a pre- and post-operative diagnosis of thoracic disc protrusion. The records reflect that on July 31, 2015, Petitioner underwent right T9-10, T10-11 and T11-12 zygapophysial joint injections for a pre- and post-operative diagnosis of thoracic spondylosis. (PX6).

The medical records of Prairie Spine & Pain Institute were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records reflect that Petitioner was seen on July 12, 2017, at which time it was noted that he was a past known patient and that he had been treated and tried to work with chronic pain in the past. It was noted that Petitioner was complaining predominantly of having falls and having weakness in the legs and that he was concerned with that and what that may be doing with respect to his pain and discomfort level and also his mobility. It was noted that Petitioner had a lot of the midthoracic pain that was unchanged from before, and that he had a little bit of low back pain as well. It was noted that there was no obvious strength deficit on examination. Petitioner was recommended to undergo a lumbar MRI to make sure there was no neurocompressive lesion. Petitioner was also referred to a neurologist to make sure he did not have a neurological condition or systemic neurological system problem that was being overlooked. It was noted that Dr. Kube also thought that Petitioner was getting more restless legs. (PX7).

The records of Prairie Spine & Pain Institute reflect that Petitioner underwent a dorsal column stimulator trial placement on September 19, 2016 for a pre- and post-operative diagnosis of chronic thoracic pain from trauma. At the time of the September 28, 2016 visit, it was noted that Petitioner was out from his stimulator, that he was still getting sensation significantly into the ribs and the rib cage and that he still had a fair amount of back pain. It was noted that the leg pain was substantially better but that that was not the predominant issue for him. Petitioner was recommended chronic medication management, which he was having done with his primary care physician. Petitioner was placed at maximum medical improvement and discharged from care. At the time of the August 10, 2016 visit, it was noted that Petitioner was referred

from Dr. Patel and had complaints of pain, thoracic in nature, going on since January 16, 2015. It was noted that the pain was pretty significant in his thoracic spine and that it happened when working with cribbing and dunnage, which were oversized railroad ties. It was noted that Petitioner and one of the apprentices were moving several of them and that at about the twelfth one, he went to his knees and had severe back pain, pain that went up to his right shoulder and maybe a little bit around the left ribs. It was noted that Petitioner's legs had been starting to ache as well. It was noted that Petitioner was assessed with chronic pain in the thoracic spine secondary to trauma. It was noted that Petitioner had tried multiple interventions and had had a few people recommend a dorsal column stimulator trial, for which he wanted another opinion. It was noted that Dr. Kube informed Petitioner that he was not the classic patient for a dorsal column stimulator and that usually he liked to see a large radicular component, but that he recommended that he proceed with the trial and pending the results of the trial, they could gauge the efficacy of the permanent implant. It was noted that the therapist did not feel that Petitioner needed an additional FCE and that Petitioner was given a permanent 30-pound maximum lift and that he would be able to lift as much as 10 pounds on an occasional basis. (PX7).

The transcript of the deposition of Dr. Richard Kube was entered into evidence at the time of arbitration as Petitioner's Exhibit 8. Dr. Kube testified that he is a surgeon specializing in orthopedics and the spine and that he is board-certified. (PX8).

Dr. Kube testified that he first saw Petitioner on August 10, 2016, at which time he had complaints of pain mainly thoracic in nature that he described as having begun on January 16, 2015. He testified that Petitioner stated that it was pretty significant thoracic spine pain, that he was working with cribbing and dunnage, that they were moving several of them and that at about the twelfth one, he went to his knees with severe back pain that went up in his right shoulder and a little bit around the left ribs. He testified that Petitioner reported that his legs had been starting to ache as well and that it had been going on since that time. It was noted that Petitioner had epidurals which he thought made the pain worse, that he had had a variety of rehab that had only done so much for him and that he initially had a very large muscle knot immediately following the incident. He testified that he had thoracic x-rays and a thoracic MRI from March of 2015. He testified that his diagnosis was that of chronic pain, predominantly thoracic region, secondary to the trauma that Petitioner described. He testified that Petitioner had tried multiple non-operative interventions and that his MRI demonstrated some small disc protrusions or bulges at multiple levels higher in the thoracic spine and that there was some spinal cord contact, but certainly not something that he thought a decompression would be appropriate to go after. He testified that he did not feel that open thoracic surgery would be beneficial to Petitioner and that it would just be a matter of trying to manage his pain in a better or different way than he was prior to being seen. He testified that he talked to Petitioner about doing a spinal cord stimulator trial and that it was performed in September. (PX8).

Dr. Kube testified that when he saw Petitioner after the trial stimulator, he felt that he was probably not a good candidate for a conversion into a permanent implant. He testified that Petitioner was continuing to have a significant amount of rib stimulation. He testified that Petitioner continued to get stimulation laterally and that those patients typically did not do well if you were not able to drive the stimulation more into the dorsal horns. He testified that he placed Petitioner at maximum medical improvement and that he was to continue with pain management. He agreed that at the time that he released Petitioner he did not address any form of physical restrictions because of his condition and that he was under the impression that Petitioner had had some kind of restrictions already. He testified that if Petitioner was not under any restrictions his practice would be to order an FCE, but that he thought that was already completed. He testified that he sometimes deferred to the FCE and that he used an FCE as a tool to help determinate what the individual could and could not ultimately do if and when they were available to him. (PX8).

Dr. Kube testified that based upon the contemporaneous onset of symptoms Petitioner described to him and the ongoing symptoms that he had, he believed that there was a causal relationship to the work accident described to him. He testified that thoracic issues were unfortunately difficult. (PX8).

On cross examination when asked whether he was provided any medical records for his review during the time that he was evaluating and making treatment recommendations, Dr. Kube responded that he had an IME report and then some outside medical like rib x-rays and the thoracic spine MRI. He testified that he predominantly relied on Petitioner's history. He testified that he did not know how long Petitioner worked for Respondent. He testified that he did not have an understanding of what Petitioner's job duties were other than what happened the day of the accident. He agreed that when he saw Petitioner in August of 2016, it was at the referral of his primary care physician, Dr. Patel. (PX8).

On cross examination, Dr. Kube agreed that Petitioner denied having been injured before. He agreed that when he first saw Petitioner, his chief complaint was neck and back pain, arm and leg pain, numbness and weakness. He agreed that when he saw Petitioner in August of 2016, it was for a reported injury that occurred in January of 2015. He agreed that Petitioner indicated that the problem was noted to have worsened recently and that he discussed as a treatment option a dorsal column stimulator trial. He agreed that he did not believe that Petitioner was the classic patient for a stimulator and that the classic patient was usually either cervical or lumbar. He testified that one could do it for the thoracic region, but you did not see it as often. He agreed that he felt at that time that Petitioner was not a surgical candidate. He agreed that he acknowledged that Petitioner had some mild degree of degenerative changes. (PX8).

On cross examination, Dr. Kube agreed that based on the history provided by Petitioner, he did not have any significant prior issues in his back and nothing that required significant ongoing treatment. He agreed that he was not provided with any medical records or documentation to confirm or refute that. He testified that he was not aware that Petitioner had a prior work-related injury on May 17, 2013 with another employer. He denied that Petitioner related to him any complaints or treatment following that work injury. He denied that Petitioner related to him any ongoing complaints that he had as a result of that work injury. (PX8).

On cross examination, Dr. Kube testified that it was his understanding that Petitioner was working very heavy duty without restriction at the time of the injury in January of 2015. He testified that Petitioner did not indicate to him at all that the prior injury that he had in May of 2013 had impacted his ability to work in any way before January. He testified that he was not aware that the May 2013 claim settled in October of 2015 with compensation for future medical. He agreed that he relied on the accuracy of the history provided to him by Petitioner in reaching his diagnosis and opinions on medical causation. He agreed that the history provided to him by Petitioner was that he had no prior injury. (PX8).

On cross examination, Dr. Kube testified that he was not aware that Petitioner was involved in a motor vehicle accident in 2005. He denied that Petitioner provided any history to him about injury, complaints or treatment following that motor vehicle accident. He agreed that he had no records documenting any complaints or treatment for that motor vehicle accident. He testified that he was not aware that Petitioner was involved in a 3-wheeler accident on April 27, 2010. He denied that Petitioner related to him any complaints, treatment or ongoing symptoms that he had following the accident in April of 2010. He agreed that he had no medical records regarding any treatment following that accident. (PX8).

On cross examination, Dr. Kube agreed that if the evidence as presented showed that Petitioner did, in fact, have prior injuries, prior medical treatment and/or that his ability to work was impacted before January 15th, he would agree that this could change his opinions on the issue of medical causation. He testified that he was not provided with an FCE for review. He testified that he was under the impression that Petitioner had had an FCE. He denied having reviewed an FCE that was completed for Petitioner. (PX8).

On cross examination, Dr. Kube agreed that his records documented that on September 20, 2016, Petitioner called in and said that the stimulator was not working like he thought it would. He agreed that he next saw Petitioner on September 28, 2016 and that his visual analog score was 67 for his back and 39

for his right and left legs. He agreed that the visual analog score was based on self-reporting. He testified that from a medical standpoint, it was considered objective. He agreed that he noted at that time that Petitioner's Oswestry Disability Index was 64 and that it was based on his answers to a variety of questions regarding his impairment. He agreed that he did not recommend a permanent implant as Petitioner was not likely to have substantial improvement. He agreed that he released Petitioner at maximum medical improvement and discharged him from care, and that he also recommended chronic medication management to be done with his primary care physician. He testified that he did not know whether Petitioner was on any kind of chronic pain management medication before the alleged work injury in January of 2015. (PX8).

On cross examination, Dr. Kube agreed that he did not see Petitioner again for ten months until he came in recently for an evaluation on July 12, 2017. He agreed that Petitioner provided a history of back pain with a worsening in right leg pain, numbness and falling that started one year prior. He agreed that if Petitioner had a worsening in symptoms about one year prior, it would put those complaints around July of 2016. He agreed that when he saw Petitioner in July of 2017, his visual analog score was 89 which was an increase from the initial evaluation of 67. He agreed that there was a significant increase in complaints since the last time that he saw Petitioner ten months before in September of 2016. He testified that Petitioner indicated that he was disabled during that period of time. He testified that his understanding was that Petitioner had not had any other intervening incident that could cause an increase in symptoms. (PX8).

On cross examination, Dr. Kube agreed that with the note of the degenerative changes in his spine, it was fair to say that an individual could have an increase in symptomatology absent any kind of accident or injury based on the degenerative nature of their condition. He agreed that he performed a physical examination in July of 2017, that he noted that Petitioner's complaints were really unchanged from before and that maybe now he was having some low back pain as well. He agreed that he felt that Petitioner had more or less restless legs and that he recommended an MRI of the lumbar spine. He agreed that his report indicated that the low back complaints were new to that visit and that he had not previously made any diagnosis to the low back or recommended a lumbar MRI. He agreed that he was also recommending a referral to a neurologist to make sure that Petitioner did not have some kind of neurological condition or systematic neurological system problem that was being overlooked. He testified that when Petitioner was talking about intermittent weakness, one always worried about multiple sclerosis or something of that nature. He testified that he did not have anything on the MRIs that would explain why Petitioner would be falling or having weakness, so he wanted him to see a neurologist. He agreed that evaluation by a neurologist or exploring underlying potential neurological conditions would be conditions not related to a claimed work injury on January 16, 2015 because those were new or different complaints that Petitioner was having. (PX8).

Off Work Slips were entered into evidence at the time of arbitration as Petitioner's Exhibit 9. A Work Status Form dated August 10, 2016 as issued by Dr. Kube noted that Petitioner was allowed to return to work at the Light Activity level which was that of frequent lifting of 10 pounds and limited lifting up to 30 pounds, rare overhead and floor to waist, limited bending and twisting, limited prolonged sitting or standing position. A Work/School Status Note dated January 28, 2016 as issued by Dr. Newell noted that Petitioner could return to work on January 28, 2016 with permitted activity of walking or standing only occasionally, occasional lifting of 10 pounds maximum and/or carrying articles like small tools and that it was effective until the next appointment. A Work/School Status Note dated December 16, 2015 as issued by Dr. Newell noted that Petitioner could return to work on December 16, 2015 with permitted activity of walking or standing only occasionally, occasional lifting of 10 pounds maximum and/or carrying articles like small tools, limited bending/twisting/squatting and no climbing and that it was effective until the next appointment. (PX9).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 10.

The Report of Dr. Donald DeGrange dated December 9, 2015 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The report reflects that Petitioner was seen for an IME on December 9, 2015, at which time it was noted that he stated that on or about January 16, 2015, he and co-workers were lifting heavy railroad ties and stacking them to make a staging table, that he had picked up several of the ties before and that he estimated that they weighed about 200 pounds. It was noted that as Petitioner picked up the tie, he had the immediate onset of mid back pain on the right side, pointing to his ribcage. It was noted that Petitioner followed up with his primary care physician and was evaluated by Dr. Koth, who referred him to pain management where he underwent two different kinds of injections. It was noted that Petitioner stated that there was no benefit and that he hurt more now than before. It was noted that Petitioner had been a union boilermaker for several years, that he had had several injuries to his neck, upper back and shoulders, one of which was in March or April of 2014, and that he stated that he had never sustained a broken vertebra, any surgery or any prolonged or chronic pain such as he had currently. It was noted that Petitioner had a current chief complaint of mid back pain, that he was pointing to the right rib cage in the area of the inferior angle of the scapula placing it at about T8 or T9 level and that the symptoms were fairly well localized and were mechanical in nature in that they worsened with activity, including bending and twisting, prolonged sitting, standing and walking, and heavy lifting. It was noted that Petitioner developed leg pain and aches into both thighs a couple of months ago and now had paresthesia in both of his feet, that he was currently using a TENS unit that he obtained through physical therapy and that he was still seeing Dr. Newell for pain management. (RX1).

The report reflects that Petitioner described a lifting injury during the course and scope of employment activities on or about January 16, 2015 but did not report this until mid-March 2015, and that he stated that the delay was due to the fact that he thought it was a muscle strain which would improve with time. It was noted that the MRI indicated some disc degeneration with a very small protrusion off to the left side at 3-4, which was on the opposite side of his symptoms, was not causing any spinal cord or nerve root compression and was not consistent with his stated subjective complaints. It was noted that it was not clear to Dr. DeGrange what would be gained by referral to a neurosurgeon in the absence of any gait disturbances or focal motor or sensory deficits and that Petitioner had been afforded thoughtful and appropriate diagnostic studies and treatment. It was noted that Dr. DeGrange did not see any indications for further treatment and that Petitioner had reached maximum medical improvement and could return to his usual and customary job duties in the absence of any objective findings on physical examination or diagnostic studies. (RX1).

The report reflects that Dr. DeGrange's diagnosis was that of thoracic sprain superimposed upon preexisting degenerative changes per the MRI. It was noted that the MRI was quite clear, that there were no indications for any further diagnostic testing and that, in the absence of any focal motor or sensory deficits, neurodiagnostic EMGS were not indicated. It was noted that there were no further treatment recommendations because of the lack of correlation between Petitioner's subjective complaints and the MRI findings and that the only finding of any approaching significance was the small left-sided protrusion at T3-4, which was on the wrong side and quite proximal to where Petitioner was indicating his symptoms were. It was noted that Petitioner could return to his full-duty capacity, that he was at maximum medical improvement and that he was at maximum medical improvement on or about mid-April 2015. It was noted that there were no indications for any injections due to the absence of a discrepancy between the subjective complaints and objective findings, as well as the absence of any significant focal motor or sensory deficits. (RX1).

The medical records of Dr. J.T. Davis were entered into evidence at the time of arbitration as Respondent's Exhibit 2. The records reflect that Dr. Davis authored a "To Whom It May Concern" letter dated June 30, 2014 in regards to Petitioner's work injury of May 17, 2013 when, while working, he attempted to prevent himself from falling and reached up and grabbed a bar and jarred his shoulder. It was noted that it had been brought to Dr. Davis' attention that Petitioner may have had prior neck and shoulder

complaints in the past and therefore previous history with the same location. It was noted that Dr. Davis based his opinion on Petitioner's history that prior to this work injury his shoulder was doing well, that he had no complaints similar to what he had experienced in the past and that following his work injury, his shoulder condition worsened. It was noted that based on that history alone, it was his opinion that the work injury of May 17, 2013 either caused or exacerbated a previous underlying condition of the left shoulder that required a subsequent diagnosis and treatment options that had been provided including potential surgery, which Petitioner elected to undergo to improve his left shoulder condition. (RX2).

The records of Dr. Davis reflect that a Nurse's Note was prepared dated March 5, 2014, which noted that Petitioner called and left a message for a return call in reference to his recommended surgical procedure. It was noted that in repetitive conversation, Petitioner talked of a release for a new position that he was very interested in and that he stated that he was not interested in proceeding with the recommended surgical procedure and wished to live with his current condition and return to work without restrictions. It was noted that a full release status was given. The Doctor's Report of Work Status and Restrictions dated March 5, 2014 noted that Petitioner wished to not proceed with the recommended surgical procedure and that a full release was given. At the time of the October 21, 2013 visit, it was noted that Petitioner had some improvement but was still not where he needed to be and that he had pain superiorly and laterally in the shoulder. The assessment was that of a 49-year-old male with degenerative cervical spine disease seeing a spine specialist along with right [*sic*] shoulder partial thickness rotator cuff tearing, subacromial outlet impingement and acromial clavicular joint arthrosis. It was noted that Petitioner would be scheduled for left shoulder arthroscopic distal clavicle resection, subacromial decompression, rotator cuff debridement versus unlikely repair. (RX2).

The Settlement Contract Lump Sum Petition and Order for 13 WC 19697 was entered into evidence at the time of arbitration as Respondent's Exhibit 3. The date of accident was noted to be that of May 17, 2013, that Petitioner was climbing out of a hole, slipped, lost his balance and fell, and that the body part affected was that of the left shoulder. The settlement terms indicated that the claim was settled on a disputed basis for 5% loss of use of the person-as-a-whole. The settlement contracts were approved on October 20, 2015. (RX3).

The medical records of Real Rehabilitation were entered into evidence at the time of arbitration as Respondent's Exhibit D.[1] The records reflect that a Plan of Care was prepared on August 28, 2013 for a diagnosis of left shoulder partial rotator cuff tear. The Discharge Summary dated November 22, 2013 noted that Petitioner had not met his long term functional goals of return to work without limitation, that he had partially met his goal of reporting independence with activities of daily living, that he had not met his goal of returning to a normal sleep pattern and that he had not met his goal of discharging pain medication. (RXD).

CONCLUSIONS OF LAW

With respect to disputed issue (F) pertaining to the issue of causation, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of January 16, 2015.

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[1] By way of procedural history, proofs were originally closed in Herrin on November 17, 2017. Proofs were re-opened on November 29, 2017 in light of a joint request from both parties that proofs be re-opened to allow for submission of additional medical record evidence. Proofs were subsequently closed again in Collinsville on December 18, 2017.

The Arbitrator notes that Dr. Koth's assessment was noted to be that of (1) thoracic back pain; (2) degenerative disc disease; (3) herniated disk at 3-4 for which he recommended physical therapy and core strengthening as well as medications. (PX2). The assessment at SIH Brain & Spine Institute on January 19, 2016 was that of back pain and spondylosis, thoracic, without myelopathy. (PX3). Dr. Newell at Rehab Physician Services saw Petitioner on July 8, 2015, at which time Petitioner was recommended to undergo thoracic facet joint injections for both diagnostic and therapeutic evaluation and to continue in physical therapy but to progress to some aquatherapy. (PX4). Dr. Colle's assessment at the time of the May 10, 2016 visit was that of (1) disc disorder disc displacement (HNP) thoracic; (2) spondylosis thoracic; (3) obesity, for which he recommended Petitioner undergo consultation for pain management for possible dorsal column stimulator, pain pump or additional pain management modalities and an FCE for permanent restrictions. (PX5). Dr. Kube testified that based upon the contemporaneous onset of symptoms Petitioner described to him and the ongoing symptoms that he had, he believed that there was a causal relationship to the work accident described to him and that thoracic issues were unfortunately difficult. (PX8). Even Dr. DeGrange's diagnosis was that of thoracic sprain superimposed upon preexisting degenerative changes per the MRI, although Dr. DeGrange admittedly also opined that that there were no further treatment recommendations because of the lack of correlation between Petitioner's subjective complaints and the MRI findings, that Petitioner could return to his full-duty capacity and that he was at maximum medical improvement on or about mid-April 2015. (RX1). Finding the opinions of Drs. Koth, Colle and Kube to be more persuasive than those as proffered by Dr. DeGrange, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of January 16, 2015.

The Arbitrator notes that it is unchallenged that Petitioner was capable of working a heavy, labor-intensive job prior to his injury of January 16, 2015 as a boilermaker. Furthermore, the Arbitrator notes that Petitioner testified that he continued to work full duty until he was laid off on May 2, 2015, approximately four months later. Petitioner testified that he was on the job but was "grounded" and that Respondent did not want him climbing, which was unrefuted at trial. Also unrefuted at the time of arbitration was Petitioner's testimony that he first treated with the company doctor and that it was when the company doctor requested medical information from his primary care doctor that Dr. Patel became involved. While the Arbitrator is admittedly concerned by Petitioner's failure to disclose to his treating physicians that he had had previous accidents prior to the January 16, 2015 accident at issue, the Arbitrator also notes that the evidence did not reveal that the thoracic spine was involved in any of those pre-accident claims.

Having considered the entirety of the medical evidence in the case, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of January 16, 2015.

With respect to disputed issue (J) pertaining to the issue of medical services, in light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's care and treatment was reasonable, necessary and causally related to his work accident of January 16, 2015. As a result thereof, Respondent shall pay all reasonable and necessary medical services as contained in Petitioner's Exhibit 10 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

With respect to disputed issue (K) pertaining to the issue of temporary total disability benefits, the Arbitrator notes that Petitioner claims that he is entitled to temporary total disability benefits for the timeframe of May 4, 2015 through November 17, 2017. (AX1).

"[T]o prove temporary total disability, the employee must demonstrate not only that he did not work, but also that he was unable to work." *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 256, 899 N.E.2d 365, 378, 326 Ill. Dec. 148 (2008). The Arbitrator finds that Petitioner has demonstrated that he did not work and was unable to work for the timeframes of December 16, 2015 through January 28, 2016 and August 10, 2016 through November 17, 2017, but that he has failed to demonstrate that he did not work and was unable to work during the timeframes of May 4, 2015 through December 15, 2015 and January 28, 2016 through August 9, 2016.

In so concluding, the Arbitrator notes at the outset that only three work slips were entered into evidence at the time of arbitration as contained in Petitioner's Exhibit 9. First, a Work Status Form dated August 10, 2016 as issued by Dr. Kube noted that Petitioner was allowed to return to work at the Light Activity level which was that of frequent lifting of 10 pounds and limited lifting up to 30 pounds, rare overhead and floor to waist, limited bending and twisting, limited prolonged sitting or standing position. (PX9).

Second, a Work/School Status Note dated January 28, 2016 as issued by Dr. Newell noted that Petitioner could return to work on January 28, 2016 with permitted activity of walking or standing only occasionally, occasional lifting of 10 pounds maximum and/or carrying articles like small tools and that it was effective until the next appointment. (PX6). The medical records of Dr. Newell, however, reflect that Petitioner did not return to Dr. Newell for any further treatment after the visit on January 28, 2016. The Arbitrator declines to speculate as to the anticipated duration of the work slip issued on January 28, 2016.

Third, a Work/School Status Note dated December 16, 2015 as issued by Dr. Newell noted that Petitioner could return to work on December 16, 2015 with permitted activity of walking or standing only occasionally, occasional lifting of 10 pounds maximum and/or carrying articles like small tools, limited bending/twisting/squatting and no climbing and that it was effective until the next appointment. (PX9). Petitioner testified that on cross examination that there was no light duty available in boilermaking, and the Arbitrator notes that this testimony was unrefuted at trial as no witnesses were called by Respondent to suggest otherwise.

As a result of the foregoing, the Arbitrator finds that Petitioner has demonstrated that he did not work and was unable to work for the timeframes of December 16, 2015 through January 28, 2016 and August 10, 2016 through November 17, 2017, but that he has failed to demonstrate that he did not work and was unable to work during the timeframes of May 4, 2015 through December 15, 2015 and January 28, 2016 through August 9, 2016.

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

With respect to Subsection (i) of Section 8.1b(b), the Arbitrator notes that no AMA rating was offered by either party. The Arbitrator places no weight on this factor when making the permanency determination.

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that the record reveals that Petitioner was employed as a boilermaker at the time of the accident and that he has not returned to that position since May of 2015. The Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 38 years old on his date of accident. Given the younger age of Petitioner and the fact that Dr. Kube placed him under permanent restrictions, the Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iv) of Section 8.1b(b), the Arbitrator notes that, following his work injury, Petitioner returned to his position as a boilermaker for a period of time until he was laid off in May of 2015. While Petitioner testified that he has not worked in more than two years, Petitioner also admitted on cross examination that he has not made any attempts to seek employment since he was laid off by Scheck Mechanical in May of 2015, that he has not presented to the union hall to request placement nor has he sought any other employment outside of the union and that he has not participated in any type of job search. The Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (v) of Section 8.1b(b), the Arbitrator finds that the evidence of disability is corroborated by the treating medical records. At the time of hearing Petitioner testified to issues involving his mid back radiating to the right side. At the time of the visit with Dr. Kube on July 12, 2017, it was noted that Petitioner was a past known patient and that he had been treated and tried to work with chronic pain in the past. It was noted that Petitioner was complaining predominantly of having falls and having weakness in the legs and that he was concerned with that and what that may be doing with respect to his pain and discomfort level and also his mobility. It was noted that Petitioner had a lot of the midthoracic pain that was unchanged from before, and that he had a little bit of low back pain as well. (PX7).

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all of the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant. Based on the above factors and the record in its entirety, the Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of **35% loss of use of the person-as-a-whole** as provided in Section 8(d)2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JORGE TORRES PINEDO,

Petitioner,

vs. NO: 13 WC 40561

TRINITY LABOR SERVICES, and STATE TREASURER as *ex-officio* custodian of the INJURED WORKERS' BENEFIT FUND,

19IWCC0007

Respondent.

DECISION AND OPINION ON REVIEW

An Application for Adjustment of Claim was filed alleging Petitioner sustained a right lower extremity injury arising out of and in the course of his employment with Trinity Labor Services on May 4, 2012. Trinity Labor Services did not maintain workers' compensation insurance on the date of the alleged accident, and the custodian of the Injured Workers' Benefit Fund was subsequently added as a party respondent as provided in Section 4(d) of the Act.

The matter proceeded to hearing with all issues in dispute on November 8, 2017. Trinity Labor Services did not appear at the hearing. The Injured Workers' Benefit Fund was represented by the Illinois Attorney General's office. On December 21, 2017, the Arbitrator issued a decision finding for Petitioner on all issues. Respondent Injured Workers' Benefit Fund timely filed a Petition for Review. Notice having been provided to all parties, the Commission, after considering the issues and being advised of the facts and law, adopts the statement of facts as set forth by the Arbitrator in his decision and incorporates such facts herein, but reverses the Decision of the Arbitrator on the threshold issues of accident and causation.

We begin by reiterating the immutable principle that liability under the Workers' Compensation Act cannot rest upon imagination, speculation or conjecture, or upon a choice between two views equally compatible with the evidence, but such liability must arise out of

facts established by a preponderance of the evidence. *Immaculate Conception Church v. Industrial Commission*, 395 Ill. 615, 623, 71 N.E.2d 70 (1947). Petitioner alleges he developed right foot pain while working at the recycling center on May 4, 2012, subsequently discovered a nail in his shoe, and therefore surmised he stepped on a nail at work. The Commission finds Petitioner failed to meet his burden of proof.

The Commission observes Petitioner provided conflicting testimony as to when he discovered the nail in his shoe. Petitioner initially testified he saw the nail before he went to the hospital: "My foot was hurting, and I got home - - and I got home and I seen it was hurting, and I had a nail and then I went to the hospital." T. 18. Petitioner later testified he found the nail after he was released from the hospital and informed the doctor about it when he went back for follow-up care:

> Well, [the doctor] told me, "What happened?" I said I didn't know. And then when I got home, when I got home afterwards, I was looking at my shoe. I was looking for something; and then afterwards, I told him that I have found a nail on my shoe. When I went back to treatment, I told him that I had found a nail on my shoe - - on the shoe that I use for work. T. 30-31.

The contemporaneous medical records do not corroborate either timeline. To be clear, there is no mention of stepping on a nail documented in the medical records until November 26, 2013, 18 months after the alleged accident, when Petitioner presented to Dr. Mertzenich for a diabetic foot and Lower Extremity Amputation Prevention ("LEAP") exam. PX9. Instead, the emergency room records reflect Petitioner's foot became "progressively red" over the prior three days and "he came home from work and noticed that when he pulled off his sock there was quite a bit of pus in the sock." PX8. Dr. Michelotti's May 7, 2012 consultation report notes an infection developed since May 4 and memorializes "it is possible patient was wearing a work shoe that did not fit properly." PX8. As detailed below, the Commission finds these records are fatal to Petitioner's claim.

Initially, the Commission emphasizes the only employment history provided by Petitioner was he "works at Applebee's." PX8. As such, there is nothing in the medical record to support Petitioner's claim of an accidental injury sustained at the recycling plant while in the employ of Trinity Labor Services.

Additionally, and implicating causation, Petitioner testified he got home from work on May 4, 2012 and "took off my shoe, and it was all full of blood." T. 15. Certainly, this is what would be anticipated if Petitioner sustained an acute puncture trauma that day. The medical records, however, document Petitioner described finding his sock saturated with pus which the Commission finds is clearly more consistent with an active infection. Our conclusion is supported by the substantial physical examination findings recorded on May 7, 2012, including redness and pitting edema up to the knee, foot "grossly swollen and deformed," "foul smelling, swollen right foot which is warm and cellulitic," and "purulent ulcer" on the base of the great toe extending onto second toe. PX8. The Commission concludes the highly degraded condition of Petitioner's foot is inconsistent with what would be expected if the trauma had occurred only three days prior. The Commission also finds it significant that Petitioner has a long history of

uncontrolled diabetes. There are approximately 350 pages of medical records in the Crusader Clinic exhibit; of the treatment documented therein, the vast majority is for diabetes and the residuals thereof, including diabetic retinopathy and annual LEAP exams. We further note Dr. Michelotti diagnosed Petitioner with advanced diabetic foot infection with gas gangrene of the soft tissue involving the forefoot, yet no medical expert opinion evidence was provided regarding the disease process of gas gangrene. While "[i]t is not necessary to establish a causal connection by medical testimony" (*Pulliam Masonry v. Industrial Commission*, 77 Ill. 2d 469, 471, 397 N.E.2d 834 (1979)), and a finding of causal connection can be made based solely on a claimant's testimony, without supporting medical evidence (*Price v. Industrial Commission*, 278 Ill. App. 3d 848, 854, 663 N.E.2d 1057 (1996)), in this case, Petitioner's testimony is insufficient to overcome the medical evidence establishing Petitioner suffered from a diabetic foot infection.

The Commission finds Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment with Trinity Labor Services on May 4, 2012. The Commission further finds Petitioner failed to prove his condition of ill-being is causally related to the alleged accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's claim is denied and the award of benefits is vacated.

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

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

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: JAN 10 2019

LEC/mck

O: 11/14/18

43

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TORRES PINEDO, JORGE
Employee/Petitioner

Case# **13WC040561**

TRINITY LABOR SERVICES/ILLINOIS STATE TREASURER AS EX-OFFICIO OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

19IWCC0007

On 12/21/2017, 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 1.48% 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:

2489 BLACK & JONES
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0000 TRINITY LABOR SERVICE
356 PRAIRIE HILL ROAD
SOUTH BELOIT, IL 61080

5946 ASSISTANT ATTORNEY GENERAL
HELEN LOZANO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

- [x] 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

Jorge Torres Pinedo
Employee/Petitioner

v.

Trinity Labor Services / Illinois State Treasurer as ex-officio of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **13 WC 40561**

Consolidated cases:

19IWCC0007

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Rockford, Illinois**, on **November 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. [x] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

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

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

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

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

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

G. [x] What were Petitioner's earnings?

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

I. [x] 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 Liability of Injured Workers' Benefit Fund, Notice to Respondent

FINDINGS

On the date of accident, **May 4, 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 these accidents *was* given to Respondent.

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

In the year preceding the injury, Petitioner's average weekly wage was **$510.00**.

On the date of accident, Petitioner was **56** years of age, *single* with **1** dependent child.

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

ORDER

- The Respondent shall pay the Petitioner the sum of **$483.36** / week for a period of **38** weeks, as provided in Section 8(e), at the minimum statutory loss rate because the injuries sustained caused **100% amputation of the right great toe.**
- The Respondent shall pay the Petitioner the sum of **$306.00** / week for a period of **25.05** weeks, as provided in Section 8(e), because the injuries sustained caused **15% loss of the right foot.**
- The Respondent shall pay the Petitioner temporary total disability benefits of $ **340.00** / week for **1 & 2/7** weeks, from **May 7, 2012 – May 16, 2012**, as provided in Section 8(b) of the Act.
- The Respondent shall pay $ **$10,735.42** for necessary medical services, as provided in Section 8(a) and 8.2 of the Act and consistent with the medical fee schedule.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Signature of Arbitrator

12/18/17
Date

DEC 21 2017

STATEMENT OF FACTS

The parties appeared for hearing on November 8, 2017. Petitioner was represented by counsel and testified through an interpreter, Rafael Arealno. On August 22, 2017, Petitioner mailed Respondent, Trinity Labor Services, a certified letter advising of the November 8, 2017 hearing date. That letter was returned as undeliverable and could not be forwarded. (Px. 7) As Respondent did not have workers' compensation insurance coverage, the Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund. (Px. 6)

Petitioner testified that on May 4, 2012, he was employed by Trinity Labor Services. Petitioner testified that he worked at a recycling center on Harlem Road. He had been working at the recycling center for approximately 9 years. While working at the recycling center, his employer frequently changed. Approximately 1.5 months before his claimed injury, Trinity Labor Services took over the staffing. Petitioner testified that he was required to apply for his job through Trinity. Petitioner went to Trinity Labor Services and applied for the job he was already performing. Petitioner was then hired by Trinity Labor Services to continue performing his job at the recycling center. Petitioner testified that he was paid by check by Trinity Labor Services. He was paid $8.50 per hour and testified that he worked between 60 and 80 hours a week. He testified to working from 5 a.m. to 9 p.m., or up to 16 hours a day. He would work at least 60 hours a week. Petitioner testified that overtime was mandatory and that the workers were told they had to work or would be replaced. Taxes were taken from his paychecks.

Petitioner's job required him to separate materials to be recycled. Petitioner testified that materials came down a conveyor belt and he would separate the materials, including plastics, glass, aluminum, wood, etc. At the time of his claimed injury, Petitioner was 56 years old, having been born on April 20, 1956. He was single with one dependent child, born on September 27, 2000.

Petitioner testified that on May 4, 2012, he experienced pain in his right foot while working. Petitioner stated that when he got home and removed his shoe, it was full of blood. He testified that he noticed a nail between his shoe and his toes with the nail having entered his big toe. Petitioner testified that he informed his manager, Hugo Torres, that he had to go to the hospital after finding a nail in his work shoe. Petitioner testified that Mr. Torres went to see him at the hospital. Petitioner explained that he does not know exactly when the nail went into his shoe. However, his pain began while he was working and continued until he removed his shoe and found the nail inside it. Petitioner testified that after experiencing pain in his foot for a couple of days, he sought medical attention. Petitioner testified that he only wore his work shoes to his job at the recycling center. Given the nature of his job, his shoes were very dirty. As such, he only wore them at work.

Records submitted show Petitioner presented to Rockford Memorial Hospital on May 7, 2012. (Px. 8) At the hospital, Petitioner described that he noticed that his right foot was red 3 days prior. It had been getting progressively worse. Also noted was that he worked at Applebees and that he came home from work and noticed that when he pulled off his sock there was quite a bit of pus in the sock. He was diagnosed with advanced diabetic foot infection with gas gangrene of the soft tissues involving the forefoot. Petitioner was admitted and underwent a right great toe amputation on May 8, 2012. He was released from the hospital on May 15, 2012 with discharge diagnoses of right great toe gas gangrene, status post right great toe amputation, status post right foot wound debridement and delayed primary closure, diabetes, and foot pain. (Px. 8)

Petitioner followed up for treatment at Crusader Clinic on May 16, 2012. (Px. 9) Thereafter, he began treatment for his diabetes. His foot was examined on November 26, 2013. It was noted that he had lost his right great toe when he stepped on a nail and did not feel it. (Px. 9, p. 359) An x-ray was performed of the right foot on December 3, 2013. Postoperative changes of the amputation were noted with erosive changes of the 2nd and 3rd metatarsal-phalangeal joint spaces were described. (Px. 9, pp. 403-404) Ongoing swelling in the right foot was noted on December 9, 2013. (Px. 9, p.355) On April 8, 2014, Dr. Mertzenich noted his opinion that Petitioner's edema was residual from the amputation and prior infection. (Px. 9, pp. 326-327) On June 30, 2014, Dr. Mertzenich expressed his opinion that the infection he suffered caused his ongoing problem with swelling into his 2nd toe. (Px. 9, p. 302) He continued to treat with Crusader Clinic and on April 4, 2016, he began treating for a diabetic ulcer on his second toe of the right foot. (Px. 9, pp. 148-49) Petitioner underwent ulceration and debridement of the 2nd toe on April 25, 2016. (Px. 9, pp.138-139) This treatment continued for a prolonged period time, with the last appointment recorded on June 5, 2017. (Px. 9, pp. 56-59)

Petitioner testified that he continues to experience pain in his 2nd toe with shoe wear. His foot continues to swell. Petitioner acknowledged treating for diabetes for years. However, he stated that he had no problems with his foot prior to his injury. His toes were straight and he had no pain. Petitioner described a complete lack of symptoms in his left foot. He has difficulty walking due to the pain and swelling in his right foot.

Petitioner testified that after being released from the hospital, he attempted to return to work for Trinity. He testified that he was told that there was no work available for him. He testified that he was off work for approximately 2 months before finding another job washing dishes 2 days a week. He testified that he frequently needs to sit because his foot swell with standing for approximately 20 minutes.

Notice of the trial date was attempted on Respondent. (Px. 7) Petitioner offered a certificate of noncompliance from the NCCI confirming that Respondent failed to have insurance. (Px. 6) Finally, Petitioner offered exhibits 1 through 5 which were the original Application for Adjustment of Claims and the amended Applications for Adjustment of Claims, adding the Injured Workers Benefit Fund as a party to the case. (Px. 1, 2)

With respect to A.) Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds as follows:

The Arbitrator finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act on May 4, 2012. Petitioner testified that he worked at the recycling center for approximately 9 years. However, the employer frequently changed between various agencies. Approximately 1.5 months prior to his injury, Trinity Labor Services took over staffing of the recycling center. Petitioner went to the staffing agency and applied for his job and was hired. Petitioner testified he received his paychecks from Trinity Labor Services, and taxes were taken out. Petitioner testified to work long hours, 5 a.m. to 8-9 p.m., working a total of 60 – 80 hours a week.

Petitioner testified that his job was as a sorter of materials to be recycled. He stood at a conveyer belt and sorted materials such as glass, plastic, wood, and aluminum. The provisions of the Act apply automatically to any enterprise in which sharp edged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage... and to enterprises in which electric, gasoline, or other power driven equipment is used in the operation thereof. Petitioner worked for an enterprise handling junk and salvage and did so over electric driven conveyor belt. As such, the work is subject to the Illinois Worker's Compensation Act consistent with 820 ILCS 305/3(8, 15).

The Arbitrator finds Petitioner's testimony credible and finds automatic coverage under Section 3 of the Illinois Workers Compensation Act on May 4, 2012.

With respect to B.) Was there an employee-employer relationship, the Arbitrator finds as follows:

The Arbitrator finds that there was an employee-employer relationship between Petitioner and Trinity Labor Services.

Petitioner testified that he worked at the recycling center for approximately 9 years through various agencies. He testified that approximately 1.5 months before his injury, the agency that staffed the recycling center changed to Trinity Labor Services. His boss told him he needed to apply at Trinity Labor Services to keep his job. Petitioner testified that he did so and was hired by Trinity Labor Services. He worked long days, up to 16 hours a day, sorting materials to be recycled. He was paid $8.50 per hour and was paid by check from Trinity Labor Services. All of this information went uncontradicted at trial. Further, the Arbitrator finds Petitioner credibly testified to his employment relationship with Respondent. Therefore, the Arbitrator finds that there was an employee-employer relationship between Petitioner and Trinity Labor Services on May 4, 2012.

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

The Arbitrator finds that an accident occurred that arose out of and in the course of Petitioner's employment with Respondent on May 4, 2012. Petitioner testified that on that day, while working at the recycling center for Trinity Labor Services, he experienced pain in his right foot. He had pain throughout the day and when he got home and took off his work shoe, he noted a significant amount of blood on his foot and in his shoe. He later found a nail in his shoe that had punctured his right foot. Petitioner sought treatment at Rockford Memorial Hospital 3 days later and complained of right foot pain for 3 days. The record noted that he had pain, redness, and pus from the foot. He was diagnosed with an infection and his right great toe was amputated. Petitioner testified that his shoes became very dirty working at the recycling center. As such, he only wore them at work. Petitioner found a nail in his shoe after experiencing pain throughout the day in the same foot and finding the foot bloody and swollen after getting home. As such, the Arbitrator finds that Petitioner's injury arose out of and in the course of his employment by Respondent, Trinity Labor Services.

With respect to D.) What was the date of the accident, the Arbitrator finds as follows:

The Arbitrator finds that the date of the accident was May 4, 2012. Petitioner testified that he had pain in his foot that day and removed his shoe to find it very bloody. He sought treatment three days thereafter. Petitioner's initial emergency room record from May 7, 2012 noted that he had been experiencing pain for 3 days. As such, Petitioner's testimony and the records support an injury date of May 4, 2012.

With respect to E.) Was timely notice of the accident given to Respondent, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner provided timely notice of the accident to Respondent, Trinity Labor Services. Petitioner testified that he told his supervisor, Hugo Torres, that he had to go to the hospital after finding a nail in his work shoe. Petitioner testified that Mr. Torres then visited Petitioner in the hospital. No evidence was provided to contradict Petitioner's testimony. Therefore, the Arbitrator finds that timely notice was given by Petitioner to Respondent.

With respect to F.) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner's present right foot condition of ill-being is causally related to the injury that occurred on May 4, 2012. Petitioner underwent an amputation of his first great toe on May 8, 2012 due to the infection that had set in. His ongoing records thereafter note ongoing issues with pain and swelling in his right foot. Dr. Mertzenich noted his opinion that Petitioner's edema was residual from the amputation and prior infection. Petitioner testified to ongoing difficulty with pain and swelling in his foot consistent with the amputation he underwent as a result of the infection. Therefore, the Arbitrator finds that Petitioner's current right foot condition of ill-being is causally related to his May 4, 2012 injury.

With respect to G.) What were Petitioner's earnings, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner earned $510.00 per week for Trinity Labor Services. Petitioner testified that he was paid $8.50 per hour. He testified to working up to 16 hours a day, for 60-80 hours a week. Petitioner did not present paystubs or wage records at hearing. However, Petitioner testified credibly to the hours worked and the wages he received. There was no testimony to the contrary. As such, the Arbitrator calculates his average weekly wage at $510.00 based on an hourly rate of $8.50 and 60 hours of work per week.

With respect to H.) What was Petitioner's age at the time of the accident and I.) What was Petitioner's marital status at the time of the accident, the Arbitrator finds as follows:

Petitioner testified that he was born on April 20, 1956 and was 56 years old at the time of his injury. Respondent offered no evidence to refute Petitioner's testimony. His medical records confirm his date of birth. Therefore, the Arbitrator finds that Petitioner was 56 years old at the time of injury on May 4, 2012.

Petitioner also testified that he was single with 1 dependent child under the age of 18 at the time of his May 4, 2012 injury. He testified that he had one child, born on September 27, 2000. Respondent offered no evidence to refute Petitioner's testimony. Therefore, the Arbitrator finds that Petitioner was single and with 1 dependent child at the time of his May 4, 2012 injury.

With respect to J.) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary for the injuries he sustained on May 4, 2012. The Arbitrator notes that the medical records, diagnoses, treatment carried out, and treatment recommendations are noted in the Statement of Facts. The Arbitrator finds that Respondent failed to offer any evidence to refute the reasonableness and necessity of the medical treatment received by Petitioner for his injuries. Therefore, the Arbitrator finds that the treatment Petitioner received at Rockford Memorial Hospital and Crusader Clinic were reasonable and necessary for his injury.

Based on the Arbitrator's findings that Petitioner suffered an injury that arose out of and in the course and scope of his employment for Respondent, Trinity Labor Services, and that the treatment Petitioner received was reasonable and necessary, the Arbitrator finds that Respondent is liable for the treatment provided, as set forth in Petitioner's Exhibit 11. Respondent is liable for the $163.00 at Rockford Memorial, $60.00 at Crusader Clinic, and for reimbursement to Illinois Department of Public Aide, which paid $10,512.42 in services relative to Petitioner's May 4, 2012 injury. Of particular note, the bills paid by Illinois Department

of Public Aide relate to Petitioner's hospitalization from May 7, 2012 through May 14, 2012. As such, Respondent is liable for the unpaid medical bills, pursuant to the medical fee schedule, totaling $10,735.42.

With respect to K.) What temporary benefits (TTD) are in dispute, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner is owed temporary total disability benefits from May 7, 2012 to May 16, 2012 for a total of 1 & 2/7 weeks at the TTD rate of $340.00 per week.

The Supreme Court of Illinois has held that "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 v. Illinois Workers' Compensation Commission, 236 Ill. 2d 132 (2010).

"To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work. (Internal citation omitted). It is irrelevant whether the claimant could have looked for work. (Internal citation omitted). The dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement."

Mech. Devices v. Indus. Comm'n (Johnson), 344 Ill. App. 3d 752, 759 (4th Dist. 2003).

"The factors to be considered in determining whether a claimant has reached maximum medical improvement include: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) "most importantly," whether the injury has stabilized."

Id. at 760.

Petitioner was hospitalized from May 7, 2014 through May 15, 2012. He then followed up at Crusader Clinic on May 16, 2012. While Petitioner did not return to work for Respondent, Trinity Labor Services, his records do not reflect any work restrictions at that time or thereafter. As such, Petitioner is entitled to TTD benefits from May 7, 2012 through May 16, 2012.

With respect to L.) What is the nature and extent of the injury, the Arbitrator finds as follows:

In determining the level of permanent partial disability for injuries incurred on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to the most current edition of the AMA's "Guides to the Evaluation of Permanent Impairment"; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. (820 ILCS 305/8.1b)

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. (820 ILCS 305/8.1b)

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

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes neither party offered an AMA impairment rating by any physician. 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 worked as a laborer for Respondent. While Petitioner did not return to work for Respondent, Trinity Labor Services, there is no evidence to reflect any work restrictions or that he could not return to work as a laborer. The Arbitrator therefore gives no 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 her accident. As Petitioner is approaching the sixth decade of his life, he will live with his disability for a much shorter period than a younger individual. 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 no evidence was submitted to demonstrate the injury had/has an impact on his future earnings. As such, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner underwent a right great toe amputation on May 8, 2012 for diagnoses of right great toe gas gangrene, status post right great toe amputation, status post right foot wound debridement and delayed primary closure, diabetes, and foot pain. Petitioner followed up for treatment at Crusader Clinic. By December 3, 2013, an x-ray of the right foot showed postoperative changes of the amputation with erosive changes of the 2nd and 3rd metatarsal-phalangeal joint spaces. Petitioner testified that he continues to experience pain and swelling in his right foot. He has ongoing pain in his 2nd toe which is also bent now due to the amputation of his great toe. He has difficulty walking or standing longer than 20 minutes due to his right foot pain. Petitioner has been able to secure subsequent employment, but works only 2 days a week and frequently needs to sit down to rest. Petitioner continues to seek treatment for the pain and swelling in his right foot. As such, the Arbitrator therefore gives greater weight to this factor.

Based on the above, the Arbitrator finds that Petitioner sustained 100% loss of the right great toe and 15% permanent loss of use of the right foot. Petitioner's injury to his right great toe and foot has left him with significant ongoing limitations.

With respect to O.) **Other Liability of Injured Workers' Benefit Fund, the Arbitrator finds as follows:**

The Arbitrator notes that the legislative intent of in establishing the IWBF is to protect workers whose employers fail to provide adequate workers' compensation coverage and that the IWBF is Petitioner's only recourse for benefits under the Illinois Workers' Compensation Act. The IWBF is a special fund, and not an employer. Illinois State Treasurer v. Illinois Workers' Compensation Commission, 2015 IL 11748 (2015).

Petitioner presented a certification from the National Council on Compensation Insurance indicating that no insurance coverage could be found for Trinity Labor Services on May 4, 2012. (Px. 6) Petitioner attempted to serve Respondent, Trinity Labor Services via certified mail. The letter was undeliverable and was not able to be forwarded. (Px. 7)

As such, the Arbitrator finds notice was sufficiently attempted upon Respondent, Trinity Labor Services and the IWBF is liable for this award.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Melissa Gordon,

Petitioner,

vs. NO: 14 WC 17753

State of IL / Murray Developmental Center,

Respondent.

19IWCC0008

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice provided to all parties, the Commission, after considering the sole issue of prospective medical care and being advised of the facts and the 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 (1980).

The Commission affirms the Arbitrator's finding Petitioner sustained accidental injuries arising out of and in the course of her employment on February 26, 2014. The Commission further affirms the Arbitrator's finding Petitioner's cervical condition of ill-being is causally related to the February 26, 2014 accident, but she reached maximum medical improvement for her cervical condition as of July 28, 2015 per Dr. Robson and needs no further treatment related to the February 26, 2014 accident, other than medications. As such, the Commission affirms the Arbitrator's finding the proposed cervical disc replacement surgery recommended by Dr. Gornet is denied. The Commission affirms the Arbitrator's finding Respondent has paid all reasonable and necessary charges for all reasonable and necessary medical services, and Respondent is

entitled to credit for all medical expenses paid by Respondent. The Commission further notes the parties stipulated that the issue regarding potentially outstanding medical expenses is reserved for further hearing, if necessary. Lastly, the Commission strikes the following sentence found on page 12, the first paragraph of the Arbitrator's decision: "The Arbitrator further finds that the current treatment recommended by Dr. Gornet, specifically _____, is reasonable and necessary within the meaning of Section 8(a) of the Act."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's January 18, 2018 decision is hereby affirmed and adopted as clarified above.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove she is entitled to prospective medical care, and her claim for cervical disc replacement surgery recommended by Dr. Gornet is hereby denied.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

DATED: JAN 10 2019
LEC/maw
o11/27/18
43

L. Elizabeth Coppoletti

Joshua D. Luskin

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

GORDON. MELISSA
Employee/Petitioner

Case# **14WC017753**

16WC018375

ST OF IL/MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

19IWCC0008

On 1/18/2018, 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 1.60% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5983 CARAWAY FISHER & BROOMBAUGH PC
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JAN 18 2018

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

MELISSA GORDON
Employee/Petitioner

Case # **14** WC **17753**

v.

Consolidated cases: **16 WC 18375**

STATE OF IL / MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

19IWCC0008

An *Application for Adjustment 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 **June 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] 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 26, 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 **$52,629.15**; the average weekly wage was **$1,012.10**.

On the date of accident, Petitioner was **39** years of age, *married* with dependent children.

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

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

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

ORDER

The Arbitrator finds that the Petitioner sustained accidental injuries on February 26, 2014 which arose out of and in the course of her employment with the Respondent. The Arbitrator further finds that the Petitioner's cervical condition is causally related to the February 26, 2014 accident.

The Arbitrator finds that the Petitioner has reached MMI with regard to the Petitioner's cervical condition and needs no further treatment that would be related to the February 26, 2014 accident other than medications. As such, the Arbitrator finds that the proposed cervical disc replacement surgery recommended by Dr. Gornet 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

January 17, 2018
Date

JAN 18 2018

STATEMENT OF FACTS

The Petitioner, a Respondent employee since August of 2010, worked as a Licensed Practical Nurse (LPN) II. This involved performing assessments, passing medications and completing paperwork. On 2/26/14, approximately a half hour before her shift ended, she was attempting to place a C-PAP machine on a mental resident named Jeff. while he was in bed. She testified that he grabbed her by the right forearm and pulled her towards him over the bedrail, jerking her arm, to where her feet came off the floor. After she got herself away from him, she "gave report" and went home. Petitioner testified the incident resulted in pain in her shoulder, upper back and neck areas. The next day she went into work and reported the incident to her Cottage Director, and after preparing an injury packet with the on-premises nurse, the Petitioner was referred to the emergency room.

A 2/27/14 Employee Notice of Injury indicates Petitioner reported trying to apply a C-PAP device on a patient when he got agitated and pulled her by her right arm over the bedrail. (Rx4). The Supervisor's report notes Petitioner was grabbed by the right arm and pulled into and slightly over the side rail of the bed. (Px5).

The 2/27/14 report from St. Mary's Centralia notes Petitioner developed back pain that started after she was leaning over the bedrail of a patient and was pulled by the aggressive patient. She felt immediate pain/strain in her mid and center back. She reported prior back strains but no major injuries. She noted no numbness or tingling. Examination noted tenderness and spasm in the right thoracic back muscle, and that Petitioner could not lean back, or lean forwards past 90 degrees. The diagnosis was thoracic back sprain, and Petitioner was prescribed Motrin, Flexeril and Norco. (Px15).

The Petitioner testified that she followed up with her primary provider, Dr. Hahs. It appears the initial visit was 3/4/14. She complained of right sided pain from shoulder to hip since being pulled over by a patient, almost into the bed to where her feet were no longer on the floor. Noting concern for how long her symptoms had lasted, Dr. Hahs took Petitioner off work, and she was referred for physical therapy, as well as shoulder and spine x-rays to rule out bony injury. At her 3/18/14 follow-up, Dr. Hahs noted x-rays showed nothing acute, and Petitioner was held off work and referred to an orthopedic specialist. (Px2).

The x-ray reports reflected mild midthoracic spondylosis, slight thoracic kyphosis/scoliosis, minimal degenerative cervical disc disease (C3 to C6), loss of cervical lordosis with spasm, prominent L5/S1 degenerative disc disease and rudimentary ribs at L1. As to the right shoulder, possible impingement with narrow acromiohumeral distance on abduction view was noted. (Px2).

Petitioner saw orthopedic surgeon Dr. Mall on 3/31/14, reporting a consistent history of accident to Dr. Mall. She also reported immediate pain in her right shoulder, neck and back. Dr. Mall reported her pain was posterior in nature and radiated down the right arm with numbness into the fingers. Petitioner denied any prior similar problems. On exam, he noted a positive cervical Spurling's test, and a positive right shoulder O'Brien's test with mild rotator cuff weakness.

Noting shoulder x-rays showed no significant degeneration. Dr. Mall diagnosed rotator cuff strain versus partial cuff tear, biceps/labral complex injury and possible cervical radiculopathy. He prescribed steroids, therapy and anti-inflammatories. He noted that due to overlap between the neck and shoulder, both structures needed to be evaluated, and if Petitioner did not improve he would obtain MRIs. He opined that the injury as described could have caused injury to the rotator cuff, supero-labral area, and "could potentially pull on a nerve root of the cervical spine – depending on how this happened." (Px3).

The initial PT report from St. Mary's on 4/1/14 notes a referral diagnosis of displacement of cervical intervertebral disc and rotator cuff sprain. (Px1). On 4/22/14, Petitioner reported no significant improvement, and that a lot of her pain was in the posteromedial shoulder and shoulder blade and trapezius regions. Petitioner reported an incident in therapy where she felt a pop and her hand went numb. (Px3). Dr. Mall obtained MRIs that day. The right shoulder report notes insertional undersurface tendinopathy or mild partial tearing of the supraspinatus with subchondral degenerative change and cyst formation, but no full thickness rotator cuff tear. Cervical films reportedly showed a minimal disc bulge at C4/5 with questionable tiny partial annular tear, but no significant contour abnormality and no nerve root impingement. (Px4). Dr. Mall's review indicated what he described as moderate grade cuff tearing and some fluid around the bicep, while cervically there was some disc protrusion which appeared to be central in nature. He recommended ongoing therapy and referred Petitioner to Dr. Boutwell for possible cervical injections versus trigger point injections. His report stated: "While there is no significant disc herniation protruding on a nerve root, she easily had a traction-type injury to one of the nerve roots and caused inflammation around the nerve root that may respond to cortisone injection." (Px3).

On 5/6/14, Dr. Boutwell reviewed Petitioner's records and examined her, coming to the conclusion she had a "likely mixed cervical picture", and recommended a C3/4 epidural and a series of nerve blocks on the right from C3 to C7. (Px8). The epidural was performed on 5/14/14, and the nerve blocks were performed on 6/2/14. (Px9).

On 6/2/14, Petitioner told Dr. Mall the injections made her neck pain worse, and that therapy increased her shoulder pain significantly. Dr. Mall believed the majority of Petitioner's symptoms were coming from the neck, while her "secondary" pain in the posterior shoulder was also likely neck related in the trapezius, but could also be related to underlying shoulder pathology. He recommended continued therapy for both, as well as differential injections in and around the shoulder – if this relieved her symptoms, "this is almost assuredly a cervical spine condition only." (Px3).

Respondent obtained a utilization review from orthopedic surgeon Dr. Sampat with regard to Dr. Mall's recommendation for an additional 4 weeks of therapy. His 6/11/14 report non-certified this treatment, indicating Petitioner had already undergone 36 therapy sessions and nothing further would be supported by Official Disability Guidelines (ODG) based on his review of the records and the diagnoses indicated. (Px5).

On 6/12/14, Dr. Boutwell saw Petitioner and reported that she had "a rather equivocal response" to the injections, and that neither was profoundly beneficial. She recommended "switching gears", and prescribed gabapentin. (Px8).

On 6/30/14, Petitioner reported that she had significant right shoulder pain that continued to worsen with therapy and any activity, and that Neurontin for cervical pain provided no relief. Dr. Mall injected the intraarticular space and subacromial space, with Petitioner reporting the former provided 75% relief, and the latter 95% relief. Based on this, Dr. Mall opined both locations were contributing to her pain and prescribed arthroscopic surgery. (Px3).

On 7/2/14, Petitioner reported to Dr. Boutwell that she was stable since the last visit with the same pain ranging from 3/10 to 8/10 in intensity. She changed Petitioner's prescription from diclofenac to Relafen along with gabapentin. At 7/29/14 follow-up, Dr. Boutwell stated that Petitioner had "ongoing recalcitrance to interventional procedures and

NSAIDs, as well as anti-neuropathic pain medication." She concurred with Dr. Mall attempting surgery, "if for no other reason" than that all other treatments had failed, but noted that Petitioner could be guarding diffusely and this could cause her right neck pain and impact the nerve roots in such a way as to mimic a radiculopathic-type picture. Petitioner was to reduce medications in anticipation of surgery. (Px8).

On 8/12/14, Dr. Mall performed surgery involving a right rotator cuff repair, open biceps tenodesis and subacromial decompression with radiculopathy. The post-surgical diagnoses were partial thickness cuff tear (50%), biceps tendonitis and Os acromiale. It appears the Petitioner also had a brachial plexus block administered for acute post-op pain. (Px6).

Dr. Mall initiated therapy on 8/26/14. On 9/29/14, Petitioner was doing well with minimal complaints, though she noted a recent fall where she fell onto her shoulder. On 10/27/14, Dr. Mall noted Petitioner was doing well, making some improvements, and she was to begin strengthening therapy along with range of motion. On 11/24/14, therapy was continued, with Dr. Mall noting Petitioner should be ready to return to full duty work in a month, and if she wasn't he would recommend two weeks of work conditioning. On 12/23/14, Dr. Mall reported that Petitioner made a lot of strides in the last month and recommended two more weeks of therapy followed by two weeks of conditioning. On 1/20/14, Petitioner noted some tenderness with lifting in work conditioning. Dr. Mall released Petitioner to full duty with no overtime, and if she did well was going to release her at maximum medical improvement (MMI) in a month. (Px3).

On 2/17/15, Dr. Mall reported that Petitioner was doing well from a shoulder standpoint, was working full duty and, other than soreness towards the end of the day, was tolerating it well. Petitioner reported consistent and persistent numbness into the right ulnar distribution as well as some neck symptoms. Dr. Mall noted "from her initial visit on", Petitioner had complained of numbness into her fingers with radiating pain from the neck. Dr. Mall here states that the Petitioner had a full thickness cuff tear, despite films and the operative report indicating only a partial thickness tear, and that he therefore elected to proceed with shoulder surgery. He then diagnosed possible cervical radiculopathy versus right cubital tunnel and ordered a cervical MRI and EMG/NCV testing, while continuing full duty "from a shoulder standpoint." Noting he didn't have the full report from either study on 3/24/15, Dr. Mall referred Petitioner to Dr. Gornet for cervical evaluation at that time. (Px3).

The 3/24/15 cervical MRI showed no significant disc profile abnormality, central canal stenosis or neuroforaminal stenosis throughout the cervical spine, and no significant facet arthropathy. It was also noted that this was not significantly changed versus the 4/22/14 films. (Px4).

EMG/NCV testing was also performed on 3/24/15. Dr. Phillips reported that it showed no evidence of any cervical radiculopathy or peripheral neuropathy such as carpal or cubital tunnel. The latter was confirmed via ultrasound testing. (Px11).

Petitioner first saw Dr. Gornet on 4/16/15, reporting that "her current problem began on or about 2/26/14 . . . [A mentally disabled] patiently disabled patient. The patient suddenly grabbed her arm and pulled her and this caused an injury." She reported constant neck pain into the right trapezius, right shoulder and pain down into the forearm and hand with tingling as well as headaches. Petitioner reported the shoulder surgery helped her, but a portion of her symptoms had not resolved. She was working full duty with only her work hours restricted. She described paresthesias in an ulnar distribution. Examination was essentially normal, and Dr. Gornet noted that plain films reflected no significant disc degeneration or foraminal stenosis, while his review of the recent cervical MRI noted the report indicated no significant pathology, but his review of foraminal views showed "obvious foraminal herniation on the right side at C3/4 causing some foraminal narrowing" which was "missed in the radiologist's report." He noted no other significant pathology. Dr. Gornet further opined, "I have discussed with the patient that it appears her neck symptoms, shoulder and arm

symptoms are causally connected to her work-related accident. My recommendation for her would be a simple steroid injection at C3/4 on the right side." For this, he referred Petitioner to Dr. Boutwell and continued Petitioner on full work duties. (Px7)

Petitioner returned to Dr. Mall on 4/21/15, who stated that Dr. Gornet believed Petitioner's hand numbness was a separate condition and unrelated to the cervical spine, and noted that EMG/NCV testing was negative for cervical radiculopathy and cubital tunnel syndrome. He recommended cubital tunnel release and nerve transposition based on her clinical findings. (Px3).

Dr. Boutwell performed the epidural at right C3/4 on 5/11/15. (Px9). At a 6/25/15 follow-up with Dr. Gornet, Petitioner reported substantial relief with the injection – she still had symptoms, but they were much more tolerable. He advised her to continue to work and to follow up in three months, and if she was doing well she would be released, noting further injections or even surgery could still be needed. (Px7).

On 7/17/15, 9/25/15, 11/20/15 and 1/22/16, Dr. Mall continued to recommend cubital tunnel surgery, noting Petitioner was trying to get authorization to proceed. On 4/5/16, Petitioner complained of lateral epicondylar pain as well, and lateral epicondylitis was an added diagnosis, for which conservative treatment was recommended. By the last visit of 2/15/17 with Dr. Mall, Petitioner's lateral epicondylitis had resolved, but he continued to recommend cubital tunnel surgery, noting he still waiting for surgical approval. (Px3).

Petitioner was examined by orthopedic surgeon Dr. Robson on 7/28/15. Petitioner reported she was leaning over a patient to apply a C-PAP device and the patient became aggravated and pulled at her arm, resulting in mid back, neck and arm pain. The Petitioner reported aching right neck pain that radiated down the right arm with numbness and tingling in the right hand. She denied any prior history of neck or right shoulder pain, and was working full time. Petitioner noted she was to follow up with Dr. Gornet in 3 months to consider cervical surgery. After examining Petitioner and reviewing her medical records, Dr. Robson opined that the Petitioner sustained a cervical strain on 2/26/14, and continued to report right-sided neck and radicular symptoms. He opined that the Petitioner's treatment to date had been reasonable, but that she needed no further treatment, as it was unlikely to provide further benefit. He indicated the Petitioner had reached MMI, that her strain should continue to improve, and that she could work unrestricted duties. (Rx7).

On 7/30/15, Petitioner called Dr. Gornet's office and reported the injection only lasted for about 3 weeks, after which she returned to her previous state. It was noted that Dr. Gornet recommended a repeat right C3/4 epidural, and the Petitioner agreed to the plan pending her 10/1/15 appointment. (Px7). This was performed on 9/3/15. (Px10). On 10/1/15, Dr. Gornet noted Petitioner had some relief with injections, and had undergone her second. He opined that a small right C3/4 herniation correlated with her trapezial symptoms, while Dr. Mall was recommending cubital tunnel surgery, and "She understands that the pain must really guide where we go here." He prescribed medication to manage her symptoms and believed she could continue to work, though she had not yet reached MMI. (Px7).

At 12/10/15 follow up with Dr. Gornet, he noted her main complaint related to his care was right trapezial pain into the shoulder and forearm with tingling, and "she also has ulnar nerve issues." Petitioner reported her pain was slowly worsening, and while a repeat injection was discussed, Dr. Gornet wanted to continue observation and medications. On 3/21/16, Dr. Gornet planned a follow up with a C3/4 epidural and indicated the Petitioner could continue to work. He also noted no new injuries, and that he continued to believe her symptoms were causally related to the 2/28/14 accident. The epidural was performed on 4/26/16. (Px10). On 6/2/16, Dr. Gornet ordered an updated MRI scan, noting he had prescribed a C3/4 disc replacement surgery. (Px7). Repeat cervical MRI scanning on 8/18/16 reflected small disc bulges midline at C3/4 and C4/5 without stenosis or foraminal encroachment. (Px4). Dr. Gornet stated that the scan

showed what he believed to be a C3/4 foraminal herniation, only seen on foraminal views, and continued to recommend surgery. (Px7).

Dr. Robson issued an addendum report on 12/20/16. He noted that while both Dr. Gornet (C3/4 disc replacement) and Dr. Mall (cubital tunnel decompression) were recommending surgery, the epidural performed by Dr. Blake on 4/26/16 did not provide relief of Petitioner's symptoms, noting a 6 to 7 out of 10 pain score after the procedure. He also noted the updated cervical MRI was identical to 3/24/15 films and that he continued to opine that Petitioner had reached MMI and needed no further treatment: "The fact that she has had further treatment and it has not helped her confirms my opinion." (Rx8).

Petitioner last visited Dr. Gornet on 2/16/17, noting no focal neurologic complaints, but that Petitioner felt her symptoms impacted her quality of life. Dr. Gornet continued to recommend surgery and asked Petitioner to follow up in 4 months. (Px7).

Dr. Robson testified via deposition on 2/4/16. He testified that his examination was normal other than some tenderness in the right neck and shoulder with palpation, and neck pain at the extremes of motion. His review of the cervical MRI showed some loss of disc height and bulging at C3/4 and C4/5. Asked about Dr. Gornet's finding of a herniated disc, he testified he did not see any herniation, noting that the radiologist didn't either. Petitioner reported she had temporary relief for a couple of weeks following injections. Petitioner's EMG testing was normal and showed no radiculopathy. He opined that Petitioner sustained a neck strain. He opined that Petitioner did not need surgery given she had improvement, there was no evidence of radiculopathy on the EMG or MRI, and the two small cervical bulges "were not what I would consider rising to the level of surgical intervention." As noted in his report, his opinion was that the Petitioner had reached MMI, needed no further treatment and was capable of working her regular job. While Dr. Robson opined that the Petitioner had no permanency per the AMA guides, he did not testify as to how he came to that conclusion other than that she had no functional limitations. (Rx9).

On cross examination, Dr. Robson testified that it was reasonable that Petitioner saw Dr. Gornet in October 2015, after he found her to be at MMI, and obtained medications for her bad days, in order to wrap up her care, though he indicated over-the-counter NSAIDs and muscle relaxers such as antihistamine Benadryl, would also work. As to Gornet noting another possible injection at a December 2015 visit, Dr. Robson testified that this would not be reasonable, as she already had tried injections with only a couple of weeks of minimal relief ("its kind of been there, done that with her"), so the risk of additional injections would outweigh any benefits. (Rx9).

Dr. Robson was deposed a second time on 2/9/17. (Rx10). He reiterated his opinion that the Petitioner was not a cervical surgery candidate, and that she had otherwise exhausted all non-operative care and had reached MMI. She had good strength and a good examination, and there were no structural abnormalities in the spine, so Dr. Robson felt she had a good prognosis: "I felt eventually her pain would subside and she would have normal function." (p. 11). As to whether she is a surgical candidate given she has ongoing symptoms, Dr. Robson testified that there was no structural abnormality that would be amenable to surgical repair, and that he can't predict that the risk of surgery would outweigh any potential benefit given no frank pathology, and thus the surgery would not be reasonable given essentially normal cervical MRI and EMG/NCV at C3/4. He reviewed additional records since 7/28/15 which indicate Dr. Gornet is contemplating a C3/4 disc replacement, and Dr. Mall a cubital tunnel decompression. A subsequent C3/4 epidural also "did not predictably relieve her symptoms." An updated 8/18/16 MRI was also normal at the C3/4 level and for nerve impingement by the neuroradiologist who read the films. The film was virtually identical to the 3/24/15 films, which was also the radiologist's opinion. At this point, Dr. Robson advised that the Petitioner should live with her condition. He testified that while a C3/4 lesion could cause shoulder pain, it would not cause pain radiating down the arm to the hand,

which also indicates that an additional epidural, including the one performed in April 2016, is not warranted. At that epidural, Dr. Blake noted identical pain scores before and after injection of 7/10. He had no opinion with regard to Dr. Mall's treatment of the shoulder and arm, and noted he would argue that the cervical spine is not even producing the symptoms Petitioner complains of. (Rx10).

On cross exam, Dr. Robson testified that he reviewed the Petitioner's MRI films, not just the reports. He has treated patients with cervical bulges with injections, but he has not operated on them unless there was evidence of nerve root impingement. Petitioner's statements to him were that the injections provided no long-term relief. He agreed that given there are bulges, her discs weren't completely normal, but there was no impingement or displacement. As to the statement in his report that Petitioner should continue to improve, yet she has ongoing complaints, Dr. Robson testified: "Well, my problem is it may not be coming from pathology in her cervical spine." Dr. Robson had no dispute with Dr. Gornet obtaining an updated MRI in 2016, but he disputes that the films showed a herniation, noting she had a small, "like degenerative" disc bulge and no evidence at all of nerve root impingement. He again noted this is in agreement with the radiologist's report. As to Dr. Gornet's 8/18/16 report, Dr. Robson agreed C3/4 could impact the right shoulder and trapezius, but impact to the upper arm is "a little bit of a stretch", and is at odds with Petitioner's complaints of pain all the way to the fingers. He did agree that if there was a herniation on the right at that level, it could cause the shoulder and upper arm symptoms. He noted he has many patients with similar symptoms who have improved over time, even over the course of several years. Dr. Robson agreed that the work injury could be a factor in her current complaints, and he was not aware of any intervening injuries. While he testified the Petitioner has to be wary of mental patients at her job, she was not in a situation where one more thing is going to tip the scale and require surgery, as her spine structure is normal. He did not believe that Petitioner's symptoms would improve with cervical disc replacement, noting if the she has it and indicates it helps, "I just would call it a remarkable coincidence." (Rx10).

The Petitioner was also examined by Dr. Sudekum at the request of the Respondent on 8/3/15 with regard to the right upper extremity, providing a report on that date (Rx11) and his deposition testimony on 6/28/16. (Rx12). He noted the Petitioner complained of the whole hand, both dorsally and palmary, not just the ulnar portion, which would be inconsistent with an isolated cubital tunnel condition. She also had a negative EMG/NCV for cubital tunnel. He pointed out that the Petitioner's initial complaints at the ER were only of the mid-back, and the first notation he saw of a cubital tunnel evaluation or ulnar nerve symptoms was from Dr. Mall or about 2/17/15, about a year post-accident. Prior to that, Dr. Mall had only identified shoulder and cervical spine issues. He testified that it would be very atypical for cubital tunnel symptoms to present a year after an accident if they were related to that accident. In addition to a negative EMG/NCV, Dr. Phillips also obtained ultrasound testing which indicated no structural pathology at the right elbow. Based on these things and his exam, Dr. Sudekum opined that it was highly unlikely Petitioner was suffering from cubital tunnel. (Rx12).

Dr. Sudekum noted that Dr. Mall's 4/21/15 report states that Dr. Gornet didn't think the Petitioner's hand symptoms were due to a cervical condition, and Dr. Mall therefore concluded that the symptoms down the arm were due to cubital tunnel. However, Dr. Sudekum noted he did not see where Dr. Gornet gave this opinion in his prior records, and in fact was indicating he did think there was a significant cervical issue given he was recommending surgery, and all of this was prior to the EMG/NCV. He testified that Dr. Mall was recommending the most aggressive cubital tunnel treatment, surgery, despite the Petitioner having intermittent numbness throughout her hand, no medial elbow pain and a negative EMG/NCV. Dr. Sudekum did not believe the subjective complaints were consistent with the objective findings, and he believed that her complaints seemed out of proportion to the objective findings. Dr. Sudekum did not find evidence of a double-crush phenomenon, as there was no evidence of compression at either the cervical or cubital tunnel levels. In Dr. Sudekum's opinion, the Petitioner's diagnoses were mild chronic degenerative changes of the cervical, thoracic and lumbar spines, and her subjective right complaints were unsupported by objective testing and physical exam. (Rx12).

On cross examination, Dr. Sudekum acknowledged that Dr. Mall on 2/17/15 found a positive Tinel's sign at the right elbow, while Sudekum's exam indicated this was negative, and that there is some subjectivity in this test. He also agreed she had positive Phalen's and Tinel's tests at the right wrist, which could be indicative of carpal tunnel. While he also had a positive Phalen's test on exam at the right elbow, this would be relative to the median nerve, not the ulnar nerve. Dr. Sudekum acknowledged that EMG/NCV testing is not 100% accurate. He agreed it is possible Petitioner could have cervical problems resulting in neck, shoulder and even arm symptoms, but felt it was highly unlikely that, in the absence of EMG/NCV findings of cervical radiculopathy, her entire hand would go numb and still be due to radiculopathy. It is possible that she has right arm symptoms from the surgery and/or shoulder conditions that were operated on, but this would be highly unusual. As to the chronic conditions of the neck and shoulder, Petitioner's symptoms "would not be consistent with what I would normally expect as secondary effects of those conditions. But it's certainly possible that they could be playing some part in the etiology of those symptoms." This would be in the absence of secondary gain type issues, and assumes that Petitioner's complaints are accurate. He did note that cervical injections did appear to provide some improvement, and "that by itself is a pretty good indication that maybe you're onto something." (Rx12).

Petitioner testified that she continued to have the same neck and upper shoulder pain that she had before the right shoulder surgery. She testified she underwent physical therapy per Dr. Gornet, as well as cervical epidurals and nerve blocks with Dr. Boutwell, but had no lasting relief. Out of 4 injections she received, she had about 2 weeks of relief with two of them, and no relief at all from the other two.

Following her release to full duty from Dr. Mall, the Petitioner returned to her regular job in January 2015, and she has continued to perform that job through the hearing date, testifying: "It's painful, but I take pain medication." Petitioner testified that she had no neck problems prior to the accident date. She wanted to undergo the recommended C3/4 disc replacement surgery so that her condition would improve.

With regard to Dr. Mall's 9/29/14 note indicating that she tripped and fell at home, Petitioner testified her symptoms did not increase. She returned to Dr. Mall to make sure she didn't reinjure her right shoulder, and she said his assessment was that she did not.

On 4/10/16, the Petitioner testified that she was passing out medications at a cottage that was not her normal cottage. She provided a mental resident, Scottie, with his medications, but he would not leave the medication room. She testified he kept pushing and pulling on her until two mental health techs got him away from her. Petitioner testified that she felt like this incident aggravated her neck condition, but that her current symptoms are about the same, and she continues to wake up and go to bed with pain daily.

On cross examination, the Petitioner testified that on 2/26/14, when the patient grabbed her by her right forearm and pulled her over to where her feet were off the ground, it took a minute or so to get him to release her. Once she got free, she allowed him to calm down for a few minutes and she then was able to apply the C-PAP device. No other employees were present to assist, which Petitioner indicated was fairly normal. Petitioner testified her initial symptoms were shoulder, back, arm and neck pain, all on the right side, and that she had no prior similar injuries to these areas.

As to the 4/10/16 incident with Scottie, Petitioner testified that the confrontation was only with him, and that he "kept grabbing me by my arms and shoulders and pulling and pushing on me" because he wanted something more than she was dispensing to him. She estimated it was probably a couple of minutes before the techs intervened, and they were approximately 5' to 7' away from the medication room she was at. She testified that this incident aggravated her

condition because it intensified her neck and shoulder pain. She was still under the care of Dr. Mall and Dr. Gornet when this occurred, and reported the incident to them.

A 4/10/16 Employee Injury Report, signed by Petitioner, indicates she reported a resident pushed and pulled on her right arm and shoulder causing pain in the right side of her neck radiating down the arm. The Employee Notice of Injury from 4/11/16 states the Petitioner had given an individual medication and water, and he started pushing her into the medication room, and as she tried to get him out, he continued to push and pull on her right arm and shoulder. The Supervisor's report, signed by Dena Soler, who indicated she reported it to the AOD, Mary Ann Smith. A 4/11/16 Workers' Compensation Medical Report from Respondent's facility reflects that Petitioner was attacked by a patient and now had pain down the right side down the arm, and the diagnosis was cervical radiculopathy. (Px12; Px14; Rx1; Rx2). There also is an ER report from Salem Township on 4/11/16 noting a client was pushing on Petitioner trying to get into the medication room. She reported right neck and shoulder pain radiating down the arm to her fingertips, which were numb. Petitioner noted she was previously diagnosed with a bulging disc and was still involved in a workers' compensation case with regard the neck, right shoulder and right arm. The diagnosis was cervical myofascial strain, and it appears she was given medication. The reports are mostly handwritten, and it is hard to tell if anything else was prescribed or recommended. (Px13).

Petitioner testified on further cross exam that her right rotator cuff has been fine since recovering from surgery. She continues to have pain in the right neck leading down over her shoulder down to about the clavicle area. It does occasionally go into her arm: "a couple times a week it radiates down." She continues to have pain on a daily basis, and she takes Aleve and Flexeril daily. Nothing in particular aggravates her symptoms. Petitioner agreed she has been working full unrestricted duty regularly for the past two years. She wears a brace on her right arm to extend her elbow, as recommended by Dr. Mall. She agreed that her recent work performance evaluations have been good.

The Respondent called Darwin Smith and Michelle Topp, the two mental health techs that assisted Petitioner with Scottie on 4/10/16, as witnesses. Both essentially testified that Scottie has a significant case of obsessive compulsive disorder (OCD). They also both testified that they were doing other things when they heard a commotion by the medication room, where the Petitioner was. Mr. Smith testified that Scottie was at a table, the Petitioner had failed to give him the medication he expected, so he "threw a fit" and went to where Petitioner was giving out medications at the medication room door. He estimated he was 20 to 30 feet away from the door at the time. He heard scuffling, he looked up and saw Scottie throw some cups or something, and the scuffling lasted for a few seconds. Ms. Topp had grabbed Scottie, and Smith went over to help her. He did not see the Petitioner in any physical interaction with Scottie, other than that he "nudged the cart." Mr. Smith completed a witness statement sometime after the incident, and testified that he believed what it states remains accurate. On cross examination, Mr. Smith agreed that it is possible there was an interaction between Petitioner and Scottie before he heard the shuffling and looked up, and agreed that, in his experience with Scottie, he could get agitated and could get physical with the staff.

Ms. Topp's testimony was consistent with this. She was about 10 feet away from the medication room on 4/10/16 and heard the Petitioner indicate she was done with Scottie, and then heard some commotion: "like some stuff off the med cart. I don't know if he was grabbing her stuff or just knocking her stuff off." This lasted a couple of seconds, and when she looked up, Scotty was standing next to the cart. To her recall, Scottie was just standing by the cart, though she testified: "I don't remember a whole lot." She and Mr. Smith then directed Scottie back to the unit. She herself did not see Scottie contact the Petitioner or get into a physical altercation with her. She noted that with Scottie's OCD (obsessive compulsive disorder) condition, if someone, such as a new nurse, does not follow his specific normal protocol, he can have a fit of rage and will act out. On cross exam, she also agreed that her back was initially turned and

she was not initially looking at where the Petitioner was, and so she did not see what may have happened between Scottie and the Petitioner before she looked up.

Ms. Topp's witness statement indicated that after Petitioner told Scottie he could go, he went into the medication room and started grabbing for things on top of the cart, which is when she and Mr. Smith redirected him out of the room. Mr. Smith stated essentially the same thing in his witness statement. (Rx3).

In rebuttal testimony, Petitioner testified that after the incident with Scottie on 4/10/16, she went to Elm Cottage (Respondent's administration facility) after her shift, reported the incident to the RN there and completed an injury report (Rx1). As to the supervisor's report of injury (Rx2), Petitioner testified that part III was completed in the handwriting of the Dena Soler, the "RSS" who supervised her and all of the technicians, and to whom she is supposed to report an accident, and she reported it to Mary Ann Smith. Both Soler and Smith signed off on Rx2, and no one has questioned her version of events since she reported it. On cross examination, the Petitioner agreed that she prepared the document in Rx1 on 4/11/16 relative to the 4/10/16 accident. As to the "how injury occurred" portion, Petitioner had no knowledge of when her supervisor actually completed the form or why it was the exact same words used in both forms to describe the injury. Petitioner testified that Ms. Soler is no longer her supervisor.

The parties stipulated on the record that the issue of prior medical expenses has been reserved, and may be litigated in the future, if needed. (Tr. p. 71).

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 Petitioner testified that on 2/26/14 her arm was grabbed and jerked by an agitated mental patient while she was attempting to apply a C-PAP device to his face while he was in bed. She also testified that the arm was yanked, and that she was lifted off the ground and almost into the patient's bed. There are multiple accident reports that were submitted by both parties that were completed on 2/27/14, and these reports provide a consistent history of accident. The initial ER report from 2/27/14 from St. Mary's Centralia further supports the Petitioner's testimony in terms of how she was injured at work.

The Arbitrator finds that the Petitioner has established that she sustained accidental injuries arising out of and in the course of her employment with the Respondent on 2/26/14. She was clearly in the course of her employment, as she was still working her regular shift and was performing her job in applying the C-PAP device to a patient at the time of the incident. The Arbitrator further finds that the Petitioner's accident arose out of the employment as she was put in a situation of increased risk of injury based on dealing with a mental patient who physically yanked her arm. In the Arbitrator's view, the preponderance of the evidence clearly supports a compensable 2/26/14 accident.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, and WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The parties specified at the start of the hearing that the issue to be addressed in the case is the causal relationship of Petitioner's cervical spine to her work accident or accidents. As such, the Arbitrator will not rule on the causal relationship of any other conditions. The Arbitrator finds that the Petitioner's cervical condition of ill-being is causally related to the 2/26/14 accident. The Arbitrator further finds that the current treatment recommended by Dr. Gornet, specifically _______, is reasonable and necessary within the meaning of Section 8(a) of the Act. However, the Arbitrator finds that the previously, and potentially future, recommended C3/4 disc replacement surgery is not reasonable and necessary pursuant to Section 8(a).

The Petitioner initially had mid-back complaints at her ER visit of 2/27/14. However, shortly thereafter, her complaints included the right side of her body from her shoulder to her hip. The initial April 2014 cervical films showed a mild bulging disc at C4/5, with no evidence of pathology at C3/4 according to the radiologist's report. Following this, Dr. Mall initially stated that there was no significant disc herniation compressing a nerve root, but that the Petitioner "easily" had a traction-type injury to one of the nerve roots that caused inflammation around the nerve root and that might respond to cortisone injection. Dr. Boutwell on 5/6/14 opined that Petitioner had a likely "mixed cervical picture", recommending a C3/4 epidural and a series of nerve blocks on the right from C3 to C7.

Petitioner testified that two injections helped, and two did not, but did not specify which ones did or did not help.

Petitioner reported to Dr. Mall the injections and therapy made her neck pain worse. Dr. Boutwell indicated the Petitioner reported an "equivocal" response to the injections. While noting potential shoulder involvement, Dr. Mall opined initially a strong belief that most of the Petitioner's problems were cervical. Based on the relief Petitioner reported with shoulder injections he then performed, Dr. Mall opined that the shoulder was involved and prescribed surgery. Dr. Boutwell then indicated she agreed with the surgery "if for no other reason" than that all other treatments had failed. However, she also opined that Petitioner could have been diffusely guarding her condition, and that this could have resulted in her right neck pain and could have impacted the nerve roots in such a way as to mimic a cervical radiculopathy.

Right shoulder surgery was performed in August 2014, and the Petitioner testified as follows about her post-operative condition:

"Q. So after this shoulder surgery, were you still having any kind of pain that you related to your neck?
A. Yeah, I had pain in my neck and the upper shoulder area daily, and that's what I was seeking treatment through Dr. Gornet for.
Q. And that was the pain that had been present even before the shoulder surgery?
A. Yes."

Petitioner testified that she continued to have the same neck and upper shoulder pain that she had before the right shoulder surgery. She testified she underwent physical therapy per Dr. Gornet, as well as cervical epidurals and nerve blocks with Dr. Boutwell, but had no lasting relief. Out of 4 injections she received, she testified she had about 2 weeks of relief with two of them, and no relief at all from the other two, but did not specify which two in either case.

Dr. Mall's post-operative reports reflect that the Petitioner had significant improvement with surgery. On 2/17/15, Dr. Mall reported that Petitioner's right shoulder was doing well and he ultimately released Petitioner to full duty relative to the shoulder. However, after this, the Petitioner continued to report consistent and persistent symptoms in the neck, posterior shoulder and numbness into the right ulnar distribution. Dr. Mall had noted "from her initial visit on", the Petitioner had been complaining of her right shoulder and numbness into her fingers with radiating pain from the neck.

The Arbitrator fails to see how the shoulder surgery really changed the Petitioner's condition, outside of the notes of Dr. Mall. which appear to be in opposition to the Petitioner's ongoing right neck, shoulder and arm/hand complaints. This takes on more particular importance when Dr. Mall, despite previously noting partial thickness rotator cuff tear in his surgical report (which is also what the right shoulder MRI indicated), he stated that he had decided to proceed with shoulder surgery based on a full thickness rotator cuff tear. He had previously indicated his strong belief that the Petitioner's symptoms were cervical until he performed the shoulder injections, and the records do not bear out his statements that she had a full thickness cuff tear. This, as well as the Petitioner's own reports of similar symptomatic complaints both before and after surgery, impacts the persuasiveness of Dr. Mall's opinions in this case in the Arbitrator's view

The 3/24/15 cervical MRI report of the radiologist noted no significant disc abnormality, central canal stenosis or neuroforaminal stenosis throughout the cervical spine, and no significant facet arthropathy. It was also noted that this was not significantly changed versus the 4/22/14 films. EMG/NCV testing that day was normal regarding both radiculopathy and peripheral neuropathy.

On 4/16/15, Dr. Gornet noted complaints of constant neck pain into the right trapezius, right shoulder and pain down into the forearm and hand with tingling as well as headaches. Petitioner reported the shoulder surgery helped her, but a portion of her symptoms had not resolved. In thoroughly reviewing the records in evidence, it is unclear to the Arbitrator exactly what portion of the symptoms were improved with shoulder surgery, as the Petitioner appeared to have essentially the same complaints she had before shoulder surgery. Dr. Gornet's examination was also essentially normal, and Dr. Gornet noted that plain films reflected no significant disc degeneration or foraminal stenosis. His review of the recent cervical MRI noted the report indicated no significant pathology, but his review of foraminal views showed "obvious" foraminal herniation on the right side at C3/4 causing some foraminal narrowing that he stated was missed in the radiologist's report. In the Arbitrator's view, Dr. Gornet's statements negatively impacts his opinions in this case. Both the radiologist and Dr. Robson have indicated they did not see any disc herniations on MRI films. For Dr. Gornet to indicate such herniation to be "obvious" in such circumstances does not make sense.

Dr. Mall on 4/21/15 then states that Dr. Gornet believed Petitioner's hand numbness was a separate condition and unrelated to the cervical spine, resulting in Mall's recommendation of right elbow surgery. As noted by Dr. Sudekum, there is no indication noted in the records of Dr. Gornet of him providing this opinion.

Following the right C3/4 epidural performed by Dr. Boutwell, Dr. Gornet on 6/25/15 indicated that the Petitioner reported substantial relief with the injection. While she still had symptoms, Dr. Gornet indicated she found them more tolerable, and his plan at that point was, if she returned in three months doing well, to release the Petitioner from care. However, on 7/30/15, Petitioner called Dr. Gornet's office and reported the injection only lasted for about 3 weeks, after which she returned to her previous state. This doesn't make sense to the Arbitrator, since it had already been 6 weeks after the injection when Gornet saw her on 6/25/15. How would she report very good results 6 weeks after the injection, and then 2.5 months after the injection report that relief only lasted 3 weeks? Something does not jibe.

On 7/28/15, Dr. Robson opined that the Petitioner sustained a cervical strain on 2/26/14, and continued to report right-sided neck and radicular symptoms. He opined that the Petitioner's treatment to date had been reasonable, but that she needed no further treatment, as it was unlikely to provide further benefit

Following a 9/3/15 epidural, on 10/1/15 Dr. Gornet noted Petitioner had some relief with injections, and had undergone her second, but did not specify the results of that specific second injection. He opined that a small right C3/4 herniation

correlated with her trapezial symptoms, while Dr. Mall was recommending cubital tunnel surgery, stating "She understands that the pain must really guide where we go here." He opined that Petitioner could continue to work, though she had not yet reached MMI. In his 12/20/16 addendum report, Dr. Robson noted that while both Dr. Gornet (C3/4 disc replacement) and Dr. Mall (cubital tunnel decompression) were recommending surgery, the epidural performed by Dr. Blake on 4/26/16 did not provide relief of Petitioner's symptoms, noting a 6 to 7 out of 10 pain score after the procedure.

Repeat cervical MRI scanning on 8/18/16 reflected small disc bulges midline at C3/4 and C4/5 without stenosis or foraminal encroachment at either level. Despite this same finding by the radiologist, Dr. Gornet opined that the scan showed what he believed to be a C3/4 foraminal herniation, only seen on foraminal views, and continued to recommend surgery. Dr. Robson reported that the updated cervical MRI was identical to 3/24/15 films, and continued to opine that Petitioner had reached MMI, noting that the failure of further treatment to improve her condition "confirms my opinion."

Robson testified that he did not see a herniation in the cervical MRI films, that the radiologist also did not find one, that there was no evidence of radiculopathy on the EMG or MRI, and that the two small cervical bulges would not rise to the level of requiring surgical intervention. Explaining this further, Dr. Robson testified that there was no structural abnormality that would be amenable to surgical repair, and that he could not say that the risk of surgery would outweigh any potential benefit given no frank pathology.

After reviewing Dr. Gornet's post-7/28/15 records, Dr. Robson opined that the Petitioner had reached MMI and her best option was to live with her condition. He questioned how much of her symptoms were even coming from the cervical spine. The confusion over the source of Petitioner's various symptoms is clearly reflected in the records of Dr. Mall, Dr. Boutwell and Dr. Gornet. Dr. Robson testified that while Dr. Gornet was correct that a C3/4 lesion could cause neck and shoulder pain, and possibly upper arm pain, it would not cause pain radiating down the arm to the hand. Given the delay in any indication of cubital tunnel suspicion until a year after the accident, Dr. Sudekum testified that such condition, if it even existed given his lack of both examination and EMG/NCV findings for same, would not be related to the accident.

Petitioner testified on further cross exam that her right rotator cuff has been fine since recovering from surgery. She continues to have pain in the right neck leading down over her shoulder down to about the clavicle area that occasionally goes into her arm a couple times a week. She also noted that nothing in particular aggravated her symptoms, and she had been working full unrestricted duty regularly for two years prior to the hearing.

While the Arbitrator believes that the Petitioner testified credibly in this case regarding ongoing symptoms, the Arbitrator finds that the preponderance of the evidence indicates that the source of her symptoms remains in question. The Arbitrator believes that the symptoms themselves, including symptoms that may be coming from the cervical spine, remain causally related to the 2/26/14 accident, she has failed to prove that any further treatment beyond medications is reasonable and necessary pursuant to Section 8(a) of the Act. The Arbitrator finds the opinions of Dr. Robson to be more persuasive than those of Drs. Gornet and Mall as to the cervical spine for the reasons noted above. As such, the Arbitrator finds that the Petitioner has reached MMI with regard to the cervical spine and that she requires no further treatment as a result of the 2/26/14 accident.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Melissa Gordon,

Petitioner,

vs. NO: 16 WC 18375

State of IL / Murray Developmental Center,

19IWCC0009

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice provided to all parties, the Commission, after considering the issues of causal relationship and prospective medical care and being advised of the facts and the law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's finding that although Petitioner sustained accidental injuries arising out of and in the course of her employment on April 10, 2016, she failed to prove a causal relationship exits between those injuries and her current condition of ill-being.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's January 18, 2018 decision is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that since Petitioner failed to prove a causal relationship exists between the accident of April 10, 2016 and Petitioner's current condition of ill-being, her claim is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

DATED: JAN 1 0 2019
LEC/maw
o11/27/18
43

L. Elizabeth Coppoletti

Joshua D. Luskin

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

GORDON, MELISSA
Employee/Petitioner

Case# **16WC018375**

14WC017753

ST OF IL/MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

19IWCC0009

On 1/18/2018, 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 1.60% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5983 CARAWAY FISHER & BROOMBAUGH PC
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
602 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JAN 18 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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

MELISSA GORDON
Employee/Petitioner

Case # **16** WC **18375**

v.

Consolidated cases: **14 WC 17753**

STATE OF IL / MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

19IWCC0009

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

FINDINGS

On the date of accident, **April 10, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$52,629.15**; the average weekly wage was **$1,012.10**.

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

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

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

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

ORDER

The Arbitrator finds that the Petitioner sustained an accident which arose out of and in the course of her employment on April 10, 2016. The Arbitrator further finds that the Petitioner has failed to prove that her condition of ill-being is causally related to the April 10, 2016 accident.

No benefits are awarded.

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

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

Signature of Arbitrator

January 17, 2018

Date

JAN 18 2018

STATEMENT OF FACTS

The Petitioner, a Respondent employee since August of 2010, worked as a Licensed Practical Nurse (LPN) II. This involved performing assessments, passing medications and completing paperwork. On 2/26/14, approximately a half

and cyst formation, but no full thickness rotator cuff tear. Cervical films reportedly showed a minimal disc bulge at C4/5 with questionable tiny partial annular tear, but no significant contour abnormality and no nerve root impingement. (Px4). Dr. Mall's review indicated what he described as moderate grade cuff tearing and some fluid around the bicep, while cervically there was some disc protrusion which appeared to be central in nature. He recommended ongoing therapy and referred Petitioner to Dr. Boutwell for possible cervical injections versus trigger point injections. His report stated: "While there is no significant disc herniation protruding on a nerve root, she easily had a traction-type injury to one of the nerve roots and caused inflammation around the nerve root that may respond to cortisone injection." (Px3).

On 5/6/14, Dr. Boutwell reviewed Petitioner's records and examined her, coming to the conclusion she had a "likely mixed cervical picture", and recommended a C3/4 epidural and a series of nerve blocks on the right from C3 to C7. (Px8). The epidural was performed on 5/14/14, and the nerve blocks were performed on 6/2/14. (Px9).

On 6/2/14, Petitioner told Dr. Mall the injections made her neck pain worse, and that therapy increased her shoulder pain significantly. Dr. Mall believed the majority of Petitioner's symptoms were coming from the neck, while her "secondary" pain in the posterior shoulder was also likely neck related in the trapezius, but could also be related to underlying shoulder pathology. He recommended continued therapy for both, as well as differential injections in and around the shoulder – if this relieved her symptoms, "this is almost assuredly a cervical spine condition only." (Px3).

Respondent obtained a utilization review from orthopedic surgeon Dr. Sampat with regard to Dr. Mall's recommendation for an additional 4 weeks of therapy. His 6/11/14 report non-certified this treatment, indicating Petitioner had already undergone 36 therapy sessions and nothing further would be supported by Official Disability Guidelines (ODG) based on his review of the records and the diagnoses indicated. (Px5).

On 6/12/14, Dr. Boutwell saw Petitioner and reported that she had "a rather equivocal response" to the injections, and that neither was profoundly beneficial. She recommended "switching gears", and prescribed gabapentin. (Px8).

On 6/30/14, Petitioner reported that she had significant right shoulder pain that continued to worsen with therapy and any activity, and that Neurontin for cervical pain provided no relief. Dr. Mall injected the intraarticular space and subacromial space, with Petitioner reporting the former provided 75% relief, and the latter 95% relief. Based on this, Dr. Mall opined both locations were contributing to her pain and prescribed arthroscopic surgery. (Px3).

On 7/2/14, Petitioner reported to Dr. Boutwell that she was stable since the last visit with the same pain ranging from 3/10 to 8/10 in intensity. She changed Petitioner's prescription from diclofenac to Relafen along with gabapentin. At 7/29/14 follow-up, Dr. Boutwell stated that Petitioner had "ongoing recalcitrance to interventional procedures and NSAIDs, as well as anti-neuropathic pain medication." She concurred with Dr. Mall attempting surgery, "if for no other reason" than that all other treatments had failed, but noted that Petitioner could be guarding diffusely and this could cause her right neck pain and impact the nerve roots in such a way as to mimic a radiculopathic-type picture. Petitioner was to reduce medications in anticipation of surgery. (Px8).

On 8/12/14, Dr. Mall performed surgery involving a right rotator cuff repair, open biceps tenodesis and subacromial decompression with radiculopathy. The post-surgical diagnoses were partial thickness cuff tear (50%), biceps tendonitis and Os acromiale. It appears the Petitioner also had a brachial plexus block administered for acute post-op pain. (Px6).

Dr. Mall initiated therapy on 8/26/14. On 9/29/14, Petitioner was doing well with minimal complaints, though she noted a recent fall where she fell onto her shoulder. On 10/27/14, Dr. Mall noted Petitioner was doing well, making some improvements, and she was to begin strengthening therapy along with range of motion. On 11/24/14, therapy was

continued, with Dr. Mall noting Petitioner should be ready to return to full duty work in a month, and if she wasn't he would recommend two weeks of work conditioning. On 12/23/14, Dr. Mall reported that Petitioner made a lot of strides in the last month and recommended two more weeks of therapy followed by two weeks of conditioning. On 1/20/14, Petitioner noted some tenderness with lifting in work conditioning. Dr. Mall released Petitioner to full duty with no overtime, and if she did well was going to release her at maximum medical improvement (MMI) in a month. (Px3).

On 2/17/15, Dr. Mall reported that Petitioner was doing well from a shoulder standpoint, was working full duty and, other than soreness towards the end of the day, was tolerating it well. Petitioner reported consistent and persistent numbness into the right ulnar distribution as well as some neck symptoms. Dr. Mall noted "from her initial visit on", Petitioner had complained of numbness into her fingers with radiating pain from the neck. Dr. Mall here states that the Petitioner had a full thickness cuff tear, despite films and the operative report indicating only a partial thickness tear, and that he therefore elected to proceed with shoulder surgery. He then diagnosed possible cervical radiculopathy versus right cubital tunnel and ordered a cervical MRI and EMG/NCV testing, while continuing full duty "from a shoulder standpoint." Noting he didn't have the full report from either study on 3/24/15, Dr. Mall referred Petitioner to Dr. Gornet for cervical evaluation at that time. (Px3).

The 3/24/15 cervical MRI showed no significant disc profile abnormality, central canal stenosis or neuroforaminal stenosis throughout the cervical spine, and no significant facet arthropathy. It was also noted that this was not significantly changed versus the 4/22/14 films. (Px4).

EMG/NCV testing was also performed on 3/24/15. Dr. Phillips reported that it showed no evidence of any cervical radiculopathy or peripheral neuropathy such as carpal or cubital tunnel. The latter was confirmed via ultrasound testing. (Px11).

Petitioner first saw Dr. Gornet on 4/16/15, reporting that "her current problem began on or about 2/26/14 . . . [A mentally disabled] patiently disabled patient. The patient suddenly grabbed her arm and pulled her and this caused an injury." She reported constant neck pain into the right trapezius, right shoulder and pain down into the forearm and hand with tingling as well as headaches. Petitioner reported the shoulder surgery helped her, but a portion of her symptoms had not resolved. She was working full duty with only her work hours restricted. She described paresthesias in an ulnar distribution. Examination was essentially normal, and Dr. Gornet noted that plain films reflected no significant disc degeneration or foraminal stenosis, while his review of the recent cervical MRI noted the report indicated no significant pathology, but his review of foraminal views showed "obvious foraminal herniation on the right side at C3/4 causing some foraminal narrowing" which was "missed in the radiologist's report." He noted no other significant pathology. Dr. Gornet further opined, "I have discussed with the patient that it appears her neck symptoms, shoulder and arm symptoms are causally connected to her work-related accident. My recommendation for her would be a simple steroid injection at C3/4 on the right side." For this, he referred Petitioner to Dr. Boutwell and continued Petitioner on full work duties. (Px7)

Petitioner returned to Dr. Mall on 4/21/15, who stated that Dr. Gornet believed Petitioner's hand numbness was a separate condition and unrelated to the cervical spine, and noted that EMG/NCV testing was negative for cervical radiculopathy and cubital tunnel syndrome. He recommended cubital tunnel release and nerve transposition based on her clinical findings. (Px3).

Dr. Boutwell performed the epidural at right C3/4 on 5/11/15. (Px9). At a 6/25/15 follow-up with Dr. Gornet, Petitioner reported substantial relief with the injection – she still had symptoms, but they were much more tolerable. He

advised her to continue to work and to follow up in three months, and if she was doing well she would be released, noting further injections or even surgery could still be needed. (Px7).

On 7/17/15, 9/25/15, 11/20/15 and 1/22/16, Dr. Mall continued to recommend cubital tunnel surgery, noting Petitioner was trying to get authorization to proceed. On 4/5/16, Petitioner complained of lateral epicondylar pain as well, and lateral epicondylitis was an added diagnosis, for which conservative treatment was recommended. By the last visit of 2/15/17 with Dr. Mall, Petitioner's lateral epicondylitis had resolved, but he continued to recommend cubital tunnel surgery, noting he still waiting for surgical approval. (Px3).

Petitioner was examined by orthopedic surgeon Dr. Robson on 7/28/15. Petitioner reported she was leaning over a patient to apply a C-PAP device and the patient became aggravated and pulled at her arm, resulting in mid back, neck and arm pain. The Petitioner reported aching right neck pain that radiated down the right arm with numbness and tingling in the right hand. She denied any prior history of neck or right shoulder pain, and was working full time. Petitioner noted she was to follow up with Dr. Gornet in 3 months to consider cervical surgery. After examining Petitioner and reviewing her medical records, Dr. Robson opined that the Petitioner sustained a cervical strain on 2/26/14, and continued to report right-sided neck and radicular symptoms. He opined that the Petitioner's treatment to date had been reasonable, but that she needed no further treatment, as it was unlikely to provide further benefit. He indicated the Petitioner had reached MMI, that her strain should continue to improve, and that she could work unrestricted duties. (Rx7).

On 7/30/15, Petitioner called Dr. Gornet's office and reported the injection only lasted for about 3 weeks, after which she returned to her previous state. It was noted that Dr. Gornet recommended a repeat right C3/4 epidural, and the Petitioner agreed to the plan pending her 10/1/15 appointment. (Px7). This was performed on 9/3/15. (Px10). On 10/1/15, Dr. Gornet noted Petitioner had some relief with injections, and had undergone her second. He opined that a small right C3/4 herniation correlated with her trapezial symptoms, while Dr. Mall was recommending cubital tunnel surgery, and "She understands that the pain must really guide where we go here." He prescribed medication to manage her symptoms and believed she could continue to work, though she had not yet reached MMI. (Px7).

At 12/10/15 follow up with Dr. Gornet, he noted her main complaint related to his care was right trapezial pain into the shoulder and forearm with tingling, and "she also has ulnar nerve issues." Petitioner reported her pain was slowly worsening, and while a repeat injection was discussed, Dr. Gornet wanted to continue observation and medications. On 3/21/16, Dr. Gornet planned a follow up with a C3/4 epidural and indicated the Petitioner could continue to work. He also noted no new injuries, and that he continued to believe her symptoms were causally related to the 2/28/14 accident. The epidural was performed on 4/26/16. (Px10). On 6/2/16, Dr. Gornet ordered an updated MRI scan, noting he had prescribed a C3/4 disc replacement surgery. (Px7). Repeat cervical MRI scanning on 8/18/16 reflected small disc bulges midline at C3/4 and C4/5 without stenosis or foraminal encroachment. (Px4). Dr. Gornet stated that the scan showed what he believed to be a C3/4 foraminal herniation, only seen on foraminal views, and continued to recommend surgery. (Px7).

Dr. Robson issued an addendum report on 12/20/16. He noted that while both Dr. Gornet (C3/4 disc replacement) and Dr. Mall (cubital tunnel decompression) were recommending surgery, the epidural performed by Dr. Blake on 4/26/16 did not provide relief of Petitioner's symptoms, noting a 6 to 7 out of 10 pain score after the procedure. He also noted the updated cervical MRI was identical to 3/24/15 films and that he continued to opine that Petitioner had reached MMI and needed no further treatment: "The fact that she has had further treatment and it has not helped her confirms my opinion." (Rx8).

Petitioner last visited Dr. Gornet on 2/16/17, noting no focal neurologic complaints, but that Petitioner felt her symptoms impacted her quality of life. Dr. Gornet continued to recommend surgery and asked Petitioner to follow up in 4 months. (Px7).

Dr. Robson testified via deposition on 2/4/16. He testified that his examination was normal other than some tenderness in the right neck and shoulder with palpation, and neck pain at the extremes of motion. His review of the cervical MRI showed some loss of disc height and bulging at C3/4 and C4/5. Asked about Dr. Gornet's finding of a herniated disc, he testified he did not see any herniation, noting that the radiologist didn't either. Petitioner reported she had temporary relief for a couple of weeks following injections. Petitioner's EMG testing was normal and showed no radiculopathy. He opined that Petitioner sustained a neck strain. He opined that Petitioner did not need surgery given she had improvement, there was no evidence of radiculopathy on the EMG or MRI, and the two small cervical bulges "were not what I would consider rising to the level of surgical intervention." As noted in his report, his opinion was that the Petitioner had reached MMI, needed no further treatment and was capable of working her regular job. While Dr. Robson opined that the Petitioner had no permanency per the AMA guides, he did not testify as to how he came to that conclusion other than that she had no functional limitations. (Rx9).

On cross examination, Dr. Robson testified that it was reasonable that Petitioner saw Dr. Gornet in October 2015, after he found her to be at MMI, and obtained medications for her bad days, in order to wrap up her care, though he indicated over-the-counter NSAIDs and muscle relaxers such as antihistamine Benadryl, would also work. As to Gornet noting another possible injection at a December 2015 visit, Dr. Robson testified that this would not be reasonable, as she already had tried injections with only a couple of weeks of minimal relief ("its kind of been there, done that with her"), so the risk of additional injections would outweigh any benefits. (Rx9).

Dr. Robson was deposed a second time on 2/9/17. (Rx10). He reiterated his opinion that the Petitioner was not a cervical surgery candidate, and that she had otherwise exhausted all non-operative care and had reached MMI. She had good strength and a good examination, and there were no structural abnormalities in the spine, so Dr. Robson felt she had a good prognosis: "I felt eventually her pain would subside and she would have normal function." (p. 11). As to whether she is a surgical candidate given she has ongoing symptoms, Dr. Robson testified that there was no structural abnormality that would be amenable to surgical repair, and that he can't predict that the risk of surgery would outweigh any potential benefit given no frank pathology, and thus the surgery would not be reasonable given essentially normal cervical MRI and EMG/NCV at C3/4. He reviewed additional records since 7/28/15 which indicate Dr. Gornet is contemplating a C3/4 disc replacement, and Dr. Mall a cubital tunnel decompression. A subsequent C3/4 epidural also "did not predictably relieve her symptoms." An updated 8/18/16 MRI was also normal at the C3/4 level and for nerve impingement by the neuroradiologist who read the films. The film was virtually identical to the 3/24/15 films, which was also the radiologist's opinion. At this point, Dr. Robson advised that the Petitioner should live with her condition. He testified that while a C3/4 lesion could cause shoulder pain, it would not cause pain radiating down the arm to the hand, which also indicates that an additional epidural, including the one performed in April 2016, is not warranted. At that epidural, Dr. Blake noted identical pain scores before and after injection of 7/10. He had no opinion with regard to Dr. Mall's treatment of the shoulder and arm, and noted he would argue that the cervical spine is not even producing the symptoms Petitioner complains of. (Rx10).

On cross exam, Dr. Robson testified that he reviewed the Petitioner's MRI films, not just the reports. He has treated patients with cervical bulges with injections, but he has not operated on them unless there was evidence of nerve root impingement. Petitioner's statements to him were that the injections provided no long-term relief. He agreed that given there are bulges, her discs weren't completely normal, but there was no impingement or displacement. As to the statement in his report that Petitioner should continue to improve, yet she has ongoing complaints, Dr. Robson testified:

"Well, my problem is it may not be coming from pathology in her cervical spine." Dr. Robson had no dispute with Dr. Gornet obtaining an updated MRI in 2016, but he disputes that the films showed a herniation, noting she had a small, "like degenerative" disc bulge and no evidence at all of nerve root impingement. He again noted this is in agreement with the radiologist's report. As to Dr. Gornet's 8/18/16 report, Dr. Robson agreed C3/4 could impact the right shoulder and trapezius, but impact to the upper arm is "a little bit of a stretch", and is at odds with Petitioner's complaints of pain all the way to the fingers. He did agree that if there was a herniation on the right at that level, it could cause the shoulder and upper arm symptoms. He noted he has many patients with similar symptoms who have improved over time, even over the course of several years. Dr. Robson agreed that the work injury could be a factor in her current complaints, and he was not aware of any intervening injuries. While he testified the Petitioner should be wary of mental patients at her job, she was not in a situation where one more thing is going to tip the scale and require surgery, as her spine structure is normal. He did not believe that Petitioner's symptoms would improve with cervical disc replacement, noting if the she has it and indicates it helps, "I just would call it a remarkable coincidence." (Rx10).

The Petitioner was also examined by Dr. Sudekum at the request of the Respondent on 8/3/15 with regard to the right upper extremity, providing a report on that date (Rx11) and his deposition testimony on 6/28/16. (Rx12). He noted the Petitioner complained of the whole hand, both dorsally and palmary, not just the ulnar portion, which would be inconsistent with an isolated cubital tunnel condition. She also had a negative EMG/NCV for cubital tunnel. He pointed out that the Petitioner's initial complaints at the ER were only of the mid-back, and the first notation he saw of a cubital tunnel evaluation or ulnar nerve symptoms was from Dr. Mall or about 2/17/15, about a year post-accident. Prior to that, Dr. Mall had only identified shoulder and cervical spine issues. He testified that it would be very atypical for cubital tunnel symptoms to present a year after an accident if they were related to that accident. In addition to a negative EMG/NCV, Dr. Phillips also obtained ultrasound testing which indicated no structural pathology at the right elbow. Based on these things and his exam, Dr. Sudekum opined that it was highly unlikely Petitioner was suffering from cubital tunnel. (Rx12).

Dr. Sudekum noted that Dr. Mall's 4/21/15 report states that Dr. Gornet didn't think the Petitioner's hand symptoms were due to a cervical condition, and Dr. Mall therefore concluded that the symptoms down the arm were due to cubital tunnel. However, Dr. Sudekum noted he did not see where Dr. Gornet gave this opinion in his prior records, and in fact was indicating he did think there was a significant cervical issue given he was recommending surgery, and all of this was prior to the EMG/NCV. He testified that Dr. Mall was recommending the most aggressive cubital tunnel treatment, surgery, despite the Petitioner having intermittent numbness throughout her hand, no medial elbow pain and a negative EMG/NCV. Dr. Sudekum did not believe the subjective complaints were consistent with the objective findings, and he believed that her complaints seemed out of proportion to the objective findings. Dr. Sudekum did not find evidence of a double-crush phenomenon, as there was no evidence of compression at either the cervical or cubital tunnel levels. In Dr. Sudekum's opinion, the Petitioner's diagnoses were mild chronic degenerative changes of the cervical, thoracic and lumbar spines, and her subjective right complaints were unsupported by objective testing and physical exam. (Rx12).

On cross examination, Dr. Sudekum acknowledged that Dr. Mall on 2/17/15 found a positive Tinel's sign at the right elbow, while Sudekum's exam indicated this was negative, and that there is some subjectivity in this test. He also agreed she had positive Phalen's and Tinel's tests at the right wrist, which could be indicative of carpal tunnel. While he also had a positive Phalen's test on exam at the right elbow, this would be relative to the median nerve, not the ulnar nerve. Dr. Sudekum acknowledged that EMG/NCV testing is not 100% accurate. He agreed it is possible Petitioner could have cervical problems resulting in neck, shoulder and even arm symptoms, but felt it was highly unlikely that, in the absence of EMG/NCV findings of cervical radiculopathy, her entire hand would go numb and still be due to radiculopathy. It is possible that she has right arm symptoms from the surgery and/or shoulder conditions that were operated on, but this would be highly unusual. As to the chronic conditions of the neck and shoulder, Petitioner's

symptoms "would not be consistent with what I would normally expect as secondary effects of those conditions. But it's certainly possible that they could be playing some part in the etiology of those symptoms." This would be in the absence of secondary gain type issues, and assumes that Petitioner's complaints are accurate. He did note that cervical injections did appear to provide some improvement, and "that by itself is a pretty good indication that maybe you're onto something." (Rx12).

Petitioner testified that she continued to have the same neck and upper shoulder pain that she had before the right shoulder surgery. She testified she underwent physical therapy per Dr. Gornet, as well as cervical epidurals and nerve blocks with Dr. Boutwell, but had no lasting relief. Out of 4 injections she received, she had about 2 weeks of relief with two of them, and no relief at all from the other two.

Following her release to full duty from Dr. Mall, the Petitioner returned to her regular job in January 2015, and she has continued to perform that job through the hearing date, testifying: "It's painful, but I take pain medication." Petitioner testified that she had no neck problems prior to the accident date. She wanted to undergo the recommended C3/4 disc replacement surgery so that her condition would improve.

With regard to Dr. Mall's 9/29/14 note indicating that she tripped and fell at home, Petitioner testified her symptoms did not increase. She returned to Dr. Mall to make sure she didn't reinjure her right shoulder, and she said his assessment was that she did not.

On 4/10/16, the Petitioner testified that she was passing out medications at a cottage that was not her normal cottage. She provided a mental resident, Scottie, with his medications, but he would not leave the medication room. She testified he kept pushing and pulling on her until two mental health techs got him away from her. Petitioner testified that she felt like this incident aggravated her neck condition, but that her current symptoms are about the same, and she continues to wake up and go to bed with pain daily.

On cross examination, the Petitioner testified that on 2/26/14, when the patient grabbed her by her right forearm and pulled her over to where her feet were off the ground, it took a minute or so to get him to release her. Once she got free, she allowed him to calm down for a few minutes and she then was able to apply the C-PAP device. No other employees were present to assist, which Petitioner indicated was fairly normal. Petitioner testified her initial symptoms were shoulder, back, arm and neck pain, all on the right side, and that she had no prior similar injuries to these areas.

As to the 4/10/16 incident with Scottie, Petitioner testified that the confrontation was only with him, and that he "kept grabbing me by my arms and shoulders and pulling and pushing on me" because he wanted something more than she was dispensing to him. She estimated it was probably a couple of minutes before the techs intervened, and they were approximately 5' to 7' away from the medication room she was at. She testified that this incident aggravated her condition because it intensified her neck and shoulder pain. She was still under the care of Dr. Mall and Dr. Gornet when this occurred, and reported the incident to them.

A 4/10/16 Employee Injury Report, signed by Petitioner, indicates she reported a resident pushed and pulled on her right arm and shoulder causing pain in the right side of her neck radiating down the arm. The Employee Notice of Injury from 4/11/16 states the Petitioner had given an individual medication and water, and he started pushing her into the medication room, and as she tried to get him out, he continued to push and pull on her right arm and shoulder. The Supervisor's report, signed by Dena Soler, who indicated she reported it to the AOD, Mary Ann Smith. A 4/11/16 Workers' Compensation Medical Report from Respondent's facility reflects that Petitioner was attacked by a patient and now had pain down the right side down the arm, and the diagnosis was cervical radiculopathy. (Px12; Px14; Rx1;

Rx2). There also is an ER report from Salem Township on 4/11/16 noting a client was pushing on Petitioner trying to get into the medication room. She reported right neck and shoulder pain radiating down the arm to her fingertips, which were numb. Petitioner noted she was previously diagnosed with a bulging disc and was still involved in a workers' compensation case with regard the neck, right shoulder and right arm. The diagnosis was cervical myofascial strain, and it appears she was given medication. The reports are mostly handwritten, and it is hard to tell if anything else was prescribed or recommended. (Px13).

Petitioner testified on further cross exam that her right rotator cuff has been fine since recovering from surgery. She continues to have pain in the right neck leading down over her shoulder down to about the clavicle area. It does occasionally go into her arm: "a couple times a week it radiates down." She continues to have pain on a daily basis, and she takes Aleve and Flexeril daily. Nothing in particular aggravates her symptoms. Petitioner agreed she has been working full unrestricted duty regularly for the past two years. She wears a brace on her right arm to extend her elbow, as recommended by Dr. Mall. She agreed that her recent work performance evaluations have been good.

The Respondent called Darwin Smith and Michelle Topp, the two mental health techs that assisted Petitioner with Scottie on 4/10/16, as witnesses. Both essentially testified that Scottie has a significant case of obsessive compulsive disorder (OCD). They also both testified that they were doing other things when they heard a commotion by the medication room, where the Petitioner was. Mr. Smith testified that Scottie was at a table, the Petitioner had failed to give him the medication he expected, so he "threw a fit" and went to where Petitioner was giving out medications at the medication room door. He estimated he was 20 to 30 feet away from the door at the time. He heard scuffling, he looked up and saw Scottie throw some cups or something, and the scuffling lasted for a few seconds. Ms. Topp had grabbed Scottie, and Smith went over to help her. He did not see the Petitioner in any physical interaction with Scottie, other than that he "nudged the cart." Mr. Smith completed a witness statement sometime after the incident, and testified that he believed what it states remains accurate. On cross examination, Mr. Smith agreed that it is possible there was an interaction between Petitioner and Scottie before he heard the shuffling and looked up, and agreed that, in his experience with Scottie, he could get agitated and could get physical with the staff.

Ms. Topp's testimony was consistent with this. She was about 10 feet away from the medication room on 4/10/16 and heard the Petitioner indicate she was done with Scottie, and then heard some commotion: "like some stuff off the med cart. I don't know if he was grabbing her stuff or just knocking her stuff off." This lasted a couple of seconds, and when she looked up, Scotty was standing next to the cart. To her recall, Scottie was just standing by the cart, though she testified: "I don't remember a whole lot." She and Mr. Smith then directed Scottie back to the unit. She herself did not see Scottie contact the Petitioner or get into a physical altercation with her. She noted that with Scottie's OCD (obsessive compulsive disorder) condition, if someone, such as a new nurse, does not follow his specific normal protocol, he can have a fit of rage and will act out. On cross exam, she also agreed that her back was initially turned and she was not initially looking at where the Petitioner was, and so she did not see what may have happened between Scottie and the Petitioner before she looked up.

Ms. Topp's witness statement indicated that after Petitioner told Scottie he could go, he went into the medication room and started grabbing for things on top of the cart, which is when she and Mr. Smith redirected him out of the room. Mr. Smith stated essentially the same thing in his witness statement. (Rx3).

In rebuttal testimony, Petitioner testified that after the incident with Scottie on 4/10/16, she went to Elm Cottage (Respondent's administration facility) after her shift, reported the incident to the RN there and completed an injury report (Rx1). As to the supervisor's report of injury (Rx2), Petitioner testified that part III was completed in the handwriting of the Dena Soler, the "RSS" who supervised her and all of the technicians, and to whom she is supposed

to report an accident, and she reported it to Mary Ann Smith. Both Soler and Smith signed off on Rx2, and no one has questioned her version of events since she reported it. On cross examination, the Petitioner agreed that she prepared the document in Rx1 on 4/11/16 relative to the 4/10/16 accident. As to the "how injury occurred" portion, Petitioner had no knowledge of when her supervisor actually completed the form or why it was the exact same words used in both forms to describe the injury. Petitioner testified that Ms. Soler is no longer her supervisor.

The parties stipulated on the record that the issue of prior medical expenses has been reserved, and may be litigated in the future, if needed. (Tr. p. 71).

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 sustained an accident which arose out of and in the course of her employment on 4/10/16. She testified that she was passing out medications in the course of her work duties in a building she did not normally work in, and encountered a mental resident who became agitated and pulled on her body and arms in an effort to obtain more or different medication. The accident reports completed by Petitioner and her supervisors were consistent in this regard. Two mental health technicians, Smith and Topp, testified that they did not see the incident described by Petitioner occur on 4/10/16. However, both also indicated their attention was elsewhere at the time, and they only turned around when they heard commotion near the medication room. They both agreed the commotion involved a resident named Scottie, that they only saw what was going on after they turned around and not before, and that Scottie is an OCD patient who can throw fits when he isn't provided his medications according to his specific protocol, such as when an unfamiliar nurse is providing his medications.

Taking all of the evidence into account, the greater weight of the evidence supports the Petitioner's version of events. The Arbitrator finds that the pulling of Petitioner's body and arms by resident Scottie constituted an accident which arose out of and in the course of her employment.

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

While the Arbitrator has determined that an accident occurred within the meaning of the Act, the Petitioner has failed to prove that any current condition of ill-being is related to this accident. The Petitioner sustained a prior accident on 2/26/14, which is the subject of companion case number 14 WC 17753. The Petitioner continued to treat for her cervical spine, right shoulder and right upper extremity into the hand following that incident, and through and after 4/10/16.

The 4/11/16 ER report from Salem Township referenced the 4/10/16 incident, with complaints of right neck and shoulder pain radiating down the arm to her fingertips, which were numb. These are the same complaints she had before the accident. She was diagnosed with a cervical myofascial strain. No subsequent medical records in evidence were located by the Arbitrator which reference the 4/10/16 incident in any way, and no physician causally relates that incident to Petitioner's current condition. Rather, the treating physicians have opined that the Petitioner's current condition is

related to the 2/26/14 accident. The Arbitrator finds that the greater weight of the evidence supports the finding that the Petitioner failed to prove her current condition of ill-being is related to the 4/10/16 accident.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings with regard to causation, this issue is moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NORMA BAKER, as widow of
RONALD BAKER,

Petitioner,

vs. NO: 13 WC 20051

CHICAGO PARK DISTRICT,

Respondent.

19IWCC0010

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 penalties and attorney's fees, and being advised of the facts and law, modifies the Corrected Decision of the Arbitrator as stated below and otherwise affirms and adopts the Corrected 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.

For the reasons explained below, the Commission modifies the Corrected Decision of the Arbitrator and awards Petitioner penalties pursuant to Section 19(l) of the Act, in the amount of $10,000.00. The remainder of the Arbitrator's Corrected Decision is affirmed and adopted.

Procedurally, on April 16, 2007, Arbitrator Maureen Pulia found that the now deceased, Ronald Baker, had suffered an impairment of his lung function, including the development of both a restrictive airway disease [RAD] and Chronic Obstructive Pulmonary Disease [COPD], as a

result of his exposure to chlorine and sodium bisulfate while working for Respondent. Mr. Baker (hereinafter the "Decedent") was awarded medical expenses, temporary total disability (TTD) benefits, and permanent total disability (PTD) benefits of $725.51/week. Arbitrator Pulia's Decision was affirmed by the Commission on March 11, 2008, and the Circuit Court of Cook County confirmed the Commission's findings on April 29, 2009.

On June 7, 2013, the Decedent's spouse, Norma Baker, filed a death claim with the Illinois Worker's Compensation Commission after Ronald Baker died on May 26, 2013; the causes of death listed in order on the Death Certificate were: (1) Coronary artery disease; (2) cor pulmonale; and, (3) HLP. The Death Certificate also listed the following contributing conditions to death: "DHTZ, COPD, HTN, OBESITY, CKD ST, GOUT." (PX4).

Respondent denied responsibility for death benefits under Section 7 of the Act, claiming that the Decedent's death was unrelated to his RAD and COPD.

The matter proceeded to hearing before Arbitrator Kurt Carlson on March 14, 2017, with proofs closed on June 7, 2017. Arbitrator Carlson found that the Decedent's death was causally related to his work duties, $8,000 was awarded for burial expenses, a death benefit of $725.51/week pursuant to Section 7 of the Act (and as computed under Section 8(b) of the Act) was awarded to the Decedent's surviving spouse, Norma Baker, and penalties and fees against Respondent were denied.

The now Petitioner, Norma Baker, as widow of Ronald Baker, filed her Petition for Review on the issue of penalties and attorney's fees on April 19, 2018, and Respondent filed its Petition for Review on April 27, 2018. Respondent ultimately satisfied the award and moved to dismiss its Review. The Commission granted Respondent's Motion on September 17, 2018. Petitioner's Petition for Review remained pending.

Section 19(l) states:

> In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay of 14 days or more shall create a rebuttable presumption of unreasonable delay. 820 ILCS 305/19(l).

Arbitrator Carlson awarded no penalties or attorney's fees finding that Respondent had a good faith basis for denying Petitioner's claim for benefits because the Decedent had died of a cardiac condition. The Arbitrator indicated that "[i]t would not be apparent to [an] insurance company adjuster or third-party administrator to immediately pay out on the claim." (Arbitrator Carlson's Decision, pg. 10). The Arbitrator further noted that the Death Certificate was confusing, and that a genuine question existed as to the cause of the Decedent's death.

The Commission agrees, in part, with the Arbitrator's Corrected Decision that Respondent had a good faith basis for denying Petitioner's claim for benefits under Section 7 of the Act. However, the Commission finds that Respondent no longer had a good faith basis to deny benefits after the parties took the evidence deposition of Respondent's Section 12 physician, Dr. Dan Fintel, on May 1, 2017.

Dr. Fintel, who was board-certified in Internal Medicine, Cardiovascular Diseases, Critical Care Medicine, and Nuclear Cardiology, had issued a Section 12 report on November 11, 2015. (RX1, pg. 6; RX1, Respondent's Deposition Exhibit 2). Dr. Fintel opined that the Decedent's COPD, which had been caused by his many years of smoking and unrelated to his job duties for Respondent, was a contributing cause of his death. Dr. Fintel further opined that:

> I think the chronic obstructive lung disease caused primarily by the years of cigarette smoking and lung damage, with progressive lung damage, particularly at the very end of his life, was an important cause of his right ventricular failure, and the fluid overload, the hypoxemia that he had at the end of his life requiring oxygen therapy, and not work-related exposure. (RX1, pg. 19).

However, the Commission finds that Dr. Fintel's opinion was based on incorrect or incomplete information which was later elucidated at his deposition. On May 1, 2017, Dr. Fintel testified that prior to issuing his report in November 2015, he had not been provided all of the Decedent's medical records, or any information relative to the arbitration hearing before Arbitrator Pulia, and he did not know the Decedent's work history or what type of chemicals he may have been exposed to at work. (RX1, pgs. 22-25; 38). Dr. Fintel testified that in lieu of being sent the approximately 18,000 pages of medical records, he was provided with a 250-page document that contained a record of the Decedent's multiple visits with caregivers between 2008 and 2013. Dr. Fintel also reviewed a 15-page, single-spaced summary of the Decedent's medical history; this summary was provided by Respondent. (RX1, pg. 31).

Dr. Fintel further testified that he was not aware that the Decedent had stopped smoking in 1988, 25 years before the Decedent's death. (RX1, pg. 33). In her April 16, 2007 Decision, Arbitrator Pulia indicated that the Decedent had stopped smoking in 1988, some 25 years before his death; the Commission affirmed this finding. (PX8, pg. 6). Dr. Fintel stated that this information would suggest that the Decedent's "lung function shouldn't have continued to deteriorate if it was just due to smoking, if indeed it was factually true that he had stopped smoking in 1988." (RX1, pg. 34).

As noted by Arbitrator Carlson, irrespective of cause, Dr. Fintel had concluded that the Decedent's lung damage contributed to his death, and he clarified how the Decedent's arrhythmic event was a consequence of the cor pulmonale. (RX1, pg. 16).

> Cor pulmonale is a consequence of the hostile environment that the right ventricle finds itself in in a patient like Ronald Baker. The increasing pressures on the right side of the circulation due to the

> combination of left ventricular diastolic failure due to coronary artery disease and his obesity in the setting of diabetes with large and small vessel coronary disease, the low oxygen levels due to his obstructive pulmonary disease all put an enormous stress on the right ventricle. (RX1, pgs. 17-18).

Arbitrator Pulia previously determined that the Decedent's lung disease was causally related to his work duties; that finding was affirmed by both the Commission and the Circuit Court. Thus, the Commission is bound by the law of the case doctrine that the Decedent's COPD and RAD is causally related to his work duties. However, the Commission is presented with the issue as to whether the Decedent's lung condition was a cause in the Decedent's death and whether Respondent's delay in paying the death benefits was unreasonable in light of Dr. Fintel's deposition testimony.

The Commission is not persuaded by Dr. Fintel's report in light of his deposition testimony. His testimony establishes that the basis for his report was premised upon a lengthy history of cigarette smoking, which was not supported by the record. Once confronted with information that the Decedent stopped smoking in 1988, Dr. Fintel retracted his prior statement and opined that the Decedent's smoking was not a cause of his lung condition.

As the issue of causal connection between the Decedent's work duties and his COPD and RAD had been previously determined, and the Decedent's smoking history had been eliminated as a cause in the Decedent's lung disease, the credible evidence establishes that the Decedent's COPD was a cause in the Decedent's death and his COPD was related to his work duties. Accordingly, the Commission finds that Respondent had no reasonable basis to deny benefits after Dr. Fintel's May 1, 2017 deposition. However, it was not until September 4, 2018 that Respondent advised the Commission that it had paid Arbitrator Carlson's award. Therefore, pursuant to Section 19(l), the Commission is compelled to award $10,000.00 in penalties.

The Commission has also considered Petitioner's request for penalties and attorney's fees pursuant to Sections 19(k) and 16 of the Act, and denies same. Though the Commission is of the opinion that Respondent's notions were misguided, the Commission does not believe that the Respondent acted vexatiously. Respondent relied upon the opinion of a medical practitioner whose conclusions were flawed. His conclusions were flawed as he was provided incomplete information. It is apparent that Respondent realized the incorrectness of its actions, as it paid the arbitration award and dismissed its Review in this claim. Had Respondent persisted in its Review, the Commission might have been inclined to find otherwise.

For the above reasons, Petitioner's request for Section 19(k) penalties and Section 16 attorney's fees are denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator, filed March 20, 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 surviving spouse of the Decedent Ronald Baker, death benefits commencing May 26, 2013, in the sum of $725.51 per week, because the injury caused the employee's death, as provided in Section 7 of the Act. Respondent is to pay outstanding benefits accrued to June 7, 2017 of $152,771.36, minus $42,255.10 already paid, for a total outstanding benefit owed of $110,516.26.

IT IS FURTHER ORDERED BY THE COMMISSION that if the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay $8,000.00 for burial expenses to the surviving spouse, as provided in Section 7(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $10,000.00 as provided in Section 19(l) of the Act; Petitioner's request for penalties and attorney's fee pursuant to Sections 19(k) and 16 of the Act is denied.

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

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

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

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

DATED: JAN 1 1 2019
MJB/pm
O: 12-11-18
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED FATAL

NORMA BAKER AS WIDOW OF RONALD BAKER
Employee/Petitioner

Case# 13WC020051

19IWCC0010

CHICAGO PARK DISTRICT
Employer/Respondent

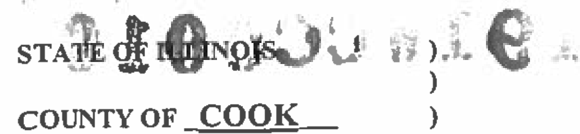
On 3/20/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 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:

0391 HEALY SCANLON LAW FIRM
KEVIN T VEUGELER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

1401 SCOPELITIS GARVIN LIGHT ET AL
GERALD F COOPER
30 W MONROE ST SUITE 600
CHICAGO, IL 60603



STATE OF ILLINOIS)
)
COUNTY OF COOK)

RAF 8(G) X

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED DECISION
FATAL

NORMA BAKER as widow of RONALD BAKER,
Employee/Petitioner

v.

CHICAGO PARK DISTRICT
Employer/Respondent

Case # 13 WC 020051

19IWCC0010

An *Application for Adjustment 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 Workers' Compensation Commission, in the city of **Chicago**, on **03-14-17 & 06-07-17**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. Was there an employee-employer relationship?

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

D. What was the date of the accident?

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

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

G. What were the petitioner's earnings?

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

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

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

K. What amount of compensation is due for Temporary Total Disability?

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

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

N. Is the respondent due any credit?

FINDINGS

- On **05/31/2001**, the respondent **Chicago Park District** *was* ~~*was not*~~ operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship *did* ~~*did not*~~ exist between the decedent and respondent.
- On this date, the decedent *did* ~~*did not*~~ sustain injuries that arose out of and in the course of employment.
- Timely notice of this accident *was* ~~*was not*~~ given to the respondent.
- Decedent's death is causally related to the accident.
- In the year preceding the injury, the Decedent earned $**56,589.52** with this Respondent; the average weekly wage was $ **1,088.26**.
- At the time of injury, the petitioner was **58** years of age, *married* ~~*single*~~ with **0** child~~ren~~ under 18.
- Necessary medical services ~~*have*~~ *have not* been provided by the respondent.
- To date, $**42,255.10** has been paid by the respondent on account of this injury.
- The arbitrator finds that Decedent died on May 26, 2013, leaving 1 surviving spouse, Norma, and no dependent children, as provided in section 7(a) of the Act.

ORDER

Respondent shall pay death benefits, commencing May 26, 2013, of $725.51/week to the surviving spouse, ***Norma Baker***, on her own behalf until her death, because the injury caused the employee's death, as provided in Section 7 of the Act. Respondent to pay outstanding benefits accrued to June 7, 2017 of $152,771.36, minus $42,255.10 already paid, for a total outstanding benefit owed of **$110,516.26**.

If the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

Respondent shall pay **$8,000.00** for burial expenses to the surviving spouse, as provided in Section 7(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, as provided in Section 8(g) of the Act.

Penalties

No penalties are awarded in this matter.

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

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

Signature of Arbitrator

March 13, 2018
Date

MAR 20 2018

19IWCC0010

IN THE ILLINOIS WORKERS' COMPENSATION COMMISSION
CHICAGO, ILLINOIS

NORMA BAKER as widow of RONALD BAKER,	)	
Petitioner,	)	**NO. 13-WC-020051**
	)	**Arbitrator Kurt Carlson**
v.	)	
CHICAGO PARK DISTRICT,	)	
Respondent.	)	

19IWCC0010

MEMORANDUM OF DECISION OF ARBITRATOR

Law of the Case:

The law of the case doctrine applies to matters before the Workers' Compensation Commission. Guerra v. McShane Const. Corp, 07 ILWC 36628 (2011). Under the law of the case doctrine, a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. Help at Home v. Ill. Workers' Comp. Comm'n, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). The Commission decision becomes the law of the case for subsequent stages of the litigation. Id. On March 11, 2008, the Illinois Workers' Compensation Commission found that Petitioner's decedent had established that he suffered an impairment of his lung function, including the development of both a restrictive airway disease and Chronic Obstructive Pulmonary Disease, as a result of his exposure to chlorine and sodium bisulfate while working for Respondent. (PX8, 03/11/2008 IWCC Decision). The Commission ordered Respondent to pay temporary total disability and found that Petitioner's decedent was permanently and totally disabled and ordered payment of weekly benefits in the amount of $725.51/week. (PX8). The Circuit Court of Cook County affirmed the

Commission's findings in its entirety. (PX8). No further appeals were taken by Respondent and the decision of the Commission is final.

Findings of Fact:

Petitioner, Norma Baker testified that she married her husband, Ronald Baker, on February 22, 1966. (3/14/17 Tr. p. 7). This was confirmed by the Certificate of Marriage received into evidence. (PX6).

On April 16, 2007, Arbitrator Pulia of the Illinois Workers' Compensation Commission found that Petitioner's decedent was permanently totally disabled as a result of an injury that arose out of and in the course of his employment with Respondent, the Chicago Park District. (PX7). Specifically, the Arbitrator found that as a result of repeated exposure to chlorine and sodium bisulfate, two chemicals used to maintain the Respondent's pools, Petitioner's decedent suffered impaired lung function that precluded him from working as a stationary engineer. (PX7). The impaired lung function of Petitioner's decedent included both restrictive airway disease and chronic obstructive pulmonary disease. (PX7)

On March 11, 2008, the Illinois Workers' Compensation Commission affirmed the Arbitrator's decision in its entirely, with the exception of typographical errors. (PX8). The Circuit Court of Cook County confirmed the Commission's findings. (PX8).

On May 26, 2013, Petitioner's decedent, Ronald Baker died at St. James Hospital. (PX4). According to the Medical Certificate of Death signed by Dr. Adam Milik, Petitioner's

decedent died of coronary artery disease and cor pulmonale. (PX4). One of the significant contributing causes of his death was the Chronic Obstructive Pulmonary Disease that was previously found to have arose out of and in the course of his employment with Respondent and resulted in his permanent total disability. (PX4).

Petitioner testified that she incurred funeral expenses in the amount of $8,623.58. (3/14/17 Tr. p. 7, PX5).

Respondent presented the testimony of Dr. Daniel Fintel for $5,500.00. (RX1, P. 39-40). According to Dr. Fintel, Petitioner's decedent died as a result of a heart condition, cor pulmonale, with contributing factors including low oxygen levels from his lung disease, including COPD, that Dr. Fintel attributed to Petitioner's decedent's smoking, that continued "until the very end of his life." (RX1 P. 9-16). Dr. Fintel noted the low oxygen levels were the result of his lung disease. (RX1 P. 17-18).

Dr. Fintel testified that Petitioner's decedent's death was not caused by his work activities, though he admitted that his opinion could change if there was relevant material that he was not provided to review. (RX1, P. 17, 20).

Irrespective of cause, Dr. Fintel concluded that Petitioner's decedent's lung damage contributed to his death. (RX1 P. 19, 29-30).

On cross-examination, Dr. Fintel conceded that the cause of Petitioner's death, cor pulmonale was specifically caused by both Petitioner's decedent's restrictive and obstructive airway disease. (RX1 P. 21).

Dr. Fintel noted that he was not provided the following materials to review:

- Christ Hospital records,
- University of Chicago records,
- Petitioner's decedent's cardiologist, Dr. Catherine Burke,
- Petitioner's decedent's cardiologist, Dr. Albert Lin,
- Petitioner's decedent's pulmonologist, Dr. John P. Kress,
- Petitioner's decedent's pulmonologist, Dr. Alan Leff,
- Petitioner's decedent's cardiologist, Dr. Cohen,
- Petitioner's decedent's vascular physician, Dr. Lewis B. Schwartz,
- Petitioner's decedent's primary physician, Dr. Mark Reiter
- Petitioner's decedent's pulmonologist, Dr. Antanas Razma,
- Petitioner's decedent's vascular physician, Dr. William McCarthy,
- any of the depositions taken in the underlying matter including Dr. Reiter's deposition,
- a job description or any testimony from Petitioner's decedent or his supervisors concerning his working conditions and exposures,
- the Material Safety Data Sheets for either chlorine or sodium bisulfate, nor
- the Commission decision. (RX1, P. 22-26, 37-38, 42).

Dr. Fintel also acknowledged that his misunderstanding of Petitioner's decedent's smoking history came from Respondent. (RX1, P. 32-33). The Commission previously acknowledged, consistent with the medical records received into evidence, that Petitioner's decedent stopped smoking in 1988, some twenty-five years before his death. (PX8, P. 6). With the correct information concerning smoking, Dr. Fintel conceded that smoking did not contribute to his deteriorating lung function, and ultimate death. (RX1, P. 33-34).

Conclusions of Law

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

(F) ***Whether the Petitioner's condition of ill-being is causally related to the injury?***

According to Dr. Adam Milik, Petitioner's chronic obstructive pulmonary disease or COPD was a significant condition contributing to Mr. Baker's death. (PX #2 & #4). Consistent with the Law of the Case, this condition arose out of and in the course of his employment with Respondent. Furthermore, Respondent's Section 12 examiner, Dr. Fintel, confirmed that Petitioner's heart condition, and resultant death, was directly attributed to both his restrictive and obstructive airway disease. (RX #1 @ p. 19, 21 & 30) Both of these lung impairments have been determined to be causally connected and arising out of and in the course of his employment with Respondent.

It is well-settled that an employee need only show that some act of employment was a causative factor, not the sole or, principal cause, of his injury. *Alderson v. Select Beverage, Inc.*, 06 I.W.C.C. 0095, 01 W.C. 33435 (2006). The fact that the employee had a preexisting condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. *Id*. The question is whether the evidence supports an inference that the accident aggravated or accelerated the process which led to the employee's current condition of ill-being. *Id*.

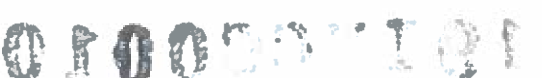
In light of the Commission's previous Findings of Fact, and the contributing conditions that caused Petitioner's decedent's death as outlined in the Certificate of Death, the Arbitrator

finds that Petitioner's decedent's death was causally connected to, and arose out of and in the course of his employment with Respondent.

Respondent argues that the death certificate cannot be used as on the issue of causal connection. The statute dealing with vital statistics, 410 ILCS 535/1 et. seq., states death certificates be considered as prima facia evidence of facts stated therein stated." Usually, this would exclude opinion and conclusions of examining physicians. People v. Fiddler, 45 Ill2d 181, Henninger v. Inter-Ocean Cas. Co., 217 Ill. App. 542 (1920). However, in this case, Dr. Adam Milik, who rendered the opinion was a treating physician who had personal knowledge of the matters stated. As a result, his causal connection opinion is admissible and establishes the presumption of causation, while slim, that Respondent was unable to overcome.

Dr. Fintel's ultimate opinion that Petitioner's decedent's death was not a result of his work exposure must be rejected as it goes against the law of the case. Dr. Fintel simply reviewed a summary prepared by Respondent in reaching his conclusion and failed to review relevant medical records and work histories resulting in his flawed opinion. More importantly, Fintel's expert testimony helped advance Petitioner's claim by stating that Baker's COPD was an important cause of his right ventricular failure: that the patient's restrictive and obstructive pulmonary disease contributed to the cor pulmonale that was the cause of the Petitioner's death: and the lung function contributed to his ultimate death. (RX #1 @ p. 19, 21 & 30) This testimony was devastating to the Respondent's defense and helped establish causal connection so strongly for Petitioner that taking the deposition of Dr. Milik was unnecessary.

After reading the deposition transcript of Dr. Fintel, it seemed clear to the Arbitrator that the doctor did not understand the legal posture of the case before rendering his opinion.



(J) *Were the medical services that were provided to Petitioner reasonable and necessary?*

Petitioner submitted the burial expenses in the amount of $8,623.58 without objection. Therefore, pursuant to §7(f), Respondent is ordered to pay $8,000.00 for burial expenses.

(K) *What amount of compensation is due for Temporary Total Disability?*
(L) *What is the nature and extent of the injury?*

Based on the above findings, Respondent is ordered to pay death benefits to Petitioner in the amount of $725.51/week, commencing on June 7, 2013, for the remainder of her life. At the time of hearing, the outstanding benefits accrued to March 23, 2017 were $152,771.36, minus $42,255.10 already paid, for a total outstanding benefit owed of $110,516.26.

(M) Should penalties or fees be imposed upon Respondent?

No penalties are awarded in the matter for three reasons. First, the Petitioner died of a cardiac condition or heart attack. It would not be apparent to insurance company adjuster or third-party administrator to immediately pay out on the claim. Second, the death certificate's admissibility into evidence and its competency to establish conclusive proof of causation was unclear until the time of trial. In fact, it may have only established the "presumption of causation," especially when you consider language of death certificate in its entirety. Please consider Part II of the document stating, "Enter other significant conditions contributing to death but not resulting in the underlying cause given in PART 1." One could certainly understand that previous statement to mean Petitioner's COPD did not result in the underlying causes of Coronary Artery Disease, Cor Pulmonale or HLP. As a result, the death certificate is somewhat contradictory and admittedly confusing. Moreover, it was not a claim warranting the notion of

penalties until after Dr. Fintel's deposition on May 1, 2017, which was after proofs were opened on this matter (March 17, 2017). The arbitrator notes also this is sixteen years after the original occurrence and four years after the claimant's death.

In light of the above, it can be said that Respondent had a good faith basis for denying Petitioner's claim for benefits, at least until immediately after Dr. Fintel's deposition. The Arbitrator will not award penalties under the above circumstances.

If Respondent persists in denying the claim, however, it would seem feasible to award penalties in the future. Dr. Fintel established causal connection in favor of Petitioner. Respondent must recognize that a delay in payment of 14 days or more creates a presumption of unreasonable delay under 820 ILCS 305/19(l).

(N) Is the respondent due any credit?

The parties agreed that $42,255.10 has been paid by Respondent on account of this injury.

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 ROCK ISLAND	)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

THOMAS MCDONALD,

Petitioner,

vs. NO: 16 WC 33357

WAHL CLIPPER,

Respondent.

19IWCC0011

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, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's Decision with respect to all issues except the nature and extent of Petitioner's injury.

After consideration of the five factors set forth in Section 8.1b(b) of the Act, and the record as a whole, the Commission views the Petitioner's permanent partial disability for the right hand and thumb injury different from the Arbitrator.

Findings of Fact and Conclusions of Law

On July 10, 2016, the Petitioner suffered a comminuted displaced fracture of the right thumb first metacarpal that required percutaneous pinning to repair with open wound debridement and closure. Five weeks later radiographs revealed a well-aligned fracture at the base of the thumb metacarpal in satisfactory position with two K-wires. On August 16, 2016, the pin sites looked

mildly infected and both pins and K-wires were removed, and the areas debrided.

The Commission also notes that Petitioner attended physical therapy for his right thumb injury August 25, 2016 through October 14, 2016. (Px3) Petitioner then underwent left shoulder surgery for a non-occupational condition on October 20, 2016 and ceased thumb therapy to focus on his left shoulder.

The Petitioner returned to therapy on October 26, 2016 and reported for rehabilitation of his left shoulder as well. Thereafter, the Petitioner underwent therapy for his left shoulder and his right thumb; the therapy notes were separate even if occurring on the same day. On November 15, 2016 the Petitioner reported every day he felt that he was able to go a little further and a little faster with his rowing machine. On November 29, 2016, the therapy notes reflect Petitioner reported his thumb was doing better since stopping therapy for his shoulder surgery. He reported the sensitivity was starting to get better, but he still had stiffness in the thumb joint. He reported he had returned to lifting light weights with minimal problems. On December 6, 2016 the Petitioner reported no new concerns with his thumb and one week later he reported no new concerns with his right hand. On December 29, 2016 Petitioner reported he had been doing a lot of packing for his upcoming move. On January 3, 2017 his shoulder was "a little sore from band work outs at home and packing for his move." (Px3)

The Petitioner was released to return to full-duty work without restrictions and from further medical care by his treating surgeon, Dr. Shawn Hanlon, on January 30, 2017. The Assessment/Plan states: "Presently, I think he is close to reaching maximum medical improvement." Dr. Hanlon noted that at that time Petitioner's retirement from his position at work was scheduled to begin in 3 days. (Px4)

Respondent entered Dr. Michael Vender's February 21, 2017 Section 12 opinion report and an April 24, 2017 AMA impairment report into evidence. In his Section 12 opinion report, Dr. Vender opined Petitioner was status post closed reduction pin fixation, right thumb metacarpal fracture. Dr. Vender further opined that Petitioner was treated appropriately with pin fixation after debridement of a wound and that he had reached maximum medical improvement. Dr. Vender noted Petitioner's residuals relate to loss of motion in the thumb, both in flexion and extension, however, significant function remains. The nature of the residuals would not require any work or activity restrictions. (Rx1)

On April 24, 2017, Dr. Vender assigned a residual impairment of 7% Thumb (Table 15-2) = 3% upper extremity (Table 15-12, p. 421). Dr. Vender enclosed a copy of the Quick-Dash questionnaire utilized for the evaluation and a worksheet demonstrating the derivation of that value. (Rx2)

The Commission gives Dr. Vender's unrebutted AMA impairment rating moderate weight under Section 8.1b(b)(i) and in favor of a reduction of the Arbitrator's permanent partial disability award.

The Commission agrees with the Arbitrator's considerations under the remaining four factors of Section 8.1b(b)(ii), (iii), (iv) and (v) as it relates to Petitioner's right thumb injury adding the left shoulder therapy records evidence the Petitioner had no complaints of decreased grip

strength while performing exercise like rowing, pull-ups and bands.

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 right thumb and hand injuries that caused 20% loss of use of the right hand pursuant to Section 8(e) as the result of the July 10, 2016 work-related accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2017 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 $660.00 per week for a period of 41 weeks, as provided in Section 8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 20% of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $15,012.00 as set forth in Petitioner's exhibit 5, for medical expenses under Sections 8(a) and 8.2 of the Act. Respondent shall be given credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

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 $27,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 1 1 2019
KWL/bsd
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McDONALD, THOMAS
Employee/Petitioner

Case# **16WC033357**

WAHL CLIPPER
Employer/Respondent

19IWCC0011

On 12/20/2017, 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 1.48% 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:

4707 LAW OFFICE PF CHRIS DOSCOTCH
DAMON YOUNG
2708 N KNOXVILLE AVE
PEORIA, IL 61604

0264 HEYL ROYSTER VOELKER & ALLEN
DANA HUGHES
PO BOX 6199
PEORIA, IL 61601-6199

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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Thomas McDonald
Employee/Petitioner
v.
Wahl Clipper
Employer/Respondent

Case # 16 WC 33357

Consolidated cases: N/A

19IWCC0011

An *Application for Adjustment 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 **Rock Island**, on **7/12/17**. 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. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **7/10/16**. 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 $**57,200.00**; the average weekly wage was $**1,100.00**.

On the date of accident, Petitioner was **59** years of age, *single* with **no** dependent children.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $**15,012.00**, as set forth in Petitioner's exhibit 5, as provided in Sections 8(a) and 8.2 of the Act.

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

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of $**660.00**/week for a further period of **51.25** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **25% loss of use of the right hand**.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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

12/18/17
Date

ICArbDec p. 2

DEC 20 2017

thumb, both in flexion and extension, but no work restrictions were required. On April 24, 2017, Dr. Vender prepared an AMA rating. The impairment rating was 7% of the thumb and 3% of the upper extremity. (RX 2).

CONCLUSIONS

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

Petitioner testified he worked for Respondent running a Vat machine. Petitioner testified he got his right hand and thumb caught in the louvers of the Vat machine while trying to unclog the machine. Petitioner's right hand and thumb was caught for roughly 25 minutes in the machine before it was released. Petitioner was then immediately taken by ambulance to the emergency room and had surgery to the right hand. Petitioner was diagnosed with a crushing injury of the right hand. X-rays demonstrated a displaced fracture of the base of the first metacarpal bone of the right hand. Petitioner also suffered significant cuts on the right side of his hand that required stitches. Petitioner underwent surgery consistent with repositioning of the right metacarpal with an internal fixation device where a K-wire was placed. On August 16, 2016, Petitioner underwent a procedure to remove pins and to treat an infection. On January 30, 2017, Petitioner was released to full duty but was having issues with range of motion, numbness and tingling, and grasping small objects.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds Petitioner's current condition of ill-being as it relates to the right hand and thumb is causally related to the injury he received on July 10, 2016.

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

Petitioner introduced into medical expenses totaling %15,012.00. (PX 5). evidence the following medical expenses incurred as a result of the July 10, 2016 work accident. Respondent disputed the charges only as to liability based upon the issue of causation.

Based upon the Arbitrator's finding of causation, the Arbitrator finds the medical treatment rendered to Petitioner in regards to his right hand and thumb was reasonable and necessary and related to the work accident of July 10, 2016.

Respondent shall pay reasonable and necessary medical services of $15,012.00, as set forth in Petitioner's exhibit 5, 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.

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 an AMA rating was performed by Dr. Vender whose impairment rating is 7% of thumb and/or 3% upper extremity. However, impairment does not equal disability. The impairment rating is part of the determination for permanent partial disability benefits, but is not the sole or main factor. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes Petitioner testified at trial he retired after the accident and his injury had no bearing on this retirement. Arbitrator further notes Petitioner was released to full-duty without restrictions on January 30, 2017. Petitioner could have returned to his full-duty job. The Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 59-years-old at the time of the accident. Because Petitioner was able to return to his regular job and work without restrictions, the Arbitrator gives *lesser* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes 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 Petitioner was released from medical treatment on January 30, 2017 by Dr. Hanlon. Petitioner did not have a full range of motion, had numbness and tingling and had issues with dexterity. It is also important to note Petitioner suffered a displaced fracture of the right first metacarpal that required hardware to be placed and then removed due to an infection. Petitioner was seen by Dr. Vender pursuant to section 12 of the Act. Dr. Vender noted Petitioner did have a range of motion issue and the questionnaire in the AMA rating was consistent with Petitioner's testimony in regards to his ongoing issues with his right hand. The Arbitrator therefore gives *greater* weight to this factor.

The Petitioner suffered a displaced fracture of the first metacarpal on the proximal side of the joint. Petitioner testified at trial that his thumb and hand was caught in the machine louvers. Petitioner had stitches placed in his hand due to the accident and is having ongoing problems with both his thumb and hand. Based on these facts and prior Commission decisions regarding MCP Joint fractures, Arbitrator finds this award should be placed on the right hand.

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 his right hand pursuant to §8(e) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Myra Weir,

Petitioner,

vs.

NO: 12WC 30411
15WC 33646

Department of Healthcare and Family Services,

Respondent.

19IWCC0012

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 5, 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 or summons required for State of Illinois cases.

DATED: JAN 1 1 2019
o112018
MJB/jrc
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

WEIR, MYRA
Employee/Petitioner

Case# **12WC030411**
15WC033646

DEPT OF HEALTHCARE & FAMILY SERVICES
Employer/Respondent

19IWCC0012

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:

4463 GALANTI LAW OFFICE
LESLIE N COLLINS
PO BOX 99
EAST ALTON, IL 62024

4993 ASSISTANT ATTORNEY GENERAL
CHELSEA GRUBB
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

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

FEB 5 - 2018

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

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Myra Weir
Employee/Petitioner

v.

Department of Healthc[illegible] Services
Emplo[illegible]

Case # 12 WC 30411

Consolidated cases: 15WC33646

19 I W C C 0012

An *Applicati[illegible] for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **December 20, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the [illegible]

DISPUTED ISSUES

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

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

C. [ ] Did an accident occur that arose out of and in the course of 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 **Reasonableness and necessity of medical treatment**

19IWCC0012

FINDINGS

On the date of accident, 8/6/12 and 9/14/15, 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 $47,784.00; the average weekly wage was $918.92.

On the date of accident, Petitioner was 54 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 $13,126.80 for TTD for time period 11/21/16-3/24/17, $ for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $106,095.66.

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

ORDER

See Attached.

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]
Signature of Arbitrator

2/2/18
Date

ICArbDec19(b)

FEB 5 - 2018

The Arbitrator finds the following Facts:

Petitioner, Myra Weir, testified she was employed by the State of Illinois Department of Healthcare and Family Services as a Child Support Specialist. She began working for the Department of Healthcare and Family Services in May of 2010. Petitioner testified she works in the call center. Her job duties require her to answer telephones, type and use her hands to write and take notes on the computer. Petitioner testified her notes go into the computer and she answers anywhere from 30-50 calls per day. She is required to write some information down that goes to other areas. She testified she delegates all work that comes through the phones.

Petitioner testified she was working on August 6, 2012. She testified the alarm went off, and she was a safety person who was required to make sure everyone on her floor exited safely. Petitioner testified she slipped on some slimy gutter waste and fell to the ground, landing on her right side.

Petitioner injured her lumbar spine in the accident and was treated by Dr. Matthew Gornet. She had surgery performed on September 23rd and 25th, 2012. The treatment to Petitioner's lumbar spine is not disputed by Respondent.

Petitioner was diagnosed with a right wrist scaphoid fracture. She was placed in a thumb splica cast and given a bone stimulator. Petitioner was treated with physical therapy with no positive result.

Petitioner sought treatment from Dr. Neumeister. Petitioner first sought treatment from Dr. Neumeister on May 15, 2013. Dr. Neumeister diagnosed Petitioner with CMC joint arthritis

with joint space narrowing as well as sclerosis of her right CMC joint. Dr Neumeister gave her a steroid injection and advised Petitioner they would manage the pain conservatively; however, surgery was likely down the road. (PX 1 at 212).

Dr. Neumeister saw Petitioner on June 17, 2013, at which point he recommended an LRTI procedure with excision of the trapezium.

Dr Neumeister saw Petitioner again on January 30, 2014. X-rays were performed that demonstrated bony spurs at the base of the right thumb and narrowing of the joint space. (PX 1 at 203). Petitioner received another injection in her thumb and she was provided with a cool comfort brace. (PX 1 at 203)

Dr. Neumeister performed a right thumb Burton arthroplasty of the CMC joint on March 11, 2014. (PX1 at 224).

Petitioner performed hand therapy and was given home exercises to perform post-surgery. (PX 1 at 176-198)

Petitioner returned to see Dr. Neumeister on June 5, 2014, for evaluation. She was 12 weeks post op. Dr Neumeister noted tenderness and serous collection upon examination. It was aspirated and cortisone was left in around the CMC joint to help with pain. (PX 1 at 172)

Petitioner returned to see Dr. Neumeister on June 16, 2014. Upon examination, there was a positive grind test. Dr. Neumeister suggested Petitioner have a tightrope fixation of the CMC joint on the right thumb to stabilize it. (PX 1 at 168)

Dr Neumeister performed a right tightrope suspension arthroplasty of the 1st CMC joint on August 4, 2014. (PX 1 at 219).

Petitioner returned to see Dr. Neumeister on August 11, 2014, and began therapy on her right hand. She was placed in a thumb spica type Thermoplast splint. (PX 1 at 162)

Petitioner performed hand therapy for several weeks post-surgery. (PX 1 at 130-163).

Petitioner saw Dr. Neumeister on September 8, 2014, and he noted continued pain in the right CMC joint. (PX 1 at 157) Dr. Neumeister saw Petitioner on September 29, 2014, and noted significant pain in the thumb and wrist. (PX 1 at 140).

Petitioner returned to see Dr. Neumeister on October 30, 2014. Petitioner reported ongoing pain, stiffness and poor range of motion, particularly near the CMC, both closer to the index finger and toward the thenar eminence. Petitioner didn't think therapy was helping her. (PX 1 at 126). Dr Neumeister gave Petitioner a steroid injection.

Petitioner returned to see Dr. Neumeister on October 24, 2014. Dr. Neumeister noted continued discomfort and tenderness. He gave Petitioner a steroid injection. (PX 1 at 120)

Dr Neumeister saw Petitioner again on January 5, 2015. Petitioner continued of pain around the STT region of her right thumb. Dr. Neumeister ordered x-rays that revealed evidence of STT arthritis. (PX 1 at 114)

Petitioner returned to see Dr. Neumeister on February 26, 2015, and noted complaints to her left carpometacarpal joint. She noted that it was increasing in tenderness and bothers her when she opens up doors and use the key type of activities. (PX 1 at 112). Examination revealed swelling of the basilar joints, positive crepitance and significant tenderness. He noted healing on the right side. Petitioner received a steroid injection on the CMC joint of the left thumb. (PX 1 at 112)

Petitioner returned to see Dr. Nuemeister on March 30, 2015, who appeared to be doing well after the last visit. (PX 1 at 106)

Petitioner saw Dr. Neumeister on April 27, 2015. She noted some pain and she was progressing with activities. (PX 1 at 101) At this visit, Petitioner and Dr. Neumeister discussed

Petitioner's ability to return to work. Dr. Neumeister ordered the therapist to perform an functional assessment and he would see her back after that. (PX 1 at 101)

An FCE was performed on May 12, 2015. (PX 1 at 87-97). The FCE recommended Petitioner return to work initially for 4 hours per day and progress to an 8 hour day over a 1-2 week time. (PX 1 at 87)

Dr. Neumeister saw Petitioner on May 28, 2015. He examined her and noted pain on the right CMC joint. She noted weakness in her grip and when she tries to open jars and doors. He noted tenderness around the CMC joint toward the scaphotrapezoid zone. Dr. Neumeister gave Petitioner a steroid injection at the base of the CMC and ST joint. (PX 1 at 85)

Dr Neumeister returned Petitioner to work starting 4 hours per day beginning June 1, 2015. (PX 1 at 85 and 82)

Petitioner returned for a follow up visit with Dr. Neumeister on June 15, 2015. She had been back to work for a period of two weeks. Petitioner complained of increased pain since going back to work. Dr. Neumeister recommended Petitioner continue working despite her continued pain complaints. He released her to full duty. (PX 1 at 80)

Petitioner saw Dr. Neumeister on July 13, 2015. Petitioner complained of pain in the CMC joint and told Dr. Neumeister the steroid shot did not work she received the month before. Upon examination, swelling was noted over the dorsal radial aspect on the right but no tenderness to palpation over the 1st dorsal compartment. Tenderness to palpation was noted over the CMC joint and some tenderness to palpation extending throughout the wrist up into the forearm. (PX 1 at 76) Dr. Neumeister ordered a bone scan to help determine the source of Petitioner's pain.

Petitioner returned to see Dr. Neumeister on September 14, 2015, after having a bone scan performed. The result of the bone scan was non-specific and likely related to post-surgical changes. (PX 1 at 64). Petitioner complained of tenderness in the hands. Petitioner complained of numbness and tingling in both of her little fingers and half of the ring finger. Upon examination, there was a positive provocative Tinel's in the bilateral cubital tunnel. He noted no evidence of carpal tunnel notable by examination but did note occasional numbness in the thumb and index finger. Dr. Nuemeister noted he felt the wrist was an extension of the arthritis. He noted some ST arthritis that might require a fusion in the future. He recommended Petitioner see Dr. Gilchrist to rule out cubital tunnel. (PX 1 at 64)

Petitioner returned to Dr Neumeister's office on October 30, 2015. She complained of left thumb base pain. Physical examination revealed a positive grind test with an adducted position at rest and slightly dorsally displaced metacarpal base. Numbness and tingling in the distribution of the ulnar nerve in both hand as well as positive provocative Tinel sign at the elbow bilaterally was noted. (PX 1 at 58). Petitioner was still waiting for nerve compression studies to be performed. They were scheduled for sometime in December. Petitioner was administered a steroid shot to the left thumb. (PX 1 at 56)

Petitioner returned to see Dr. Neumeister on December 17, 2015. Dr. Neumeister recommended Petitioner undergo a limited fusion at the right wrist and carpal and cubital tunnel on the right side. (PX 1 at 53).

Petitioner returned to Dr. Neumeister on February 8, 2016. He recommended right STT fusion with distal radius graft and right carpal and cubital tunnel syndrome. (PX 1 at 49) . Petition was held off work until after surgery with no use of her right hand.

Petitioner returned to Dr. Neumeister on March 21, 2016. She presented with pain in the right thumb base that spreads throughout her hand onto the 2nd and 3rd metacarpal phalangeal joint and frequent numbness and tingling along the entire hand. (PX 1 at 39). Petitioner was advised to continue anti-inflammatory therapy and hand therapy and was provided with a comfort cool splint, all while waiting for insurance approval. (PX 1 at 42)

Petitioner saw Dr. Neumeister on May 23, 2016. She had continued complaints of pain at the base of her right and left thumbs as well as the A1 pulley of the right thumb. Petitioner reported the anti-inflammatories were not working and were interfering with her activities of daily living. Petitioner complained of numbness and tingling in the fingers on her right hand. (PX 1 at 34) Dr. Neumeister diagnosed her with a right trigger thumb and left CMC joint arthritis. Dr Neumeister administered a kenalog injection into the STT joint on the right and into and around the A1 pulley of the right thumb and into the left CMC joint. (PX 1 at 37)

Petitioner returned to Dr. Neumeister on September 12, 2016. Surgery was still not approved. Petitioner continued to have the same symptoms and Dr. Neumeister still had the same surgical recommendations. Dr. Nuemeister administered a Kenalog injection into the left thumb. (PX 1 at 31)

Petitioner returned to Dr. Neumeister on April 3, 2017. She was given an injection into the left CMC joint. Dr. Neumeister's examination or surgical recommendations did not change. Dr Neumeister noted Petitioner was using the left hand significantly more and she noticed significant discomfort when she opens doors, jars and twists with her thumb. (PX 1 at 26)

Dr. Neumeister saw Petitioner on May 8, 2017. Petitioner's symptoms had not changed. Dr. Neumeister administered kenalog injections. His surgical recommendation did not change. (PX 1 at 22)

Petitioner saw Dr. Neumeister on June 22, 2017. He examined Petitioner. He noted her right long finger was triggering and administered an injection. Dr. Neumeister's surgical recommendations did not change. (PX 1 at 17)

On August 14, 2017, Petitioner saw Dr. Neumeister. Upon physical examination, Dr. Neumeister noted a positive grind test at the left carpometacarpal joint. He noted a positive provocative compression test at the carpal and cubital tunnel on the left. (PX 1 at 10)

Petitioner was seen on September 11, 2017, by Dr. Neumeister. Petitioner complained of bilateral hand pain. She stated her left was worse than her right. She noted a burning sensation around her left thumb. She described difficulty with coordination of the left hand and difficulty picking things up. She was diagnosed with bilateral carpal and cubital tunnel syndrome and surgery was recommended for both. Dr. Neumeister's recommendation for surgery on the right STT joint remained the same. (PX 1 at 5)

Petitioner testified at trial that when she returned to see Dr. Neumeister on February 26, 2015, she began having problems with her left thumb as a result of overusing the same. Petitioner testified that she was on restrictions and not able to use her right hand as a result of the work injury to her right hand.

Petitioner testified she returned to work on June 1, 2015, after having two surgeries to her right thumb. Petitioner testified she started out working four hour days and then returned to full duty.

Petitioner testified she began having problems with her right hand and left hand once she returned to work. Petitioner testified she returned to see Dr. Neumeister on September 14, 2015,

and she had complaints of numbness and tingling in her left and right hand. Petitioner testified she had a nerve study done.

Petitioner testified she continued to work full duty until February 8, 2016, when Dr. Neumeister held her off work pending surgery. Petitioner testified she remains off work as of the date of trial.

Petitioner testified she just wants to have the procedures recommended by Dr. Neumeister. She testified she just wants a normal life. She testified she wants to go back to work and get her hands better and be able to enjoy things without having constant pain in both hands.

Petitioner testified she had no problems with her hands or elbows prior to the work accident.

Petitioner was sent for a Section 12 examination with Dr. James Williams on February 6, 2013. Dr. Williams examined Petitioner and reviewed several medical records as set forth in his IME Report dated February 6, 2013. Dr. Williams noted that Petitioner was honest and forthcoming. He reported she gave good effort during her examination. Dr. Williams recommended increased activity and getting her back to work 4-6 weeks at light duty with the right and full use of the left. He believed that if the cortisone shots worked, she should be full duty within 6 weeks.

Petitioner returned for a second IME with Dr. Williams on February 25, 2015. Dr. Williams placed Petitioner at MMI with regard to her right thumb as of this date.

Petitioner returned for a third IME with Dr. Williams on March 6, 2017. Dr. Williams did not causally relate Petitioner's bilateral carpal and cubital tunnel syndrome to her job duties.

Dr. Williams gave an evidence deposition on June 30, 2016. In that deposition, Dr. Williams was given a hypothetical patient to use as the basis for his testimony. Dr. Williams testified that this hypothetical patient's carpal and cubital tunnel syndrome were not causally related to her job duties. Petitioner's attorney objected to the testimony of Dr. Williams based on the Ghere case. In the deposition, Dr. Williams testified that he had not seen Petitioner since February 25, 2015, when he gave his deposition testimony on June 30, 2016. Dr. Williams testified that as of February 25, 2015, Petitioner did not have any symptoms relating to carpal or cubital tunnel syndrome. Dr. Williams testified he did not examine Petitioner since she rendered complaints to Dr. Neumeister about her hands and elbows. He testified he did not review any EMG Nerve Conduction studies.

Dr. Neumeister gave his evidence deposition on June 6, 2016. Dr. Nuemeister testified Petitioner's work accident in August 2012 caused or aggravated the condition in her right thumb and hand. He testified that the need for both surgeries on her thumb in 2014 were as a result of her work accident. He further testified that the STT arthritis was causally related to the work accident.

Dr. Nuemeister testified that Petitioner's job duties aggravated the carpal and cubital tunnel conditions that he diagnosed her with. Dr. Neumeister testified that people can have cubital tunnel syndrome in the absence of positive EMG/nerve conduction studies.

Dr. Williams gave his evidence deposition again on September 28, 2017. Dr. Williams testified that Petitioner's job duties did not cause, contribute, aggravate, accelerate or exacerbate any of her symptoms relating to the carpal or cubital tunnel diagnosis given by Dr. Neumeister.

On cross-examination, Dr. Williams testified he had not seen Petitioner's work station. He testified he didn't review any ergonomic studies. He testified symptoms relating to carpal and

cubital tunnel can wax and wane. Dr. Williams testified that Petitioner's activities of daily living could have aggravated the condition on the right thumb as a result of overuse.

Petitioner incurred the following medical bills that were submitted at trial:

SLU Healthcare/Dr. Neumeister	$1,288.55
IWP	$ 133.73

The Arbitrator concludes:

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

Petitioner's condition of ill-being relating to the right STT joint and the left CMC joint are causally related to Petitioner's accident of August 6, 2012. Petitioner did not have an symptoms prior to the work accident.

Petitioner testified she began having symptoms in the left CMC joint while she was being held off work for her right hand and was under restrictions to not use her right hand. As a result of overuse of the left hand, Petitioner, at minimum, aggravated the CMC joint.

Dr. Nuemeister opined that said condition was aggravated by overuse of the left hand and testified it was causally related to the accident.

Regarding the need for the surgery at the right STT joint, Dr. Neumeister testified it was causally related to the original work accident.

Regarding the carpal and cubital tunnel syndromes, Dr. Neumeister testified that Petitioner's job duties, at minimum caused and aggravation and are therefore causally related. Dr. Nuemeister has a clear understanding of Petitioner's job duties.

Dr. Nuemeister is a Board Certified plastic surgeon who specialized in hand surgery. Dr Neumeister is the editor of the Hand Journal and has been since 2010. Dr, Nuemeister has treated Petitioner since 2013 for her injuries.

Dr. Neumeister is more credible than Dr. Williams who gave testimony in his first deposition based on an imaginary patient and managed to come to the conclusion the patient could not have carpal or cubital tunnel syndrome. Dr. Williams then testified again after being able to examine Petitioner and made the same conclusions. Dr. Neumeister's opinion is more credible than that of Dr. Williams.

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

Respondent has not paid all reasonable and necessary medical bills to date. Respondent shall pay the outstanding medical bills as set forth in Petitioner's Exhibit 3 and as further set forth above.

K&O Is Petitioner entitled to any prospective medical care? Is the prospective medical care reasonable and necessary?

The prospective medical care as recommended by Dr. Neumeister is reasonable and necessary and shall be authorized and paid for by Respondent pursuant to the fee schedule.

Dr. Neumeister is recommended bilateral carpal and cubital tunnel surgeries and STT joint surgery on the right thumb. Said procedures shall be authorized and paid for by Respondent.

L. What TTD benefits are due and owing?

Respondent shall pay Petitioner TTD benefits from February 8, 2016-October 20, 2017, representing a period of 97 2/7 weeks. Petitioner shall receive credit for TTD benefits paid from November 21, 2016-March 24, 2017.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Zachary Janssen,

Petitioner,

vs. NO: 16 WC 23681

19IWCC0013

Unique Personnel,

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, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission notes that since the date of accident in this case (7/14/16) occurred subsequent to the effective date of the amendment (9/1/11), an analysis pursuant to the five (5) factors set forth in §8.1b of the Act is required.

With respect to (i), the reported level of impairment pursuant to subsection (a), the Commission finds that no impairment rating was submitted into evidence. Thus, like the Arbitrator, the Commission accords no weight to this factor.

With respect to (ii), the occupation of the injured employee, the Commission notes that Petitioner was working as a laborer at the time of the accident. Given that Petitioner's occupation necessarily requires the use of his injured hand and fingers, the Commission accords this factor greater weight.

With respect to (iii), the age of the employee at the time of the injury, the Commission notes that Petitioner was 21 years of age at the time of the accident. Given his youth, Petitioner

presumably has an extended work/life expectancy to look forward to, and as such will have to live and work without the full use of his right hand and fingers during that period. As a result, the Commission accords this factor greater weight.

With respect to (iv), the employee's future earning capacity, the Commission finds that the partial amputation of three of his fingers on his dominant hand will have a limiting effect on the type of jobs Petitioner will be able to obtain in the future, particularly for a worker with limited or no specialized job skills other than his ability to perform manual labor. As a result, the Commission accords this factor greater weight.

Finally, with respect to (v), evidence of disability corroborated by the treating medical records, the Commission notes that Petitioner suffered partial amputations with bone loss of three of the fingers on his right, dominant hand. Specifically, the operative report dated 7/14/16 shows that Dr. Naam performed the following procedures: 1) extensive debridement and irrigation of severe circular saw injuries of the right long, ring, and little fingers; 2) revision of amputation of the right ring finger at the level of the distal end of the middle phalanx with neurectomy; 3) open treatment of open fractures of the distal phalanx of the right long finger with bone loss; 4) repair of multiple avulsion laceration of the nailbed of the right long finger; 5) repair of deep jagged lacerations of the right long finger (3 cm); 6) open treatment of open comminuted fracture of the distal phalanx of the right little finger with bone loss; 7) repair of multiple deep avulsion lacerations of the germinal matrix of the right little finger with significant nailbed tissue loss; 8) full-thickness nailbed grafting of the right little finger from the right ring finger; 9) repair of lacerations of the right little finger (5 cm); and 10) soft tissue reconstruction of the amputation of the right little finger using V-Y flap. (PX1). The post-operative diagnoses included: 1) very severe circular saw injuries of the right long, ring, and little fingers; 2) severe mutilating injuries of the right long, ring, and little fingers; 3) almost complete traumatic amputation of the right ring finger at the level of the distal end of the middle phalanx; 4) open, comminuted fracture of the distal phalanx of the right long finger and the right little finger with bone loss; 5) severe avulsion lacerations of the nailbed of the right long finger; 6) multiple deep avulsion lacerations of the seroma and sterile matrix of the right little finger with significant nailbed loss; and 7) multiple lacerations of the right long and little fingers. (PX1).

Petitioner required three surgeries on his ring finger, including the excision of an ulcerating lesion and/or cyst on the stump on two occasions following the initial surgery. The last procedure apparently included not only excision of the recurrent cyst but also resection of the distal end of the proximal phalanx in order to prevent recurrence. (PX1).

Currently, Petitioner noted he has pain in his right hand, noting that "[w]hen it gets cold out, my fingers, they're absolutely numb. Just right now, I can go outside right now, and they're absolutely numb. The tips of my fingers get cold, turn red instantly. More like when I am hammering, when I am hammering or chiseling to beat out brick, the vibration of smaking the hammer hurts from gripping the hammer." (T.14-15). When asked to describe the location of his pain, Petitioner noted "[p]retty much right in here, these fingers mostly, these two fingers right here (witness indicating) from holding the bottom of the hammer. They get real sore from hitting the brick. If I am cutting a brick on the saw, when I am pushing, it shakes because it is a tile saw." (T.15).

When asked whether the pain ever goes into the palm of his hand, Petitioner responded: "[t]he most it goes down is down to these knuckles right here (witness indicating). I have these knuckles, these ones pretty much, but it does come down here (witness indicating), depends if I am carrying something heavy. Sometimes I have to carry a box of bricks, which is 48 bricks in a box, and they're extremely heavy." (T.15). Petitioner went on to state that "[t]he way we get things to the top of the scaffold is pull by rope, so any time I am gripping something real tight, I feel it go down into my palm. That's when it really gets my palm the most, when I am holding something, lifting something or squeezing something real hard, like a hammer, a chisel, a drill. When I am constantly holding a drill, squeezing the bottom of it, it hurts." (T.15-16). He noted that he does not have the same problems with his left hand. (T.16). He indicated that his job entails a lot of gripping and lifting. (T.16). However, he stated that his hand does not really get tired, noting that "[m]ostly, just the pain stays in it, not really get tired." (T.16).

Petitioner also testified that "... my strength is all right. Mostly, just these three fingers, I can't really use these fingers for strength, unless I am lifting up something. You know, I can still lift up stuff. It's just the pain. You know, ... I can still lift everything pretty much. It's just the pain in my hand when I do. I still got good pressure when I squeeze, but that's just between these three fingers. I can't really squeeze with these fingers down here (witness indicating)." (T.17). He agreed that he was talking about his ring and pinky fingers. (T.17).

In addition, Petitioner noted that when "... I go to open up a door knob, if I just kind of tap the top of my fingers, any of these three, if I just hit them on something, just say I put my hand in my pocket, and I hit something in my pocket with the top of my finger, it hurts. If I go to open a door knob and it hits on the door, anything like that, it hurts extremely bad because my bone is just right there on top of that." (T.18). He also stated that "... with my right hand, when I use a pair of pliers, when I went to open up a pair of pliers, I drop pliers quite a bit, because this is the fingers I use to open up them, I use a pair of pliers." (T.18). He indicated that "[w]hen I use pliers, it's mostly when I use wire for the top of the coal mines and stuff like that. We get wire to hold up our lights and wire up our cords and everything like that. I use pliers for that. If not, it's pretty much just at home when I use pliers if I am working on something. Working on my 4-wheelers or something like that, I use pliers." (T.18-19).

The Commission notes that pursuant to §8(e)9 of the Act "[t]he loss of 2 or more digits, or one or more phalanges of 2 or more digits, of a hand may be compensated on the basis of partial loss of use of a hand..." In this case, Petitioner suffered bone loss in at least two of the fingers of his right, dominant hand, and credibly testified that he still experiences pain and limitation not only with the affected fingers but with the hand as a whole. As a result, the Commission finds that a more appropriate award would include the loss of use of the hand itself, and not just the right ring and middle fingers, as determined by the Arbitrator.

Therefore, based on the above and the record taken as a whole, the Commission modifies the decision of the Arbitrator to find that Petitioner suffered permanent partial loss of use of 30% of the right hand pursuant to §8(e)9 of the Act. The Commission finds that this is in addition to the previously awarded and statutorily mandated 100% loss of use of the right ringer finger and 50% of the right middle finger.

19IWCC0013

Finally the Commission corrects a clerical error in the Arbitrator decision to show that Petitioner's permanent partial disability rate is equal to $524.34 (not $524.74), given that Mr. Janssen suffered partial amputation of his middle, ringer and little fingers, and would therefore be entitled to a minimum rate of 50% of the State's average weekly was (.5 x $1,048.67) pursuant to §8[b]4.1 of the Act.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $524.34 per week for a period of 61.5 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the loss of use of 30% of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $524.34 per week for a period of 46 weeks, as provided in §8(e)3 and §8(e)4 of the Act, for the reason that the injuries sustained caused the loss of use of 50% of the right middle finger and 100% of the right ring finger, respectively.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $26,700.00. 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: JAN 1 1 2019
o:12/11/18
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JANSSEN, ZACHARY
Employee/Petitioner

Case# **16WC023681**

UNIQUE PERSONNEL
Employer/Respondent

19IWCC0013

On 6/27/2018, 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 2.08% 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:

3101 PRINCE LAW FIRM
TYLER N DIHLE
401 N MONROE ST
MARION, IL 62959

2904 HENNESSY & ROACH PC
STEVE KLYCZEK
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

ZACHARY JANSSEN
Employee/Petitioner

v.

UNIQUE PERSONNEL
Employer/Respondent

Case # **16** WC **23681**

Consolidated cases: ____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **April 5, 2018**. By stipulation, the parties agree:

On the date of accident, **July 14, 2016**, 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 **$2,468.93**, and the average weekly wage was **$467.07**.

At the time of injury, Petitioner was **21** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of **$29,887.38** for permanent partial disability 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

Respondent shall pay Petitioner the sum of $524.74/week for a further period of 57 weeks, as provided in Sections 8(b), 8(e), 8(e)4, and 8(e)5 of the Act, because the injuries sustained caused **100% loss of use of the right ring finger, 50% loss of use of the right middle finger, and 50% loss of use of the right little finger..**

Respondent shall pay Petitioner compensation that has accrued from **July 14, 2016** through **April 5, 2018**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

6/25/18
Date

JUN 27 2018

Zachary Janssen
vs.
Unique Personnel

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of arbitration, the sole issue in dispute is the nature and extent of Petitioner's injuries from the July 14, 2016 accident.

The Arbitrator Finds

Petitioner testified that he worked for Respondent building decks for bleachers by cutting plywood and bolting the bleachers together. On July 14, 2016, Petitioner was at work cutting a board that was warped with a saw that had a broken saw guard. Petitioner further testified that the saw caught his glove and pulled his right hand into the saw. Admitted into evidence as PX 2 are the records from St. Anthony's Memorial Hospital which contain the records of treatment rendered to Petitioner immediately after the accident occurred. According to these records, as a result of the accident, Petitioner suffered a complete amputation of the tip of the right little finger, an incomplete amputation of the middle finger at the distal end of the middle phalanx, and mutilization of the tip of the middle finger, as well as, fractures of the distal phalanges of the middle and small fingers and the distal end of the middle phalanx and the base of the distal phalanx of the ring finger. On the date of accident, Petitioner underwent surgery which involved a revision of the amputation of the ring finger at the distal end of the middle phalanx, open treatment of the open fracture of the distal phalanx of the long finger with bone loss, and open treatment of an open comminuted fracture of the distal phalanx of the small finger with bone loss. Petitioner followed up with the surgeon, Dr. Naam, and Petitioner's hand was placed in a splint and Petitioner was prescribed Norco for pain. On July 26, 2016, the sutures were removed from the middle finger. By August 2, 2016, Petitioner was to begin gentle range of motion exercises. By August 16, 2016, Petitioner was to begin physical therapy. Petitioner was returned back to work full duty on September 6, 2016. However, Petitioner returned to Dr. Naam on September 27, 2016 reporting that, when he started working, he developed more pain and swelling. Dr. Naam prescribed Lyrica and took Petitioner back off of work. As the pain had improved significantly, Dr. Naam returned Petitioner back to work as of November 10, 2016. (PX. 1.)

On June 20, 2017, Petitioner returned to Dr. Naam due to the development of an ulcerating lesion on the tip of the ring finger stump. Dr. Naam performed surgery on the right ring finger on July 17, 2017 which involved an excision of the epidermal inclusion cyst of the tip of the right ring finger amputation stump. On August 1, 2017, sutures were removed from the right ring finger amputation stump. On August 21, 2017, Petitioner was returned back to full duty work. (PX 1.)

Petitioner had a recurrence of the cyst at the tip of the ring finger stump starting at the end of September 2017. Dr. Naam performed another surgery on the right ring finger amputation stump on November 5, 2017, which involved the excision of an epidermal inclusion cyst. On December 6, 2017, the surgical sutures were removed. Petitioner was started on antibiotics on December 21, 2017. Petitioner was returned back to full duty work as of December 18, 2017. (PX 1.)

Petitioner testified that he now works for S&S Ceramic laying bricks in coal mines. This job requires Petitioner to climb ladders and down into pipes. Petitioner testified that he regularly uses a hammer and chisel, a putty knife, and an air hammer. Petitioner testified that the injured fingers become numb in cold weather. Petitioner also testified that he has pain in his last two fingers while using a hammer. Petitioner further testified that he has pain going into his palm when he carries

heavy loads of bricks, pulls ropes, or squeezes tools. Petitioner testified that he has a loss of strength in his right ring and little fingers which cause him to drop pliers while at work. Petitioner also testified that he still has sensitivity in the tips of the injured fingers and feels acute pain when the tips of the injured fingers contact hard surfaces or objects.

The Arbitrator Concludes

With regard to subjection (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 Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a laborer at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that the job duties of Petitioner's job at the time of the accident and the job duties of Petitioner's present employment are similar in regards to the use of the right middle, ring, and little fingers. Therefore, the Arbitrator gives lesser weight to this factor.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 21 years old at the time of the accident. Petitioner will live a longer life due to his relatively young age without the full use of the last three fingers on his right hand. Therefore, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earning capacity, the Arbitrator notes that there is no evidence that Petitioner's earning capacity is affected due to the work injury. Therefore, the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner did have complaints of weather sensitivity, as well as, tenderness in the tips of the injured fingers, pain and weakness in the ring and little fingers, and pain going into his palm upon heavy lifting or gripping, however, the medical records do not note ongoing complaints. Therefore, the Arbitrator gives lesser 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 100% loss of use of the right ring finger, 50% loss of use of the right middle finger, and 50% loss of use of the right little finger pursuant to Sections 8(b)4.1, 8(e)3, 8(e)4, and 8(e)5 of the Act. The affect of the injuries to the fingers on the function of the right hand as a whole does not rise to the level to warrant an award on the hand.

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

Christopher D Small,
Petitioner,

19IWCC0014

vs.

NO: 17 WC 6693

SOI-Dept. of Central Management Services,
Respondent.

DECISION AND OPINION ON REVIEW

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

DATED: JAN 1 1 2019
o12/6/18
DLS/rm
046

David L. Gore

Stephen J. Mathis

DISSENT

I respectfully dissent from the Decision of the majority. The Arbitrator awarded Petitioner $4,031.00 in medical expenses and 12.5 weeks of permanent partial disability benefits

representing loss of 2.5% of the person-as-a-whole. I would have found that Petitioner did not sustain his burden of proving that his accident on February 23, 2017 caused any permanent disability involving his lumbar spine and would have vacated the award for permanent partial disability benefits.

Petitioner suffered a prior work-related injury to his lumbar spine in 2009 while picking up bags of salt. He filed a workers' compensation claim for that injury which was settled on August 26, 2009 for $49,854.00, representing loss of 15% of the person-as-a-whole. The MRI following the 2009 accident revealed degenerative disc disease L4-S1. Petitioner sustained the instant accident on February 23, 2017 while pushing a desk up a ramp. He was diagnosed with a back strain and full recovery was expected. That diagnosis remained the same throughout treatment. An MRI following the 2017 accident produced the same findings as the 2009 MRI. Petitioner returned to his previous, physically demanding job on May 1, 2017 and had no difficulty performing the duties of that job.

I agree with the Arbitrator and the majority that Petitioner sustained his burden of proving a compensable accident on February 23, 2017 and I agree that Petitioner was entitled to temporary total disability benefits for the time he was off work due to the instant injury. However, I conclude that he suffered only a temporary exacerbation of his prior lumbar condition. I base that conclusion on the facts that he was diagnosed with a strain for which complete recovery was anticipated, the MRI from 2017 showed no structural change in the condition of his lumbar spine since the prior lumbar injury in 2009, and Petitioner was able to return to work at his physically strenuous job within about two months of the accident.

For these reasons, I respectfully dissent from the majority opinion. I would have found that Petitioner did not sustain his burden of proving that his work-related accident on February 23, 2017 caused any permanent disability and would have vacated the Arbitrator's permanent partial disability award.

DLS/dw
O-12/6/18
46

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0014

SMALL, CHRISTOPHER D
Employee/Petitioner

Case# **17WC006693**

SOI-DEPT OF CENTRAL MANAGEMENT SERVICES
Employer/Respondent

On 12/6/2017, 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 1.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1157 DELANO LAW OFFICES LLC
CHARLES H DELANO IV
1 S E OLD STATE CAPITOL PLZ
SPRINGFIELD, IL 62705

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

4993 ASSISTANT ATTORNEY GENERAL
CHELSA GRUBB
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

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

DEC 6 - 2017

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Chris Small
Employee/Petitioner

Case # 17 WC 006693

v.

Springfield

State of Illinois – Department of Central Management Services
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, arbitrator of the Commission, in the city of **Springfield**, 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 the 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 the petitioner's employment by the respondent?

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

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

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

G. [ ] What were the petitioner's earnings?

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

I. [ ] What was the petitioner's marital status at the time of the accident

J. [x] Were the medical services that were provided to petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary 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 the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Other ________________

FINDINGS

On **February 23, 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 $ **94,083.94**; the average weekly wage was $ **1,809.30**.

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

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

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

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

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

ORDER

The respondent shall pay the Petitioner the sum of $775.18/week for a further period of 12.5 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused a 2.5**% permanent partial disability to his person as a whole**.

The respondent shall pay the further sum of $ 4,031.00 for necessary medical services, as provided in Section 8(a) and 8.2 of the Act.

Pursuant to a stipulation between the parties, Respondent shall receive a credit for any payments made by its group health insurance. Respondent will satisfy any subrogation claim by its group health insurance.

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

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

In support of the Arbitrator's decision relating to (C) , Accident, the Arbitrator finds the following facts:

Petitioner testified that he was employed by the State of Illinois-Department of Central Management Services. (Arbitration Transcript, hereinafter "A.T." Page 9). Petitioner has been with the State of Illinois since 1987. (A.T., Pages 9 & 10). On February 23, 2017, Petitioner injured his back and stomach at work. (A.T., Page 10). Petitioner testified that he was attempting to push a desk up a ramp. (A.T., Page 10). The desk slid off to the side so Petitioner repositioned it and went back down the ramp. (A.T., Page 10). Petitioner started from the bottom of the ramp and again attempted to push the desk up the ramp. (A.T., Page 10). Petitioner then noticed a pull in his back and stomach. (A.T., Pages 10 & 11).

Petitioner notified his employer of what had occurred (A.T. Page 11). Petitioner sought medical treatment several days later. (A.T., Page 11).

Petitioner completed an employee's notice of injury on February 27, 2017. (PX 2) The history provided was consistent with the Petitioner's trial testimony. A Form 45 was prepared on the same date by the Respondent. The history provided by the petitioner was again consistent with his trial testimony. (RX 1) The histories provided by the Petitioner to his treating providers, Dr. Campbell and Dr. Morton, were also consistent with is trial testimony.

Respondent offered no evidence to rebut the Petitioner's accident other than question his credibility. Specifically, it argued that the Petitioner testified to having no prior back problems for at least a year or two prior to his accident while medical records from his treating physician showed lower back complaints on September 21, 2016, which was approximately five months prior to his accident.

The Arbitrator notes the discrepancy, but feels it is outweighed by the other evidence presented including the consistent histories referenced above. In addition, the Arbitrator notes that the Petitioner did acknowledge prior lower back injuries and treatment. He further testified that his most recent pre accident problems came as a result of bouncing on the seat of his lawn mower, which is the history contained in the office note of September 21, 2016. He also said that his back symptoms resolved quickly following that incident and the treatment notes confirm that he was seen only once by Dr. Campbell. (RX 3) It appears that the event was insignificant and the Arbitrator understands how the Petitioner might not have recalled when it occurred. In addition, the examination findings by Dr. Campbell on February 27, 2017 and Dr. Morton on March 9, 2017 are the type normally seen following a recent trauma. Dr. Campbell noted tenderness in the lumbar paraspinals and decreased flexion, while Dr. Morton noted tenderness in the muscles as well. (PX 3,4)

Based upon the above evidence, the Arbitrator finds the Petitioner sustained an accidental injury on February 23, 2017, as alleged.

In support of the Arbitrator's decision relating to (F), Causation, the Arbitrator finds the following facts:

The Arbitrator repeats the findings set forth in support of (C), as if set forth fully herein.

As indicate above, Petitioner's injury occurred on February 13, 2017. He was seen at Springfield Clinic Prompt Care on February 27, 2017, by Dr. Mary Campbell. Dr. Campbell's office note from this visit is included in the record as Petitioner's Exhibit 3. Exhibit 3 contains Petitioner's history of injury as well as

Petitioner's complaints of pain radiating into his left leg. Dr. Campbell found tenderness in Petitioner's lumbar paraspinous muscles as well as decreased flexion of his lumbar sacral spine. He was prescribed Naproxen and Metaxalone. Dr. Campbell believed that Petitioner sustained a soft tissue injury and told Petitioner to be rechecked if his symptoms did not resolve.

After seeing Dr. Campbell at Prompt Care, Petitioner saw his family physician, Dr. Scott Morton. Dr. Morton's records are included in the record as Petitioner's Exhibit 4. Dr. Morton saw Petitioner on March 9, 2017, April 3, 2017 and May 1, 2017. Dr. Morton's diagnosis was abdominal muscle strain, lumbar radiculopathy and lumbar strain. Dr. Morton initially continued the prescription medication prescribed by Dr. Campbell and instructed Petitioner on exercises to perform to attempt to alleviate his back and stomach pain.

When Dr. Morton saw Petitioner a second time on April 3, 2017, Petitioner's pain was getting worse and radiating down into his left leg and foot. He was experiencing numbness as well as weakness in the leg. Dr. Morton's note indicates that Petitioner had a similar problem in 2009 and saw Dr. William Payne and Dr. Koteswara Narla. An MRI done at that time, showed an L4-5 disc bulge for which Petitioner was treated with epidural steroid injections that resolved his problem. Dr. Morton indicated that Petitioner should continue his stretching exercises and may again need epidural steroid injections. Dr. Morton prescribed an MRI. That test was performed on April 17, 2017, at Springfield Clinic. Dr. Morton reviewed the MRI results with Petitioner during his office visit of May 1, 2017. Dr. Morton's note indicates that that MRI showed mild disc degeneration at L3-4, L4-5, L5-S1. Dr. Morton noted that there was not significant spinal canal or neuroforaminal stenosis. His diagnosis on that date was disc degeneration, lumbar sacral radiculopathy and lumbar strain. Dr. Morton told Petitioner to continue his duties at work but use common sense and be careful doing heavy lifting, bending, twisting and climbing. Dr. Morton indicated that if Petitioner's symptoms worsened, he may need an orthopaedic spine consultation and possible physical therapy or epidural steroid injections.

Petitioner testified that at the time of the hearing, he still had pain in his lower back which would radiate into his left hip and other times would radiate down the back of his left leg towards his foot. (A.T., Page 16). Petitioner testified that these problems have never gone away since his accident on February 23, 2017. (A.T., Page 17).

Respondent argues that at best, the Petitioner has a temporary aggravation of his pre-existing lower back condition which resolved itself by May 1, 2017, the date he last saw Dr. Morton. Records were introduced from Memorial Medical Center and Springfield Clinic covering about ten years of medical treatment, dating back to March 2007. The records do show the Petitioner did treat on various occasions for his lower back, which he acknowledged during his testimony.

The records show that the Petitioner did treat with providers a Springfield Clinic in June 2010, January 2011 and the aforementioned September 2016. The records show that all of the care was for apparent back strains and importantly none of the care extended for longer than two weeks time. The Petitioner did have one significant period of lumbar treatment as the result of a work accident in January 2009. His treatment, which lasted almost six months, consisted of fourteen physical therapy visits, two lumbar epidural injections, medications and restrictions from work. As in the instant case, he had symptoms in the back as well as the left leg. An MRI showed mild disc bulging as well as a tiny central herniation. (RX 3) An EMG done June 3, 2009 was interpreted by Dr. Narla as showing chronic left L5 radiculopathy. However, the Petitioner did report to his therapists that as of June 26, 2009, he was doing much better. He was then discharged from physical therapy. (RX 2)

The above evidence shows that the Petitioner did have chronic problems with his lumbar spine. However, it also shows that after each episode requiring treatment, his symptoms improved. As he explained to

his doctor during his April 16, 2014 physical, his lumbar pain was intermittent, tolerable and not really giving him any problems at that time. (RX 3)

Here, the Petitioner treated consistently from his accident in February through May 1, 2017, when he was last seen by Dr. Morton. Unlike his earlier care, Dr. Morton's note of that date shows some ongoing problems. His exam noted not only mild tenderness but a positive straight leg raising test on the left side with slight decreases in the left ankle reflex. His diagnosis on that date was lumbar disc degeneration with mild disc bulging and radiculopathy. He suggested the Petitioner be careful with work activity and a possible referral to either an orthopedist or neurosurgeon if the symptoms worsened. (PX 4) The Arbitrator believes this evidence is inconsistent with the Respondent's argument that there was only a temporary aggravation which resolved as of that date. Instead, the evidence shows that the Petitioner did aggravate his pre-existing condition and that his current condition of ill being is due, at least in part, to said aggravation.

In support of the Arbitrator's decision relating to (J), medical bills, the Arbitrator finds the following facts:

The Arbitrator repeats the findings set forth in support of (C) and (F), as if set forth fully herein.

The Respondent's objection to payment of medical bills is based on its contention that Petitioner did not sustain an accident which arose out of and in the course of his employment with Respondent and its contention that his condition of ill-being is not causally related to that accident. Given the findings set forth above that Petitioner's injury did arise out of and the course of his employment and that his current condition ill-being is causally related to that injury, the Arbitrator finds the Respondent responsible for payment of the following medical bills pursuant to the fee schedule:

1. Mary Campbell, M.D. in the amount of $168.00 (Petitioner's Exhibit 5); and
2. Scott Morton, M.D. in the amount of $3,863.00 (Petitioner's Exhibit 6).

These bills should be paid pursuant to the fee schedule. Pursuant to a stipulation between the Parties, if the Respondent has paid any of these charges through its group health insurance, it shall receive a credit for such payments. The Respondent has agreed that it will not seek reimbursement from Petitioner for any payments made through its group health insurance.

In support of the Arbitrator's decision relating to (L), Nature And Extent, the Arbitrator finds the following facts:

The Arbitrator repeats the findings set forth in support of (C), (F) and (J), as if set forth fully herein.

The date of this accident is February 23, 2017. Accordingly, 820 ILCS 305/8.1(b) applies to this case. That section of the Act requires permanent partial disability to be established using five (5) criteria. Those criteria are:

1. The AMA reported level of impairment;
2. The occupation of the injured employee;
3. The age of the employee at the time of the injury;
4. The employee's future earning capacity; and
5. Evidence of disability corroborated by the treating medical records.

The statute provides no single factor shall be the sole determinate of disability. The statute requires a written order explaining the relevance and weight of any factors used in addition to the level of impairment as reported by the physician.

In this case, there is no impairment rating included in the evidence. Accordingly, the nature and extent of Petitioner's permanent partial disability must be based upon the remaining four (4) factors.

The Occupation of the Petitioner

Petitioner is employed for the State of Illinois in as a labourer. He has laboured his entire life and has been with the State for many years. As such, he is required to use his body and back on a daily basis to perform tasks such as lifting. Petitioner continues to have problems with pain in his back and leg. Despite these problems, he is able to perform his job. Given the fact that Petitioner's job requires heavy strenuous labor, this factor favors his claim.

Petitioner's Age

At the time of his injury, Petitioner was 51 years of age. This factor is basically neutral.

Petitioner's Future Earning Capacity

There was no direct evidence of wage loss in this case. Petitioner is earning the same salary he was earning at the time of the occurrence. This factor favors the Respondent.

Disability Corroborated by the Medical Records

Petitioner's medical records are reviewed above in connection with the section relating to causal connection (C) of this decision. They do corroborate his testimony. However, as noted above, he did have a chronic back condition producing symptoms prior to this accident.

Considering these factors as a whole pursuant to Section 8.1(b) of the Act, 820 ILCS 305/8.1(b), the Arbitrator finds that Petitioner sustained accidental injuries that caused a 2.5% loss of his person as a whole. The Arbitrator further finds that Respondent shall pay the Petitioner the sum of $775.18 per week for a further period of 12.5 weeks as provided in Section 8(e) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL MALCIC,

Petitioner,

vs. NO: 11 WC 41734

SERV CORP. INTERNATIONAL,
EVERGREEN CEMETERY,
Respondent.

19IWCC0015

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner was a Groundsman for Respondent. He laid out graves. His duties included finding four pins per lot, measuring grave sizes, and using a slide hammer probe to make sure there were no obstructions. The hammer probe was 5 feet tall and had a 17-pound weight attached that slides up and down. The hammer is used to smash into the ground to locate obstructions. The grounds are made of clay, sand or dirt. Sometimes they are water-logged and sometimes they are frozen.

2. Petitioner stands five feet two inches tall and weighs one hundred and ten pounds. It required all the physical force he could muster to operate the probe. He wrapped both

hands around the probe and slammed the weight down. He did this several times per grave lot. If he hit an obstruction, he would have to do several more probes around the site to see where things were positioned.

3. Probing could take anywhere from fifteen minutes to an hour of constant work. Petitioner also used a spade shovel to dig up concrete pins that sink into the ground. This required him to make stabbing motions towards the ground while gripping the shovel with both hands. He used the spade shovel daily. It could take Petitioner five minutes to an hour to locate the pins.

4. Petitioner testified that seventy-five to eighty percent of his work day was used to work on grave sites, the rest of the time he was lifting caskets into the mausoleum.

5. Petitioner also used a Tamper, which is a tool with a flat bottom made of metal and vibrates like a jackhammer. It weighs 175 to 200 pounds. Petitioner used this machine to compact the ground on top of the grave. It vibrated so quickly that his hands were a blur as he held the tool. Using the Tamper could take 10 to 15 minutes if the soil was dry. However, Evergreen Cemetery had poor drainage and a lot of the clay tile was broken, so they had a lot of cave-ins. This would cause a 3x8 size grave to enlarge to 9x15. This would require 30 minutes of using the Tamper. Petitioner used the Tamper 15 times in a typical 5-day week.

6. Petitioner began noticing stiffness in his hands in 2006. He would wake up overnight with the stiffness, but by the time he got to work he had loosened his hands up by squeezing a ball. He also complained to Hammond Clinic about his hand pain, which was treated with medication. Around September 2009 Petitioner began noticing sharp pains in his right thumb joint.

7. Between July 15, 2011 and September 15, 2011 Petitioner began noticing his hands locking up on him at night. His hands would be stiff every morning, so he would squeeze a ball during his 45-minute commute to work, which enabled them to loosen up enough to be able to work. Eventually, however, the stiffness caused Petitioner to see Dr. Fanto, a hand doctor.

8. Petitioner continued working, but soon informed Dr. Fanto about an episode when he was probing for forty-five minutes and then attempted to grab a shovel in another spot and his left hand paralyzed. He was then sent for a carpal tunnel test after x-rays did not show any left finger arthritis. On October 18, 2011 Petitioner was taken off work. He was diagnosed with left carpal tunnel syndrome and left thumb laxity. Petitioner has not returned to work since. He now receives Social Security Disability.

9. In September 2011 Petitioner complained of pain in his left hand and a protuberance of the basal joint with localized tenderness.

10. Dr. Fanto opined that Petitioner's conditions were work-related. In a deposition, Dr. Fanto testified that Petitioner's basal joint arthritis was aggravated by his work

19IWCC0015

activities of gripping, pounding and direct pressure on the joint. He also stated that Petitioner's left thumb ligament injury could have been caused by chronic pressure applied to the thumb. He opined that Petitioner's carpal tunnel syndrome was aggravated by his work duties of gripping vibratory tools. He also noted that his opinion was based in part on Petitioner's size, and that using the probe in Winter months would generate more stress on Petitioner's joints than it would on someone who weighed more and was more muscular. Dr. Fanto also testified that basal joint pain could alter how a person grips things, which in turn leads to them gripping in an unusual way in an attempt to avoid pain, which could lead to a stretching of joint ligaments.

11. Petitioner was eventually referred for a left carpal tunnel release and left thumb ligament surgery, which was performed June 25, 2012. During the 8 months off work prior to surgery, his hand pain was not as bad. Petitioner testified that it took eight months to perform the surgery because Respondent refused to approve it. Although surgery was never approved, by June 2012 Petitioner and Dr. Fanto decided to go ahead with the surgery anyway. Dr. Fanto told Petitioner that if he put the surgery through his group medical insurance that he would not require Petitioner to pay the balance.

12. After left hand surgery, Dr. Fanto continued treating Petitioner due to him still having some laxity in his repaired thumb ligament. Dr. Fanto wanted to take a tendon from Petitioner's arm and put it on the left thumb to make it stronger. Petitioner never underwent this surgery, however, but treated with Dr. Fanto through March of 2013.

13. Currently Petitioner has pain in his right-hand basal joint, which is the joint where the thumb connects to the wrist. He feels this pain while gripping. He has pain and frozen shoulder when he sleeps on his right shoulder. He also experienced shoulder pain after attempting to work out with an 8-pound dumbbell. He has no right arm pain since he stopped working, however. He also has no more left-hand pain or locking up since he is no longer working. Although he does get swelling at the incision location. He does have pain in his left wrist.

The Commission affirms the Arbitrator's rulings on accident, causal connection, medical expenses, temporary total disability benefits and temporary total disability credit. However, the Commission modifies the award for permanent partial disability benefits.

The Commission views the evidence slightly different than does the Arbitrator, thus modifying the award, and finding that Petitioner's left carpal tunnel syndrome and left basal joint arthritis caused a 22.5% loss of use of his left hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $456.00 per week for a period of 46.125 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused a 22.5% loss of use of his left hand.

19IWCC0015

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 $65,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 14 2019
O: 11/15/18
DLG/wde
45

David L. Gore

Stephen Mathis

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MALCIC, DANIEL
Employee/Petitioner

Case# **11WC041734**

11WC018059
11WC048493
12WC004086

SERV CORP INTERNATIONAL (EVERGREEN CEMETERY)
Employer/Respondent

19 I .CC0015

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:

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

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

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daniel Malcic
Employee/Petitioner

Case # **11WC041734**

v.

Consolidated cases: **11WC018059; 11WC048493; & 12WC004086**

Serv Corp International (Evergreen Cemetery)
Employer/Respondent

19IWCC0015

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **February 26, 2018 and March 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [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 **09/15/2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**39,520.00**; the average weekly wage was $**760.00**.

On the date of accident, Petitioner was **54** 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, $**NA** for TPD, $**NA** for maintenance, and $**NA** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**10,384.11** under Section 8(j) of the Act for medical bills paid.

ORDER

Respondent shall pay to Petitioner all reasonable, necessary and related medical services for treatment of Petitioner's left hand as provided in Section 8(a) and Section 8.2 of the Act and pursuant to the medical fee schedule. Respondent shall be given a credit of $10,384.11 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 $506.67 per week for 73 & 5/7 weeks, commencing October 18, 2011 through March 19, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay to the Petitioner permanent partial disability benefits of $456.00 per week for 61.5 weeks because the injuries sustained caused 30% loss of use of the left hand, as provided in Section 8(e) of the Act.

See Rider to 11 WC 18059 for findings of fact and conclusions of law.

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

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

David A. Kane
Signature of Arbitrator

March 29, 2018
Date

APR 2 - 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Malcic,
Petitioner,

vs. NO: 11 WC 18059

Serv Corp International(Evergreen Cemetery) ,
Respondent.

19IWCC0016

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 14 2019
o111518
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MALCIC, DANIEL
Employee/Petitioner

Case# **11WC018059**

11WC041734
11WC048493
12WC004086

SERV CORP INTERNATIONAL (EVERGREEN CEMETERY)
Employer/Respondent

19IWCC0016

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:

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

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

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daniel Malcic
Employee/Petitioner

Case # **11WC018059**

v.

Consolidated cases: **11WC041734; 11WC048493; & 12WC004086**

Serv Corp International (Evergreen Cemetery)
Employer/Respondent

19IWCC0016

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **February 26, 2018 and March 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [ ] 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 **08/04/2010**, 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 $**39,520.00**; the average weekly wage was $**760.00**.

On the date of accident, Petitioner was **53** years of age, *single* with **0** dependent children.

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

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

Respondent shall be given a credit of $**17,299.16** for TTD, $**NA** for TPD, $**NA** for maintenance, and $**NA** for other benefits, for a total credit of $**17,299.16**. Neither party claims any overpayment or underpayment of TTD.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $506.67 per week for 31 & 3/7 weeks, commencing December 7, 2010 through July 15 2011, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $17,299.16 for TTD paid. Neither party claims any underpayment or overpayment of TTD.

Respondent shall pay Petitioner permanent partial disability benefits of $456.00 per week for 100 weeks, because the injuries sustained caused 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.

David A. Kane
Signature of Arbitrator

March 29, 2018
Date

APR 2 - 2018

Attachment to Arbitration Decisions
Daniel Malcic v. Serv Corp International (Evergreen Cemetery)
11WC018059, 11WC041734, 11WC048493 & 12WC004086 (consolidated)

The Arbitrator addresses the cases in chronological order by alleged date of accident.

12WC004086 (DA 9-23-09)

Findings

Prior to September 2009, Petitioner Daniel Malcic (Petitioner) complained of bilateral hand pain. PX 2, pg. 15.On February 18, 2006, bilateral hand x-rays indicated no definitive acute bony abnormality. PX 2, pg. 53. On October 26, 2007, MRI of the bilateral wrists MRI showed: early degenerative changes of the right first MCP joint and minimal degenerative changes of the intercarpal articulation; and degenerative osteoarthopathy of the left first MCP and thumb basilar joint. PX 2, pg. 48-49.

In September 2009 Petitioner weighed 110 pounds and was 5'2" in height. Petitioner is right hand dominant.

In September 2009 Petitioner was working for Respondent Service Corporation International (Respondent) at Evergreen Cemetery as grounds crew specialist or member. That job required Petitioner to lay out graves and probe for obstructions. Petitioner was required to use a slide hammer probe that is a 4.5 foot rod with a

sliding 17 pound weight that petitioner had to smash into the ground with two hands. Petitioner would grip the probe and put as much force as he could into doing the probing. Petitioner would generally do 7 probes per grave and extra probes if there was some obstruction. Sometimes the ground was hard because it was frozen or clay. Petitioner would do at least f15 minutes of constant probing per grave.

In addition to the probing, Petitioner was required to use a spade shovel in his job. Petitioner would have to grip the shovel and make stabbing motions into the ground, which was sometimes frozen. Petitioner use a shovel daily. Petitioner would use a shovel 5 to 10 minutes per grave.

Petitioner also used a 175 pound, gas-powered machine called a tamper. The machine had a flat plate at the bottom and would vibrate like a jack-hammer. The tamper would compact the ground in the grave. The bottom of the tamper would hit the ground very hard and the top of the tamper would vibrate. Petitioner would grip the handle of the tamper at the top. Petitioner would have to use a lot of power to control the tamper. The top of the tamper would vibrate such that Petitioner's hands were a blur. Petitioner used the tamper on every grave. The Petitioner used the tamper 15 minutes to 30 minutes per grave. The Petitioner would use the tamper about 15 times per week.

The job required Petitioner to carry and lift planks, caskets, and plywood sheets weighing up to 50 pounds.

Prior to September 2009 Petitioner had never had any surgeries to either of his hands.

In September 2009, Petitioner began to get sharp pains and while gripping things the pain got worse. The pain got worse when Petitioner gripped a shovel or a tamper.

On September 10, 2009, Petitioner saw Dr. Harry Moffitt ant Hammond Clinic complaining of right wrist tenderness, swelling in his hand and pain in his thumb. PX 2, pg. 172. X-ray of the right wrist demonstrated no evidence for acute fracture or dislocation and was negative. PX 2, pg. 174. Dr. Moffitt diagnosed degenerative arthritis of the right CM first joint and recommended a spica brace and Medrol Dosepak. PX 2, pg. 173.

On November 3, 2009, Petitioner underwent surgery on his right hand by Dr. Moffitt at Hammond Clinic. PX 2, pg. 121.

After the surgery, Petitioner followed up with Dr. Moffitt and was scheduled for physical therapy. PX 2, pg. 107.

On February 18, 2010, Petitioner followed up with Dr. Moffitt who released Petitioner to return to work with limited probing only. PX 2, pg. 98.

On March 18, 2010 and May 8 2010, Petitioner followed up with Dr. Moffitt regarding the right first CMC arthroplasty. PX 2, pg. 94 & 96.

Petitioner notices pain in his right hand when he is gripping objects.

Conclusions: Accidental Injuries

The Arbitrator concludes that Petitioner did not sustain accidental injuries to his right hand that arose out of and in the course of his employment with Respondent on September 23, 2009. The Arbitrator bases this conclusion on a thorough review of the medical records that do not show any particular date of manifestation or connection to the employment due to repetitive trauma. Based on this conclusion, all other issues are moot.

11WC018059 (DA 8-4-10) & 11WC048493 (DA 10-11-11)

The Arbitrator incorporates the findings of fact from the consolidated case 12WC004086 as if fully set forth herein.

The parties stipulated that on August 4, 2010, Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent. At that time Petitioner was loading a plywood sheet and it got stuck, Petitioner jerked the plywood sheet and noticed pain and a stabbing sensation in his right shoulder area. Over the next few days, Petitioner noticed that his shoulder was getting really bad.

On September 1, 2010, Petitioner saw Dr. Richard Rodarte of the Hammond Clinic. PX 2, pg. 86. Petitioner was complaining of right shoulder pain 8 out of 10. PX 2, pg. 91. History was pain after heavy lifting almost 1 month before loading plywood onto truck. PX 2, pg. 91 & 93. X-ray of the right shoulder showed no fracture. PX 2, pg. 92. Dr. Rodarte recommended physical therapy. PX 2, pg. 86.

On September 10, 2010, Petitioner was seen by Dr. Richard Rodarte at Hammond Clinic and Dr. Rodarte diagnosed right shoulder strain and allowed Petitioner to continue current restrictions. PX 2, pg. 78. Petitioner complained of 8 out of 10 right shoulder pain. PX 2, pg. 81. Dr. Rodarte noted that Petitioner had already had 2 sessions of PT. PX 2, pg. 81.

On September 21, 2010, Petitioner was discharged from pre-operative physical therapy. PX 2, pg. 75.

On September 22, 2010, Dr. Rodarte of the Hammond Clinic noted that Petitioner was seeing Dr. Moffitt on September 23, 2010. PX 2, pg. 71. Dr. Rodarte diagnosed right shoulder strain and restricted Petitioner from working above shoulder level. PX 2, pg. 71. Dr. Rodarte referred petitioner to Dr. Moffitt. PX 2, pg. 72. Dr. Rodarte noted Petitioner was doing light duty. PX 2, pg. 73.

On September 23, 2010, Dr. Moffitt of Hammond Clinic noted that Petitioner was experiencing right shoulder pain and restricted Petitioner to no lifting above his right shoulder. PX 2, pg. 67. History was that patient injured his right shoulder at work on August 4, 2010 loading plywood. PX 2, pg. 68. Diagnosis was derangement of the right shoulder and rule out labral or cuff tear. PX 2, pg. 69.

On October 2, 2010 MRI of the right shoulder showed: mild tendinopathy of the distal aspect of the supraspinatus tendon with associated subchondral cyst formation at the superolateral aspect of the humeral head; mild subcoracoid bursitis; and degenerative findings of the AC joint with resultant Type III acromium. PX 2, pg. 209.

On November 4, 2010, Hammond Clinic on behalf of Dr. Moffitt attempted to obtain approval for right shoulder arthroscopy. PX 2, pg. 222.

On November 29, 2010, Petitioner was seen by Dr. William Heller at the request of the Respondent. PX 3, pg. 2. Dr. Heller reported that Petitioner likely was suffering from a labral disruption. PX 3, pg. 4. Dr. Heller reported that Petitioner was not at maximum medical improvement and recommended: MRI arthrogram

and subacromial corticosteroid injections. PX 3, pg. 4. Dr. Heller reported that Petitioner using his right arm in an overhead position to push plywood onto a truck and the plywood becoming stuck would represent an acute injury and could likely result in a labral injury and Dr. Heller recommended not disputing causal linkage between the current symptoms and the accidental injuries of August 4, 2010. PX 3. pg. 3.

On December 10, 2010, MRI arthrogram confirmed a superior labral tear, SLAP lesion and posterior labral tear. PX 3, pg. 6.

On January 3, 2010, Dr. Heller reported that he reviewed the MRI arthrogram and Dr. Heller recommended arthroscopic repair of the labral injury. PX 3, pg. 6. On January 11, 2011, Dr. Heller recommended right shoulder arthroscopic SLAP repair and labral repair. PX 3, pg. 7.

On January 26, 2011, Petitioner underwent right shoulder surgery by Dr. Heller at Mercy Hospital in Chicago. PX 3, pg. 31. Surgery consisted of Arthroscopic repair of the rotator cuff right shoulder; long head biceps tenotomy right shoulder; arthroscopic subacromial decompression right shoulder; manipulation under anesthesia right shoulder; and arthroscopy with extensive debridement right shoulder glenohumeral joint. PX 3, pg. 31. Postoperative diagnoses were: right shoulder rotator cuff tear; adhesive capsulitis right shoulder; and ruptured long head biceps tendon right shoulder. PX 3, pg. 31.

After the surgery Petitioner followed up with Dr. Heller and Dr. Heller recommended physical therapy. PX 3, pg. 9.

On May 31, 2011, Dr. Heller initiated work hardening and conditioning program. PX 3, pg. 40. On July 12, 2011, Petitioner completed the work hardening and conditioning program and his return to work goals were met. PX 3, pg. 49.

On July 15, 2011, Dr. Heller released Petitioner to return to regular work without restrictions. PX 3, pg. 19.

Petitioner returned to work. On October 11, 2011, Petitioner was working in his job as a grounds crew specialist or member for Respondent, when while lifting a 100 pound mausoleum panel, Petitioner noticed a lot of stiffness in his right shoulder.

On October 28, 2011, Petitioner saw Dr. Heller and gave a history of manipulating an 80 pound object on October 11, 2011 when he felt pain in his right shoulder. PX 3, pg. 21. Dr. Heller injected a small amount of Depomedrol into Petitioner's right shoulder. PX 3, pg. 21. Dr. Heller reported that Petitioner's right shoulder was functioning well and that may have had a mild right shoulder strain, but there was no evidence of significant recurrent or new injury. PX 3, pg. 21.

On June 8, 2012, Petitioner followed up with Dr. Heller. PX 3, pg. 23. Dr. Heller reported that Petitioner's right shoulder seemed to be functioning quite well and that no further injection or aspiration was necessary. PX 3, pg. 23.

On August 8, 2012, Petitioner was seen by Dr. Carl DiLella at the referral of his primary care physician Dr. Goldman. PX 7, pg. 24. Petitioner gave Dr. DiLella a history of prior surgery to his right shoulder and most recently clicking and

popping of the right shoulder and pain in the right shoulder sleeping. PX 7, pg. 24. Dr. DiLella noted palpable tenderness over the AC joint and palpable clicking and popping. PX 7, pg. 24. X-rays of the right shoulder revealed moderate AC degenerative and arthritic changes. PX 7, pg. 24. MRI dated September 26, 2012 noted post-surgical changes from prior rotator cuff repair, small high-grade partial-thickness undersurface tear involving the supraspinous tendon and moderate subacromial/subdeltoid bursitis. PX PX 7, pg. 28. Dr. DiLella did not think Petitioner needed any additional surgery but that there was a possibility for future injections. PX 7, pg. 21.

Petitioner occasionally notices pain in his right shoulder.

Conclusions: Causal Connection

The Arbitrator concludes that Petitioner's condition of ill-being as it relates to his right shoulder is causally related to the accidental injuries of August 4, 2010. A chain of events that demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability is sufficient evidence to prove a causal nexus between the accident and the employee's injury and an accident need only be a cause of the condition of ill being. Schroeder v. IL Workers' Comp. Comm'n., 2017 IL App (4th) 160192WC, pars. 19 & 28. Here, Petitioner was not experiencing any problem with his right shoulder until August 4, 2010 when Petitioner sustained stipulated accidental injuries that arose out of and in the course of his employment. Disability resulted from the stipulated accidental injuries.

The Arbitrator concludes that the Petitioner's condition of ill-being is not related to any alleged accidental injuries of October 11, 2011. The Arbitrator concludes that the alleged incident of October 11, 2011 was not an intervening injury of any kind but merely a continuation of the symptoms that Petitioner had been experiencing since the stipulated accidental injuries of August 4, 2010. Based on this conclusion, all other issues relating to the alleged incident of October 11, 2011, Case 11WC048493 are moot. All other findings and conclusions relating to Petitioner's right shoulder are referred to Case 11WC018059.

Conclusions: Nature & Extent

The Arbitrator concludes that as a result of the stipulated accidental injuries to his right shoulder of August 4, 2010, the Petitioner sustained 20% loss of use of the person as a whole pursuant to the holding in Will County Forest Preserve District. The Arbitrator bases this conclusion on a thorough review of the medical records from Dr. Moffitt, Dr. Heller and the surgery report of January 26, 2011.

11WC041734 (DA 9-15-11)

The Arbitrator incorporates the findings of fact from the consolidated Cases 11WC018059, 11WC048493 and 12WC004086 as if fully set forth herein.

The job duties of grounds crew specialist or member have been described in consolidated Case 12WC004086 and the Arbitrator incorporates those findings as if fully set forth herein.

From July 2011, when Petitioner was released to return to work from a right shoulder injury which is the subject of consolidated Cases 11WC018059 and 11WC048493, until September 2011, Petitioner was working for Respondent as grounds crew specialist or member. During that period of time Petitioner began noticing that his left hand was very stiff and that it would lock up at night. Petitioner noticed that he could not grip with his left hand when he was using a shovel or a probe.

On September 15, 2011, Petitioner saw Dr. Salvatore Fanto. PX 4. Dr. Fanto reported that Petitioner was noticing pain in his left hand and a protuberance of the basal joint with localized tenderness and tenderness at the metacarpal phalangeal joint of the left thumb with laxity of the joint on the radial side. PX 4, pg. 6. Dr. Fanto recommended EMG. PX 4, pg. 51.

On October 7, 2011, EMG showed left sided median neuropoathy at the wrist and mild left sided ulnar neuropathy. PX 4, pg. 30.

On October 18, 2011, Dr. Fanto reported that Petitioner had positive median nerve compression test, positive Phalen test and positive Tinel sign. PX 4, pg. 47. Dr. Fanto noted that the EMG was positive for carpal tunnel syndrome. PX 4, pg. 47. Dr. Fanto's diagnostic impression was torn radial collateral ligament of the left thumb metacarpal-phalangeal joint and carpal tunnel syndrome. PX 4, pg. 47. Dr. Fanto reported that in his opinion the conditions are work related and due to repetitive trauma. Dr. Fanto recommended out-patient surgery for which he sought authorization and took Petitioner off of his regular work duties. PX 4, pg. 47. Petitioner never returned to work after that date.

On December 14, 2011, Petitioner was seen by Dr. Thomas Wiedrich at the request of the Respondent pursuant to Section 12 of the Act. Dr. Wiedrich opined that the MP joint laxity was not related to Petitioner's work. Dr. Wiedrich opined that Petitioner's carpal tunnel syndrome was likely either casued or aggravated by his work activities. Dr. Wiedrich opined that Petitioner would benefit from carpal tunnel release. Dr. Wiedrich opined that petitioner ultimately could require a left CMC joint arthroplasty for his left thumb arthritis. Dr. Wiedrich recommended that Petitioner remain off work and restricted petitioner to avoid forceful repetitive activity with the left hand, no lifting more than 10 pounds and avoiding heavy vibratory equipment.

On February 25, 2012, Dr. Fanto responded to Dr. Wiedrich (in a report mistakenly dated February 25, 2011; see PX 6, pg. 16 for explanation of typographical error in date). PX 4, pg. 1. Dr. Fanto pointed out the areas in which he felt the report of Dr. Wiedrich were flawed. PX 4, pg. 3. Dr. Fanto continued to recommend surgery. PX 4, pg. 3.

On May 29, 2012, Dr. Fanto reported that he had no response from worker's compensation. PX 4, pg. 13.

On June 25, 2012, Dr. Fanto performed surgery on Petitioner's left hand. PX 4, pg. 24. Operative diagnoses were left carpal tunnel syndrome and rupture of the radial collateral ligament of the metacarpalpophalageal joint of the left thumb. PX 4, pg. 24 Surgery consisted of: left carpal tunnel release, repair of the flexor digitorum profundus of the small finger, repair of the radial collateral ligament of the metacarpalpophalageal joint of the left thumb; and repair of abductor pollicis brevis muscle. PX 4, g. 24.

After the surgery, Petitioner continued to follow up with Dr. Fanto. PX 4. On March 19, 2013, Dr. Fanto reported that Petitioner continued to notice some pain in the basal joint of his left thumb and suggested additional repair. PX 4, pg. 20.

Petitioner notices swelling in his left hand and pain in his left wrist.

Dr. Fanto testified in an evidence deposition taken by agreement of the parties on May 13, 2016. PX 6. Dr. Fanto testified that in his opinion the Petitioner's basal joint arthritis was aggravated by Petitioner's work activities including gripping pounding and direct pressure. PX 6, 23-24. Dr. Fanto testified that in his opinion the Petitioner's left thumb ligament injury could have been caused by chronic pressure applied to the thumb. PX 6, pg. 25. Dr. Fanto testified that in his opinion the Petitioner's carpal tunnel syndrome was aggravated by the Petitioner's work

activities, including gripping and use of vibratory tools, including specifically the stamper (previously referred to as tamper). PX 6, pg. 26.

Dr. Wiedrich testified in an evidence deposition taken by agreement of the parties on July 18, 2017. Although Dr. Wiedrich originally reported that the Petitioner's carpal tunnel syndrome was causally connected to his work activities, Dr. Wiedrich subsequently testified that neither Petitioner's carpal tunnel syndrome or Petitioner's left thumb joint laxity were causally connected to Petitioner's work activities. Dr. Wiedrich was never asked any opinions regarding the tamping machine. pg. 26. Petitioner objected to any questions of Dr. Wiedrich regarding the use of the tamping machine as a violation of the 48 hour under Section 12 of the Act. pg. 27. Dr. Wiedrich never recorded any information about use of the tamper. pg. 36. Dr. Wiedrich stated that Petitioner's work activities could have aggravated the symptoms of his left thumb arthritis. pg. 36. Dr. Wiedrich stated that if Petitioner's thumb arthritis became painful, Petitioner would have needed surgery relating to the collateral ligament laxity. pg. 37. Dr. Wiedrich stated that vibration over extended periods of time can cause or aggravate carpal tunnel syndrome. pg. 38. Dr. Wiedrich stated that the probing reports he reviewed were based on an employee other than the Petitioner. pg. 41. Dr. Wiedrich stated that the less motion one has in one's thumb, the more stress that is placed on the radial collateral ligament. pg. 43.

Conclusions: Accidental Injuries

The Arbitrator concludes that Petitioner sustained accidental injuries to his left hand that arose out of and in the course of his employment on September 15, 2011.

The Arbitrator notes that this is the date of manifestation for this repetitive trauma claim because this was the date that Petitioner first saw Dr. Fanto complaining of a problem with his left hand and relating it to some aspect of Petitioner's work.

Conclusions: Causal Connection

The Arbitrator concludes that Petitioner's condition of ill-being of his left hand, specifically including the left wrist carpal tunnel syndrome and the condition of Petitioner's left thumb, is causally related to the accidental injuries of September 15, 2011. The Arbitrator bases this conclusion on the explicit opinions and records of Dr. Fanto. The Arbitrator gives more weight to the opinions of Dr. Fanto than to the opinions of Dr. Wiedrich, at least in part because Dr. Fanto specifically considered the use of the tamper, which Dr. Wiedrich did not. In a repetitive trauma case, there is no legal requirement that a petitioner establish the quantitative components of his work or any quantitative minimum of certain activities in order to prove causation. Darling v. Indus. Comm'n., 176 Ill.App.3d 186, 196 (1st Dist. 1988). Dr. Wiedrich's analysis regarding the number of probes that Petitioner performed is therefore misplaced, especially because Dr. Wiedrich was analyzing the probes done by a different employee, not necessarily the same stature as the Petitioner.

Conclusions: Medical Treatment

Based on the conclusions relating to accidental injuries and causation above, the Arbitrator concludes that all the treatment rendered by Dr. Fanto to the Petitioner's left hand, including the surgery of June 25, 012, is reasonable, necessary and related to the accidental injuries of September 15, 2011. Even Dr. Wiedrich agreed that the treatment was reasonable and necessary, although not causally connected to any accidental injuries.

Conclusions: Temporary Total Disability

Based on the conclusions relating to accidental injuries and causal connection above, the Arbitrator concludes that Petitioner was temporarily totally disabled from October 18, 2011, when Dr. Fanto first took Petitioner off work, until March 19, 2013, the last time Petitioner saw Dr. Fanto. The Respondent agreed that if liability were found, Petitioner would have been temporarily totally disabled from at least June 25, 2012, the date of the surgery, through November 16, 2012. Dr. Fanto tried to get workers' compensation to approve the surgery from October 18, 2011 through the date of surgery.

Conclusions: Permanent Partial Disability

With regard to subsection (i) of Section 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 grounds crew specialist at the time of the accident. Based on Petitioner's undisputed description of that job and the job description reviewed by Dr. Wiedrich, the Arbitrator concludes that is a heavy job. The Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 54 years old at the time of the accident. Because of his age, Petitioner has to live with the permanent partial disability until his work life expectancy. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner retired from his job. The Arbitrator therefore gives some 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's credible complaints are corroborated by the records of Dr. Fanto. 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 30% loss of use of the left hand pursuant to Section 8 (e)9 of the Act. Even though the accidental injuries occurred after June 28, 2011 and involve carpal tunnel due to repetitive trauma, the accidental injuries do not involve repetitive trauma only and the Arbitrator uses 205 weeks as the value of the hand.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jean Lawrence,
Petitioner,

vs. NO: 11 WC 49165

Illinois Department of Human Services,
Respondent.

19IWCC0017

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 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.

DATED: JAN 14 2019
o122018
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LAWRENCE, JEAN
Employee/Petitioner

Case# **11WC049165**

ILLINOIS DEPT OF HUMAN SERVICES
Employer/Respondent

19IWCC0017

On 4/20/2018, 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 1.94% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0924 BLOCK KLUKAS MANZELLA & SHELL
BRYAN SHELL
19 W JEFFERSON ST
JOLIET, IL 60432

6096 ASSISTANT ATTORNEY GENERAL
JOHN CATALANO
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

APR 20 2018

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

- [ ] 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

Jean Lawrence
Employee/Petitioner

v.

Illinois Department of Human Services
Employer/Respondent

Case # 11 WC 49165

Consolidated cases: N/A

19IWCC0017

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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Kankakee**, on **March 19, 2018**. By stipulation, the parties agree:

On the date of accident, **June 11, 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 **$34,788.00**, and the average weekly wage was **$669.00**.

At the time of injury, Petitioner was **53** years of age, ***married*** with **no** dependent children.

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner sustained an undisputed accident at work on June 11, 2010. Arbitrator's Exhibit ("AX") 1. She testified that she was disposing of a garbage bag containing glass. Petitioner testified that glass stuck out of the bag and cut her leg. The medical records reflect that Petitioner presented to Riverside Medical Center with a laceration to the right knee. PX1. Petitioner was evaluated for the presence of a foreign body, none were found. Id. The Arbitrator viewed the alleged disfigurement at the hearing. Petitioner's right knee showed a one-inch scar that was approximately ¼ inch thick. The scar was puffy and discolored to almost white compared to Petitioner's natural skin color. The scar also had eight stitch marks from the attempt to close the wound leaving four marks above and four marks below the length of the scar.

Based on the totality of the record, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 15 weeks of disfigurement pursuant to Section 8(c) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$401.40**/week for **15** weeks, because the injuries sustained caused the disfigurement of the **right knee/leg**, as provided in Section 8(c) of the Act.

Respondent shall pay Petitioner compensation that has accrued from **June 11, 2010** through **March 19, 2018**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

April 19, 2018
Date

APR 2 0 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 KANKAKEE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jean Lawrence,
Petitioner,

vs. NO: 09 WC 12013

Illinois Department of Human Services,
Respondent.

19IWCC0018

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 3, 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: JAN 14 2019
o122018
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LAWRENCE, JEAN
Employee/Petitioner

Case# **09WC012013**

ST OF IL DEPT OF HUMAN SERVICES
Employer/Respondent

19IWCC0018

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:

0924 BLOCK KLUKAS & MANZELLA PC
BRYAN SHELL
19 W JEFFERSON ST
JOLIET, IL 60432

6069 ASSISTANT ATTORNEY GENERAL
JOHN CATALANO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREA 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

MAY 3 - 2018

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

- [ ] 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

Jean Lawrence
Employee/Petitioner

Case # **09** WC **12013**

v.

Consolidated cases: **N/A**

State of Illinois Department of Human Services
Employer/Respondent

19IWCC0018

An *Application for Adjustment 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 **Kankakee**, on **March 19, 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] 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

FINDINGS

On **March 6, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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 $**34,788.00**; the average weekly wage was $**669.00**.

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 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 $**4,778.73** for TTD, $**0** for TPD, $**0** for maintenance, and $0 for other benefits (i.e., long-term disability benefits), for a total credit of $**4,778.73**.

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

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner did sustain a repetitive trauma injury to the right hand that manifested on March 6, 2008 as claimed.

The Arbitrator further finds that Petitioner has failed to prove that she sustained a repetitive trauma injury to the left hand on March 6, 2008 as claimed. By extension, all other issues are rendered moot and all requested compensation and benefits related to the left hand including prospective medical treatment are denied.

Medical Benefits

Respondent shall pay reasonable and necessary medical services reflected in Petitioner's Exhibits related to the right hand that remain unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for any medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Petitioner's claim for payment of other medical bills related to the left hand is denied.

Permanent Partial Disability: Right Hand

Respondent shall pay Petitioner permanent partial disability benefits of $401.40/week for 15.375 weeks, because the injuries sustained caused the 7.5% loss of the right hand, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

May 1, 2018
Date

MAY 3 - 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Jean Lawrence
Employee/Petitioner

v.

State of Illinois Department of Human Services
Employer/Respondent

Case # **09** WC **12013**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute at this hearing include accident, notice, causal connection, Respondent's liability for certain unpaid medical bills, and the nature and extent of the injury or if Petitioner is entitled to prospective medical treatment. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Jean Lawrence (Petitioner) testified that she worked for the State of Illinois Department of Human Services (Respondent) at the Shapiro Development Center as a Housekeeper. She worked for Respondent approximately 35 years and retired seven years ago. In her position, Petitioner testified that she would dust, mop, sweep, clean mirrors, clean toilets, prepare for lunchtime, dump trash, etc. She explained that the Shapiro Development Center has two floors and she was responsible for both.

On a typical day, Petitioner testified that she would dust the floors, mop the floors, then go into the bathrooms, clean toilets, wipe mirrors, and wash down anything on the walls. She then set up for lunch including condiments, re-checked bathrooms, dumped the trash, re-check the bathrooms again on both floors, and mopped the bathrooms again. Petitioner testified that she would spend about six hours per day doing heavy mopping, 40 hours per week. In the winter, she would also shovel snow and salt the sidewalks before going inside and beginning work.

Petitioner described the mop that she used along with a square bucket with a wringing device that she would press to wring the mop. Petitioner testified that she would typically use her right hand to press down on the wringing device. Petitioner testified that she used both hands to use the mop.

March 6, 2008

Petitioner testified that her right hand began to tingle, swell, and become numb. In her Notice of Injury, Petitioner wrote, "I was mopping and I felt a pain in my hand and it continued to get worst[sic]." RX5. Petitioner identified the part of her body that was indicated by this injury as her, "right hand." Id. Petitioner did not mention her left hand in her report. Id. Petitioner testified that she went to the doctor, but before doing so she reported the symptoms to her supervisor, Kathy Hamlin (Ms. Hamlin).

[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. Exhibits attached to depositions will be further denominated with "(Dep. Ex. _)." The Arbitration Hearing Transcript is denominated as "Tr." with corresponding page numbers.

That same day, Petitioner treated with Dr. Rajendra Pennepalli (Dr. Pennepalli) and Riverside Medical Center where Petitioner was diagnosed with "injury pain and swelling to right wrist and hand." PX3 at 81. Dr. Pennepalli ordered an x-ray of Petitioner's right hand, which did not show any evidence of acute fracture, subluxation, or radiopaque foreign body. Id., at 79. No x-rays were taken or complaints made regarding Petitioner's left hand. Id.

On March 11, 2008, Petitioner followed up with Dr. Pennepalli, who found that Petitioner's right hand swelling went down and referred Petitioner to Dr. Kermit Muhammad (Dr. Muhammad) in order to rule out carpal tunnel syndrome. PX2 at 5.

On March 17, 2008, Petitioner was treated by Dr. Muhammad at Oak Orthopedics. PX4 at 5. Petitioner presented with, "complaints of pain and numbness and tingling in the right hand. She localizes to the radial digits. She tried splinting with some limited relief." Id. Dr. Muhammad performed a physical examination of both Petitioner's right and left hand. Id., at 5-6. For the right hand, both Carpal Tunnel Tinel's sign and Phalen's were positive. Id. Dr. Muhammad found Petitioner's left hand to be normal. Id., at 6.

On March 20, 2008, Dr. Ashraf Hasan (Dr. Hasan) conducted an EMG test that showed bilateral moderate carpal tunnel syndrome, slightly worse on right side. PX4 at 10. After reviewing this EMG, Dr. Muhammad gave Petitioner an injection for her right hand and restricted Petitioner's work to her "uninjured extremity," meaning her left hand. Id., at 11-13. Petitioner returned to Dr. Muhammad on April 11, 2008 and reported only temporary relief from the carpal tunnel injection. Id., at 14. As a result, Dr. Muhammad recommended a release surgery for Petitioner's right hand. Id., at 15-16.

On March 23, 2008, Dr. Muhammad performed a right carpal tunnel release without complication. PX4 at 17. Petitioner followed up after her surgery on May 6, 2008. Id., at 18. At that time, Dr. Muhammad removed Petitioner's sutures, kept Petitioner off work, and started Petitioner on occupational therapy for three weeks. Id. Only several occupational therapy progress reports are reflected in the records. Id., at 29-34. On May 27, 2008, Dr. Muhammad noted that Petitioner had scar hypersensitivity and prescribed more occupational therapy. Id., at 20. Petitioner was then returned to work with a 5lb weight restriction and an anti-vibration glove. Id., at 22. Lastly, Dr. Muhammad found Petitioner had reached maximum medical improvement and released Petitioner to full duty on July 27, 2008. Id. Petitioner failed to make any complaints regarding her left hand throughout her entire course of treatment. Id.

On February 2, 2014, after Petitioner retired, she fell down some stairs and broke her right wrist. As a result, Petitioner underwent surgery on her right wrist and permanent hardware was installed. Petitioner admitted that she had not sought any treatment for her right hand between July 27, 2008 and February 2, 2014.

Petitioner testified that she could not recall when she started feeling numbness and tingling in her left hand, but it was while she was employed by Respondent. She testified that she told Mr. Hamlin about her left hand, but she could not recall when. Petitioner testified that she did not fill out a form (accident form) for numbness and tingling in her left hand. No surgery or physical therapy for the left hand. Petitioner testified that she did not use her left hand to wring out the mop.

Section 12 Examination & Deposition Testimony – Dr. Fernandez

On April 21, 2016, Petitioner underwent a medical evaluation pursuant to Section 12 of the Act with Dr. Fernandez at her attorney's request. PX15 at 5-6; PX15 (Dep. Ex. 2). Dr. Fernandez at Midwest Orthopedics at

Rush, a board certified orthopedic surgeon with an added qualification in hand surgery, who is the team physician for the Chicago White Sox and Chicago Bulls and Director of Microsurgery at Midwest Orthopedics Hand & Shoulder Center at Rush. PX15 at . After a history and examination, diagnosed left carpal tunnel syndrome as well as right carpal tunnel syndrome, which was improved post carpal tunnel release surgery with some residual complaints. PX15 (Dep. Ex. 2). Dr. Fernandez opined that the bilateral carpal tunnel was related to her work activities over the previous 35 years, which included her exposure to repeated gripping, grasping and use of mops and brooms and other instruments as well as emptying trash. Id. These are all activities that were frequent and forceful to cause and/or aggravate the underlying condition of carpal tunnel syndrome on both sides. Id. Dr. Fernandez recommended a repeat EMG for the left hand as well as surgery on the left hand including carpal tunnel release. Id. Dr. Fernandez recommended observing the current condition on the right hand and no treatment if they remain stable. Id. Dr. Fernandez recommended work restrictions of no forces over 10-20 pounds and restrictions on repetition until further treatment on the left hand. Id. Dr. Fernandez testified and his opinions did not waiver from those stated in his April 21, 2016 report. *See generally* PX15.

Section 12 Examination & Deposition Testimony – Dr. Vitello

On June 30, 2017, Petitioner underwent a medical evaluation pursuant to Section 12 of the Act with Dr. Vitello at Respondent's request. RX3; RX3 (Dep. Ex. 2). Dr. Vitello agreed with Dr. Fernandez and found that Petitioner did have casually related carpal tunnel syndrome in her right hand in 2008. RX3 at 29. Petitioner told Dr. Vitello that her right hand got better after her carpal tunnel release, but her symptoms in her right had become much worse after she fractured her wrist. Id., at 20. As such, Dr. Vitello opined to a reasonable degree of medical certainty that Petitioner's current wrist condition was not casually related to her work accident, but rather to the more recent injury when Petitioner fractured her wrist. Id., at 30-31.

Regarding Petitioner's left hand, Dr. Vitello found no causal relationship between the Petitioner's current condition and the alleged accident based on the patient's history and medical records. RX3 ; RX3 (Dep. Ex. 2). Dr. Vitello specifically asked Petitioner, "if she had any treatment for the left [hand] and she denie[d] that there was any treatment for her left hand complaints." Id. With regard to Petitioner's positive EMG, Dr. Vitello stated these test results were not corroborated with any treatment or complaints at the time of the EMG in 2008. RX3 ; RX3 (Dep. Ex. 2). In addition, Dr. Vitello found that Petitioner had a benign exam that did not correlate with her subjective complaints. Id., at 28.

Additional Information

Regarding her current right hand condition, Petitioner testified that her right hand is numb and she cannot lift anything like pots or pans. She needs to use both hands to lift items and her right hand continues to tingle and fall asleep, particularly at night. Petitioner also experiences weather changes. She testified that she does not take any over-the-counter medications for her pain or symptoms.

Regarding her current left hand condition, Petitioner testified that she notices that her left hand is numb and that never resolved. Her left hand still falls asleep. Petitioner testified that she did not return to Dr. Mohammed.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

In support of the Arbitrator's decision relating to Issues (C) and (D), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent and the date of the accident, the Arbitrator finds the following:

The facts must be closely examined in repetitive-injury cases to ensure a fair result for both the faithful employee and the employer. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 71 (2006) (*citing Three "D" Discount Store*, 198 Ill. App. 3d 43, 49 (4th Dist. 1989)). Compensation is allowable where an injury is not sudden, but gradual so long as it is linked to the claimant's work. *Durand*, 224 Ill. 2d at 66 (*citing Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529 (1987)). The Illinois Supreme Court went on to highlight its *Peoria County* decision stating that "To deny an employee benefits for a work-related injury that is not the result of a sudden mishap *** penalizes an employee who faithfully performs job duties despite bodily discomfort and damage." *Durand*, 224 Ill. 2d at 66 (*citing Peoria County*, 115 Ill. 2d at 529-30).

Petitioner claims that she sustained a repetitive trauma injury to the right hand due to the repetitive use of her housekeeping equipment over the course of decades while employed by Respondent. Petitioner testified that she reported her symptoms to her supervisor, Ms. Hamlin, before seeking medical attention. Petitioner also completed an accident report relating to her right hand condition only. The medical records corroborate Petitioner's testimony. Petitioner also obtained a medical evaluation at her own request from Dr. Fernandez. He agreed that Petitioner's carpal tunnel syndrome was causally related to Petitioner's 35 years of work for Respondent as a housekeeper. Respondent's Section 12 examiner, Dr. Vitello, agreed with Dr. Fernandez and found that Petitioner did have casually related carpal tunnel syndrome in her right hand in 2008. Based on the foregoing, the Arbitrator finds that Petitioner did sustain a repetitive trauma injury to the right hand that manifested on March 6, 2008 as claimed.

Petitioner also claims that she sustained a repetitive trauma injury to the right hand due to the repetitive use of her housekeeping equipment over the course of decades while employed by Respondent. However, Petitioner testified that she could not recall when she started feeling numbness and tingling in her left hand, although it was while she was employed by Respondent. She explained that she told Mr. Hamlin about her left hand symptoms, but she could not recall when. Unlike her right hand condition, Petitioner did not fill out any report of injury form.

An employee claiming that she suffered a repetitive-trauma injury must still point to a date within the statutory limitations period on which both the injury and its causal link to her work became plainly apparent to a reasonable employee. *Durand*, 224 Ill. 2d at 65 (*citing Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 209 (1st Dist. 1993)); *see also Peoria County*, 115 Ill. 2d at 531. "[B]ecause repetitive-trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work." *Id.*, (*citing Oscar Mayer v. Industrial Comm'n*, 176 Ill. App. 3d 607, 610 (4th Dist. 1988)).

Given that Petitioner had already experienced carpal tunnel syndrome symptoms in her right hand, reported those to her supervisor, and filled out a report of injury form, it would have become plainly apparent to Petitioner at the time of the onset of her symptoms, which she was unable to recall at the time of the hearing. Based on the foregoing, the Arbitrator finds that Petitioner has failed to prove that she sustained a repetitive trauma injury to the left hand on March 6, 2008 as claimed. By extension, all other issues are rendered moot and all requested compensation and benefits related to the left hand including prospective medical treatment are denied.

In support of the Arbitrator's decision relating to Issue (E), whether timely notice of the accident given to Respondent, the Arbitrator finds the following:

Notice of an accident shall give the approximate date and place of the accident, if known, and may be given orally or in writing, but not later than 45 days after the accident with some very limited exceptions. 820 ILCS 305/6(c). The purpose of the notice requirement is to enable an employer to investigate an alleged accident. *Seiber v. Industrial Comm'n*, 82 Ill. 2d 87, 95 (1980). A claimant's compliance with the notice requirement is established by placing the employer in possession of the known facts related to the accident within the statutory period. *Seiber*, 82 Ill. 2d at 95.

As noted in the accident analysis above, Petitioner has established that sustained a repetitive trauma injury to the right hand that manifested on March 6, 2008 as claimed. Petitioner testified that she reported her symptoms to her supervisor, Ms. Hamlin, before seeking medical attention and she immediately completed an accident report relating to her right hand condition only. Thus, the Arbitrator finds that Petitioner has established that she provided timely notice of a repetitive trauma injury to the right hand that manifested on March 6, 2008 as claimed.

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

As noted in the accident analysis above, Petitioner has established that sustained a repetitive trauma injury to the right hand that manifested on March 6, 2008 as claimed. The medical records corroborate Petitioner's testimony and she obtained a medical evaluation from Dr. Fernandez at her own request. Dr. Fernandez authored a report in which he agreed that Petitioner's carpal tunnel syndrome was causally related to her 35 years of work for Respondent as a housekeeper. Respondent's Section 12 examiner, Dr. Vitello, agreed with Dr. Fernandez and found that Petitioner did have casually related carpal tunnel syndrome in her right hand in 2008. Based on the foregoing, the Arbitrator finds that Petitioner has established causal connection between her right hand condition and a repetitive trauma injury that manifested on March 6, 2008 as claimed.

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

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992)). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its

determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001).

As noted in the accident and causal connection analyses above, Petitioner has established that sustained a repetitive trauma injury to the right hand that manifested on March 6, 2008 as claimed. The medical bills submitted into evidence relate to hospital services, diagnostic testing, physicians' services, and physical therapy prescribed as a direct result of Petitioner's right hand condition. No evidence was offered to controvert the reasonableness or necessity of any of Petitioner's right hand medical treatment. To the contrary, Respondent's Section 12 examiner, Dr. Vitello, agreed with Petitioner's Section 12 examiner, Dr. Fernandez, that Petitioner's right hand condition was causally related to her work activities and that the attendant medical treatment had been appropriate. Thus, the Arbitrator awards the medical bills incurred by Petitioner related to the right hand as reflected in Petitioner's Exhibits that remain unpaid to be paid by Respondent as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for any such medical bills that have been paid. Petitioner's claim for payment of other medical bills related to the left hand is denied.

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

Based on the record as a whole—which reflects that Petitioner, a 51-year-old right-hand dominant Housekeeper sustained a repetitive trauma injury to the right hand that resulting in carpal tunnel syndrome surgery and post-operative care with some limited ongoing symptoms—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 7.5% loss of use of the right hand pursuant to Section 8(e).

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rhonda Gibson,

Petitioner,

vs. NO: 18 WC 05779

State of Illinois/ Department of Rehabilitation,

Respondent.

19IWCC0019

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, 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 May 9, 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.

19IWCC0019

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

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

DATED: JAN 14 2019
o120618
DLG/mw
045

David L. Gore

Stephen Mathis

Deborah Simpson

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

GIBSON, RHONDA
Employee/Petitioner

Case# **18WC005779**

ST OF IL/DEPT OF REHABILTATION
Employer/Respondent

19IWCC0019

On 5/9/2018, 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 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
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

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

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

MAY 9 - 2018

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)

Rhonda Gibson
Employee/Petitioner

Case # 18 WC 05779

v.

Consolidated cases: n/a

State of IL/Dept. of Rehabilitation
Employer/Respondent

19IWCC0019

An *Application for Adjustment 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, January 17, 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 $14,285.04; the average weekly wage was $274.71.

On the date of accident, Petitioner was 45 years of age, single with 0 dependent child(ren).

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 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 prospective medical treatment including, but not limited to, the treatment (including possible surgery) as recommended by Dr. Mathew Gornet.

Respondent shall pay Petitioner temporary total disability benefits of $220.00 per week for 11 5/7 weeks commencing January 17, 2018, through April 10, 2018, as provided in Section 8(b) of the Act.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

May 5, 2018
Date

MAY 9 - 2018

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment for Respondent on January 17, 2018. The Application alleged that Petitioner was assisting a client and sustained an injury to the right shoulder and 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. In regard to temporary total disability benefits, Petitioner claimed she was entitled to temporary total disability benefits for 11 5/7 weeks, commencing January 18, 2018, through April 10, 2018 (the date of trial). Respondent stipulated Petitioner sustained a work-related accident on January 17, 2018, but disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a home health care assistant. Petitioner testified that on January 17, 2018, she was assisting a client out of a bathtub and sustained a "popping" sensation in her right shoulder. Petitioner stated she never had any prior injuries or symptoms in regard to her right shoulder.

Petitioner apparently initially sought medical treatment at Urgent Care in Centralia and was subsequently seen by Dr. Freehill. Dr. Freehill administered an injection to the right shoulder, but it did not provide any relief (the medical records regarding this initial treatment were not tendered into evidence at trial).

Petitioner was later seen by Dr. Nathan Mall, an orthopedic surgeon, on February 16, 2018. At that time, Petitioner advised Dr. Mall that the client she was assisting on January 17, 2018, weighed 250 pounds and had been getting more dependent on her over the last three to four months. She informed Dr. Mall that when she attempted to lift the client, she felt a distinct "pop" and had numbness that went into her hand (Petitioner's Exhibit 4).

Dr. Mall examined Petitioner and opined she had a likely cervical disc injury. He ordered an MRI scan of the cervical spine (Petitioner's Exhibit 4).

The MRI was performed on March 1, 2018. According to the radiologist, the MRI revealed a right paracentral and left foraminal disc protrusion at C5-C6 (Petitioner's Exhibit 6).

Dr. Mall saw Petitioner on March 1, 2018, and reviewed the MRI scan. Because it revealed that Petitioner had sustained a cervical disc injury, he referred Petitioner to Dr. Matthew Gornet, an orthopedic surgeon (Petitioner's Exhibit 4).

Dr. Gornet evaluated Petitioner on March 1, 2018. Dr. Gornet reviewed the MRI scan and agreed it revealed a disc injury at C5-C6. He recommended Petitioner be referred to Dr. Boutwell for a steroid injection. If there was no improvement after Petitioner underwent the steroid injection, then Dr. Gornet opined that disc replacement surgery at C5-C6 would be appropriate. Dr. Gornet continued a light duty work restriction of no lifting over five pounds and no overhead work.

At trial, Petitioner testified that she has not been able to return to work as a health care assistant. Petitioner stated she wants to proceed with the treatment recommended by Dr. Mall and Dr. Gornet.

On cross-examination, Petitioner stated that she does provide babysitting services for her grandchildren for which she is paid $500.00 per month. At the time of trial, Petitioner agreed she has continued to provide such babysitting services.

Conclusions of Law

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

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of January 17, 2018.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related injury to her right shoulder on January 17, 2018, when she assisted a client out of a bathtub.

Petitioner's testimony that she had no prior right shoulder injuries or symptoms was unrebutted.

Petitioner was subsequently diagnosed as having sustained a disc injury at C5-C6.

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.

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

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the treatment (including possible surgery) recommended by Dr. Matthew Gornet.

In support of this conclusion the Arbitrator notes the following:

Dr. Gornet has recommended Petitioner undergo a steroid injection, but if there is no improvement of Petitioner's condition afterward, Dr. Gornet has opined that disc replacement surgery at C5-C6 would be appropriate.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 11 5/7 weeks commencing January 18, 2018, through April 10, 2018.

In support of this conclusion the Arbitrator notes the following:

Petitioner has been unable to work at her job as a home health care assistant for the aforestated period of time because she has been under active medical treatment and under work/activity restrictions imposed by her treating physicians.

While Petitioner has continued to perform babysitting duties for her grandchildren of $500.00 per month, it does not constitute any type of regular employment.

William R. Gallagher, Arbitrator

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Johnson,
Petitioner,

vs. NO: 15 WC 16270

Southern Illinois University- Carbondale,
Respondent.

19IWCC0020

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 4, 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: JAN 14 2019
o120618
DLG/mw
045

David L. Gore

Stephen Mathis

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JOHNSON, DANIEL
Employee/Petitioner

Case# **15WC016270**

SOI-SOUTHERN ILLINOIS UNIVERSITY CARBONDALE
Employer/Respondent

19IWCC0020

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:

3101 PRINCE LAW FIRM
TYLER DIHLE
404 N MONROE ST
MARION, IL 62959

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

0558 ASSISTANT ATTORNEY GENERAL
SHANNON RIECKENBERG
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

APR 4 - 2018

STATE OF ILLINOIS)

)SS.

COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daniel Johnson
Employee/Petitioner

Case # 15 WC 016270

v.

Consolidated cases: ____

State of Illinois-Southern Illinois University Carbondale
Employer/Respondent

19IWCC0020

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ed Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **02/15/2018**. 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

E. [ ] 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 ____

19IWCC0020

FINDINGS

On **09/15/2014**, 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 $**20,850.06**; the average weekly wage was $**992.86**.

On the date of accident, Petitioner was **52** years of age, *married* with **1** dependent children.

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

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

Respondent shall be given a credit of $**10,874.82** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,874.82**.

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

ORDER

The Arbitrator finds Petitioner has failed to meet his burden of proof in this matter. Petitioner's claim for permanency 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.

Signature of Arbitrator   3/23/18
Date

APR 4 - 2018

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DANIEL JOHNSON,
Employee/Petitioner,

v. Case No. 15 WC 016270

STATE OF ILLINOIS – SOUTHERN ILLINOIS UNIVERSITY CARBONDALE,
Employer/Respondent.

19IWCC0020

STATEMENT OF FACTS

On September 15, 2014, Petitioner was employed with Southern Illinois University, Carbondale as an extra help temporary employee when he allegedly sustained a work-related injury to his right shoulder. This claim came before Arbitrator Lee for trial at the Herrin docket on February 15, 2018. The issues in dispute include accident, causation, payment of medical bills, and nature and extent of the injury.

On September 18, 2014, Petitioner came into the office of Jeni Batson, SIUC workers' compensation coordinator. (PX5). Petitioner informed Ms. Batson he had a shoulder surgery and bicep repair about 2 years prior. (PX5). Petitioner was uncertain what had happened, but on September 15, 2014 he was unable to get comfortable to sleep because his right shoulder was in pain. (PX5). Petitioner said he planned to go to his doctor and will likely use his own insurance because "he ain't trying to file no work comp claim but Sue told him to call the hotline." (RX5).

On September 19, 2014, Petitioner worked all day, which was the last day of his temporary extra help contract. (RX5).

On September 22, 2014, Petitioner completed a Workers' Compensation Employee's Notice of Injury which listed a date of injury of September 9, 2014. (RX2). Also on September 22, 2014, Foreman Julia K. Houg completed a Supervisor's Report of Injury or Illness which listed a date of injury of September 15, 2014. (RX3).

MEDICAL HISTORY

On April 15, 2014, Petitioner presented to the Southern Illinois University Student Health Services for a SIU Respirator Fit Test Medical Evaluation. (PX3).

On April 17, 2014, Petitioner returned to Student Health Services for follow up and review of his earlier fit test. (PX3). Petitioner's medications included Hydrocodone, Omeprazole, and Valium. (PX3).

On September 19, 2014, Petitioner returned to Student Health Services for a problem with his shoulder. (PX3). Petitioner reportedly felt pops in his shoulder while pulling on a valve between water pipes. (PX3). Petitioner's symptoms included weakness, decreased range of motion, worsening pain, tightness in the back of his neck, and areas of point tenderness. (PX3). The injury occurred at work and Petitioner had notified his supervisor and the workers' compensation people. (PX3). Petitioner was referred to orthopedics. (PX3).

On September 29, 2014, Petitioner presented to Dr. J.T. Davis at The Orthopaedic Institute of Southern Illinois following a work injury on September 15, 2014. (PX2). Petitioner's initial right shoulder repair on December 27, 2011 was noted. (PX2). Petitioner's physical exam consisted of active forward elevation in the scapular plane to 110 degrees, 150 degrees passively, external side rotation to 40 degrees, internal rotation to L5, and 4+/5 rotator cuff strength. (PX2). Petitioner received an injection into his shoulder and a home exercise program. (PX2). Petitioner was placed on work restrictions including a 5 pound weight limit, wait level work only with no repetitive lifting, pushing, or pulling. (PX2).

On November 3, 2014, Petitioner returned to Dr. Davis and reported relief from the injection given in September. (PX2). Petitioner's physical exam was largely unchanged, with the exception of increased active forward elevation in the scapular plane to 120 degrees and 5/5 rotator cuff strength. (PX2). Dr. Davis recommended continuation of protective body mechanics, home exercise, medications, and work restrictions. (PX2).

On November 11, 2014, Petitioner presented to Dr. Dane Elliot, physical therapist at The Orthopaedic Institute of Southern Illinois after referral by Dr. Davis for an injury which began September 14, 2014. (PX2). Petitioner continued in physical therapy for 23 visits until January 14, 2015. (PX2). The indicated diagnosis was a rotator cuff (capsule) strain. (PX2). Overall, Petitioner reported some soreness throughout treatment but indicated the shoulder felt good and was improving. (PX2).

On December 8, 2014, Petitioner returned to Dr. Davis and reported improvement with some soreness after physical therapy. (PX2). Petitioner's physical exam was largely unchanged, with the exception of increased active forward elevation in the scapular plane to 140 degrees, internal rotation to L4-5, and 5-/5 rotator cuff strength. (PX2). Dr. Davis noted Petitioner continued to make progress and ordered additional physical therapy and work hardening. (PX2). Petitioner's work restrictions continued. (PX2).

On January 12, 2015, Petitioner returned to Dr. Davis and reported he was doing well but experiencing mild biceps muscle belly pain. (PX2). Petitioner told his doctor he was ready to return to work full duty. (PX2). Petitioner's physical exam was largely unchanged, with the exception of active forward elevation in the scapular plane to 160 degrees, external side rotation to 50 degrees, internal rotation to L4, and 5-/5 rotator cuff strength. (PX2). Dr. Davis planned to continue with protective body mechanics, home exercises, medications, and progressive

activities. (PX2). Petitioner was allowed to return to work without restrictions on January 13, 2015. (PX2). Dr. Davis noted MMI would be discussed in 1 month. (PX2).

On February 9, 2015, Petitioner returned to Dr. Davis and reported a work accident which Petitioner termed as an aggravation. (PX2). Dr. Davis ordered an MRI of the right shoulder to access the integrity of the rotator cuff. (PX2). New work restrictions were placed of 5 to 10 pounds lifting, no overhead work, pushing, pulling, or repetitive flexion and extension. (PX2). Petitioner was required to complete a new Patient Questionnaire. (PX2).

On February 26, 2015, an MRI of the right shoulder was completed at InMed Diagnostic Services as requested by Dr. Davis. (PX2). The impressions of Dr. Kevin Wright included old surgical changes in the humeral head and abnormal appearance of the biceps tendon, along with findings consistent with a rotator cuff tear and nonspecific cystic appearance of the acromion process. (PX2).

On March 2, 2015, Petitioner completed a new intake form at The Orthopaedic Institute of Southern Illinois. (PX2). Petitioner's chief complaint of injury was cut fingers which occurred February 27, 2015 at work when a grinder kicked back and caught his fingers. (PX2). No other symptoms or histories were included. (PX2). Petitioner listed his current medications as Hydrocodone, Valium, and Prilosec. (PX2). Petitioner checked the box indicating he had painful joints and listed only his fingers. (PX2). Petitioner indicated he had back and neck problems, along with tingling in his fingers. (PX2). When asked if there were any other health concerns, Petitioner indicated NO. (PX2).

Also on March 2, 2015, Petitioner signed a Work Status Policy put forth by The Orthopaedic Institute of Southern Illinois. (PX2). In pertinent part, the policy made Petitioner aware that his physician may restrict his work activities, would provide a work status slip, would not release his restrictions unless medically safe, and could not backdate restrictions. (PX2).

Also on March 2, 2015, Petitioner completed a Workers' Compensation Information form indicating his employer was Miners Builders Group. (PX2).

Also on March 2, 2015, Petitioner presented to Dr. Davis for left middle finger and left hand pain, including a laceration, swelling, and weakness. (PX2). The onset of Petitioner's injury was February 28, 2015 at work. (PX2). Dr. Davis not only did not treat Petitioner's right shoulder at this appointment, but did not even include symptoms with it in the Review of Systems, citing only back pain, bone/joint symptoms, and neck stiffness. (PX2).

On March 12, 2015, Petitioner returned to Dr. Davis for treatment of his left middle finger. (PX2). No mention was made of Petitioner's right shoulder in the medical record. (PX2). Dr. Davis noted that visual overview of all four extremities was normal. (PX2).

Also on March 12, 2015, Petitioner returned to Dr. Davis following what Petitioner termed as a work aggravation of his right shoulder condition. (PX2). Dr. Davis said the previous MRI scan was inconclusive. (PX2). His physical exam was unchanged. (PX2). Petitioner was given work restrictions of no overhead work, pushing, pulling, or repetitive flexion and

extension. (PX2). Dr. Davis requested a second MRI scan on the 3.0 Tesla magnet due to Petitioner's surgical history. (PX2).

On October 14, 2016, an MRI of Petitioner's right upper extremity was completed at Carbondale Memorial Hospital as requested by Dr. Davis. (RX4). The impressions consisted of degenerative arthrosis right acromioclavicular joint, rotator cuff muscle bulk fatty infiltration without definitive atrophy, prior attempted rotator cuff repair involving the supraspinatus tendon, marked tendinitis and likely scar/granulation tissue, 14 x 16 mm high-grade partial tearing over the critical zone and 12 o'clock position, questionable tiny full-thickness communication, small amount of free fluid subacromial/subdeltoid bursa which could reflect an overlying degree of bursitis, moderately severe infraspinatus tendinosis, questionable prior bicipital tenodesis with correlates with operative history, partial thickness tearing at the point of attachment, distal intact long head biceps tendon fibers, mild right glenohumeral joint osteoarthritis, diminutive and degenerative superior posterior right glenoid labrum. (RX4).

TESTIMONY

Dr. J.T. Davis via telephonic deposition on July 14, 2016 in Daniel Johnson v. Southern Illinois University Carbondale, 15 WC 16270, and Daniel Johnson v. Washington Group-URS, 15 WC 16096 (PX1)

On direct examination, Dr. Davis testified that since 2008 he has been a board certified, orthopedic surgeon with medical school training at the University of Illinois in Chicago, orthopedic training for 5 years at Tulane University in New Orleans, and specialty training at the Kerlan-Jobe Clinic in Los Angeles for arthroscopic shoulder, elbow, and knee surgery.

Dr. Davis testified he first met with Petitioner regarding a September 2014 injury on September 29, 2014. Petitioner informed him he was removing overhead asbestos at work in a tall building on September 15, 2014 when he felt and heard a pop. Petitioner had progressive pain and weakness predominantly with elevation on the right side above the shoulder level. Dr. Davis testified at that first appointment Petitioner had limited range of motion and weakness of the rotator cuff, resulting in a differential diagnosis of rotator cuff strain versus retear following a prior repair done December 27, 2011. Dr. Davis believed enhanced imaging was not needed at that time and instead proceeded with a subacromial corticosteroid injection. Dr. Davis confirmed he had performed Petitioner's prior surgical repair in 2011 which had required 5 anchors and also addressed the biceps tendon, resulting in a full recovery without restrictions. Dr. Davis did not see Petitioner from early 2012 to September of 2014.

Dr. Davis testified Petitioner returned to his office on November 3, 2014 with good relief from the injection so the doctor initiated physical therapy without ordering an MRI. Dr. Davis indicated Petitioner returned to his office on December 8, 2014 with some improvement and soreness so the doctor imitated work hardening therapy. Dr. Davis stated Petitioner returned to his office on January 12, 2015 with mild biceps belly pain but was ready to return to full activities. Petitioner was released and set to return in one month to make sure things went well before Dr. Davis closed out the case.

Dr. Davis saw Petitioner again on February 9, 2015, about 30 days after he was initially released, after a work aggravation of his underlying shoulder condition. Dr. Davis had no details about this aggravation and was not sure if the appointment was to follow up or was newly scheduled after the additional injury. Dr. Davis said something at work must have agitated Petitioner's condition but could not state to what degree or severity as this assessment was only based on Petitioner's description of symptoms. Dr. Davis thought Petitioner's injury at SIUC could have made him more susceptible to an additional injuries or aggravations. However, Dr. Davis admitted he usually does a physical exam but the February 9, 2015 record did not contain the results of an exam. The following record on March 12, 2015 indicated Petitioner's physical exam was unchanged. In light of those records, Dr. Davis could not tell if there was any worsening of the shoulder condition after the injury at Olmsted lock and dam.

When asked what diagnosis he reached for Petitioner, Dr. Davis testified there was concern that he reinjured his rotator cuff, but the diagnosis was still pending due to the poor quality of the MRI scan of February 26, 2015. The doctor could not confirm the existence of a reinjury or the extent of a potential injury. Dr. Davis testified Petitioner's treatment was on hold as they awaited the MRI scan which he believed had been requested and denied. Dr. Davis stated the MRI scan was medically necessary to decipher between the presence of scar tissue, expected changes from the 2011 surgery, or a new injury with new tearing. Dr. Davis said his last interaction with Petitioner as to the right shoulder was March 12, 2015.

Petitioner's counsel asked a series of questions regarding medical records which were not supplied to either Respondent's counsels, Southern Illinois University Carbondale and Washington Group-URS. Counsel for SIUC objected to the line of questioning by Petitioner's attorney pursuant to *Ghere v. Industrial Commission*, 278 Ill.App.3d 840, 845, 663 N.E.2d 1046, 1050, 215 Ill.Dec. 532, 536 (1996). The Commission in *Ghere* concluded the purpose of the workers' compensation statute requiring a physician to send copy of his or her records to employers no later than 48 hours before giving testimony at arbitration is to prevent employees from springing surprising medical testimony on the employer. *Ghere* citing 820 ILCS 305/12. The Arbitrator sustains Respondent's objection as the records in question were not supplied at any time prior to Dr. Davis's deposition or even at arbitration.

Dr. Davis could not affirmatively state at the time of his deposition whether the injury he treated Petitioner for beginning in September of 2014 was different than that he repaired surgically in 2011. Dr. Davis indicated he would need a new MRI to answer that question. Hypothetically, Dr. Davis agreed that if the 2014 injury affected the same anatomy as the 2011 injury then it could be an aggravation of the preexisting condition. Dr. Davis also could not affirmatively state whether the injury Petitioner reported in February of 2015 worsened or aggravated the condition Petitioner initially reported to the doctor in September of 2014 and for which he had been released in January of 2015. The doctor could only state the Petitioner reported a worsening of symptoms to him.

On cross examination by Respondent, Southern Illinois University Carbondale, Dr. Davis testified the last record he had in his possession was from March of 2015. Dr. Davis stated the patient's status at that time was unchanged but he was having problems with his shoulder so an MRI was requested. Dr. Davis termed the February 26, 2015 MRI scan as inadequate because

the Tesla magnet was too low at the facility where it was completed. Dr. Davis was unaware of how or why Petitioner had his MRI done at that facility and said he did not send Petitioner there. Dr. Davis did not know when his most recent request for an MRI had been denied as he had not been told it was requested or denied by his staff. Dr. Davis confirmed he was assuming the MRI was denied. Dr. Davis was unsure if Petitioner had been treating conservatively since he saw him in March of 2015. Dr. Davis said conservative treatment was not sought after February of 2015 because they were instead looking for the MRI. Dr. Davis was treating Petitioner for a laceration beginning on March 2, 2015 but did not have those records for questioning.

Dr. Davis testified he could not see any worsening of symptoms from January to February 2015 and that Petitioner's condition was the same. Dr. Davis said that, in terms of objective findings in January, there was some light limitation in motion and slight weakness on the right side. Dr. Davis said that he believed the physical exam findings would have been unchanged from January in February and March since no changes were noted in his records though they were not specifically spelled out in the record either. Dr. Davis did not know the date of the second injury or aggravation. He only knew it occurred between Petitioner's appointment on January 12, 2015 and February 9, 2015. Dr. Davis could not recount Petitioner's symptoms after the reinjury in February, but assumed it meant increased pain based on how it was dictated. Dr. Davis did not know where the pain was located. The doctor did not know if it was in the same location as the previous pain from the September 2014 injury. Dr. Davis clarified the term "work aggravation" was supplied by Petitioner. Dr. Davis stated the one month follow up scheduled in February would have been to review Petitioner's return to work and if it was without issue, Petitioner would have been at MMI. Dr. Davis did not know how long Petitioner waited after his reinjury to see the doctor. Dr. Davis did not have the reinjury date and did not have Petitioner's employer information for that accident. Dr. Davis did not have record of any prescriptions given to Petitioner.

Dr. Davis testified he may have had Petitioner complete a new patient intake form if he was seeing him for another injury, such as the finger laceration he sustained. Dr. Davis said it would not have been out of the ordinary for Petitioner only to include his laceration on the intake form completed in March of 2015, rather than also including his shoulder condition.

Dr. Davis testified he did not prescribe Petitioner Hydrocodone, Valium and Prilosec. Dr. Davis did not know what Petitioner's work restrictions were when he saw him last in March of 2015. Dr. Davis was not aware of any other potential aggravations suffered by Petitioner since his surgery in 2011.

On cross examination by Respondent, Washington Group-URS, Dr. Davis clarified that a patient intake form is not always completed when a patient has a new injury but is already being treated by the physician. Dr. Davis testified he did not have February 2, 2015 listed as an accident date for Petitioner with his new employer. Dr. Davis said the accident date listed as September 29, 2014 was a typographical error and should have said September 15, 2014. Dr. Davis agreed he was unaware of Petitioner's employer, job assignment, or mechanism of injury from January to February 2015. Dr. Davis confirmed there was no impact on Petitioner's physical examination findings. Yet, Dr. Davis stated Petitioner's condition of ill-being in March of 2015 was caused by his September 15, 2014 work injury.

On redirect examination, Dr. Davis testified he was unaware of what restrictions Petitioner was on at his March 12, 2015 appointment and deferred to his medical record. Dr. Davis said it is common for him to place restrictions for patients who continue to experience symptoms pending the results of an MRI scan.

On recross examination by Respondent, Southern Illinois University Carbondale, Dr. Davis testified his statement that Petitioner's condition of ill-being in February of 2015 was caused by his September 2014 work injury was purely based on the patient's history and not on objective testing. Dr. Davis again confirmed that there were no physical exam changes from January to February of 2015, a time when Petitioner allegedly injured himself at Olmsted lock and dam.

On recross examination by Respondent, Washington Group-URS, Dr. Davis confirmed his note did not include specific indication that Petitioner experienced an increase in symptoms. However, the doctor said that since he dictated the note to say there was an aggravation that meant there was an increase in symptoms in his terminology. Dr. Davis testified Petitioner's pain from January was still bothering him in February 2015.

Daniel Johnson, Petitioner

On direct examination, Petitioner testified he was working at Southern Illinois University on September 15, 2014 completing asbestos removal as a laborer. Petitioner stated he was to be employed 900 hours, but the University always stopped just short of that at approximately 850 hours for those working out of the labor hall. Petitioner indicated his job duties included primarily asbestos removal which required overhead stretching, putting up glove bags, wearing respirators, cleaning tools, carrying supplies, carrying ladders, putting up poly, and anything else which would be necessary for the public's safety. On September 15, 2014, Petitioner said he was doing a quick job in the boiler room with one other man. Petitioner described everything he was working on being in the air 10 feet or higher and involving a big pipe. Petitioner explained that Miss Sue sent him in there because she knew he would get the job done quickly. Petitioner stated he injured his shoulder. Petitioner described the accident as occurring because he was at the top of the pipe and reaching in a small space which caused his shoulder to pop like a rubber band when he went to grab further. Petitioner said he reported it to Sue. Petitioner indicated he was in pain and could not raise his arm, even at night.

Petitioner testified he sought medical care at SIUC and was then referred to J.T. Davis. Petitioner confirmed he had seen Dr. Davis before this accident for a shoulder surgery and bicep repair in 2011-2012. Petitioner put forth that he had fully recovered from that injury and had returned to work full duty. Petitioner said he was fully able to do the work of a typical laborer without any pain whatsoever. For this most recent accident, Petitioner said Dr. Davis recommended he have an MRI but a person over the phone refused it. Petitioner testified he was provided injections and physical therapy which did not help his condition. Petitioner claimed he asked Dr. Davis to release him to go back to work after his workers' compensation benefits were terminated. Petitioner said the doctor returned him to work but he could not recall when.

Petitioner testified he may have went to work at the lock and dam in Olmsted after the first accident but was not sure. Petitioner testified he agitated his already injured shoulder while working at Olmsted. Petitioner described the accident as occurring while he was picking up an aerospace concrete blanket on his shoulder which weights a quarter of a pound. Petitioner said he reported it but it was just an agitation. Petitioner testified the pain was not different after that accident as compared with the first one. Petitioner believed he returned to Dr. Davis for treatment after that and he wanted to do another MRI but he was so grainy the doctor would not tell if there was a tear or not. Petitioner affirmatively stated Dr. Davis ordered another MRI as a result but it was never completed because workers' compensation would not pay for it which made Dr. Davis release him. After prompting from his attorney, Petitioner then testified they actually did complete the second MRI and then he was released from care without restrictions.

This Arbitrator asked for the date Petitioner was released from treatment. Petitioner and his counsel could not supply the date and indicated it was contained in Dr. Davis's medical records. Petitioner's counsel suggested to Petitioner he was likely released in December of 2017. Petitioner stated he could not recall, but did not think it was 2017. Petitioner testified Dr. Davis wanted to provide him with work restrictions but he told the doctor not to as he could not return to work as a laborer with restrictions of any kind. Petitioner testified he went back to work wherever he was called and has been numerous places since his release including the pipeline and railroad. Petitioner testified to having problems with his shoulder while working which has caused him to favor his left side. This has resulted in pain on the left side. Petitioner indicated he has issues with overhead lifting and can't pick up much.

Petitioner testified he is not currently working and has not done so since October of 2017 because he can't find work he can do. Petitioner claimed he cannot do physical work anymore because his left side is going out on him now. Petitioner stated he has been flagging since it places no weight on him but there isn't much work like that now.

On cross examination, Petitioner could not recall his date of injury. After being told his attorney was referring to a date of injury of September 15, 2014, Petitioner agreed it might be that date. When asked if he recalled completing an Employee's Notice of Injury, Petitioner responded he had reported the injury to Sue and she completed the paperwork, with the exception of what he filled out at the doctors' offices. When presented with the actual document, Respondent's Exhibit 2, Petitioner changed his testimony and agreed he had completed the Notice of Injury after the accident. Petitioner agreed the Notice of Injury listed the date of injury as September 9, 2014. Petitioner stated the 9th could be correct but he was not sure without his book which he did not have with him. Petitioner agreed he had no reason to dispute September 9, 2014 as the date of accident since that is what he wrote only days after it occurred and signed the document. Petitioner testified he called the Tristar hotline and did everything Sue told him to as she was his supervisor for the job at SIUC. Petitioner added his foreman was named Mike Guetersloh. Petitioner said he had no reason to dispute that he called the Tristar hotline to report the accident but could not recall making the call.

Petitioner described his injury as occurring while removing asbestos which was his primary job during his time at the University. Petitioner testified his assignment was to last 850 to 900 hours but he could not recall the dates he was employed by SIUC. When provided with

the original contractual employment dates of April 14, 2014 to December 19, 2014 Petitioner said he would agree that was correct if it was 900 hours. Petitioner confirmed 900 hours of work could take 8 months in his experience. Petitioner testified his employment with SIUC ended after his accident. Petitioner could not recall if the temporary employment was changed to end in September rather than December of 2014. Petitioner later testified his contract did not end in September of 2014. Petitioner testified he did more than asbestos removal, including stocking warehouses, moving boxes, and other tasks assigned by Sue.

Petitioner testified he would be able to pinpoint the exact moment his injury occurred as it had popped like a rubber band and his arm fell making it unable for him to lift his shoulder all of the way. Petitioner stated he did not seek medical treatment until the day following the accident. Petitioner was subsequently referred to Dr. Davis but could not recall how long he had to wait. Petitioner affirmed he was unable to move his shoulder the entire time which is the same condition it is in now.

Petitioner testified he had no problems whatsoever after his first shoulder surgery in 2011-2012. Petitioner explained he went to therapy and babied it for a while but he had full range of motion and could pick up weight. Petitioner said he had medications and prescriptions at the time but did not take them because he could not be on the job while doing so. Petitioner denied any soreness after his shoulder surgery outside of the first few months. Petitioner attributed that to Dr. Davis's skills and the fact he did what he was told to care for it.

Petitioner testified he probably returned to work in January of 2015. Petitioner said he did so because workers' compensation stopped paying him. Petitioner was presented with Dr. Davis's medical records from January 12, 2015 which indicated Petitioner was doing well and was ready to get back to work full duty. In response, Petitioner said he didn't have any money and had to handle his $1,400 per month house payment and so needed to go back to work full duty. When Petitioner was informed Respondent had paid TTD up until his January 12, 2015 appointment with Dr. Davis at which time he was returned to work full duty, Petitioner disagreed stating they had stopped paying him before that time so he had to go back to work. Petitioner denied that he was doing well when Dr. Davis returned him to work. Petitioner claimed the doctor did not want to release him without restrictions of 10 pounds. Petitioner said he took the restrictions to the union hall and was told he could not come back to work. Petitioner was informed the doctor's note with restrictions from Dr. Davis was not included in the medical records in evidence. Petitioner did not have the note with him at trial because he was not told to bring anything but said he could probably find it. Petitioner then took what he claims was Dr. Davis's second work status note which contained no restrictions to the union hall and was placed on a work list to return to work. Petitioner confirmed he worked up the list and was called out when it was his turn.

Petitioner agreed he was next called out to work at Olmsted lock and dam. Petitioner could not recall the date but agreed it was likely in late January and at full duty. Petitioner could not recall when he injured himself at Olmsted but clarified it was not an injury but an aggravation of previous shoulder injury. Petitioner denied filing a workers' compensation claim for the incident at Olmsted lock and dam. Petitioner claimed he never pursued a claim against that employer because he didn't hurt himself there and that would be fraud. Petitioner alleged a

woman from Olmsted tried to get him to file a claim but he refused because he did not hurt himself there and reiterated that would be fraud and criminal action. Petitioner denied that his current attorneys in this claim, Prince Law Firm, ever filed a claim for him against Olmsted lock and dam. He denied depositions were ever taken in that claim. Petitioner indicated he has since returned to Olmsted to work but they will not let him because of the lawsuit pending against SIUC. When confronted with case number 15 WC 16096, Daniel Johnson v. Washington Group URS, Petitioner interrupted saying he didn't know what his lawyers filed. Petitioner denied signing an Application for Adjustment of Claim in 15 WC 16096. Petitioner offered that Olmsted never sent him any money in that claim and we would not find his signature on any such claim. Petitioner testified he termed his injury at Olmsted lock and dam as an aggravation because he felt it aggravated his shoulder. Petitioner said Dr. Davis probably did not place any restrictions on his ability to work after the Olmsted accident but he probably wanted to. Petitioner testified the last time he went back to work at Olmsted lock and dam he was called into the safety office to discuss his inability to pick up significant weight. Petitioner explained they brought up the lawsuit he had file against them and told him he could no longer work for them.

Petitioner testified he did not see Dr. Davis again after his appointments with him in January, February, and March of 2015. Petitioner claimed this was because he could not afford to pay the bills. When confronted with the existence of an MRI of Petitioner's right shoulder from December of 2016 from Carbondale Memorial Hospital Petitioner responded by saying whatever it was, whenever they did something, whatever he done, I done. Petitioner was uncertain if the MRI was requested by Dr. Davis but indicated he had not treated for the shoulder with anyone else. Petitioner said he had other MRIs completed but those had nothing to do with this claim, but a potential brain tumor instead.

Petitioner testified he is currently released to work full duty without restrictions. Petitioner testified he has always favored his left side. Petitioner stated Dr. Davis is the last doctor he saw for his shoulder complaints but could not recall when that was. Petitioner said Dr. Davis did not prescribe medication for his shoulder complaints because he could not have any. Petitioner said he had previously completed physical therapy but was not participating in any at this time.

Petitioner testified he is having issues getting work out of the union hall as there isn't any work he can do other than flagging. Yet, Petitioner said he does not and cannot turn down work that is offered by the hall. Petitioner clarified saying he just tells the hall he can't do that as actually turning it down would put him back further on the list and you can only turn down three jobs before going to the bottom. Petitioner stated that when a job comes up that he believes he cannot do he doesn't do it and instead the union hall will send him out on jobs he can do. Petitioner testified he has no work restrictions in place with the union hall.

On redirect examination, Petitioner testified December 5, 2016 was the day Dr. Davis released him to go back to work for the last time. Petitioner confirmed he reported the reinjury at Olmsted to his employer by indicating he was previously hurt at SIUC. Petitioner said he did not want to pursue a workers' compensation claim against Olmsted lock and dam as it was not

their fault. Petitioner then confirmed that Prince Law Firm, his current attorneys in this claim, filed an Application for Adjustment of Claim on his behalf against Olmsted.

Petitioner's counsel stipulated that Prince Law Firm filed an Application for Adjustment of Claim for the Olmsted accident in 15 WC 16096 but have since dismissed it.

Jeni Batson, Workers' Compensation Coordinator for Southern Illinois University, Carbondale

On direct examination, Ms. Batson testified she is the workers' compensation and disability coordinator at Southern Illinois University in Carbondale and has been so employed for a little over 10 years. Ms. Batson said she was familiar with Petitioner. Ms. Batson stated Petitioner was paid TTD from September 20, 2014 through January 12, 2015. Ms. Batson indicated Petitioner's TTD ended because he was given a full duty release from his physician on January 12, 2015.

Ms. Batson testified Petitioner was employed with the University as an extra help temporary employee which meant he was an at will employee. Ms. Batson explained those employees are given certain contract dates but if a job they are hired to do is completed before the end of the contract, the contract would end early. Ms. Batson agreed they are not allowed to work over 900 hours as Petitioner stated in his testimony. Ms. Batson said Petitioner's original contract dates were April 14, 2014 to December 19, 2014 but the contract or work did not actually last until December. Ms. Batson testified the job Petitioner was hired to so was completed ahead of schedule so it actually ended September 19, 2014.

Ms. Batson testified Petitioner first sought treatment for his injury on September 19, 2014, which was also his last day of employment with SIUC. Ms. Batson recalled having conversations with Petitioner about his accident. Ms. Batson explained that on September 18, 2014, Petitioner came to her office to complete the workers' compensation claim paperwork packet. Petitioner informed Ms. Batson that he wasn't exactly sure what happened, but on September 15, 2014 he was unable to get comfortable to sleep because of the pain in his right shoulder. Petitioner assumed he had hurt it at work but didn't know how. Petitioner notified Ms. Batson he had his own insurance and would likely be using it rather than workers' compensation benefits because he wasn't trying to file a claim. Petitioner was told to call the Tristar hotline. When Ms. Batson was asked about Petitioner's recount of the accident in his direct examination testimony wherein he stated he could remember the exact moment the injury occurred because his shoulder popped like a rubber band, Ms. Batson affirmatively stated Petitioner's testimony did not align with what he had told her days after the accident. Ms. Batson said when she initially spoke with Petitioner about the accident while in her office, he left her with the impression he did not know what had caused his shoulder injury.

Ms. Batson testified she was told about Petitioner's injury at Olmsted lock and dam by the adjuster at Tristar, Roberta Williams. Ms. Batson confirmed SIUC was not paying TTD to Respondent at the time of his injury at Olmsted lock and dam as he was no longer an employee of the University at that time.

On cross examination, Ms. Batson testified she was familiar with Respondent's Exhibit 2 and referred to it as the Tristar Workers' Compensation Employee's Notice of Injury form which the employee fills out. Ms. Batson confirmed that form indicated Petitioner was working overhead and felt a pop.

Ms. Batson reiterated that TTD was paid from September 20, 2014 to January 12, 2015 and agreed she received off work slips for Petitioner throughout that timeframe. Ms. Batson testified she was unsure if the medical bills were paid during that time as Tristar keeps track of the payment of all medical bills. Ms. Batson confirmed she did not dispute TTD payments throughout that timeframe. Ms. Batson agreed TTD was only terminated because of the doctor's release.

On redirect examination, Ms. Batson testified her communications occurred with Petitioner on September 18, 2014 when he came to her office to pick up the workers' compensation claim packet. The Arbitrator inquired whether Ms. Batson made any notes on that date. Ms. Batson confirmed that she had handwritten notes and an email addressing her concerns. A discussion was had about entering Ms. Batson's notes into evidence. The Employee Summary Form was ultimately admitted into evidence as Respondent's Exhibit 5 and was also read into the record by Ms. Batson. Ms. Batson stated Petitioner told her on September 18, 2014, that had shoulder surgery and biceps repair about two years prior and was sure what happened but on the 15th he was unable to get comfortable to sleep because his right shoulder hurt. Petitioner told Ms. Batson he wasn't trying to file a work comp claim.

CONCLUSIONS OF LAW

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

Issue (D): What was the date of the accident?

Petitioner has failed to meet its burden in showing an accident occurred which arose out of and in the course of his employment with Respondent.

Several different dates of accident were put forth by Petitioner including September 9, 2014 as listed on the Workers' Compensation Employee's Notice of Injury, September 15, 2014 as listed on the Application for Adjustment of Claim, September 14, 2014 as listed by Dane Elliot, physical therapist, on November 11, 2014, and September 29, 2014 as listed by Dr. Davis. Workers' Compensation Coordinator for Southern Illinois University, Jeni Batson, testified Petitioner informed her on September 18, 2014 he was uncertain of what had caused his shoulder pain. Petitioner said he assumed it was asbestos removal, but continued to work until the end of his contract on September 19, 2014 before seeking medical treatment. When Petitioner presented to Student Health Services for treatment, he reported feeling pops while pulling on a valve. When he presented to Dr. Davis 10 days later he reported feeling one pop during asbestos removal. At trial, Petitioner could not recall his date of injury and thought either September 9th or 15th could have been the correct date. Yet, he claimed he could pinpoint the exact moment of the accident. Petitioner said several times he could not lift his shoulder and yet continued to

work for the University doing overhead work for at least 4 days and up to 10 days, depending on which date of accident is correct. This was followed by a waiting period of another 10 days for Petitioner to see Dr. Davis before being provided work restrictions.

The timeline Petitioner alleges in this case is suspect and too speculative for the Arbitrator to find that Petitioner has met his burden of proof. For that reason, the Arbitrator concludes Petitioner has not met his burden of proof as to the existence of an accident. Petitioner's claim is, therefore, denied.

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

Petitioner's inability to maintain a consistent story seems to have begun days following the accident. He told differing timelines and descriptions of his accident to his employer and physicians. At trial, Petitioner often contradicted himself and could not provide answers to the questions asked. Petitioner claimed Dr. Davis released for full duty work on January 12, 2015 because his workers' compensation benefits had been terminated and he needed the money. This was unequivocally refuted by Dr. Davis's medical records and testimony of Jeni Batson. Petitioner went on to say he was released from care because Respondent would not pay for a second MRI. This too was negated by Petitioner's own attorney, Dr. Davis's records, and the MRI scan admitted as Respondent's Exhibit 4. Though at first he could not remember, Petitioner claimed his temporary employment did not end on September 19, 2014. This too was disproven by Ms. Batson's records and testimony. Dr. Davis allegedly gave Petitioner work restrictions of 10 pounds around January of 2015 which Petitioner took to the union hall. The union hall then told Petitioner he could not work with restrictions so Petitioner returned to Dr. Davis and had the restrictions removed. Such a work status note was not contained in the medical records and Petitioner could not produce a copy at hearing. Alternatively, the medical records introduced did contain a Work Status Policy as part of Petitioner's Exhibit 2 which was put forth by The Orthopaedic Institute of Southern Illinois which blatantly denied they would engage in any of the activities Petitioner described. Petitioner went on to offer no real guidance as to when he was injured at Olmsted lock and dam, other than he thought it was an aggravation, without any medical support for this contention. He vehemently claimed he did not file a workers' compensation claim against the dam, a statement which was clearly rejected by his attorney's stipulation that 15 WC 16096 had been filed by Petitioner against Washington Group-URS, or Olmsted lock and dam, but was ultimately dismissed. According to the medical records and forms completed by Petitioner, he was prescribed Hydrocodone, Valium and heartburn medication prior to and after the accident. Dr. Davis did not prescribe this medication. It is unclear what this medication was intended to treat. Lastly, Petitioner stated he could not find work because of his shoulder injury. He said his left side is going out now and seemed to attribute this to his right sided shoulder injury, though that contention is contained nowhere in the medical evidence. There was inconsistency in Petitioner's testimony that he turns down jobs which he feels he cannot do and that he cannot turn down jobs offered by the hall. Regardless, Petitioner has no formal work restrictions in place. In light of the foregoing, the Arbitrator is forced to put very little weight on the testimony of Petitioner as he contradicted not only himself, but the records and testimony of all other individuals playing any role in this claim.

Most importantly, Petitioner has not offered a causation opinion to support its claim. The deposition of Dr. Davis was taken prior to the conclusion of Petitioner's treatment. At the deposition on July 14, 2016, the doctor testified Petitioner's diagnosis was still pending. He could not confirm the existence an injury or reinjury as Petitioner's treatment was only hold until the MRI was redone. Dr. Davis went on to explain that he could not state whether the potential injury he treated Petitioner for beginning in September of 2014 was different than the surgical repair from 2011. Any assessment the doctor made in his records was purely related to Petitioner's subjective description of his symptoms and not on objective testing. The only definitive diagnosis contained in the medical records was a rotator cuff strain. This diagnosis was consistent with Petitioner's following appointments in December and January in which his shoulder discomfort, range of motion, and strength improved. In January, Petitioner told Dr. Davis he was ready to return to work full duty and the doctor agreed, returning him without restrictions, according to the medical records. Dr. Davis's plan at that time was to release Petitioner at MMI in 1 month as long as his return to work went well. Petitioner went to work at Olmsted lock and dam as his temporary position at SIUC had concluded.

Unfortunately, Petitioner's work at Olmsted lock and dam resulted in another work accident. Petitioner argues this was an aggravation and so should be attributed to SIUC, but this is not supported by the evidence. Petitioner listed his employer at that time as Miners Builders Group, not SIUC. Petitioner reported an aggravation, in his terms, to Dr. Davis at his appointment on February 9, 2015. Petitioner went from having a full duty release to nearly sedentary lifting restrictions due to the accident at Olmsted. Despite Petitioner terming the new work accident as an aggravation, Dr. Davis did not record any increased symptoms in his medical records. The specifics of Petitioner's physical exam findings were not noted but the doctor stated they were unchanged in January, February, and March. Dr. Davis attempts to tie the incident at Olmsted to that which occurred in September of 2014. However, he admitted he could not tell if the incident at Olmsted created a worsening of Petitioner's condition. In February of 2015, an MRI was requested. Dr. Davis gave two explanations for this at separate times. First, he stated it was because Petitioner wasn't getting better, yet the medical records suggest otherwise. Second he said it was because of what Petitioner called a work aggravation so further injury could be ruled out. Under either explanation, Respondent should not be liable for treatment rendered after January 12, 2015. Dr. Davis testified Petitioner was essentially released from care on January 12, 2015. The doctor was uncertain of whether the February 9th appointment was to follow up regularly or was made as a result of the new injury. It is possible Petitioner never would have returned to Dr. Davis if not for the injury at Olmsted lock and dam. Dr. Davis was also unaware of the date of the new injury, the mechanism of injury, who Petitioner was working for and where, how long Petitioner waited to seek treatment, or what symptoms it caused. In January, Petitioner only had light limitation in range of motion (160 degrees) and slight weakness (5-/5) which led Dr. Davis to assume he would be at MMI at the next visit. If not for the intervening accident at Olmsted, the Arbitrator concludes Petitioner would have been released from care without restrictions. There is no evidence in the medical records to suggest otherwise. There is no evidence to support the contention the injury was related to Petitioner's accident at SIUC. The only evidence of an aggravation or worsening is Petitioner's own testimony which is biased and unreliable. According to Dr. Davis, Petitioner has not treated with him since March 12, 2015. This was seemingly echoed by Petitioner's testimony yet disputed by Petitioner's attorney who claimed he was placed at MMI in 2016.

Petitioner failed to provide a medical record containing Petitioner's placement at MMI after referencing the existence of one at arbitration and in Dr. Davis's deposition. A second MRI was also completed for Petitioner's right shoulder on October 18, 2016 which showed degenerative and post-surgical changes. In light of the foregoing, this Arbitrator concludes Petitioner's treatment effectively ended on January 12, 2015 when he was released at full duty without restrictions.

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?

Based on the above, paragraph (J) is moot.

Issue (K): What temporary benefits are in dispute (TTD)?

See paragraph (N) below.

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

The Arbitrator places significant weight on Petitioner's failure to offer into evidence any medical records with a definitive diagnosis other than that of a rotator cuff strain. As a result, the Arbitrator finds no permanency exists as to Petitioner's right shoulder.

Issue (N): Is Respondent due any credit?

Based on paragraph (F) above, Respondent is due a TTD credit in the amount of $10,874.82 for TTD paid from September 20, 2014 to January 12, 2015 as Petitioner has failed to meet his burden of proof in this matter and is, therefore, not entitled to the TTD which was paid.

In light of the foregoing, the Arbitrator finds Petitioner failed to meet his burden of proof as to the disputed issues of accident, causation, medical care, and entitlement to temporary benefits. Petitioner's claim is, therefore, denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Janice Skwarczyk,
Petitioner,

vs. NO: 12 WC 16851

Palos Community Hospital,
Respondent.

19IWCC0021

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 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.

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

DATED: JAN 14 2019
o122018
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SKWARCZYK, JANICE
Employee/Petitioner

Case# **12WC016851**

PALOS COMMUNITY HOSPITAL
Employer/Respondent

19IWCC0021

On 5/31/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.03% 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:

0664 LAW OFFICE OF JOSEPH HAFFNER
800 WAUKEGAN RD
SUITE 200
GLENVIEW, IL 60025

0081 LORENZ & BERGIN PC
JOHN BERGIN
120 N LASALLE ST SUITE 1420
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Janice Skwarczyk
Employee/Petitioner

v.

Palos Community Hospital
Employer/Respondent

Case # 12 WC 16851

Consolidated cases: ____

19IWCC0021

An *Application for Adjustment 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 17, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 16, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$112,384.40**; the average weekly wage was **$2,161.23**.

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

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

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

Respondent shall be given a credit of **$16,995.73** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,288.96/week for 16 weeks, commencing April 17, 2012 through August 6, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from April 16, 2012 through April 17, 2017, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $16,995.73 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78/week for 107.5 weeks, because the injuries sustained caused the 21.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

05-31-18
Date

MAY 31 2018

Janice Skwarczak, Petitioner
v.
Palos Community Hospital, Respondent

12 WC 16851

Arbitrator's Findings

19IWCC0021

In regard to issues *F: Is Petitioner's current condition of ill-being causally related to the injury? And L. What is the nature and extent of the injury?;* The Arbitrator finds the following:

Findings of Fact

Petitioner testified that she worked at Respondent Palos Community Hospital for 30 years.

Petitioner testified that on April 6, 2012, she was working in the wound care clinic at Palos Community Hospital (PCH) and was injured at work.

She testified that she was assisting a 698-pound independently ambulatory patient. She was wrapping lower extremities when the patient's leg flopped off the cart, pulling her forward. Her right hip hit the cart; she immediately noticed pain in her right hip and right side of her back.

She reported the matter to her supervisors and was sent to Employee Health and was referred to Dr. Ronald Mochizuki.

On April 16, 2012, Petitioner visited Dr. Mochizuki, who prescribed pain medicine as well as a muscle relaxant. The diagnosis was right gluteal strain, likely gluteus medius/piriformis and likely gluteus maximus. (PX#1).

Petitioner returned to Dr. Mochizuki on April 23, 2012. Petitioner had positive straight leg raising on the right. The diagnosis was acute right radiculopathy. MRI was recommended and performed on April 25, 2012, and showed degenerative changes throughout the lumbar spine and broad-based right paracentral disc protrusion/extrusion at L5-S1. (PX#1).

Following the MRI of the back, Petitioner received an XR epidural injection at PCH. (PX#1).

Petitioner was referred to Dr. Anis Mekhail who examined the Petitioner on May 14, 2012 and recommended back surgery. On May 30, 2012, a right L5-S1 decompression laminotomy, foraminotomy, partial discectomy and microdiscectomy were performed at PCH by Dr. Mekhail. (PX#2).

Petitioner was also referred to Dr. Steven Wardell for right hip pain. Dr. Wardell examined the Petitioner and also reviewed an MRI of the hip. He stated that the MRI findings given the lack of effusion may have been incidental and this was somewhat supported by the physical examination. Dr. Wardell recommended Mobic and Flector patch and physical therapy and did not recommend surgical intervention for the hip. (PX#2).

Petitioner was seen by Dr. Wardell for right hip trochanteric bursitis May 23, 2012, and June 7, 2012. On July 27, 2012, Dr. Wardell noted that all pelvis and hip x-rays were normal. On August 24, 2012, Dr. Wardell noted the Petitioner had full range of motion, normal neurovascular exam, negative straight leg raising and the paresthesia in her foot were improving and weakness had resolved. She was released full duty concerning her hip. No surgical intervention was warranted.

In regard to the back post-surgery, Petitioner had physical therapy. There were follow-up visits with Dr. Mekhail on June 11, 2012, and July 9, 2012. On August 6, 2012, Petitioner was released to light duty by Dr. Mekhail. On September 10, 2012, she was doing well post-surgery. There were no radicular symptoms with negative straight leg raising, no weakness and good range of motion; she was released to full duty. On October 8, 2012, Dr. Mekhail stated that Petitioner was at MMI and could continue regular duty. (PX#2).

Petitioner testified that she has not had any treatment since October 8, 2012, relative to the 2012 accident. She did have a flare-up and visited Dr. Mekhail on January 7, 2013.

The Petitioner testified in great detail as to the modalities that she has used since 2012 to self-treat her back and reduce back pain. She testified as to stretching and other exercises she has performed.

She testified as to difficulty with walking long distances and does not hike and/or dance as she could prior to the injury. Petitioner also stated that she is not under any restrictions or under medical care regarding the 2012 accident. She does not take any prescription medication due to the 2012 accident. Petitioner stated that she had significant improvement after the lumbar surgery.

Petitioner stated that she was promoted to clinical manager for wound care since the injury.

Petitioner testified that she had an October 5, 2016, injury at PCH. She testified as to her treatment with Dr. Mekhail for the 2016 incident including two epidural steroid injections and physical therapy. She stated that ultimately all the symptoms resolved, and she was back to the post-2012 baseline.

Conclusions of Law

Causal Connection

The Arbitrator finds that the Petitioner injured her back and right hip on April 6, 2012 resulting in a right L5-S1 herniated disc and right hip trochanteric bursitis. Petitioner had diagnostic studies and physical therapy for her right hip. Petitioner had an epidural injection and lumbar surgery for the herniated disc. The recovery for the surgery was uneventful and provided significant improvement. The Arbitrator finds that the current condition of ill-being of right L5-S1 herniated disc post microdiscectomy with resolved symptoms and resolved right hip trochanteric bursitis is causally related to the injury of April 6, 2012.

Permanent Partial Disability

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a clinical supervisor 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 has no work restrictions and was promoted to a clinical manager. Because of release to full duty, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 47 years old at the time of the accident. Because the accident did not affect her work expectancy, the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes the Petitioner stated that she has been able to perform her duties and has received a promotion to clinical manager. Because of the fact that earning capacity has increased since the injury, the Arbitrator therefore gives *greater* 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 Dr. Mekhail in an October 8, 2012, report states that after the surgery Petitioner did "really well" and that her symptoms resolved. Petitioner was working regular duty and Dr. Mekhail did not believe that she would be disabled. Because of the release without restrictions and no medical evidence of disability, the Arbitrator therefore gives *lesser* 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 21.5% loss of use of a person pursuant to §8(d)2 of the Act.

Signature of Arbitrator

05-31-18
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

Thomas Almaraz,
Petitioner,

vs. NO: 16 WC 04780

City of Chicago-Department of Water,
Respondent.

19IWCC0022

DECISION AND OPINION ON REVIEW

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

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

DATED: JAN 14 2019
o122018
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALMARAZ, THOMAS
Employee/Petitioner

Case# **16WC004780**

CITY OF CHICAGO-DEPT OF WATER
Employer/Respondent

19IWCC0022

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:

4564 ARGIONIS & ASSOCIATES LLC
PETER S COORLAS JR
180 N LASALLE ST SUITE 1925
CHICAGO, IL 60601

0010 CITY OF CHICAGO
TAYLOR CHITTICK
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Thomas Almaraz
Employee/Petitioner
v.
City of Chicago – Department of Water
Employer/Respondent

Case # **16 WC 04780**

Consolidated cases: **N/A**

19IWCC0022

An *Application for Adjustment 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 **August 25, 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

FINDINGS

19IWCC0022

On **October 6, 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 $**79,669.13**; the average weekly wage was $**1,532.10**.

On the date of accident, Petitioner was **52** 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 is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Medical Benefits

Respondent shall pay Petitioner an amount equal to a total of the outstanding medical bills of $**1,297.00** from Midwest Orthopaedics at Rush and $**5,850.00** from Western Open MRI & Imaging, pursuant to Section 8(a) and subject to Section 8.2 of the Act, for the reasonable and necessary medical services rendered to him.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**1,021.40**/week, from **October 7, 2015** through **July 21, 2017**, which represents **93-3/7** weeks, in accordance with Section 8(b) of the Act.

Respondent shall receive a credit in the amount of $**70,917.81** for TTD benefits previously paid to Petitioner.

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $**755.22**/week for **55.09** weeks, as Petitioner has sustained a loss of use of his left arm (left elbow) to the extent of **3%**, pursuant to Section 8(e)10 of the Act, a loss of use of his person as a whole (left shoulder) to the extent of **2%**, pursuant to Section 8(d)2 of the Act, and a loss of use of his person as a whole (cervical spine) to the extent of **7.5%**, pursuant to Section 8(d)2 of the Act.

Respondent shall pay Petitioner benefits that have accrued since **July 22, 2017**, and shall pay the remainder, if any, in weekly payments.

19IWCC0022

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

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

Signature of Arbitrator

June 12, 2018
Date

JUN 13 2018

19IWCC0022

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

THOMAS ALMARAZ,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	16 WC 04780
	)	Chicago, IL
CITY OF CHICAGO – DEPARTMENT OF WATER,	)	
	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

Thomas Almaraz, Petitioner, testified that he had a prior work-related injury to his left shoulder in 2014, and that he filed a worker's compensation claim against Respondent following that injury. Petitioner confirmed that he underwent rotator cuff repair surgery following such 2014 injury and settled his claim with Respondent in 2015.

Petitioner testified that he was employed by Respondent on October 6, 2015 as a laborer for Respondent, City of Chicago - Department of Water. He had been employed by Respondent since 2001.

It is undisputed that on October 6, 2015, Petitioner sustained an accident. Petitioner testified that on October 6, 2015, he was injured when he was using a corn machine to drill a hole in a pipe. The corn machine weighs about 65 lbs. While he was drilling, the machine jumped out of the pipe and struck his left elbow. A co-worker asked if he was okay, and Petitioner said "No." Petitioner further testified that he was sent to MercyWorks that day where he complained of pain in left elbow, left shoulder and neck.

Petitioner testified that the staff at MercyWorks took x-rays, gave him pain medication, imposed light-duty restrictions, but that Respondent was unable to accommodate such restrictions, so he stayed off work into July of 2017.

The MercyWorks' chart notes indicate that Homer Diadula, M.D., treated Petitioner. (Px.1) X-rays of Petitioner's left arm showed no acute fractures or dislocation of his left humerus, left elbow or left shoulder. Dr. Diadula diagnosed Petitioner with contusions to the left elbow, left shoulder and left side of the neck. Petitioner continued treating at MercyWorks through December 1, 2015, at which time Petitioner reported continued pain in his left shoulder and left elbow, but no more pain in the left side of the neck. On December 1, 2015, Dr. Diadula referred Petitioner to Brian J. Cole, M.D., of Midwest Orthopaedics at Rush for continuing treatment of his left shoulder and elbow. (Px.1, Px.2)

Petitioner began treatment with Dr. Cole on December 10, 2015, at which time Dr. Cole wrote that he has seen Petitioner in the past for his left shoulder and had performed a left shoulder rotator cuff repair with biceps tenodesis on him. He further wrote that Petitioner recovered completely after this surgery, and subsequently, in October 2015, had an increased injury while at work. He recommended a course of physical therapy at Athletico Physical Therapy for Petitioner's left elbow symptoms. (Px.2)

Petitioner began a course of physical therapy at Athletico on December 15, 2015. (Px.3).

Petitioner followed up with Dr. Cole next on January 21, 2016, and continued to complain of his injuries. (Px.2) This physician recommended and administered a cortisone injection to his left shoulder. He recommended that Petitioner continue with physical therapy. Upon examination, Dr. Cole found that Petitioner exhibited a positive Spurling's test. Petitioner

also exhibited diffuse weakness of the left arm, tenderness along the trapezius, and limited range of motion with lateral movement. Petitioner had radiating pain from his neck to his left shoulder and below his elbow, as well as numbness in his left hand. (Px.2)

Petitioner followed up with Dr. Cole next on February 25, 2016. (Px.2)

On March 10, 2016, Petitioner next saw Dr. Cole. To address lingering cervical spine symptoms, he referred Petitioner to April Fetzer, D.O., of Midwest Orthopaedics at Rush, and prescribed an EMG study and a cervical MRI. (Px.2) Petitioner related to Dr. Cole that his cervical spine felt better and that he did not wish to undergo the EMG or the MRI. (Px.2)

On June 6, 2016, Petitioner did, however, undergo an MRI of his cervical spine at Western Open MRI & Imaging. Rafia S. Saleem, M.D., interpreted the images. (Px.4). Dr. Saleem offered the following impression:

1. No compression fractures are seen and the vertebral alignment is normal.
2. There is reversal of cervical lordosis consistent with muscle spasm.
3. Osteoarthritic changes are seen in the lower cervical spine.
4. At C5-C6 level, degenerative changes are seen in the intervertebral disc with loss of height and a shallow broad based central disco-osteophytic protrusion. Posterolateral osteophytes are causing bilateral foraminal narrowing left slightly more than right. Please see body of report for additional findings. (Px.4)

The body of the report states that at C6-C7, there is early desiccation of the intervertebral disc with a shallow broad based central disco-osteophytic protrusion, small posterolateral osteophytes, and a spinal cord that is of normal caliber and signal intensity. (Px.4)

On June 6, 2016, Petitioner also underwent an MRI of his left shoulder at Western Open MRI & Imaging. Rafia S. Saleem, M.D., interpreted the images. (Px.4). Dr. Saleem offered the following impression:

1. The detail is limited because of numerous susceptibility artifacts from prior surgery.
2. Osteoarthritic changes are seen in the acromioclavicular joint with prominent capsulosynovial inflammation. The hypertrophied joint is encroaching upon the coracoacromial arch.
3. There is severe tendinosis/partial thickness intrasubstance tear of the supraspinatus and infraspinatus tendons. There is no evidence of a full thickness rotator cuff tear. (Px.4)

On August 8, 2016, Petitioner returned to Dr. Cole for a follow-up appointment. Dr. Cole examined Petitioner's left shoulder and found full range of motion, 5/5 rotator cuff strength, and no instability. Upon examining Petitioner's left elbow and neck, Dr. Cole found full elbow strength, no elbow instability, positive Spurling's test and left lateral neck discomfort. Dr. Cole then declared Petitioner to be at maximum medical improvement with regard to his left shoulder. (Px.2). Dr. Cole recommended an evaluation of Petitioner's cervical spine by Dr. Fetzer and evaluation of Petitioner's left elbow by Robert W. Wysocki, M.D., also of Midwest Orthopaedics at Rush. Dr. Cole released Petitioner to light-duty work with restrictions until Doctors Wysocki and Fetzer released him. (Px.2)

On September 2, 2016, Petitioner began treating with Dr. Wysocki for left elbow pain.

On September 19, 2016, Petitioner began treating with Dr. Fetzer for his cervical spine symptoms. (Px.2)

On October 11, 2016, Dr. Fetzer administered an injection to Petitioner's greater occipital nerve. (Px.2)

On December 9, 2016, Petitioner, while under the care of Dr. Wysocki, underwent an MRI of his left elbow, which revealed a possible common extensor injury and/or possible medial epicondylitis. At that visit, Dr. Wysocki administered a cortisone injection to Petitioner's left elbow. (Px.2)

On December 12, 2016, Dr. Fetzer wrote that following receipt of the greater occipital nerve injection, Petitioner experienced very minimal relief for approximately one hour. Such injection was generally not effective. Petitioner continued to report severe pain at the left axial neck and shoulder girdle. Dr. Fetzer recommended a left cervical facet injection. (Px.2)

On January 6, 2017, at the follow-up visit to Dr. Wysocki, Petitioner stated that the injection did not provide any relief. Dr. Wysocki wrote, in pertinent part, the following:

> "I discussed with Thomas that, at this point, we would have hoped that most symptoms of pain from a contusion would have resolved, but clearly he does have ongoing pain. The MRI does not show any structurally significant concordant pathology. At this point, I do not think that I have anything further to offer him from the perspective of a hand, wrist, and elbow surgeon. I do not see any organic pathology that would preclude him from an attempt at a full-duty return to work as it pertains to the elbow. I know that he is still receiving treatment from Dr. Fetzer for his spine and last saw her on December 12, 2016, and is awaiting further care." (Px.2)

On January 6, 2017, Respondent authorized the left cervical facet injection. Dr. Fetzer contacted Petitioner for scheduling. Petitioner testified that the left cervical facet injection was initially scheduled for January 31, 2017; however, he cancelled this appointment. The left cervical facet injection was then rescheduled for February 7, 2017. (Px.2) Petitioner testified that on February 6, 2017, he confirmed the February 7. 2017 appointment. Despite this confirmation.

Petitioner testified, he cancelled the scheduled left cervical facet injection within three hours of the February 7, 2017 appointment.

On February 9, 2017, Petitioner saw Katherine Granberry, M.D., his primary care physician who is associated with Advocate Medical Group. (Px.6) He stated that the reason for his visit is as follows: "sore throat, cough, nasal congestion, runny nose, fever, headache, lower back and neck pain x 2 weeks." In the History of Present Illness section, Dr. Granberry wrote: "PATIENT STATES HE IS ON DISABILITY AND HAS HAD CHRONIC BACK AND NECK PAIN AND HE IS NOT HERE TODAY BECAUSE OF THIS. HE STATES HE HAS HAD NASAL CONGESTION SORE THROAT AND COUGH FOR 2 WEEKS AND NEEDS A NOTE STATING HE HAS BEEN SICK." Upon examining Petitioner, Dr. Granberry found nasal blockage, sore throat and cough, but found all other systems she reviewed to be negative. Body temperature was 97.7° F. Dr. Granberry diagnosed Petitioner with "Acute URI", i.e., upper respiratory infection. She prescribed Amoxicillin 500 mg. oral tablet, one tablet three time a day until gone, and Desioratadine 5 mg. oral tablet, one tablet daily. (Px.6)

On June 26, 2017, at the request of Respondent and pursuant to Section 12 of the Act, Petitioner presented to Jay L. Levin, M.D., of AP Ortho, for an examination to address his cervical spine symptoms. (Rx.1) After examining Petitioner on June 26, 2017 and reviewing some of the records, Dr. Levin issued a report dated June 26, 2017. Following a review of additional records, Dr. Levin issued a second report dated July 6. 2017. He confirmed the original diagnosis of a left cervical contusion and opined that Petitioner's continuing subjective complaints were not consistent with the natural history of his diagnosis. On the basis of his review of the medical records and his examination of Petitioner, Dr. Levin determined that

Petitioner's cervical symptoms subsequent to the October 6, 2015 work injury should have resolved within six to eight weeks of that injury. Dr. Levin concluded that Petitioner had reached maximum medical improvement referable to his cervical spine and allowed him to return to his usual and customary employment with no restrictions. (Rx.1)

Petitioner testified that his total temporary disability benefits ended following his cold (URI) and his cancellation of the last appointment for the injection. Petitioner further testified that his medical benefits ended as well, and that Dr. Fetzer refused to reschedule the injection or to treat him because of his two missed appointments. He testified that the last check he received paid him through February 3, 2017.

Petitioner testified that he resigned from his position with the Department of Water Management on July 21, 2017. He testified that was no longer treating for the injuries he sustained on October 6, 2015, and that he is not seeking any prospective medical care.

Petitioner testified that, currently, he still has pain in his left shoulder, left elbow, and neck. He testified that he is still not able to throw out a garbage bag because his left arm is too weak. He further testified that before October 6, 2015, he had injured his left shoulder, for which he underwent surgery in February 2015. Since his recovery from that shoulder surgery through October 6, 2015, Petitioner testified, he worked full duty, without restrictions or complaints. Before October 6, 2015, Petitioner testified, he had never injured his left elbow or neck. Since October 6, 2015, Petitioner continued, he has not sustained any other accidental injuries. Currently, he notices that when it is cold and windy outside, he feels pain in his left shoulder, left elbow, and neck.

On redirect examination, Petitioner testified that when he phoned Dr. Fetzer's office on

February 6, 2017 to confirm his February 7, 2017 appointment, he thought that he would feel better the next morning. He did not.

CONCLUSIONS OF LAW

In support of his decision relating to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator concludes:

Petitioner was injured on October 6, 2015 when he was struck in the left elbow by a corn machine that he was operating at work. When he treated at MercyWorks that same day, he complained of pain in his left elbow, left shoulder, and neck, for which he received further treatment.

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his work injury of October 6, 2015. Prior to this accidental injury, Petitioner had no problems with or treatment for his left elbow or neck. The Arbitrator relies on Petitioner's testimony, the treating records, and the chain of events in finding that Petitioner's current condition of ill-being of his left elbow and neck are causally related to the October 6, 2015 accident.

With regard to his left shoulder, Petitioner testified that since his recovery from the February 2015 shoulder surgery through October 6, 2015, he worked full duty, without restrictions or complaints.

In the report dated August 8, 2016 that was completed by Dr. Cole and sent to Dameca Block, Dr. Cole indicated that the diagnosis/treatment is causally related to the alleged industrial accident. (Px.2)

As it relates to Petitioner's cervical spine, Dr. Levin conducted a Section 12 examination

of Petitioner. After physically examining him and reviewing the medical records, Dr. Levin recorded the following questions and answers:

"*What is the cause of Mr. Almaraz's current symptomatology?*

The examinee's current symptomatology based upon the diagnosis stated above including the mechanism of injury from that occurrence and physical examination findings noted in the records should have resolved 6-8 weeks post his injury.

Are his symptoms caused by a work-related accident that occurred on 10/6/2015?

His continued subjective complaints are not consistent with the natural history of the diagnosis as it relates to the occurrence of October 6, 2015." (Rx.1)

With regard to Petitioner's left shoulder, the Arbitrator notes that 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. Indus. 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. Indus. Comm'n*, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967).

Moreover, in this case, the Arbitrator finds the opinions of the treating physicians to be more persuasive than those of Respondent's examining physician.

Based on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being

of his left shoulder, left elbow and neck (cervical spine) are causally related to the accident of October 6, 2015.

In support of his decision relating 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 concludes:

On December 10, 2015, Petitioner began treating at Midwest Orthopaedics at Rush and had treatment rendered to him there through February 7, 2017. (Px.2, Px.7) Petitioner testified that he received unpaid bills with respect to that treatment. The Arbitrator finds that the treatment rendered by the doctors at Midwest Orthopaedics at Rush was reasonable and necessary to treat Petitioner for the work-related injury he sustained on October 6, 2015. The Arbitrator also finds that since Petitioner's current condition of ill-being was causally related to his injury on October 6, 2015, Respondent is liable for the aforementioned medical charges and that such charges were generated as a result of treatment that was reasonable and necessary. The Arbitrator finds that the related bills in Petitioner's Exhibit 3, which total $1,297.00, are to be paid by Respondent pursuant to Section 8(a) and subject to Section 8.2 of the Act.

On June 6, 2016, Petitioner underwent a left shoulder and cervical spine MRI at Western Open MRI & Imaging. (Px.4, Px.8) Petitioner testified that he received unpaid bills with respect to this treatment. The Arbitrator finds that the treatment rendered by the medical professionals at Western Open MRI was reasonable and necessary to treat Petitioner for the work-related injury he sustained on October 6, 2015. The Arbitrator also finds that since the Petitioner's current condition of ill-being was causally related to his injury on October 6, 2015, Respondent is liable for the aforementioned medical charges and that such charges were generated as a result of

treatment that was reasonable and necessary. The Arbitrator finds that the related bills in Petitioner's Exhibit 8, which total $5,850.00, are to be paid by Respondent pursuant to Section 8(a) and subject to Section 8.2 of the Act.

Respondent offered into evidence as Respondent's Exhibit 2, a document entitled "Payment Listing," which exhibits all medical and indemnity payments that they have made.

In support of his decision relating to issue (K) "What temporary benefits are in dispute? TTD," the Arbitrator concludes:

The medical records and Petitioner's testimony demonstrate that he was substantially compliant with all his treatment.

Because Petitioner cancelled his February 7, 2017 appointment approximately three hours before the scheduled injection, Dr. Fetzer considered such cancellation to be a "no-show evaluation." It is true that there is no mention of Petitioner's upper respiratory infection in Dr. Fetzer's late January and early February records. Nevertheless, Dr. Granberry's records and Petitioner's testimony demonstrate that Petitioner was ill with a cough, cold and sore throat during the two weeks prior to February 9, 2017. (Px.6)

The Arbitrator finds that Petitioner's benefits were prematurely and wrongfully terminated in February of 2017.

In Diane Marchiori v. Evanston School District #65, 11 IWCC 0948, the Commission found that the employer was liable for payment of TTD benefits while claimant received treatment for the unrelated, concurrent condition of breast cancer. Likewise, in Debra Hudson v. United Parcel Service, 02 IIC 0814, the Commission found that the employer was liable for

payment of TTD benefits while claimant treated for an unrelated para-tracheal mass that was discovered in testing before surgery for a work-related injury to claimant's right knee.

Respondent cited Section 19(d) of the Act and argues that Petitioner refused to submit to medical care (the facet injection) that was reasonably essential to promote his recovery. The Arbitrator is not persuaded by such argument. In treating for this accidental injury, Petitioner previously received an injection from each of the following: Dr. Fetzer, Dr. Wysocki, and Kyle Pilz, PA-C.

The Arbitrator finds it significant that, with respect to his cervical spine, Dr. Fetzer never released Petitioner to go back to work. Further, Respondent did not obtain a Section 12 examination until June 26, 2017, which was nearly five months after they cut off his benefits. Dr. Levin, the Section 12 examining physician, issued one report dated June 26, 2017 and one report dated July 6, 2017.

Therefore, the Arbitrator finds that Petitioner is entitled to receive TTD benefits from October 7, 2015 through July 21, 2017. On July 21, 2017, Petitioner resigned his position with Respondent, and has not looked for work since that time. As of July 22, 2017, Petitioner took himself out of the labor market.

Respondent is entitled to receive a credit for TTD paid to Petitioner in the amount of $70,917.81. (Ax.1)

In support of his decision relating to issue (L) "What is the nature and extent of the injury?", the Arbitrator concludes:

Pursuant to Section 8.1b of the Act, for accidental injuries that occur on or after September 1, 2011, the following criteria are to be used in the determination of permanent partial disability:

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

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

With regard to subsection (i) of §8.1b(b), the reported level of impairment pursuant to subsection (a), the Arbitrator notes that 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 Petitioner was employed as a laborer for Respondent's Department of Water. A such, his work included new construction. He used heavy equipment, hoses, and various tools. One of his duties included drilling holes through pipes. The Arbitrator therefore gives moderate weight to this factor.

With regard to subsection (iii) of §8.1b(b), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 52 years old at the time of the accident. The Arbitrator gives minor weight to this factor.

With regard to subsection (iv) of §8.1b(b), the employee's future earning capacity, the Arbitrator notes that Petitioner resigned from his position with Respondent shortly after Dr. Levin released him to return to work full duty. Petitioner testified that since his resignation, he has not looked for work. No specific vocational evidence or evidence regarding Petitioner's future earning capacity was offered. The Arbitrator therefore gives minor 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:

On August 8, 2016, Dr. Cole saw Petitioner and recorded the following Subjective Complaints: "Previous history of left shoulder surgery with RC repair and biceps tenodesis, complete recovery after surgery. New injury at work 10/2015 with increased pain in the left shoulder and inner elbow area with pain also localized over radial tunnel. Complains of pain over the superior neck and radiates to the hand. Continued feeling of weakness in left arm." Dr. Cole examined Petitioner's left shoulder and found full range of motion, 5/5 rotator cuff strength, and no instability. Upon examining Petitioner's left elbow and neck, Dr. Cole found full elbow strength, no elbow instability, positive Spurling's test and left lateral neck discomfort. Dr. Cole then declared Petitioner to be at maximum medical improvement with regard to his left shoulder, but deferred to Doctors Wysocki and Fetzer for his left elbow and neck. Dr. Cole released Petitioner to light-duty work with restrictions until Doctors Wysocki and Fetzer released him.

On January 6, 2017, Dr. Wysocki wrote that Petitioner clearly has ongoing pain.

However, the doctor did not see any organic pathology that would preclude Petitioner from an attempt at a full-duty return to work as it pertains to the elbow. He noted that the MRI does not show any structurally significant concordant pathology, and that from the perspective of a hand, wrist, and elbow surgeon, he does not have anything further to offer Petitioner. Dr. Wysocki's final assessment: Left medial elbow pain, secondary to remote contusion.

On December 12, 2016, Dr. Fetzer noted that Petitioner received very minimal relief from the greater occipital nerve injection. Dr. Fetzer offered the following impression of Petitioner's cervical condition: (1) Left axial nerve pain: Likely facet mediated, and (2) Chronic left posterior shoulder girdle myofascial pain. Dr. Fetzer received authorization for the facet injection and attempted to administer it to Petitioner on January 31, 2017 and February 7, 2017. Petitioner cancelled both appointments. Following Petitioner's two cancelled appointment, Dr. Fetzer refused to treat Petitioner, but never released him to return to work. Petitioner testified that on July 21, 2017, he resigned from his position with Respondent.

The Arbitrator therefore 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 October 6, 2015 accident, Petitioner has sustained a permanent loss of use of his left arm to the extent of 3% for his left elbow injury, pursuant to Section 8(e)10 of the Act, a permanent loss of use of his person as a whole to the extent of 2% for his left shoulder injury, pursuant to Section 8(d)2 of the Act, and a permanent loss of use of his person as a whole to the extent of 7.5% for his cervical spine injury, pursuant to Section 8(d)2 of the Act.

19IWCC0022

[signature]

6-12-18

Brian T. Cronin
Arbitrator

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 LASALLE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Angelina Zarate,

Petitioner,

vs. NO: 16 WC 39372

State of Illinois/ Shapiro Developmental Center,

Respondent.

19IWCC0023

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 disabiity, causal connection, medical, prospective medical, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 22, 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.

19IWCC0023

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

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

DATED: JAN 14 2019
o122018
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

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

ZARATE, ANGELINA Case# **16WC039372**
Employee/Petitioner

ST OF IL SHAPIRO DEVELOPMENTAL CENTER
Employer/Respondent

19IWCC0023

On 5/22/2018, 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:

0139 CORNFIELD & FELDMAN LLP
JIM M VAINIKOS
25 E WASHINGTON ST SUITE 1400
CHICAGO, IL 60602

6149 ASSISTANT ATTORNEY GENL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

MAY 22 2018

STATE OF ILLINOIS)
)SS.
COUNTY OF LA SALLE)

- [ ] 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)

Angelina Zarate
Employee/Petitioner

Case # **16** WC **39372**

v.

State Of Illinois, Shaprio Developmental Center
Employer/Respondent

19IWCC0023

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Ottawa**, on **April 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [ ] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other

FINDINGS 19IWCC0023

On the date of accident, **June 7, 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 $**31,824.00**; the average weekly wage was $**612.00**.

On the date of accident, Petitioner was **22** years of age, ***single*** with **0** dependent children.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $**14,790.71**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $**408.00**/week for **89** weeks, commencing **August 9, 2016** through **April 25, 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.

Arbitrator Anthony C. Erbacci

May 16, 2018
Date

MAY 22 2018

FACTS:

19IWCC0023

On June 7, 2016, Petitioner was an employee of the Respondent, as a Mental Health Technician. She was hired on May 16, 2016. Her job duties included direct care of disabled individuals. Respondent required that Petitioner attend training classes for 3 weeks, from May 16, 2016 through June 8, 2016. These training classes took place in the Staff Development Building on the employer's property at Shapiro Developmental Center in Kankakee, Illinois. (PX 6F) The Center was owned and maintained by the Respondent. There was a parking lot about 20 feet from the entrance to the building where Petitioner and her co-workers were required to park.

Petitioner credibly testified that on June 7, 2016, at 12:00 noon, her supervisor, Donna Day, announced a lunch break. There is no cafeteria in the Staff Development Building. Petitioner's routine was to walk to her vehicle parked about 20 feet from the entrance to get her lunch that was in a cooler packed with ice. It was a sunny and dry day. Petitioner was wearing walking shoes. Petitioner testified that about 12:05 pm she started walking from her vehicle to a grassy knoll next to the building where her co-workers were sitting at a picnic table eating their lunch. Petitioner was walking on the sidewalk (PX 6B) carrying her lunch bag in one hand and her small purse in the other hand. As she was walking, Petitioner stepped on an uneven crack in the sidewalk. She testified that the photos showed a 2" difference in height in the crack. (PX 6E, 6G, 6H) Her right ankle rolled and she heard a loud snap coming from her right ankle. Petitioner testified that she caught herself from falling. She kept walking towards the picnic table but started limping immediately. She noticed pain immediately. Petitioner was crying when she reached the table. A co-worker brought Petitioner a wheelchair and told the supervisor that Petitioner had hurt herself. The supervisor, Donna Day, brought ice to Petitioner to place on her ankle.

During Petitioner's testimony, she identified Petitioner's Exhibit 6 and the 8 photographs attached to the exhibit. Petitioner testified that the crack in the sidewalk was on the sidewalk closest to the bushes and building as seen in PX 6B. She stated that she saw the crack in the sidewalk right after rolling her ankle over it. She also testified that these photographs were taken by her and a friend in June of 2017, about one year after the injury. Petitioner credibly testified that these were true and accurate representations of the accident site. She also stated that there was no change in the condition of the crack from June 2016 to June 2017.

Petitioner did finish her class for the day. Petitioner drove herself home but noticed a great amount of swelling in her right ankle. Her home is only 2 miles from her work. Petitioner visited the emergency room at Riverside Medical Center that same evening. Petitioner's history in the ER was consistent with her testimony of rolling her ankle. The ER records indicate Petitioner was limping into the ER. The examination revealed swelling and tenderness over the lateral malleolus. The clinical impression was a sprain of the calcaniofibular ligament of the right ankle. Petitioner testified that she treated at home with ice, ankle wrap, and Ibuprofen. She continued to work from June 9, 2016 to August 3, 2016. Her job required her to be on her feet only 2 hours out of the 8 hour day. Her swelling and pain levels increased as time passed on. She finally sought additional medical care on August 3, 2016 at Prairie Rock Foot and Ankle Clinic with Dr. Rebecca Hodulik, DPM. Again, Petitioner's history of rolling her right ankle and hearing a snap was consistent with her testimony. Her examination revealed tenderness over the lateral malleolus of the right foot. She prescribed an unna boot, rest, ice, compression, and elevation. On August 16, 2016, Dr. Hodulik reiterated Petitioner's time off of work from August 3, 2016. On September 30, 2016, Dr. Hodulik prescribed a MRI,

crutches, physical therapy, and continued off work. Petitioner had 11 visits of physical therapy in the month of October, 2016, at ATI. On October 28, 2016, Dr. Hodulik requested the MRI again, plus the cam walker, icing, and ibuprofen. The MRI was performed on November 17, 2016. The impression was grade 1 sprain and adjacent fluid anterior tibiofibular ligament, and laxity.

In October 2016, Petitioner was terminated from her employment with the Respondent. Her group health insurance ended coverage in November 2016. Petitioner subsequently applied for and received Medicaid insurance and coverage starting in April 2017.

Petitioner resumed medical care of her right ankle on April 15, 2017 at Riverside Medical Center. She had another episode where her right ankle rolled. It was the same condition from the work injury of June 7, 2016. She had the same continuing swelling and limping. On April 27, 2017, Dr. Hodulik referred Petitioner to OAK Orthopedics for a sprain that was "resistant to treatment".

On May 3, 2017, Dr. Puri saw her at OAK. The history was consistent with Petitioner's testimony of rolling her right ankle in June 2016 and April 2017. Physical therapy was reinitiated at ATI. Another MRI was taken on June 24, 2017 with the impression of chronic grade 1 sprain. On July 6, 2017, Dr. Puri's examination of Petitioner's right foot continued to find tenderness of medial ankle, antalgic gait, and tenderness of multiple ligaments. His assessment was instability, with anterior talofibular ligament, deltoid, and calcaneofibular ligament grade 1 sprain. Also peroneal and post tib tenosynovitis. He recommended surgery. Surgery was performed on August 21, 2017. The procedure was right ankle arthroscopy with debridement and open brostrums repair. His operative report provides reasons for the surgery including the fact that she has instability of her ankle, non-op therapy including physical therapy, bracing and activity modifications were not helping. Petitioner followed up with Dr. Puri monthly post- operative. Dr. Puri has had Petitioner on restrictions since the surgery with limited passive and active motion, and wearing a boot.

Respondent had Petitioner seen by their Section 12 physician, Dr. Holmes, from Midwest Orthopaedics at Rush on January 4, 2018. He found her current symptoms causally related to the injury of June 7, 2016. He found she had no pre-existing conditions. Dr. Holmes opined that the Brostrom procedure would be reasonable and necessary for her instability symptoms. He opined that she would be able to work in a semi-sedentary type of position at this time. He prescribed a CT scan to determine if there is also an injury to the syndesmosis with widening of the medical mortise. He opined that she is not at MMI.

Petitioner has continued to treat with Dr. Puri through March 13, 2018. Petitioner is still attending physical therapy 2 times a week.

Petitioner testified that her supervisor told her at the time of the injury that she could return to work only when she is full duty. No contrary testimony was provided by the Respondent. Since August 9, 2016 to the present, Petitioner has been either kept off work or on restrictions by her treating physicians. In addition, Dr. Holmes, the IME, has placed restrictions on Petitioner.

CONCLUSIONS:

19IWCC0023

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

The Arbitrator finds that Petitioner sustained an injury arising out of and in the course of her employment with the Respondent. The Arbitrator finds Petitioner's uncontroverted testimony as credible. The Arbitrator finds that Petitioner was injured by a defect in the sidewalk owned and maintained by the Respondent. The Petitioner was walking her usual route, carrying her lunch to sit with co-workers. During her testimony, Petitioner identified PX 6E, 6G, and 6H which are photographs showing one part of the concrete sidewalk higher than the adjoining part and the measurement was 2" difference in height. The Arbitrator finds that the photographs depict a true and accurate representation of the defect in the sidewalk. This sidewalk was not open to the public, but rather owned and maintained by the Respondent and used by the employees to travel from building to building on the grounds.

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

The Arbitrator finds that the Petitioner's current condition of ill-being is causally connected to her injury of June 7, 2016. The medical history in the emergency room and following medical care is consistent with the testimony given by Petitioner. The Petitioner's diagnosis was consistent throughout her care. The clinical impression was a sprain to the calcaniofibular ligament of the right ankle. She initially treated at home between June 9, 2016 and August 3, 2016. She credibly explained that she wrapped her right ankle, iced it, and took Ibuprofen for the pain. Eventually, the swelling and pain levels increased to where she needed professional medical attention. Dr. Hodulik's history was consistent with Petitioner's testimony and her examination revealed the same diagnosis as in the ER records. Petitioner had professional physical therapy and an MRI ordered by Dr. Hodulik. Even after such treatment, Dr. Hodulik diagnosed Petitioner with grade 1 sprain, adjacent fluid anterior tibiofibular ligament, and laxity.

After obtaining medical insurance in April 2017, Petitioner resumed her medical care to her right ankle. Dr. Hodulik continued to treat her and the examination revealed the same condition as in the Fall of 2016. Petitioner was still complaining of swelling and limping. Dr. Hodulik referred Petitioner to Dr. Puri at OAK Orthopedics specifically because the condition was "resistant to treatment". Dr. Puri examined Petitioner and diagnosed her with the same condition of chronic calcaneofibular ligament grade 1 sprain, with instability. Petitioner underwent surgery on August 21, 2017 because conservative treatment was not beneficial.

Dr. Holmes, Respondent's own Section 12 physician, found Petitioner's current symptoms causally related to the injury of June 7, 2016. He opined that the Brostrom procedure was reasonable for her instability symptoms.

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

The Arbitrator, having found for Petitioner for accident and causation, finds that Respondent is liable for all reasonable and necessary medical bills in Petitioner's Exhibits 8-12 in the amount of $14,790.71 as provided in Sections 8(a) and 8.2 of the Act.

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

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits (TTD) from August 9, 2016 through April 25, 2018 as provided in Section 8(b). Dr. Hodulik, on August 3, 2016, kept Petitioner off work while prescribing an unna boot, rest, ice, compression and elevation. The medical records do not release Petitioner to return to work full duty. Petitioner testified that the Supervisor, Donna Day, told Petitioner not to return to work unless she has a full duty release. There was no contrary testimony provided by Respondent. Dr. Puri started treating Petitioner in May 2017. He placed light duty restrictions on Petitioner after the surgery of August 21, 2017. The restrictions were limited passive and active motion and to wear a boot. The IME physician, Dr. Holmes, on January 4, 2018, opined that she would be able to work in a semi-sedentary type of position at this time.

The Respondent had terminated Petitioner's employment in October 2016. The Petitioner has been prescribed to be off work from August 3, 2016 by Dr. Hodulik, and on light duty from August 21, 2017 by Dr. Puri, and by the IME physician, Dr. Holmes. The Respondent has not accommodated Petitioner's light duty restrictions.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICCARDO THORNTON,

Petitioner,

vs. NO: 15 WC 24609

CHESTNUT HEALTH SYSTEMS, INC.,

Respondent,

19IWCC0024

DECISION AND OPINION ON REVIEW

This matter comes before the Commission on Respondent's Motion to Dismiss Review, which was filed on February 23, 2018. Petitioner filed a Response on March 6, 2018. A hearing was held before Commissioner Luskin on March 14, 2018, and a record was made.

Procedural History

As background, an Arbitration Decision was issued on November 30, 2017, which found Petitioner sustained a compensable accident on March 3, 2014, his condition was causally related to the accident, and he was entitled to medical expenses, temporary total disability benefits, and permanent partial disability benefits. Petitioner received the decision on December 7, 2017. On December 13, 2017, Respondent filed a motion to correct clerical error pursuant to §19(f) of the Act. The Arbitrator granted that motion and issued a corrected decision on December 20, 2017, clarifying the award for the number of weeks of temporary total disability benefits as Respondent requested.

Petitioner filed a Petition for Review on December 15, 2017 within 30 days of receipt of November 30, 2017 decision. The Petitioner did not file a Petition for Review of the December 20, 2017 corrected decision until February 15, 2018[1]. Petitioner received the corrected decision on December 28, 2017 – a fact Petitioner recites in the Petition for Review filed in February of 2018. Petitioner filed his Motion to Advance Petition for Review that was filed on December 19, 2017, on February 20, 2018. Respondent filed its Motion to Dismiss Petitioner's Petition for Review on

[1] Petitioner mailed his Petition for Review of the December 20, 2017 decision on February 6, 2018.

February 23, 2018. Petitioner filed his response on March 6, 2018.

Conclusions of Law

The Commission does not find Petitioner's arguments that the Corrected Decision was void, persuasive. Petitioner's argument that the Motion for a Corrected Decision under 19(f) should have been accompanied by a Notice of Motion and Order pursuant to 50 Ill. Admin. Code 9020.70, is not supported by the case law nor the practice at the Commission. The Commission does not hold hearings on §19(f) Petitions, but simply either denies the motions or recalls the erroneous decision and enters corrected decisions. Moreover, Rule 9202.70 cannot prohibit the Commission from acting in conformity with §19(f) of the Act. *See Klein Construction/Ill. Ins. Guar. Fund v. Illinois Workers' Comp. Comm'n*, 384 Ill.App.3d 233, 237 (2008) *citing Greaney v. Industrial Comm'n*, 258 Ill.App.3d 1002 (2005). §19(f) of the Act states in pertinent part: "However, the Arbitrator or the Commission may on [her] or its own *motion*, or on the *motion* of either party, correct any clerical error or errors[.] *Emphasis added.* 820 ILCS 305/19(f) (West 2012). Respondent's failure to strictly adhere to Rule 9202.70 does not divest the Commission or the Arbitrator of its duty under §19(f) of the Act.

Petitioner does not argue that he did not receive the Corrected Decision and, in fact, filed a second Petition to Review citing to a December 28, 2017 receipt date of the corrected decision. Petitioner failed to file a Petition for Review to the Commission within 30 days after the Arbitrator issued her Corrected Decision. As a result, the Commission lacked jurisdiction to consider Petitioner's Petition for Review and the Arbitrator's Corrected Decision became the decision of the Commission. *Eddards v. Ill. Workers' Comp. Comm'n* 2017 IL App (3d) 150757WC ¶22

Under the Act, an Arbitrator's Decision becomes the final decision of the Commission unless a Petition for Review is filed by either party within 30 days after the receipt of the Arbitrator's Decision. 820 ILCS 305/19(b)(West 2012). Further, §19(f) of the Act provides in relevant part as follows:

> [T]he Arbitrator or the Commission may on his or its own motion, or on the motion of either party, correct any clerical error or errors in computation within 15 days after the date of receipt of any award by such Arbitrator or any decision on review of the Commission and shall have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision. Where such correction is made the time for review herein specified shall begin to run from the date of the receipt of the corrected award or decision.

820 ILCS 305/19(f) (West 2012).

Thus, where an Arbitrator corrects a decision upon a motion for recall, a party must file a Petition for Review within 30 days after the receipt of the Arbitrator's corrected decision. 820 ILCS 305/19(b), 19(f) (West 2012); *Residential Carpentry, Inc. v. Kennedy*, 377 Ill.App.3d 499, 503 (2007) (noting that where a correction is made pursuant to section 19(f) of the Act, the time for review begins to run from the date of the receipt of the corrected award); *Campbell-Peterson v. Industrial Comm'n*, 305 Ill.App.3d 80, 84 (1999) (same). If the party fails to file the Petition for

Review within the specified time, the Arbitrator's decision "shall become the decision of the Commission and in the absence of fraud shall be conclusive." 820 ILCS 305/19(b) (West 2012)

At issue in this case is whether Petitioner properly perfected review of the Arbitrator's Decision before the Commission. Petitioner's Petition for Review of the original decision was without effect because the issuance of the corrected decision made the original decision a nullity. *Garcia v. Industrial Comm'n*, 95 Ill.2d 467, 469 (1983). Petitioner's failure to timely file a Petition for Review from the Arbitrator's Corrected Decision divested the Commission of jurisdiction to consider Petitioner's appeal. *Schulz v. Forest Preserve District of Cook County*, 344 Ill.App.3d 658, 661-62 (2003); *Campbell-Peterson v. Industrial Comm'n*, 305 Ill.App.3d 80, 84 (1999).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's Motion to Dismiss Review is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Motion to Advance Petition for Review is denied.

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

DATED: JAN 15 2019

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

CJD/dmm
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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

Stan Lesnicki,
Petitioner,

vs. No: 13 WC 09343

ITT Goulds,
Respondent.

19IWCC0025

DECISION AND OPINION ON REVIEW

A Petition for Review having been filed timely by Petitioner herein and notice given to all parties, the Commission, after considering the accident, medical expenses, prospective medical expenses, temporary total disability, benefit rates, employee-employer relationship, occupational disease, penalties and attorney's fees and statute of limitations 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 2, 2018, is hereby affirmed and adopted.

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

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

19IWCC0025

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

DATED: JAN 18 2019

o-01/16/19
jdl/wj
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Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LESNICKI, STAN W
Employee/Petitioner

Case# **13WC009343**

ITT GOULDS
Employer/Respondent

19IWCC0025

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:

0000 LESNICKI, STAN W
5230 S LOREL
CHICAGO, IL 60638

2965 KEEFE CAMPBELL BIERY & ASSOC
SHAWN R BIERY
118 N CLINTON SUITE 300
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Stan W. Lesnicki
Employee/Petitioner

v.

Case # 13 WC 09343

ITT Goulds
Employer/Respondent

19IWCC0025

An *Application for Adjustment 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 **April 13, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [x] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **§25.5 Fraud Referral**

19IWCC0025

FINDINGS

On **April 11, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$53,700.00**; the average weekly wage was **$1,032.70**.

On the date of accident, Petitioner was **41** years of age, *single* with **2** dependent children.

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

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

Respondent shall be given a credit of **$0** 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

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 April 11, 2011 and failed to prove a causal connection between any alleged accidental injuries and his current condition of ill-being.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 2, 2018
Date

ICArbDec p. 2

JUL 2 - 2018

INTRODUCTION/PROCEDURAL BACKGROUND

The matter was tried on April 13, 2018. Petitioner appeared Pro-Se and Respondent was represented by counsel.

At the onset of the hearing, there was a hearing on Petitioner's Petition to Reinstate (the matter having been dismissed for want of prosecution on July 10, 2017) and Respondent's objection to same. The PTR was admitted as Arbitrator's Exhibit 1. The Objection was admitted as Arbitrator's Exhibit 2. The PTR was granted over Respondent's objection and the matter proceeded to trial.

The completed Request for Hearing was admitted as Arbitrator's Exhibit 3.

Prior to the trial and at several prior hearings in this case, Petitioner was advised that if he wished to proceed, he would have to comply with the Workers' Compensation Act, The Rules Governing Practice Before the Illinois Workers' Compensation Commission and the Illinois Rules of Evidence.

FINDINGS OF FACT

Petitioner was employed by Respondent as an operations technician. He was hired in July of 1990. His last day of work for Respondent was April 20, 2011. (RX 3)

Petitioner testified that he was working on April 11, 2011. He wasn't sure which day of the week this was. Petitioner said that his last day of work for Respondent was April 20, 2011. He was not sure if he actually worked on April 11, 2011. Petitioner's Payroll Deposit Advice form dated 4/14/11 showed an end date of 4/15/11 and that 80 regular time hours and 7 overtime hours had been worked during that time. (PX 1) PX 1 does not show the calendar days worked.

Petitioner testified that he was injured at work. He was hit by a rotary steel bar on a vertical burn belt. He got hit on the right side of his head and fell down. He hit his head on the side and his back on other parts of his work piece and the machinery. When asked if he gave any of his doctors that history – is that history in any medical records, Petitioner responded: "I'm not sure, but it must be in some of them." When asked by the Arbitrator to clarify the date of this event, Petitioner said that it was April 20, 2011, the last day that he worked. Petitioner was reminded that he was claiming an accident date of April 11, 2011 at trial and on the Application. The Application for Adjustment of Claim was admitted as RX 4.

Petitioner testified that after the accident he sought medical treatment and gave his providers a history such that he could receive appropriate treatment.

Petitioner testified that he gave notice of his injury to his supervisor, David Joslyn and the facility manager, Robert Duffy, by verbally telling them about the accident. Neither Joslyn nor Duffy testified at trial.

Petitioner signed a Claim for Disability Benefits on April 20, 2011. It states that he was injured at Chiro One Wellness Center, Burr Ridge, IL "injured on adjusting table." The date of injury is "March, 2011". Petitioner stated that he was not claiming or receiving Workers' Compensation for the period of disability claimed. (RX 3) Petitioner received disability benefits of 100% of pay through October of 2011. His employment was terminated in October, 2011 and he has not worked anywhere else.

Petitioner testified that he first sought treatment with his family doctor, Dr. Joseph Rzucidlo ("Dr. R"), right after the accident. Dr. R. signed the APS for petitioner's disability claim on April 21, 2011. The patient's symptoms were listed as thoracic pain. He had tenderness over the upper thoracic area and decreased range of motion. The condition was not related to a work injury. Dr. R. recommended light duty for 3 weeks. (RX 3)

Dr. R's chart note of April 20, 2011 shows that the patient was being seen for thoracic spine pain of 3 weeks duration. The pain started with a chiropractic manipulation in March. Dr. R. referred Petitioner to Dr. Michael Hejna, an orthopedist. There is no history of an injury at work. There are at least 6 other chart notes in Dr. R's records relating his T-spine complaints to a chiropractic manipulation occurring in March of 2011. None of Dr. R's chart notes refer to an injury at work. Dr. R's March 22, 2011 chart states that Petitioner was seen for hyperlipidemia. The physical exam reveals no back pain or joint pain. (PX 3; RX 1)

Dr. R's records contain chart notes from Dr. Hejna. Dr. Hejna's note of May 24, 2011 says that the patient is seen for upper and mid-back pain. The onset was March of 2011. The patient related his complaints to a hard adjustment by a chiropractor. Dr. Hejna diagnosed mid thoracic pain, perhaps related to a contusion of the spinous process. An MRI was ordered and was said to show mild findings (Schmorl's nodes, slight DDD), perhaps some edema caused by the chiropractic injury. Dr. Hejna recommended PT, which was refused by the patient. Dr. Hejna's contact with Petitioner continues through February of 2013, when Dr. Hejna charted that Petitioner said he was unchanged, can't work and was wearing a hard cervical collar (the collar was not being worn at trial). Petitioner presented to have Dr. Hejna document that the Schmorl's nodes were caused by the March, 2011 chiropractic incident. Dr. Hejna refused, saying he would support causation on the edema, but not the Schmorl's nodes. (PX 3)

Dr. R's records reveal several MRI studies (some done in New York) that do not reveal significant findings. (PX 3)

Petitioner was apparently referred to a neurosurgeon, Dr. Andrew Zelby, by Dr. R. Dr. Zelby's June 6, 2011 letter states that the patient is seen for thoracic back pain, with an onset at the end of March after chiropractic manipulation. There was no history of an injury at work. The neurologic exam was normal. The symptoms were thought to be muscular in nature and a CT was ordered. (PX 3; RX 1) Petitioner was seen by Dr. Zelby after the CT (said to show some thoracic spondylosis, degenerative in nature and consistent with age) on June 16, 2011. Dr. Zelby recommended HEP and return to regular work. (RX 1)

Petitioner was seen by an orthopedist, Dr. S. G. Elias, beginning in March of 2016. Dr. Elias wrote a letter to a Nora Cruz, dated March 24, 2016, apparently attempting to relate Petitioner's cervical, thoracic and lumbar spine complaints and conditions to heavy lifting while working for Respondent as a machinist for 28 years. There is no history of any specific work related injury. The last chart not from Dr. Elias is from February of 2018, when the patient complained of low back, neck and thoracic pain. (PX 2)

Petitioner received treatment with Dr. Ahmed Elborno beginning in April of 2012. The history was of an onset of upper and middle back pain, beginning in March of 2011 after an adjustment. There is no history of a work related accident. (PX 1)

Respondent submitted the records of Chiro One, which reveal that Petitioner began treatment there in April of 2007. The records reveal treatment from March 15, 2011 through April 14, 2011. There does not appear to have been any adjustment injury noted. There was no history of a work injury. (RX 2)

Petitioner claimed TTD from April 20, 2011 to April 13, 2018 (the date of hearing). Petitioner had several attorneys in this case and none have filed a Fee Petition. Petitioner submitted no medical bills.

Petitioner said that his back was messed up because of the accident. He has constant pain and cold sensitivity.

Petitioner never received workers' compensation benefits for this claim from Respondent.

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)

Petitioner's testimony is found to be not credible.

WITH RESPECT TO ISSUE (B), WAS THERE AN EMPLOYEE-EMPLOYER RELATIONSHIP, THE ARBITRATOR FINDS AS FOLLOWS:

There was an employee/employer relationship between Petitioner and Respondent on the claimed accident date.

This finding is based upon Petitioner's testimony, PX 1 and RX 3.

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, AND ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment by Respondent on April 11, 2011.

Petitioner first testified that he was struck in the head by a rotary steel bar at work, falling and injuring his back on April 11, 2011. He later said that the date of accident was April 20, 2011, the last day that he worked for Respondent. This testimony alone is sufficient to defeat Petitioner's claim. There was no accident on April 11, 2011.

Further, the records of Dr. Rzucidlo show treatment on April 20, 2011 for thoracic spine pain related to a chiropractic manipulation in March of 2011. There is no history of a work related injury on April 11, 2011 or any other date. "It is presumed that a declaration to a treating physician as to one's physical condition and the cause thereof is true because the patient will not falsify such statements to the one from whom he expects to get medical aid." Shell Oil Co. v. Industrial Commission, 2 Ill.2d 540, 602 (1954) Here the history given to the initial medical provider is of an injury from a chiropractic manipulation. The lack of a history of a work injury persuades the Arbitrator that no such injury occurred.

The submitted records of Dr. Hejna, Dr. Zelby and Dr. Elborno also relate Petitioner's back complaints to a chiropractic manipulation injury and support the Arbitrator's finding on the issue of accident. Finally, both Petitioner and Dr. R. affirmed that Petitioner's thoracic spine pain condition was not due to a work injury on the Claim for Disability. There is no documentary evidence supporting Petitioner's testimony regarding a work accident.

The Arbitrator finds that Petitioner failed to prove a causal connection between his alleged accident at work on April 11, 2011 and his current condition of ill-being.

This finding is based on the Arbitrator's finding regarding accident, above, and the medical records which fail to support causation. In the absence of a competent and persuasive medical opinion on causation regarding Petitioner's spinal condition, the Arbitrator will not endorse causation regarding same in this case.

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

Petitioner gave Respondent timely Notice, within the meaning of §6 of the Act. This finding is based on the Claim for Disability, RX 3.

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, AND ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, AND 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 his employment by Respondent on April 11, 2011 and failed to prove a causal connection between any alleged work accident and his current condition of ill-being, the Arbitrator needs not decide these issues.

WITH RESPECT TO ISSUE (O), §25.5 FRAUD REFERRAL, THE ARBITRATOR FINDS AS FOLLOWS:

If Respondent is so inclined, it has the right, pursuant to §25.5(d) of the Act, to report allegations of fraud to the Department of Insurance for investigation. The Arbitrator makes no finding on the ultimate issue of fraud in this case.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Debora Bloom,
Petitioner,

vs. No: 15 WC 16353

Greater Peoria Mass Transit District,
Respondent.

19IWCC0026

DECISION AND OPINION ON REVIEW

A Petition for Review having been filed timely by Petitioner herein and notice given to all parties, the Commission, after considering the accident, temporary total disability, Petitioner's permanent partial disability, and notice 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 November 21, 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.

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

DATED: JAN 18 2019

o-11/28/18
jdl/wj
68

Joshua D. Luskin

Charles J. DeVriendt

DISSENTING OPINION

A claimant who suffers from a pre-existing condition may recover benefits under the Act where an accident aggravates or accelerates her condition. *International Vermiculite Company v. The Industrial Commission*, 77 Ill. 2d 1 (1979). Further the accident must be a factor which contributes to the disability. *Caterpillar Tractor Co. v. The Industrial Commission*, 92 Ill. 2d 30 (1982). Mere correlation of symptoms is not enough as causation between the accident and the resulting disability must exist. *Long v. The Industrial Commission*, 76 Ill. 2d 561 (1979). Further, as the Supreme Court of Illinois noted in *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026 (1987), "an employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process." Petitioner failed to prove her condition is work-related. Therefore, I respectfully dissent.

Petitioner testified she began her employment with Respondent in June of 2012 as a bus driver with full time employment as of 2013. T. 13-14. Petitioner worked shifts ranging from 10 to 13 hours during which she was generally allowed breaks. T. 16. Petitioner's job duties required her to use her hands to adjust the seat, release the brake, operate a lever to open/close the doors, operate levers to allow wheel chair access, and holding the steering wheel to operate the bus. T. 16-22. Petitioner's Exhibit 1 is a job description created by Petitioner which is consistent with her testimony.

Petitioner testified on and around April 27, 2015, she was working long hours and noticed her hands would become completely numb at night, and she would experience cramping in her hands when gripping the steering wheel. T. 30. Petitioner testified she previously noticed similar symptoms in 2008 which caused her to seek medical treatment. T. 31-32. Petitioner was diagnosed with carpal tunnel syndrome in 2008. T. 32.

The medical records evidence Petitioner sought treatment from Dr. Ahearn who recommended an EMG. PX3. An EMG performed on October 10, 2008 evidence moderately severe carpal tunnel syndrome bilaterally with the right slightly more affected than the left and right cubital tunnel syndrome. RX5. Of note, Petitioner provided a history of repetitive work activities experienced while performing her job as a phlebotomist and was provided a recommendation for surgery. *Id.*

The medical records evidence Petitioner sought treatment on November 5, 2014 with her primary care physician, Dr. Johnson, complaining of symptoms consistent with carpal tunnel syndrome. RX7. Dr. Johnson referred Petitioner to a hand surgeon, Dr. Mahoney. On December 2, 2014, Dr. Mahoney evaluated Petitioner who provided a history of aching, throbbing, and constant numbness in her hands with an onset of symptoms approximately six to seven years prior. Dr. Mahoney diagnosed Petitioner with bilateral cubital tunnel and carpal tunnel syndromes. RX8.

Petitioner subsequently came under the care of Dr. Neumeister who evaluated Petitioner on June 17, 2015. Petitioner provided a history of numbness and tingling in both hands for a ten-year duration with an increase of symptoms while driving a bus. PX5. Dr. Neumeister performed surgery on Petitioner's wrists/elbows on July 14, 2015 for her right and August 25, 2015 for her left. *Id.*

On April 25, 2016, Dr. Neumeister provided his causation opinion via evidence deposition. PX6. Dr. Neumeister testified Petitioner's job duties as a driver aggravated her condition. Specifically, Dr. Neumeister testified as follows: "Yeah, I would think that this could aggravate it. I think if the symptoms come on while she is doing those activities and they dissipate or go away when she is relaxed and not doing activities, that those activities are in fact aggravating the condition." PX6, p. 22. On cross-examination, Dr. Neumeister conceded that the majority of the patients he treats have a natural progression of the disease, and Petitioner's worsening of symptoms was consistent with the natural progression of the disease. PX6, p. 26-27.

On March 7, 2016, Dr. Cohen evaluated Petitioner pursuant to Section 12 of the Act at the Respondent's request. On August 29, 2016, Dr. Cohen provided his causation opinion via evidence deposition. RX1. Dr. Cohen testified Petitioner's job duties neither caused nor aggravated her conditions. RX1, p. 9-12. Specifically, Dr. Cohen testified as follows: "The most common complaint for people who have carpal tunnel syndrome involves waking up in the middle of the night with tingling and numbness. No one suggested sleep is a causative factor for carpal tunnel syndrome. It's the same concept." RX1, p. 16.

As the Court noted in *Sisbro, Inc. v. The Industrial Commission*, 207 Ill. 2d 193, 212-13 (2003):
Every employee whose disease or preexisting condition disables him while at work is not automatically entitled to a recovery under the Workmen's Compensation Act. In *Carson-Payson Co. v. Industrial Com. (1930), 340 Ill. 632, 639, 173 N.E. 184*, this court said, quoting from Lord Chancellor Loreburn's opinion in *Hughes v. Clover, Clayton & Co.* (1910), 102 L.T.R. 340, 342, *aff'g* (1909) 2K.B. 798, 101, L.T.R. 475: "In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that, whatever the man had been doing, it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone, or from the disease and employment taken together, looking at it broadly. *County of Cook, 68 Ill. 2d at 31-31.*"

Further, as the Court noted in *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026 (1987), "an employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process." "There is no requirement that a certain percentage of time be spent on a task in order for the duties to meet the legal definition of 'repetitive.'" *Edward Hines Precision Components v. Industrial Commission*, 356 Ill. App. 3d 186, 192, 825 N.E.2d 773 (2005). Instead, the Commission may review the manner and method of a claimant's job to determine if such duties are sufficiently repetitive to establish a compensable accident under a repetitive trauma theory of recovery. See *Williams v. Industrial Commission*, 244 Ill. App. 3d 204, 211, 614 N.E.2d 177 (1993), citing *Perkins Product Co. v. Industrial Commission*, 379 Ill 115, 120 (1942) ("the claimant's injury 'was directly connected with the manner and method in which she was required to do her work, and to use her arm in the discharge of her duties'").

Petitioner failed to prove a causal relationship between her work duties and her conditions of ill-being (cubital tunnel syndrome and carpal tunnel syndrome). Both Dr. Neumeister and Dr. Cohen agree that Petitioner's job duties as a bus driver did not cause her conditions. Where they differ is relative to a theory of aggravation. I would afford greater weight to the opinions of Dr. Cohen.

Dr. Cohen explained the fact Petitioner's symptoms manifested while driving the bus does not equate to an aggravation of the underlying condition. Instead, Petitioner's conditions were naturally progressing with certain activities such as sleeping or driving causing the symptoms to be more prescient. Dr. Neumeister conceded as much during his deposition.

More importantly, Petitioner's own testimony and medical treatment establishes the ongoing natural progression of her conditions. Petitioner testified in and around April of 2015 she began experiencing numbness at *night*. Again, by Petitioner's own testimony she was diagnosed with bilateral carpal tunnel syndrome in 2008. Further, the medical records establish Petitioner consistently described symptoms of numbness, tingling, and achiness with an onset in 2008. Dr. Mahoney's November 18, 2014 note memorialized the following: "Reportedly had bilateral CTS, right CuTS. Report not available [October 10, 2008 EMG]. Was told she should have surgery but did not do surgery. There is now constant tingling worse at night. There is aching pain[.]" Dr. Neumeister's June 17, 2015 note memorialized the following: "Ms. Bloom is here for reevaluation of ongoing numbness and tingling that she has on the right hand as well as the left hand. She complains that the numbness and tingling involves [*sic*] the thumb, index, long, ring, and little finger. She has had this for almost 10 years. In 2008, she was tested with a nerve conduction study and found that she had mild carpal tunnel syndrome and possible cubital tunnel syndrome. She has recently had another nerve conduction study and assessed at the Midwest Orthopedic Center in December *finding the same findings*." (Emphasis added).

Petitioner was diagnosed with bilateral carpal tunnel syndrome and right cubital tunnel syndrome in 2008 with a recommendation of surgery. She declined surgery at the time. Since 2008, her symptoms have persisted with an increase of symptoms at night due to the natural progression of her conditions. Her job duties were not repetitive and neither caused nor aggravated her condition. Accordingly, I dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BLOOM, DEBORA
Employee/Petitioner

Case# **15WC016353**

19IWCC0026

GREATER PEORIA MASS TRANSIT DISTRICT
Employer/Respondent

On 11/21/2017, 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 1.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1727 LAW OFFICES OF MARK N LEE LTD
KEVIN MORRISSON
1101 S SECOND ST
SPRINGFIELD, IL 62704

0358 QUINN JOHNSTON HENDERSON ET AL
JOHN KAMIN
227 N E JEFFERSON ST
PEORIA, IL 61602

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DEBORA BLOOM,
Employee/Petitioner

v.

GREATER PEORIA MASS TRANSIT DISTRICT,
Employer/Respondent

Case # 15 WC 16353

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 **Peoria**, on **December 15, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7/14/15**, 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$42,781.44**; the average weekly wage was **$822.72**.

On the date of accident, Petitioner was **58** years of age, *single* with **no** dependent children.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services, as set forth in Petitioner's Exhibit 7, 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 $548.48/week for 20 5/7 weeks, commencing 7/14/15 through 12/6/15, as provided in Section 8(b) of the Act.

Respondent shall be given a credit for temporary total disability benefits that have been paid

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of $493.63/week for 101.26 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused 10 % loss of the right hand (19 weeks), 10 % loss of the left hand 19 weeks), 12.5 % loss of the right arm (63.26 weeks), and 12.5 % loss of the left arm (63.26 weeks).

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

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

Michael K. Nowak, Arbitrator

11/16/17
Date

NOV 2 1 2017

FINDINGS OF FACT

Petitioner is a 59- year- old bus driver for CityLink, Greater Peoria Mass Transit District. She has been so employed since June of 2012. Petitioner works 38 hours a week currently but in 2013 Petitioner was working 50 hour weeks. Petitioners' job in those years would start at 4:30 in the morning and she would work a 13- hour shift. Petitioner testified that there are no scheduled breaks during her job.

Petitioner described that as a bus driver, the first thing she does in the morning is check the mechanics of the bus to make sure everything is in order. Petitioner then adjusts her seat using various knobs and levers. Petitioner then releases the air brake which she testified had to be pushed down, with some buses requiring a great deal of force while others are not quite as difficult. As passengers get on and off the bus Petitioner will have to use a lever to open and close the doors but described this lever as an easy twisting motion to open and close the front and rear door of the bus.

Petitioner will have to use a lever to raise and lower the bus, using another lever to let disabled passengers on and off the bus. Petitioner will use a knob to put down a wheelchair ramp when necessary. But if that does not work Petitioner would have to manually use an item she called a key that is T- Shaped and use that to lift the wheelchair ramp out. Petitioner estimated that this happens maybe 10 percent of the time.

Petitioner uses both hands on the wheel when she drives the bus, and she has to keep a snug grip on the wheel to navigate potholes and the roads with a heavy 40 foot bus. Petitioner identified the pictures of her sitting in the bus and how she would normally sit in said position when she drove the bus. Petitioner testified there is no comparison between the driving of a bus and a personal vehicle with the bus being much heavier and taking a lot more physical exertion to turn the wheel of the bus.

On the date of 4/27/2015, Petitioner was working a lot of hours but noticed she had numbness and pain in her hands at night. When driving the bus and gripping the steering wheel Petitioner hands would cramp up and it would get increasingly difficult to do her job. Petitioner testified that as the day would go on her symptoms would increase when she was working but when she was not working they were present but did not get worse as the day went on.

Petitioner had first noticed her hands getting numb in 2008. In 2008 she had an EMG performed and was diagnosed with bilateral carpal tunnel. Petitioner testified that Dr. Ahearn recommended that she may need surgical treatment for her condition in the future but it was up to her if she wanted to pursue it. The EMG from 10/10/2008 was entered into evidence. It reported an onset of symptoms of, weakness, achiness and that her hands go to sleep at night and wake her up for 6 months. There was no history of injury, but it was noted that Petitioner does use repetitive movements constantly throughout the day. The report diagnosed Petitioner with bilateral moderately severe carpal tunnel and recommended definitive management of the median entrapment.

Dr. Ahearn's office reported on this injury was 4/17/2009. This was six months after the EMG study and Petitioner still had not sought more treatment. Petitioner testified that her symptoms were not that bad at the time and were manageable. After Petitioner started with Respondent her symptoms got worse and it would cause her to wake up at night. Petitioner specifically mentioned that during the day of driving gripping the steering wheel would hurt her hands. During the years after her initial diagnosis of bilateral carpal tunnel in

2008 and her hire by Respondent in 2012, Petitioner testified that her hand symptoms were manageable. After being hired by Respondent in 2012, she testified that her symptoms gradually got worse over a couple years.

Petitioner's sought treatment with Dr. Les Johnson on 11/5/2014. Petitioner reported that her bilateral carpal tunnel syndrome was worse on the right, had an EMG NCV several years ago and also experiences some pain in her palms. Petitioner was then referred to Midwest Orthopedic.

Petitioner's initial dates of treatment with Dr. John D. Mahoney at Midwest Orthopedic were on 11/18/2014 and 12/2/2014. She gave the history that a previous bilateral EMG had taken place but couldn't remember where or with whom she had the test done. It was reported that surgery was recommended but no surgery was scheduled. Petitioner underwent a new EMG that showed bilateral cubital tunnel and mild right carpal tunnel. Petitioner would like to have surgery but wanted to wait until early summer. The intake filled out in her initial visit was entered into evidence. In the intake form Petitioner checked no when asked if this was an injury from her job. However, when listing what makes her symptoms worse she noted that holding a grip for a long period caused pain and cramping.

Petitioner credibly testified that when she saw Dr. Johnson and Dr. Mahoney she was not sure if she had a workers' compensation claim because she had been diagnosed before her employment with Respondent. It wasn't until she was informed by her Union President, Ron Cox, on 4/27/2015 that she realized her condition could still be considered work related. Petitioner testified that her conversation with Mr. Cox was within 45 days of her reporting her injury to the Respondent. Petitioner then told the dispatcher, Candy Brown, and reported it to Mr. Green. Petitioner continued to work throughout this time.

The next records entered into evidence was a telephone encounter with Dr. Johnson's office on 5/7/2015. The message was that the injury is now a workman's comp case and Midwest will not do surgery. Petitioner asked for a doctor in Springfield, Dr. Michael Neumeister. It is worth noting that her symptoms are worse while holding a steering wheel and now Midwest Orthopedic won't do surgery.

Petitioner then consulted with Dr. Neumeister to treat her condition. The initial intake form filled out by Petitioner on 6/17/2015 said that Petitioner had carpal tunnel/cubital tunnel in both arms and condition was worsening with many hours of driving a city bus causing cramping, numbness and weakened grip. In the history taken by Dr. Neumeister, Petitioner stated she had these complaints for nearly 10 years and that in 2008 she had a nerve conduction study. Petitioner complained that driving brings on her symptoms and she is required to drive 12 to 13 hour days with increased pain while she is on the steering wheel. Petitioner then was ordered to undergo a right carpal tunnel and cubital tunnel release.

On 7/14/2015, Petitioner underwent her first surgery on her right carpal tunnel syndrome and right cubital tunnel syndrome. She reported good results from surgery on the 7/30/2015 follow-up visit with Dr. Neumesiter.

The second surgery on 8/25/2015 was performed on Petitioner's left cubital tunnel and left carpal tunnel syndrome. Petitioner then followed up on 9/28/2015. Petitioner complained that she still experiences cramping and numbness in her bilateral hands and is still was unable to return to work but she does not wake up with numb hands anymore. Dr. Neumeister office suggested that she may need another EMG to evaluate her on-going symptoms and excused her from work for an additional 6 weeks.

On 11/9/2015 it was noted that Petitioners symptoms had improved some and continued her off work until December. It was noted that Petitioner was recovering well but a little slowly, Dr. Neumeister recommended a follow up in 6-8 weeks to re-evaluate. Petitioner returned to work and did not return to Dr. Neumeister. Petitioner testified she missed work from 7/14/2015, the date of her first surgery, through 12/6/2015.

Petitioner still had on-going complaints at the time of trial but surgery did resolve her waking up in the middle of the night with numbness and tingling. Petitioner noted that gripping the buses steering wheel still increasing her symptoms. She also noted that she continues to have problems with gripping anything. Petitioner also noted that she has trouble with chores at home and her husband has to assist her.

Dr. Neumeister's sworn testimony was taken in the form of a deposition on April 25, 2016. Dr. Neumeister addressed the treatment of Petitioner's condition. Dr. Neumeister testified that based upon her last date of treatment it may take a little while for her to heal or there is a possibility that her condition does not return to a normal state at all. Dr. Neumeister also reviewed the same pictures and identified by the Petitioner on the date of trial of her sitting on the bus. Dr. Neumeister also testified that the ergonomics of a person's work station and prolonged gripping could lead to the aggravation of bilateral carpal tunnel and cubital tunnel. Dr. Neumeister was given a lengthy hypothetical with the job duties and hours of the Petitioner was consistent with the un-rebutted testimony of the Petitioner given at the time of trial. He was also given a history of her medical care that was consistent with what the Petitioner testified at the date of trial. Dr. Neumesiter opined that the Petitioner's ergonomics of her work station along with long periods of forceful gripping long periods of forceful gripping aggravated her underlying cubital tunnel and carpal tunnel conditions to the point where surgical intervention was necessary. He gave this opinion even with the knowledge of her medical history with these conditions and noted the significant progression of symptoms following her employment with Respondent.

Petitioner underwent a section 12 examination with Dr. Cohen on 3/7/2016. Dr. Cohen reviewed Petitioner's medical history and job history during his examination. Dr. Cohen did not relate either Petitioner's bilateral cubital tunnel or bilateral carpal tunnel conditions to her work with Respondent. He did note in the report that Petitioner reported to him that she sought treatment in 2014 due to worsening symptoms of her hands. Dr. Cohen based his opinion that both cubital tunnel and carpal tunnel are usually idiopathic in etiology. Dr. Cohen was deposed and confirmed that in 2008 the Petitioner only suffered from carpal tunnel not cubital tunnel from his review of the record. Dr. Cohen then gave the opinion that Petitioner's carpal tunnel condition was not work related as outlined in his letter due to the fact she had already been diagnosed in 2008 and he did not think her work activities would cause carpal tunnel syndrome. Upon viewing the pictures of Petitioner sitting in a bus, Dr. Cohen did not think that the position she was sitting in would contribute to the development of cubital tunnel condition.

CONCLUSIONS

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

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 902 N.E.2d 1269 (2009). Hence, the Supreme Court has established a flexible but fair standard for determining manifestation dates in repetitive

trauma claims. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007). Although the date on which the employee becomes aware that he has a condition related to work was the first method for determining a manifestation date, it is not the only permissible means for alleging or proving manifestation. The manifestation date can be set as: (a) the date the employee actually became aware of the physical condition and its relation to work through medical consultation; (b) the date the employee requires medical treatment; (c) the date on which the employee can no longer perform work activities; or (d) when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007), *see also Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (Ill. 1987); *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill.App.3d 607, 531 N.E.2d 174 (3rd Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

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

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

The Supreme Court in *Durand* noted that the manifestation date is typically set on the date the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Durand*, 862 N.E.2d at 929. The law also allows Petitioner to select a manifestation date that coincides with discovery of injury and its relation to work after medical consultation. See *Steven Beal v. Town of Normal*, 06 IL.W.C. 25261, 10 I.W.C.C. 0380 (2010); *see also White v Worker's Compensation Commission*, 374 Ill.App.3d 907, 873 N.E.2d 388, 392-393 (4th Dist. 2007) (holding Petitioner could select accident date); *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 841-842 (1st Dist. 1999).

In *Linda Peters v. Village of Caseyville*, the Commission gave the most weight to when the claimant possessed a "confirmed diagnosis" of her condition in setting the manifestation date. *Linda Peters v. Village of Caseyville*, 14 I.W.C.C. 0796 (2014). The Commission stated:

> The Commission finds that the manifestation date of Petitioner's right carpal tunnel syndrome was March 1, 2012. Although the parties had stipulated to an accident date of September 1, 2010, we find that it is within our discretion to change the accident date to conform-to the evidence. *See Beal v. Town of Normal*, 10 IWCC 380 (2010). The medical records are clear that the first mention of any correlation between Petitioner's right carpal tunnel syndrome and her work duties is the March 1, 2012, office note of Dr. Mirly. Although Petitioner's report of injury on March 2, 2012, indicates a date of accident of "Sept 2011," we find that this is not an appropriate manifestation date in this case because Petitioner did not have a confirmed diagnosis at that time. Based on our determination of the date of accident, we find that Petitioner provided timely notice of her accidental injuries. *Id.*

In this case Petitioner alleged an accident date of 4/27/2015, the date she learned her current condition could be related to her employment despite having been diagnosed in 2008. Her unrefuted testimony indicates she told the dispatcher, Candy Brown, and reported it to Mr. Green on or about 4/27/2015. Petitioner continued to work throughout this time.

In *Durand* and *Oscar Mayer, supra* the courts recognized that the "date of collapse" method of determination, setting the manifestation date on the date of surgery, or the date the employee could no longer work was appropriate. In this case Petitioner diligently served her employer until she could no longer do so without intervention for his repetitive injuries on the date of her first surgery on 7/14/2015.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that 7/14/2015, is the appropriate manifestation date under the Act. Petitioner has met her burden of establishing her date of accident and further has provided proper notice as required by the Act.

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

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

An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Commission*, 128 N.E.2d 718, 720 (Ill. 1955); *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (Ill. 1982). In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture*, 99 I.I.C. 0961 (1999). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003) (emphasis added). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000).

In *Edward Hines Precision Components v. Indus. Comm'n*, 825 N.E.2d 773, (2nd Dist. 2005). the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (2nd Dist. 1991) and *Edward Hines supra.*

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

In this case, the evidence shows that although Petitioner had been diagnosed with bilateral carpal tunnel in 2008, her testimony and the medical records support that her condition was not severe enough for her to pursue surgical intervention. Both the treating physician and section 12 examiner agreed that for them to perform surgery they look at the presentation of symptoms. Respondent submitted records from 2008 and 2009, which establish Petitioner had been diagnosed and treated at that time. However, it is uncontested that Petitioner never sought surgical consultation for her condition until 2014, 4 years after she had started work with Respondent.

It was Petitioner's un-rebutted testimony it was her long hours, 12-13 hour days, in early 2014 that led her to seek treatment. While it is true she did not relay this specifically to her first treating physician she did report that extended gripping brought on and aggravated her symptoms. Petitioner then waited to schedule her surgery until later that year.

Petitioner gave a lengthy, detailed and believable accounting of her hours, and job duties as a bus driver on the date of trial. This testimony was un-rebutted and Respondent brought no witnesses or evidence to contradict this testimony other than a short video of Petitioner using a hand brake. In said video it does appear to be easy to engage or disengage the air brake, but this was consistent with Petitioner's testimony and the hypothetical given to Dr. Neumeister. Petitioner testified that some buses had more difficult air brakes and some have easier air brakes. But the main crux of Petitioner's argument was the prolonged periods of gripping the bus steering wheel and her position of driving that contributed to her development of bilateral carpal tunnel and cubital tunnel. Respondent offered no evidence to suggest that this testimony was either exaggerated or incorrect at the time of trial.

The Arbitrator finds the testimony of Dr. Neumeister to be more persuasive then that of Dr. Cohen in this regard. Dr. Neumeister was given a lengthy hypothetical at the time of his deposition and gave the opinion upon viewing Petitioner's driving position via pictures entered into evidence and a lengthy hypothetical consistent with the testimony given at the date of trial that Petitioner's bilateral carpal tunnel and cubital tunnel was aggravated by her work with Respondent. He based this upon her statements regarding her symptoms being

worse while performing the activity, the ergonomics of her driving, and the prolong gripping of the steering wheel. Dr. Neumeister also opinioned that Petitioner could have further aggravated her already diagnosed condition by these activities. And while Dr. Cohen did not agree that Petitioner work activities could have aggravated her condition he did agree on cross examination it was possible to further aggravate an already symptomatic condition.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met her burden of establishing that she sustained accidental injuries which arose out of and in the course of her employment with Respondent and that her current condition(s) of ill-being are causally related to the 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?

Having made the above findings in this claim, the Arbitrator finds that the treatment Petitioner has received, to date to be both reasonable and necessary. Both Dr. Neumeister and Dr. Cohen's opinions confirm this finding.

Respondent shall pay reasonable and necessary medical services, as set forth in Petitioner's Exhibit 7, 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.

Issue (K): What temporary benefits are in dispute?

Having made the above findings, the Arbitrator finds that Petitioner is entitled to temporary total benefits for 20 5/7 weeks from 7/14/2015 through12/6/2015.

Respondent shall pay Petitioner temporary total disability benefits of $548.48/week for 20 5/7 weeks, commencing 7/14/15 through 12/6/15, as provided in Section 8(b) of the Act. Respondent shall be given a credit for temporary total disability benefits that have been paid

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes Petitioner continues to work as a bus driver using her upper extremities. Petitioner testified that although her condition is

improved following surgery she still experiences symptoms. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 58 years old at the time of her injuries. Petitioner has diminished healing capacity and a low threshold for future injury as a result thereof. Furthermore, Petitioner has hand and arm intensive employment as a bus driver. 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. As a result of her intensive, repetitive employment, Petitioner developed bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome which required surgery. Petitioner testified at Arbitration that despite the improvement resulting from surgery, she continues to experience symptoms in her hands. Petitioner also had complaints about cooking, heavy gripping and inability to do some household work. Despite her continued symptoms, Petitoiner has not sought further treatment at this time. The Arbitrator further notes that Dr. Neumeister testified that it may take a while for Petitioner to heal or there is a possibility that her condition will never return to a normal state. Because the medical records and evidence taken as a whole corroborate the Petitioner's complaints of pain, weakness and loss of function in her hands, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of each hand and 12.5% loss of use of each arm pursuant to §8(e) of the Act.

Respondent shall pay Petitioner the sum of $493.63/week for 101.26 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused 10 % loss of the right hand (19 weeks), 10 % loss of the left hand 19 weeks), 12.5 % loss of the right arm (63.26 weeks), and 12.5 % loss of the left arm (63.26 weeks).

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF PEORIA	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jack Morris,
Petitioner,

vs. No. 13 WC 26023

Image Air,
Respondent.

19IWCC0027

DECISION AND OPINION ON REVIEW

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

The Arbitrator found Petitioner's right knee injury causally related to his September 14, 2012 accident, but not his left knee injury. The Arbitrator awarded Petitioner 6-4/7 weeks of temporary total disability ("TTD") benefits (September 28, 2012 through November 13, 2012); 13-5/7 weeks of temporary partial disability ("TPD") benefits (November 14, 2012 through February 17, 2013); reasonable and necessary medical services for his right knee from September 14, 2012 through August 5, 2013, and permanent partial disability ("PPD") benefits representing 15% loss of his right leg.

Respondent claims the Arbitrator erred in awarding Petitioner TTD benefits after October 15, 2012, the date through which the parties stipulated on Arb. Ex. #1 that TTD was due. Petitioner claims the Arbitrator erred in not finding his left knee injury compensable, and seeks additional TTD and medical expenses related to his left knee condition, as well as additional permanent partial disability benefits for 15% loss of use of his left leg.

Petitioner testified that on September 14, 2012, he was employed by Respondent, Image Air, as a part-time line technician. He was also concurrently employed by State Farm as a full-time analyst. His duties at Respondent included fueling and moving aircraft, helping with luggage and doing whatever else was needed. On September 14, 2012, as Petitioner was exiting a fueling truck, he slipped on the wet metal step, striking his right leg against the side of the truck, twisting it one way and his left leg, the other. He was spun around and noticed pain in both legs. On September 24, 2012, Petitioner saw Dr. Li, who examined both knees and ordered bilateral MRI's. The right knee MRI was performed on September 24, 2012; the left, on September 26, 2012. At that time, Dr. Li only recommended Petitioner undergo right knee arthroscopic surgery and performed that procedure on September 28, 2012.

During the three months after his accident, Petitioner made few if any complaints of any left knee pain. On October 4, 2012, he completed and signed a handwritten statement in which he described his, "body parts injured," as: "Right knee fractured and torn meniscus." Petitioner did not mention any injury to his left knee in either his employer's accident report or his statement. Petitioner received no treatment to his left knee from his date of accident through July 2013. Then, Dr. Li first began documenting Petitioner's complaints of left knee pain. Following unsuccessful conservative treatment, Petitioner underwent left knee arthroscopic surgery on August 27, 2013.

Debra Hindrichs, Respondent's HR representative, testified that Petitioner sent an email on September 26, 2012, in which he reported a work-related injury involving his right knee only. She testified Petitioner also completed part of a Form 45, indicating thereon that he only injured his right knee in his accident. Ms. Hindrichs denied Petitioner told her he had injured his left knee in his accident, contrary to Petitioner's testimony that he did.

Dr. Lawrence Li testified on behalf of Petitioner via deposition that when he first saw Petitioner after his accident, he reported stepping over something and landing wrong. Ten months later, on July 11, 2013, Petitioner first told Dr. Li he had injured *both* knees in his September 2012 accident. Because it made sense to Dr. Li that Petitioner had injured both knees at that time, he gave an opinion that Petitioner's September 14, 2012 work accident could have caused his condition of ill-being in both of his knees. Dr. Li conceded that Petitioner had no left knee complaints from before November 6, 2012 until July 2013.

Dr. Michael Lewis, Respondent's Section 12 expert, conducted two examinations of Petitioner: on December 13, 2012 and July 19, 2013. The first documentation in any medical record that Petitioner was claiming an injury to his left knee from his accident was in Dr. Lewis' December 18, 2012 IME report. In it, Dr. Lewis noted, "Mr. Morris was somewhat vague in his history, but believed that while at work on September 14, 2012 he slipped on a wet step, struck and/or twisted his right knee and may have struck his left knee." At Dr. Lewis' July 19, 2013 exam, the only injury Petitioner reported was to his right knee. Dr. Lewis opined Petitioner's left knee condition was not related to his work accident. At his deposition, Dr. Lewis testified that Petitioner's arthritis could have caused his medial meniscus tear depicted on his September 2012 left knee MRI even absent any acute injury. Dr. Lewis testified the presence of a meniscus tear in no way suggests that it was an acute finding following an injury.

The Commission affirms the Arbitrator's finding that Petitioner did not prove he sustained accidental injury to his left knee in his September 14, 2013 accident. He failed to report a left knee injury at that time or when given several opportunities to do so in the succeeding months. The Commission finds the testimony of Debbie Hindrichs, denying Petitioner reported a left knee injury to her, more credible than Petitioner's testimony.

Dr. Li's contemporaneous record dated September 24, 2012 did not document any history of a left knee injury at work. His medical records between November 6, 2012 and December 5, 2012, reported Petitioner's left knee was fine. On December 5, 2012, Dr. Li reported Petitioner's left knee medial meniscus tear was, "asymptomatic." Medical records between January 4, 2013 and June 3, 2013 documented no left knee symptoms or complaints. On May 30, 2013 and June 3, 2013, Dr. Li reported Petitioner's left knee exams were, "normal." Only after Petitioner's left knee became symptomatic in July 2013 did Petitioner first tell Dr. Li that he injured it in his September 14, 2012 work accident.

Although Petitioner was diagnosed with a torn left medial meniscus following his September 26, 2012 MRI, the Commission finds that to be insufficient proof that it was torn during Petitioner's September 14, 2012 accident, given his dearth of left knee complaints for ten months following the accident. The Commission also finds persuasive Dr. Lewis' testimony that meniscus tears can occur without a traumatic event; can be asymptomatic, and in Petitioner's case, could have been caused by his preexisting arthritis.

The Commission modifies the Arbitrator's award of TTD for two reasons. First, on the Request for Hearing sheet, Petitioner claimed TTD benefits related to his right knee injury only through October 15, 2012. The Commission finds that assertion binding on Petitioner. Second, Petitioner testified that he returned to both of his jobs "soon after" October 15, 2012. Accordingly, the Commission vacates the Arbitrator's award of TTD beyond October 15, 2012 and finds Respondent liable to pay Petitioner 2-4/7 weeks of TTD, from September 28, 2012 through October 15, 2012.

Regarding TPD benefits, the Commission affirms the Arbitrator's award finding Respondent liable to Petitioner for TPD between November 14, 2012 and February 17, 2013, because Respondent stipulated to that on the Request for Hearing sheet.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 24, 2017, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is modified, and Respondent shall pay Petitioner temporary total disability benefits of $899.59/week for 2-4/7 weeks, commencing on September 28, 2012 through October 15, 2012, as provided by §8(b) of the Act.

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

19IWCC0027

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 18 2019

o-11/28/18
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MORRIS, JACK
Employee/Petitioner

Case# **13WC026023**

IMAGE AIR
Employer/Respondent

19IWCC0027

On 5/24/2017, 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 1.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

3998 ROSARIO CIBELLA LTD
JANE RYAN
116 N CHICAAGO ST SUITE 600
JOLIET, IL 60432

STATE OF ILLINOIS)

)SS.

COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JACK MORRIS,
Employee/Petitioner

v.

IMAGE AIR,
Employer/Respondent

Case # 13 WC 26023

Consolidated cases: ____

19IWCC0027

An *Application for Adjustment 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 **Peoria**, on **2/17/17 and 4/25/17**. 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. [x] Was timely notice of the accident given to Respondent?

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

L. [x] What is the nature and extent of the injury?

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other ____

FINDINGS

On **9/14/12**, 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 to his right knee that arose out of and in the course of employment.

Timely notice of the accident to his right knee *was* given to Respondent.

Petitioner's current condition of ill-being as it relates to his right knee *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**$70,167.76**; the average weekly wage was $**1,349.38**.

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

Respondent shall be given a credit of $**1,713.29** for TTD, $**521.56** for TPD, $**0.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**2,234.85**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an injury to his left knee that arose out of and in the course of his employment by respondent on 9/14/12. Petitioner's claim for compensation as it relates to his left knee is denied.

Respondent shall pay Petitioner temporary total disability benefits of $899.59/week for 6-4/7 weeks, commencing 9/28/12 through 11/13/12, as provided in Section 8(b) of the Act. Respondent shall be given credit for the $1,713.29 it has already paid in temporary total disability benefits.

Respondent shall pay Petitioner temporary partial disability benefits totaling $521.56 for the period 11/14/12 through 2/17/13, as provided in Section 8(a) of the Act. Respondent shall be given credit for the $521.56 it has already paid in temporary partial disability benefits.

Respondent shall pay reasonable and necessary medical services for his right knee from 9/14/12 through 8/5/13, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall pay no medical expenses for medical services for petitioner's left knee.

Respondent shall be given a credit for medical benefits that have been paid for petitioner's right knee, 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/week for 32.25 weeks, because the injuries sustained caused the 15% loss of the petitioner's right leg, as provided in Section 8(e) of the Act.

19IWCC0027

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

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

Maureen H. Pulia

Signature of Arbitrator

5/12/17
Date

ICArbDec p. 2

MAY 24 2017

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 51 year old line technician, alleges he sustained an accidental injury to his bilateral knees, that arose out of and in the course of his employment by respondent on 9/14/12. Petitioner worked part-time for respondent. He also had concurrent full time employment with State Farm Insurance as an Analyst. Petitioner worked for respondent for 4 years prior to the injury. He worked for State Farm Insurance since January 1999.

As a line technician petitioner would fuel aircraft, move aircraft around, and help passengers with luggage. On 4/30/12 petitioner presented to Dr. Maere with complaints of knee pain. He reported that it was a new problem and the current episode stated more than 2 weeks ago. He stated that the pain was associated with an unknown factor. The pain was described as being on the outside of the knee. He stated that he could not stand on the knee or lay it flat.

On 5/7/12 petitioner presented to Dr. Li for constant right knee pain. His left knee was normal. Dr. Li noted that an MRI of the right knee showed a medial meniscus tear and chondral injury to the medial femoral condyle. His diagnosis was right knee medial meniscus tear. He recommended a right arthroscopic knee surgery. On 5/15/12 petitioner underwent a right knee arthroscopy with partial medial meniscectomy, and abrasion chondroplasty of the medial femoral condyle, patella and femoral trochlea. The diagnosis was right knee medial meniscus tear, Grade 3 chondral injury medial femoral condyle, and Grade 3-4 chondral injury to the patella and femoral trochlea. The procedure was performed by Dr. Li. Petitioner followed-up post-operatively with Dr. Li through 8/10/12. Petitioner reported some swelling in the lateral portal, but the pain had resolved. Dr. Li's diagnosis was right arthroscopic knee surgery. He noted that petitioner was doing well with some prepatella swelling. Petitioner was released to full duty work without restrictions on 8/10/12.

Petitioner alleges that on 9/14/12 while getting out of the fueling truck he slipped on a wet step of the truck, grabbed the handle on the side of the cab, and hit his right leg on the side of truck. He testified that when his right leg struck the side of truck it turned one way and his left leg went the other way, and he kind of spinned around. He testified that both legs were sore and it was hard for him to walk back to the building. Petitioner did not report any injury that day.

On 9/24/12 petitioner presented to Dr. Li. Petitioner reported that he was doing fine until a week ago and then stepped over something about 3 feet and landed wrong. Following an examination Dr. Li performed an x-ray of the left knee that showed mild narrowing of the patellafemoral joint. His diagnosis was right knee medial meniscus tear versus stress injury medially, and left knee mmt. He ordered an MRI of the right knee.

An MRI of the right knee performed on 9/24/12 revealed moderate size suprapatellar effusion; chondromalacia patellar and moderate tricompartment osteoarthritis; partially extruded medial meniscus with a horizontal tear at the junction of the body and anterior horn; likely a horizontal tear within the posterior horn of the medial meniscus; abnormal thickening and intrasubstance signal changes with both the proximal and distal patellar tendons consistent with patellar tendinopathy/tendinitis; mild prepatellar bursitis; Grade I MCL sprain; subchondral bone marrow edema within the medial aspect of the medial tibial plateau, a component of which may be related to osteoarthritis; and a possible superimposed bone contusion.

On 9/26/12 petitioner returned to Dr. Li to discuss his MRI of the right knee. Dr. Li recommended a right knee arthroscopy. He ordered a left knee MRI.

On 9/26/12 petitioner underwent an MRI of the left knee. The indication was medial knee pain for two weeks. Noted was a small suprapatellar effusion; Grade II/III chondromalacia patella and intact patellofemoral articualtion and retinacula; mild chondromalacia within the trochlear sulcus; moderate articular cartilage thinning and joint space narrowing involving both the medial lateral compartments; no focal osteochondral defects or bone contusions; and horizontal tear posterior horn medial meniscus.

On 9/26/12 at 1:08 pm petitioner drafted a letter to Dale Kruse, and ccolwel@imageair.com, and cc'd 3 others and himself. He wrote the following:

> "Just wanted to give you a heads up. Friday the 14th during the rain I had slipped getting out of one of the trucks. I injured my right knee but didn't give it much thought at that time. As the days went by - the pain in my right knee continued to get worse. I call my doctor last week and he saw me on Monday and I meet (sic) with him today to [go]over the test results. it seems that my right knee is fractured and I have a torn more of the meniscus. Because of the double injury - the doctor has scheduled surgery for Friday, September 28th. At the least, I will [be] unable to work for a few weeks. Please let me know if you have any questions. Thanks, Jack"

Petitioner testified that the "double injury" reference in his email on 9/26/12 meant an injury to his left and right knee.

Petitioner testified that after Dr. Li told him he needed surgery for his right knee he reported the injury to Debbie Hendrichs in Human Resources. Petitioner testified that he told Hendrichs that he needed time off for the surgery for his knees, and that it would be a year before he could do surgery on his left knee.

On 9/27/12 Debbie Hindrichs completed an Illinois Form 45:First Report of Injury. She noted that the petitioner reported that he " just finished parking the fuel truck and was getting out of the truck". The time of injury was 8:00 pm. She noted that petitioner stated that "it was storming and the step was wet, I slipped on the

wet step and my leg sled into the side of the cab". She also noted that petitioner claimed that he "injured my right knee-fractured and torn meniscus".

Petitioner testified that he made no reference to his left knee because he thought he would be filling out the same form when the day he was going in for surgery to his left knee.

On 9/28/12 petitioner underwent a right knee arthroscopy with partial medial menisecetomy and abrasion chondroplasty of the medial femoral condyle and patella, performed by Dr. Li. Petitioner followed-up with Dr. Li 10 times through 7/29/13. On every one of those visits, examinations of petitioner's left knee with respect to flexion, extension and patella mobility, were normal.

On 10/4/2012 petitioner completed a Statement of Claimant. He described an accident on 9/14/12, around 8:00 pm. He wrote "Friday evening, Sept. 14, 2012 it was dark & raining. Just finished fueling a plane and parked the fuel truck. As a stepped onto the truck step my right foot slipped-twisted sideways, and slid against the bottom side of the cab. I felt some pain but thought I just spraine (sic) something. I mentioned what happened to my co-worker but did not feel anything was injured. After working the rest of the weekend, I called the Doctor, thinking I could get a brace or wrap until the pain subsided. I was not able to get into the doctor until Monday, 24 Sept 2012. The doctor suspected more and ordered an MRI. I returned to the doctor on Wednesday 26 Sept 2012, at that time. I found out I had a fracture and a torn meniscus on my right knee. The doctor scheduled surgery on Friday, 28 Sept. 2012." Petitioner wrote that the injury was to his "right knee-fractured and torn meniscus". He wrote that he reported the injury first to Brandon Tibias.

On 10/9/12 petitioner began a course of physical therapy. Petitioner underwent 6 sessions through 12/4/12, but did not reach all goals. He was able to return to full duty work for State Farm because his job was sedentary, but was only found capable of returning to light duty work for respondent.

On 11/6/12, and 12/5/12 petitioner reported that his left knee was fine. From 1/4/13 through 6/3/13 petitioner voiced no left knee complaints to Dr. Li.

On 12/18/12 petitioner underwent a Section 12 examination at the request of the respondent. Petitioner gave a history of slipping on a wet step, and striking and/or twisting his right knee, and may have struck his left knee, on 9/13/12. Petitioner gave a history of his treatment to date. Following an examination and record review Dr. Lewis diagnosed a right torn medial meniscus superimposed on a preexisting tricompartmental osteoarthritis. He opined that the 9/14/12 injury temporarily exacerbated petitioner's right knee pre-existing degenerative arthritis. Dr. Lewis noted that although petitioner had a past history of knee pain, including treatment in 2012 for similar symptoms, he had not treated since 8/10/12. He noted that at the 8/10/12 visit

petitioner was doing well with mild prepatella swelling. He noted the accident history petitioner gave on 9/24/12 as "was doing fine until a week ago and then stepped over something about 3 feet and landed wrong". Dr. Lewis, based on no history or report of a left knee injury in the First Report of Injury, opined that there was no evidence of left knee injury as a result of the alleged accident. Dr. Lewis recommended continued physical therapy for another month and was of the opinion that petitioner would be at MMI at after that. Dr. Lewis recommended no further treatment. He opined that petitioner was capable of working light duty with no climbing, squatting, kneeling or bending, for 4 weeks. He opined that the restrictions were related to the injury on 9/14/12.

On 5/31/13 petitioner underwent a repeat MRI of the right knee. The impression was diminutive appearance of the body and posterior horn of the medial meniscus, likely reflecting prior partial meniscectomy, with early medial extrusion of the body remnant and a probably small meniscal fragment extending inferiorly into the coronary recess along the medial margin of the tibial plateau; mucinous degeneration of the lateral meniscus without tear; mild to moderate medial compartment degenerative joint disease with moderate to high grade chondral thinning along the medial femoral condyle; mild patellofemoral compartment degenerative joint disease; and small joint effusion and Baker's cyst with mild synovitis.

On 7/11/13 petitioner specifically stated to Dr. Li that at the time of his injury he had injured both knees and wound up having his left knee treated without realizing that it was a work related injury.

On 7/24/13 petitioner was again evaluated by Dr. Lewis at the request of the respondent. When Dr. Lewis took an accident history this time petitioner did not mention an injury to his left knee. Petitioner reported that at the present time he was much improved. He stated that he had fluid on his right knee during the past few months, but it was currently under control with anti-inflammatories. Petitioner reported problems with moderate pain, that was worse with activity, running and squatting, and somewhat improved with rest, cold and anti-inflammatories. Following an examination and record review Dr. Lewis again reiterated his causal connection finding with respect to the right knee and the injury on 9/14/12. He opined that there is a causal connection between the two. He noted that petitioner had few subjective complaints. He opined that petitioner had reached maximum medical improvement and was able to return to full duty work for respondent.

On 7/29/13 petitioner's right knee was improved. Despite the normal examination for petitioner's left knee, petitioner complained of left knee pain, worse with pivoting. Dr. Li examined petitioner and diagnosed improving after right arthroscopic knee surgery, and left knee medial meniscus tear still symptomatic.

On 8/5/13 petitioner followed-up with Dr. Li for his left knee. His symptoms remained unchanged. He reported pain that gets worse with pivoting, and that he did not want to live like this. His right knee was improved with no real swelling. Following an examination, Dr. Li diagnosed a left knee medial meniscus tear. Dr. Li recommended a left arthroscopic knee surgery.

On 8/27/13 petitioner underwent a left knee arthroscopy with partial medial and lateral meniscectomy and abrasion chondroplasty of the patella and medial femoral condyle. This procedure was performed by Dr. Li.

Petitioner followed-up postoperatively with Dr. Li through 11/29/13. This treatment included a course of physical therapy and a Game Ready system. At that time he ordered an FCE. He also directed petitioner to start work conditioning after the FCE.

On 12/17/13 petitioner underwent a FCE. Petitioner demonstrated maximal effort. Petitioner was found not capable of returning to his regular duty job for respondent, despite the fact that the evaluator had no job description for petitioner's work with respondent. However, in 2nd to last paragraph of the report on page 3, under "US Department of Labor Physical Demand Level" it states that petitioner operated safely in the "heavy" category during his FCE, which matches his reported job PDL and Spinal Functional Sort results. He was found capable of working 5-9 hours 3 days a week.

Petitioner underwent Work Hardening from 12/30/13 - 1/31/14. On 1/29/14 petitioner followed up with Dr. Li for his left knee. He reported to Dr. Li that he was doing well after finishing work conditioning. He released petitioner to full duty without restrictions and told him to continue his home exercises.

On 1/12/15 the evidence deposition of Dr. Li was taken on behalf of respondent. Dr. Li testified that when he saw petitioner on 9/24/12 he complained of pain in both knees and had positive findings on each knee. Dr. Li was of the opinion at that time that petitioner had a left knee meniscus tear. Dr. Li stated that he prescribed a Game Ready system for petitioner. The Game Ready system is a pneumatic compression therapy that combines ice with compression, decreases swelling and accelerates recovery, and reduces narcotic usage.

Dr. Li opined that if petitioner slipped after getting out of his field truck on 9/24/12 and twisted both knees that this is the type of event that could have caused the condition he diagnosed to the right knee and left knee, because the twisting would cause torsion force which can cause meniscal tears, as well as injury to the chondral surfaces. Dr. Li opined that removal of the meniscus can result in an increased risk for arthritis.

On cross-examination, Dr. Li opined that a meniscus tear can be of a degenerative nature. Dr. Li noted that petitioner was 311 pounds, and 5 feet, 10 inches tall, and that would put a lot of pressure on his knees and that weight would contribute to the development of arthritis. Dr. Li admitted that petitioner did not tell him he

sustained a work injury to his left knee until July of 2013. Dr. Li testified that after there was no mention of any left knee in the 11/6/12 report petitioner never made any further complaints regarding his left knee until July of 2013.

On 8/3/15 the evidence deposition of Dr. Lewis was taken on behalf of the respondent. Dr. Lewis testified that when he examined petitioner in December of 2012, petitioner reported symptoms related to his left knee, that were worse with pivoting activities. He stated that the MRI of the left knee showed a torn meniscus superimposed upon preexisting degenerative arthritis in the left knee. Dr. Lewis testified that when he saw petitioner on 7/19/13 petitioner did not mention his left knee being injured on 9/14/12. He also did not mention his left knee in the initial employer's first report of injury. Dr. Lewis opined that a twisting injury could cause a meniscus tear. Dr. Lewis opined that anyone who has significant arthritis in their knee will invariably have a meniscus tear. Dr. Lewis testified that he gave petitioner the benefit of the doubt and assumed that his right knee condition is related to his injury. Dr. Lewis was of the opinion that when he examined petitioner on 7/24/13 petitioner had a normal left knee exam and no subjective complaints.

On redirect examination Dr. Lewis was of the opinion when he viewed the left knee MRI petitioner had the level of arthritis that could cause a medial meniscus tear absent any acute injury.

Debra Hindrichs, who works in respondent's Human Resources and Accounting departments, was called as a witness on behalf of respondent. Hindrichs began working for respondent in February of 2002. She handles employee files, payroll, group benefits, disputes with employees, and reports workers' compensation claims to the insurance company. Hindrichs testified that she knows petitioner. She stated that he started with respondent in September of 2008, left, and then returned on 8/3/11. She testified that petitioner reported a work injury to her on 9/26/12 via email,12 days after the injury. She testified that in the email petitioner only claimed that he injured his right knee. Hindrichs testified that after she received the email she wrote back to him that he should have reported the accident right away. She sent petitioner a form 45 to complete. On the form 45 (RX5) she completed everything that was hand written and petitioner completed the typed written portions. She noted that on that form the only body part petitioner mentioned was the right knee. She testified that no injury to the left knee was noted. She testified that both times petitioner reported his accident to her he alleged he injured only his right knee. She denied that petitioner ever reported to her that he injured his left knee.

On cross examination Hindrichs believed that when petitioner noted that sustained a "double injury" that he had injured his right knee before.

Currently petitioner has pain in both knees when kneeling down. He also testified that it still hurts when he picks up heavy objects. He is also uncomfortable standing for long periods of time.

Petitioner testified that he underwent a lap band procedure between his surgeries to the right knee and left knee. He stated that he was 350 pounds before the procedure and is 285 pounds now. Between surgeries, after 10/15/12, petitioner went back to work for State Farm as an analyst because that was his full time job and it was sedentary in nature. Petitioner testified that his job for respondent was his part time job and he earned about $250 a week.

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

Petitioner alleges that on 9/14/12 he sustained injuries to his bilateral knees that arose out of and in the course of his employment by respondent. He alleges that on 9/14/12 while getting out of the fueling truck he slipped on a wet step on the truck, grabbed the handle on the side of the cab, and his right leg on the side of the truck. He testified that when his right leg struck the side of the truck it turned one way and his left leg went the other way, and he kind of spinned around. He testified that both legs were sore and it was hard for him to walk back to the building. Petitioner failed to report any injury to respondent on 9/14/12. Additionally, the arbitrator finds this testimony at trial, especially as it relates to the left knee, is inconsistent with the credible evidence.

Petitioner did not seek any treatment until 9/24/12. At that time, he presented to Dr. Li and reported that he was doing fine until a week ago when he stepped over something about 3 feet and landed wrong. Dr. Li took an x-ray of the left knee. He diagnosed a right medial meniscus tear versus stress injury medially, and left knee medial meniscus tear. Petitioner did not specify which knee he injured when he landed wrong. Thereafter, petitioner underwent an MRI of the right knee and on 9/2/12. Dr. Li recommended surgery for the right knee. He also ordered an MRI of the left knee. Petitioner had that MRI on 9/26/12.

After the recommendation for surgery on the right knee and the MRI of the left knee, petitioner drafted an email to Dale Kruse and others at respondent. He specifically stated that on 9/14/12 he slipped getting out of the truck and injured his right knee. He made absolutely no mention of any left knee injury. He stated that as time went by his right knee worsened. Again, no mention of the left knee. He stated that his right knee was 1) fractured, and 2) had a torn meniscus. He referred to this as a "double injury", and noted that he would be having surgery on 9/28/12. At trial, petitioner tried to infer that the "double injury" he was referring to on 9/28/12 was an injury to both his left and right knees. The arbitrator finds absolutely no mention in the email of anything with respect to his left knee, and notes that petitioner specifically referenced a 1) fracture knee, and torn meniscus, and then referred to these conditions in his next sentence as a "double injury". The arbitrator

finds nothing in this email from which one could reasonable infer that the "double injury" petitioner was referring to was an injury to his right and left knee, especially given the fact that there is absolutely no reference or mention of the left knee in the email.

Three days later on 9/27/12 petitioner contacted Debbie Hendrichs, who reports the worker's compensation injuries to the insured. He completed a Form 45. On it petitioner reported that he had just finished parking the fuel truck and was getting out of the truck. He further reported that it was raining, the step was wet, and as a result he slipped on the wet step and his right leg slipped into the side of cab. He reported that he fractured his right knee, and tore his right meniscus. Petitioner admitted that he made no reference to his left knee in the report. He tried to explain the reason for the omission was that he thought he would be filling out another Form 45 when he had surgery for his left knee. Given the fact that as of this date there was no recommendation for surgery to the left knee, and the fact that petitioner in his email had not made any reference to a left knee injury on 9/14/12, the arbitrator finds this testimony less than persuasive.

After petitioner underwent surgery to his right knee on 9/28/12, he completed a Statement of the Claimant on 10/4/12. In it, petitioner again described an injury to his right knee. He also again noted that he had fractured his right knee and tore his meniscus in his right knee. And again, there was no mention of any injury to his left knee. In fact, petitioner specifically noted that the injury was to his "right knee-fractured and torn meniscus".

If the accident histories petitioner documented up to this date were not enough to support a finding that petitioner did not sustain an injury to his left knee on 9/14/12, between 11/6/12 and 12/5/12, while petitioner was recuperating from his right knee surgery, petitioner reported that his left knee was fine, and from 1/4/13 through 6/3/13 he never voiced any complaints with respect to his left knee.

The first documented reference to any possible left knee injury was on 12/18/12 when petitioner told Dr. Lewis during his Section 12 examination that he "may have struck his left knee, 9/13/12", which was not even the alleged date of accident. Based on the fact that there was no history or report of a left knee injury in the first report of injury, Dr. Lewis opined that there was no evidence of a left knee injury as a result of the alleged accident on 9/14/12.

On 7/11/13, for the first time, petitioner told Dr. Li that at the time of the injury he had injured both knees and wound up having his left knee treated without even realizing that it was a work related injury. Again, the arbitrator finds this claim less than persuasive given the fact that he had no problem remembering he injured his right knee on 9/14/12.

On 7/24/13 Dr. Lewis again examined petitioner and found it a bit suspicious that this time when he took an accident history petitioner made absolutely no mention of any injury to his left knee. He also mentioned that petitioner made no mention of his left knee in the initial employer's first report of injury. Dr. Lewis was of the opinion that the when he viewed the MRI of the left knee it showed that petitioner had a level of arthritis that could cause a medial meniscus tear absent any acute injury.

Although Dr. Li was of the opinion that if petitioner actually did slip after getting out of his truck and twisted both knees, that this is the type of event could cause the condition he diagnosed with respect to the right and left knees, because the twisting would cause torsion force which can cause meniscal tears, as well as an injury to the chondral surfaces, the arbitrator does not give much weight to this opinion as it relates to the left knee since there exists no history contemporaneous to the injury, or for months later, that would support this mechanism of injury. The arbitrator also finds it significant that Dr. Li also opined that a meniscus tear can be of a degenerative nature without any trauma. Given the fact that petitioner was 311 pounds and only 5 feet 10 inches tall, Dr. Li was of the opinion that this body habitus would put a lot of pressure on petitioner's knees and that weight could contribute to the development of arthritis. The arbitrator also relies on Dr. Li's testimony that petitioner did not tell him he sustained an injury to his left knee until July of 2013, 9 months after the injury. Dr. Li testified that after there was no mention of any left knee in the 11/16/12 report, petitioner never made any further complaints regarding his left knee until July of 2013.

Lastly, the arbitrator also relies on the testimony of Hendrichs who testified that all portions of the Form 45 that made reference to only the right knee being injured were completed by petitioner. She testified that both times petitioner reported his accident to her he only made reference to injuring his right knee, and made no mention of sustaining an injury to his left knee. She denied that petitioner ever reported to her that he injured his left knee.

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 he sustained an accidental injury to his right knee, but has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his left knee, that arose out of and in the course of his employment by respondent on 9/14/12.

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT?

Petitioner drafted an email to respondent's personnel on 9/26/12 informing them of the injury to his right knee on 9/14/12. The arbitrator finds this constitutes timely notice to the respondent of the accident on 9/14/12 as it pertains to his right knee. Having found the petitioner has failed to prove by a preponderance of the credible

evidence that he sustained an accidental injury to his left knee that arose out of and in the course of his employment by respondent on 9/14/12, the arbitrator finds this issue moot as it relates to petitioner's left knee.

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

Dr. Lewis opined that the injury on 9/14/12 temporarily exacerbated petitioner's right knee pre-existing degenerative arthritis. He also opined that even though petitioner had a past history of knee pain, including treatment in 2012 for similar symptoms, he had not treated since 8/10/12, and at that visit he was doing well with only mild prepatella swelling. Dr. Li opined a casual connection between petitioner's both knees and the injury on 9/14/12.

Based on the above, as well as the credible evidence, the arbitrator finds that petitioner's current condition of ill-being as it relates to his right knee is causally related to the injury petitioner sustained on 9/14/12. However, having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his left knee that arose out of and in the course of his employment by respondent on 9/14/12, the arbitrator finds this issue moot as it relates to petitioner's left knee.

J. WERE 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 on 9/14/12, and his current condition of ill-being as it relates to his right knee is causally connected to the injury he sustained at work on 9/14/12, the arbitrator finds the medical services for only petitioner's right knee from 9/14/12 through 8/5/13 were reasonable and necessary to cure or relieve petitioner from the effects of his injury on 9/14/12. Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his left knee that arose out of and in the course of his employment by respondent on 9/14/12, the arbitrator finds this issue moot as it relates to petitioner's left knee.

Respondent shall pay all reasonable and necessary medical services related to petitioner's right knee from 9/14/12 through 8/5/13, the last date Dr. Li treated petitioner's right knee, pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for all medical bills paid pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall not pay for any treatment related to petitioner's left knee.

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner sustained an accidental injury to his right knee on 9/14/12, and that his current condition of ill-being as it relates to his right knee is causally connected to the injury he sustained at work on 9/14/12, the arbitrator finds the petitioner was temporarily totally disabled from 9/28/12 through 11/13/12, and

was temporarily partially disabled from 11/14/12 through 2/17/13. Respondent shall receive credit for the $1,713.25 in temporary total disability benefits it paid during this period, and $521.56 in temporary partial disability benefits it paid during this period.

The petitioner claims he is also entitled to temporary total disability benefits for the period he was off work due to his left knee injury. Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his left knee that arose out of and in the course of his employment by respondent on 9/14/12, the arbitrator finds this issue moot as it relates to petitioner's left knee.

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 accidental injury to his left knee that arose out of and in the course of his employment by respondent on 9/14/12, the arbitrator finds this issue moot as it relates to petitioner's left knee, and will only determine the nature and extent of the injury to petitioner's right knee.

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 line technician 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 the parties have stipulated petitioner was temporarily totally disabled or temporarily partially disabled from 9/28/12 through 2/17/13. After that date, he did return to his regular duty job. All time off after that date was causally related to his left knee, which has not been found to be a compensable injury. Because of this, the Arbitrator therefore gives lesser 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 the accident. Because petitioner was ultimately released to full duty with respect to his right knee and returned to his regular duty job, 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 since no future earnings capacity evidence was offered, 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 on 9/28/12 petitioner underwent a right knee arthroscopy with partial medical

meniscectomy and abrasion chondroplasty of the medial femoral condyle and patella. On 8/5/13 Dr. Li noted that petitioner's right knee was improved. When Dr. Lewis last examined petitioner for his right knee on 7/24/13 petitioner reported that he was much improved and the fluid he had had on his right knee was under control with anti-inflammatories. He reported moderate pain, that was worse with activity, running and squatting, and somewhat improved with rest, cold and anti-inflammatories. Because of this, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 15% loss of use of the right leg pursuant to §8(e) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mariela Valencia,
Petitioner,

vs. NO: 13WC 3744

19IWCC0028

Gilster-Mary Lee Corporation,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, temporary total disability, permanent partial disabilityand being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 1, 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: JAN 18 2019
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MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

VALENCIA, MARIELA
Employee/Petitioner

Case# **13WC003744**

13WC018973
13WC028349

GILSTER-MARY LEE CORPORATION
Employer/Respondent

19IWCC0028

On 2/1/2018, 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 [illegible] interest of 1.62% shall accrue from the date listed above to the day before the date of payment; however, if [illegible] employee's app[illegible] no change or a decrease in this award, interest shall not accrue.

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

1437 [illegible] & ASSOCIATES
208 W WA[illegible]
CARBONDALE, IL 62901

0693 FEIRICH MAGER GREE[illegible]
BRANDY L JOHNSON
2001 W MAIN ST PO BOX 1570
CARBONDALE, IL 62903-1570

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)

MARIELA VALENCIA
Employee/Petitioner

v.

GILSTER-MARY LEE CORPORATION
Employer/Respondent

Case # **13** WC **3744**

Consolidated cases: **13 WC 18973 & 13 WC 28349**

19IWCC0028

An *Application for Adjustment 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 **Herrin**, on **July 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. ☒ 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 **Number of Dependents**

FINDINGS

On the date of accident, **September 28, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident on **September 28, 2012**.

In the year preceding the injury, Petitioner earned **$18,253.99**; the average weekly wage was **$389.21**.

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 **$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 **$305.41** 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 that arose out of and in the course of her employment on September 28, 2012. All benefits are denied.

Respondent shall receive credit of $305.41 pursuant to Section 8(j).

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

January 29, 2018
Date

ICArbDec19(b)

FEB 1 - 2018

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MARIELA VALENCIA
Employee/Petitioner

v.

Case #: **13 WC 3744**
Consolidated with
13 WC 18973 &
13 WC 28349

19IWCC0028

GILSTER-MARY LEE CORPORATION
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner has filed three Applications for Adjustment of Claim for injuries she allegedly sustained from her work with Respondent. On January 22, 2013, Petitioner filed an Application (13 WC 3744) for injuries to her left lower extremity and foot that she allegedly sustained on or around September 28, 2012. On June 4, 2013, Petitioner filed an Application (13 WC 18973) for injuries to her bilateral lower extremities and feet that she allegedly sustained on or around September 28, 2012. On August 22, 2013, Petitioner filed an Application (13 WC 28349) for injuries to her bilateral lower extremities and feet that she allegedly sustained on or around May 30, 2012. The cases were consolidated. At hearing, testimony was offered by Petitioner and Steve Landholt. Petitioner testified through a certified court interpreter, Mr. Jaime Melendez.

Petitioner testified she was a line worker at Gilster-Mary Lee from 2002 to March 22, 2013. Her job required her to rotate through tasks that included packing, stocking, inspecting, and cleaning. Except when on break, Petitioner was standing and walking on concrete or metal flooring. Petitioner testified that she worked eight hour shifts six days a week. The Arbitrator notes that Petitioner's wage statement showed that, in the year proceeding the alleged accidents, there were only nine occasions where she worked six days a week. She typically worked five days a week. RX6.

Petitioner testified she started having problems with her feet in 2012. On July 30, 2012, she was seen at Murphysboro Heath Center for left heel pain that she had experienced for two to three months. She reported she had daily foot pain that was worse first thing in the morning and

after sitting for long periods of time. On examination, she had tenderness over her left, posterior heel. She was diagnosed with plantar fasciitis. RX4.

On September 28, 2012, Petitioner saw Dr. David Gunzel, a podiatrist, for left heel complaints that reportedly began insidiously and had lasted for four months. The left heel pain was present first thing in the morning and after rest. There were no right foot complaints, which Petitioner confirmed during testimony. Petitioner indicated her work required her to stand for the entire shift, that her heel pain increased with standing, and that standing was worse than walking. She reported that by the end of her shift her left heel was very painful and both of her arches hurt. Ibuprofen, exercises, and generic inserts had not improved her condition. On examination, Petitioner's plantar fascia was mildly painful to palpation bilaterally. There was moderate tenderness on the left plantar, medial heel at the medial calcaneal tubercle (MCT). She also had mild tenderness at the left plantar, central heel. Petitioner's first metatarsophalangeal (MTP) joint on her right foot had a moderate bunion deformity and the first MTP joint on the left foot had a mild bunion deformity. X-rays of the left foot showed a small heel spur. Dr. Gunzel diagnosed left plantar fasciitis, left plantar heel bursitis, bilateral hallux abductovalgus, and pain in her limb. A left heel injection was administered and Petitioner was given a fitted pair of orthoses to wear when ambulatory. RX3.

Petitioner testified that after her visit with Dr. Gunzel, she notified two of her supervisors, Charlie Newton and Lisa Woodside, of her work injuries. She stated that she provided "a paper that Dr. Gunzel gave" her. She did not read the paper, but believed that it said she had an injury from standing at work. Petitioner reportedly did not speak to Mr. Newton and/or Ms. Woodside about the alleged injuries; she merely submitted the paper from Dr. Gunzel. There were no other occasions where Petitioner talked to Mr. Newton or Ms. Woodside about her work injuries.

On November 14, 2012, Petitioner returned to Dr. Gunzel and reported that her left heel pain was better. She was not wearing her inserts at the visit. She had mild to moderate tenderness of the left plantar, medial heel at the MCT. There was no pain on palpation at the left plantar fascia or the left plantar, central heel. While the bunion on the right foot remained, there was no longer a bunion on Petitioner's left foot. A second left heel injection was administered and the right bunion was padded. RX3.

On December 7, 2012, Petitioner returned to Dr. Gunzel and reported that her left heel pain had improved. She did not wear her inserts to the appointment and stated that they were in her work shoes. On examination, there was no pain with palpation of the left plantar fascia. There was mild tenderness of the left plantar, medial heel at the MCT. The plantar, central heel tenderness had resolved. Petitioner still had mild palpable tenderness over the medial aspect of the MTP joint on the right foot. Dr. Gunzel prescribed Celebrex. Petitioner returned on February 27, 2013, and reported that she continued to have left heel pain and that her right heel was now hurting. There was no pain to palpation of the left plantar fascia. There was mild tenderness of the left plantar, medial heel at the MCT. There was no tenderness at the right plantar heel. Petitioner was diagnosed with left plantar fasciitis, left plantar heel bursitis, limb pain, and hallux abductovalgus with a right foot bunion. RX3.

Steve Landholt testified that prior to March of 2013, Respondent believed that Petitioner was a documented worker. In March of 2013, Respondent learned that there was a problem with Petitioner's Social Security number and requested that she provide documentation showing she could legally work. She did not provide the requested documentation and was terminated on March 22, 2013. Petitioner testified that her pain *worsened* after she stopped working.

On April 8, 2013, Petitioner returned to Dr. Gunzel. She was observed to be wearing sandals and she complained that her right bunion hurt when she wore shoes. Her exam was unchanged. She was diagnosed with bilateral limb pain, bursitis in the right first MTP joint, and hallux abductovalgus with a right bunion. Her left plantar fasciitis and bursitis had resolved. Injections were administered to the left heel and right bunion. On June 3, 2013, Petitioner returned to Dr. Gunzel and reported that there was no change after her last left heel injection. Her right bunion injection helped, but she had pain when she wore shoes. She reported that her right heel had become increasingly painful over the past two months and was present regardless of her activities. She had not been stretching and was wearing Dr. Scholl inserts. Her examination remained unchanged. Dr. Gunzel diagnosed bilateral plantar fasciitis, recurrent left heel bursitis, bilateral limb pain, hallux abductovalgus with a right bunion, and improved bursitis in the right medial, first MTP joint. He prescribed Prednisone and stretched her right shoe over the bunion area to help reduce stress. RX3. Petitioner testified that this was the first time that she learned that she had a right foot condition.

On June 6, 2013, Petitioner was evaluated by Dr. Gary Schmidt, Respondent's Section 12 examiner. Petitioner indicated that her job required her to stand for eight hours a day and that she had been doing this for 13 years. Her pain was progressively worsening and the symptoms were spreading down her feet into her toes. Both feet were about the same. Petitioner complained of waking with stabbing pain in her feet almost nightly and mild foot swelling. She estimated she spent 20% of her day sitting or lying down. On examination, there was no abnormal swelling, allodynia, or trophic changes. Petitioner reported decreased sensation in her plantar forefoot bilaterally. Tinel's sign was markedly positive in the tarsal tunnel area bilaterally and there was some pain along the medial cord of the plantar fascia. Dr. Schmidt diagnosed bilateral tarsal tunnel syndrome. He did not believe Petitioner's work might or could have been the cause or a causative factor of her bilateral foot condition. He explained that tarsal tunnel syndrome is unrelated to the amount of time spent standing or walking, especially in an atraumatic situation, and that the condition is common in Petitioner's age group, it often starts insidiously, and it is bilateral 33% of the time. He did not believe plantar fasciitis treatment would be beneficial and recommended an EMG/nerve conduction study. Dr. Schmidt believed Petitioner might need physical therapy and/or surgery for her non-work related tarsal tunnel syndrome. RX1.

On June 24, 2013, Petitioner presented to Dr. Gunzel for bilateral heel pain that was worsening on the right. She reported the pain occasionally shot from her heels to the balls of her feet. On examination, there was mild pain to palpation at the insertion of the left medial, plantar heel and moderate tenderness over the right medial, plantar heel. Petitioner continued to have mild tenderness over the medial aspect of the right foot's first MTP joint. Injections into her heels and right bunion were administered. She returned on August 5, 2013, and Dr. Gunzel noted there had been no change in her complaints. She reported that sometimes the pain was worse in the morning and, at other times, it was worse in the evening. The left foot was worse than the right. Prednisone

was prescribed. She returned on August 26, 2013, and bilateral heel injections were administered. On October 7, 2013, Dr. Gunzel recommended bilateral plantar fascia releases and a right bunionectomy. Tramadol was prescribed. RX3.

Dr. Schmidt testified by way of deposition on May 28, 2014. He is a Board Certified Orthopedic Surgeon who specializes in foot and ankle conditions. He testified consistent with his report. Dr. Schmidt explained that the tarsal tunnel is on the inside of the foot and extends to the foot's bottom. Symptoms from tarsal tunnel syndrome include sensory changes along the bottom of the foot, prolonged afterburn, tenderness on the side of the heel, night pain, and pain while at rest; the symptoms worsen throughout the day. Dr. Schmidt testified that the symptoms documented at the time of Petitioner's examination were consistent with tarsal tunnel syndrome. He explained that tarsal tunnel syndrome is typically insidious, will continue to worsen, and can result from changes to the foot related to aging. It is common in individuals in their 40s and 50s. He explained that plantar fasciitis occurs when there is inflammation at the insertion of the plantar fascia. It causes tenderness on the bottom of the heel and severe pain at the insertion to the plantar fascia, which is farther back than the medial cord of the plantar fascia. Individuals with plantar fasciitis will have a lot of pain when they get up from bed (*i.e.*, start-up pain), but it improves with standing and walking. He explained that plantar fasciitis does not usually involve nerve symptoms, night pain, or pain while at rest. Dr. Schmidt did not believe Petitioner had plantar fasciitis because she was not really tender over the plantar fascia, had symptoms that were inconsistent with plantar fasciitis, had a positive Tinel's sign, and had not responded to plantar fasciitis treatment. RX2.

Dr. Schmidt testified that prolonged standing would not cause or aggravate tarsal tunnel syndrome or plantar fasciitis. He explained that feet are built to stand, walk, and withstand the pressure caused by both of these actions. In fact, people with plantar fasciitis feel better when they stand and walk. In determining that Petitioner's condition of ill-being was not causally related to her work for Respondent, Dr. Schmidt considered several factors including Petitioner's age, the insidious development of her condition, the bilateral nature of her condition, the fact that she had performed the same job for 13 years without developing the condition, and the fact that she continued to have symptoms despite not working for two months. He concluded that Petitioner's treatment was not causally related to her work and that both the bunion injection and the third heel injection were unreasonable. He opined that Petitioner could work without restrictions. RX2.

On May 18, 2016, Petitioner returned to Dr. Gunzel for chronic right foot pain and bilateral heel pain. The Arbitrator notes this was the first time she had returned to Dr. Gunzel for nearly three years. She claimed that she could not work due to foot pain and that she needed to be evaluated before Dr. Gunzel's deposition on May 25, 2016. On examination, Petitioner's vibratory sensation was diminished bilaterally at the 5th MTP joint and lateral ankle. There was a positive Tinel's sign at the medial aspect of the right ankle, moderate tenderness of the right heel, and mild tenderness of the left heel. The right foot first MTP joint was red and moderately tender. The left foot had a mild bunion deformity. Dr. Gunzel diagnosed acquired hallux valgus on the right foot, right capsulitis, plantar fasciitis, bilateral calcaneal bursitis, right Achilles tendonitis, bilateral foot pain, and right tarsal tunnel syndrome. Treatment options were discussed. PX2.

Dr. Gunzel testified by way of deposition on May 25, 2016. He is a Board Certified Podiatric Orthopedist. Dr. Gunzel testified that plantar fasciitis is inflammation of the insertion of

the plantar fascia into the bone. He stated that individuals with plantar fasciitis have pain on the bottom of the heel that is typically present when they first get up and subsides with standing and walking. He testified that in his experience, plantar fasciitis could also cause night pain. He believed that the shooting pain from Petitioner's heels into the balls of her feet was consistent with plantar fasciitis. He acknowledged that tarsal tunnel syndrome is commonly insidious, can occur from changes to the foot related to aging, and is often seen in people that have reached their 40s and 50s. He also described how bunions form, explaining that a bunion develops when the big toe is pulled toward the second toe in a slightly rotated position. PX3.

Dr. Gunzel testified that the only conditions he could attribute to Petitioner's work was the left plantar fasciitis and the right bunion deformity. He believed that "anyone that works six days a week, that stands on their feet for eight hours per shift. . . certainly has a higher degree of probability of developing plantar fasciitis." He testified that standing for a "great deal of time" would put continuous strain on the plantar fascia and heighten the likelihood of injury. As Petitioner had stopped working before she developed right plantar fasciitis complaints, Dr. Gunzel was unsure how the right heel symptoms could be work related. He acknowledged the possibility that the right plantar fasciitis could have resulted from an overcompensation for the left foot, but indicated he would need detailed information concerning Petitioner's gait change and a gait analysis before he could determine whether such an overcompensation occurred. He did *not* observe an antalgic gait or limp when he saw Petitioner in 2013 or 2016. Dr. Gunzel admitted it was possible that the Petitioner was doing something outside of work that caused her plantar fasciitis. His treatment recommendations included MRIs of the feet to rule out stress fractures of the heel bones. He indicated that a stress fracture was a possibility anytime a person has the type of complaints seen in this case and a long-standing occupation that requires a significant amount of daily standing over the work week. He noted that if the MRIs showed stress fractures, the recommended treatment would be immobilization with a cast boot until the pain subsided. PX3.

Dr. Gunzel testified that when he first saw Petitioner on September 28, 2012, he did not give her any restrictions other than wearing arch supports and stretching. Although he testified that he would have limited Petitioner's standing, lifting, and stair climbing around her second or third visit if he had been asked, he did not restrict Petitioner activities at any point in time. While treating Petitioner, Dr. Gunzel believed she was capable of performing her job duties. Prior to his deposition, Dr. Gunzel was unaware that Petitioner had not worked since March 22, 2013. PX3.

At the time of arbitration, Petitioner testified that she is an illegal alien and has never been able to legally work. She testified that in 2012 she was married and had two sons. Her son Alejandro was born March 31, 1980, and her son Juan was born November 24, 1993. Petitioner testified that she also claimed her two nephews as dependents in 2012. She admitted, however, that her nephews did not live with her in 2012 and that she just gave her sister money occasionally. She testified that she has not worked since March 22, 2013.

Petitioner testified that her work caused her to have injuries to her feet on or about May 30, 2012 and September 28, 2012. She later stated the May claim may have been for her hands. Petitioner claimed that her pain first started in her left foot and it caused her to adjust how she stood and walked and she put more pressure on the right foot and limped. Petitioner testified that she limped when she was in pain and that she was always in pain while working for Respondent.

She stated that she developed right foot pain approximately six months after her left foot symptoms began. She indicated that she limped while treating with Dr. Gunzel and has continued to limp ever since. Petitioner testified that currently her pain is sometimes limited to one foot and at other times it is bilateral. She described her pain as sharp, intermittent, and worse in her left foot. It is more pronounced when she gets out of bed and in the afternoon. The pain wakes her from sleep one to two times a night. The only medication she takes is over-the-counter Ibuprofen and Tylenol. She estimated that she could stand for 15-20 minutes and walk 1 ½ blocks. She admitted that Dr. Gunzel never gave her work restrictions.

Steve Landholt has worked in Respondent's Human Resources Department for 37 years. His job duties include investigating and administrating workers' compensation claims. He explained that, per Respondent's policy, employees are required to report work injuries to a supervisor. The supervisor then completes an accident report. Mr. Landholt's investigation of the alleged work accidents included searching for an accident report and speaking to Petitioner's supervisors to see if there was any record of an injury. He concluded that Respondent had no record of the alleged injuries, there were no accident reports for alleged injuries, and no notice was given for the alleged injuries. He testified that Respondent was unaware of Petitioner's alleged work injuries until the Applications for Adjustment of Claim were received. Petitioner's file also did not contain any work slips or doctor slips from Dr. Gunzel.

Petitioner's tax returns for 2011, 2012, and 2013 were entered into evidence. Petitioner filed her tax returns under the name "Mariela Flores" and identified herself as either "single or head of household" or "head of household." In 2011, Petitioner claimed one son, Juan, and two nephews, Alfredo and Javier, as dependents. In 2012, she took a child tax credit, claiming that she had one child under the age of 18. In 2013, she claimed two sons, Juan and Alfredo, as dependents. RX8.

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 (B), whether an employee-employer relationship existed, the Arbitrator finds the following:

Under the Illinois Workers' Compensation Act (Act), employers are liable for employees' injuries so long as the injuries arose out of, and in the course of, the employment. 820 ILCS 305/2. The Act defines the term "employee" to include aliens. 820 ILCS 305/1(b)(2). Further, the term "alien" has been interpreted as including all aliens in the service of another pursuant to a contract for hire regardless of their immigration status. *Econ. Packing Co. v. Ill. Workers' Comp. Comm'n*, 387 Ill. App. 3d 283, 288-89 (1st Dist. 2008). Thus, a worker's immigration status is irrelevant when deciding whether he can receive workers' compensation benefits. *Id.*; *Arroyo v. Bretford Manufacturing, Inc.*, 11-WC-46053 (2015). The Arbitrator finds that Petitioner was an employee under the Act.

In support of the Arbitrator's decision relating to issues (C), whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent, (D), the date of accident, and (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

In order to receive benefits under the Act, a claimant must prove by the preponderance of the evidence that he sustained an accidental injury arising out of, and in the course of, his employment. *Quality Wood Products Corp. v. Industrial Commission,* 97 Ill.2d 417, 423 (1983). For an injury to have arisen out of the employment, the risk of injury must be a risk to which the claimant is exposed to a greater degree than the general public by reason of his employment. *Chmelik v. Vana,* 31 Ill. 2d 272, 278 (1964). An injury is considered "accidental" for purposes of worker's compensation if it is caused by the performance of a claimant's job. *Peoria County Belwood Nursing Home v Industrial Commission,* 115 Ill.2d 524, 529-30 (1987). The accidental injury need neither be the sole or primary causative factor in the resulting condition of ill-being, as long as it was a causative factor. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill.2d 193 (2003). Moreover, a claimant who alleges an injury based on repetitive trauma must meet the same standard of proof as a claimant who alleges an acute injury. *Durand v. Industrial Comm'n,* 224 Ill.2d 53, 64 (2006). The claimant must identify the date an injury manifested itself; "manifested itself" means the date on which both the fact of the injury and the causal relationship of the injury to the employment would have become plainly apparent to a reasonable person. *Durand,* 224 Ill.2d at 65. A claimant generally relies on medical testimony in establishing a causal connection between the repetitive work duties and the condition of ill-being. *Williams v. Industrial Comm'n.,* 244 Ill. App. 3d 204, 209 (1st Dist. 1993).

1. *When did Petitioner's condition of ill-being manifest?*

Petitioner has filed three Applications for Adjustment of Claim and alleged two different potential manifestation dates. Petitioner has alleged a manifestation date of May 30, 2012, which appears to relate to the approximate time that she first noticed left foot symptoms. She has also alleged the date on which she first saw Dr. Gunzel (September 28, 2012) as an alternative manifestation date. Petitioner believed that her left foot condition and right bunion were work related after seeing Dr. Gunzel on September 28, 2012. The Arbitrator finds the manifestation date for Petitioner's alleged left foot injury and right bunion was September 28, 2012. As Petitioner's right foot condition was not diagnosed until June 3, 2013, the Arbitrator finds this to be the manifestation date for her right foot injury. Since the May 30, 2012, claim merely provided an alternative manifestation date, that claim is denied.

2. *Whether Petitioner's condition of ill-being was causally related to an accident that arose out her employment with Respondent.*

Petitioner alleged that she developed bilateral plantar fasciitis and a bunion on her right foot from the prolonged standing and walking she performed while working for Respondent. The Arbitrator recognizes that the Commission has repeatedly held that the mere act of repetitive standing and/or repetitive walking does not constitute an "accident" as contemplated under the Act. *See Doggett v. State of Illinois/Department of Corrections,* 08-WC-05274, 13 IWCC 1090 (2013); *Burns v. Speedco & ABC Auto Auction,* 14-WC-12387, 17 IWCC 19 (2017); *Cady v. State*

of Illinois, 12-WC-10991, 13 IWCC 981 (2013). Even if such accidents were recognized, Petitioner has the burden of proving both that she developed the medical conditions alleged and that they were causally related to her job. The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that she had plantar fasciitis and further failed to prove that she sustained an accident that arose out of and in the course of her employment with Respondent.

In support of her assertions, Petitioner relied on Dr. Gunzel's findings and opinions. The only conditions that Dr. Gunzel opined were causally related to Petitioner's work were the left plantar fasciitis and the right bunion deformity. As Petitioner had stopped working before developing symptoms of right plantar fasciitis, Dr. Gunzel was unable state that her right foot condition was causally related to her work. He was also unable to state that Petitioner's right plantar fasciitis was caused by an overcompensation for her left foot pain.

The Arbitrator finds Dr. Gunzel's testimony concerning the cause of Petitioner's right bunion to be inadequate and unconvincing. The Arbitrator also finds Dr. Gunzel's conclusions concerning Petitioner's left plantar fasciitis to be unpersuasive. Dr. Gunzel indicated that prolonged standing created a higher likelihood of injury to the plantar fascia. However, he admitted that it was possible that the cause of Petitioner's plantar fasciitis was something other than her work. Moreover, his recommendation that Petitioner undergo testing to check for stress fractures suggests that Dr. Gunzel was unsure that plantar fasciitis was even the cause of Petitioner's symptoms. Petitioner's assertion of work related plantar fasciitis is further negated by the *worsening* of her left foot condition after she stopped working and the development of a right foot condition absent her prior work-related standing and walking. Additionally, although Petitioner testified that her left foot pain caused her to alter her gait and limp, the record lacks any medical evidence connecting the right foot condition to an overcompensation for left foot pain. Further, Dr. Gunzel testified he did not observe an antalgic gait or limp in 2013 or 2016, and Petitioner never reported any such changes to him. The Arbitrator notes that Petitioner was observed walking in wedged sandals at the hearing without any apparent limp or abnormal gait.

After considering all of the medical evidence, the Arbitrator finds Dr. Schmidt to be credible and accepts his opinions. Dr. Schmidt diagnosed Petitioner with bilateral tarsal tunnel syndrome and did not believe Petitioner's tarsal tunnel syndrome was work related. Dr. Schmidt explained that prolonged standing and walking would not cause or aggravate tarsal tunnel syndrome. He testified that tarsal tunnel syndrome is typically insidious and often related to changes to the foot from aging. Dr. Gunzel agreed with this testimony. Dr. Schmidt's diagnosis and opinions were supported by: (1) Petitioner's age; (2) the insidious development of her condition; (3) the bilateral nature of her condition; (4) exam findings showing a lack of real tenderness over the plantar fascia; (5) the presence of symptoms that were inconsistent with plantar fasciitis (*e.g.*, nocturnal pain; nerve symptoms, pain at rest, pain that worsens throughout the day, etc.); (6) exam findings of a positive Tinel's sign; (7) the lack of response to plantar fasciitis treatment; (8) the performance of the same job for over a decade without developing problems with her feet; (9) the continuation of her symptoms after she stopped working; (10) the continued worsening of her symptoms after she stopped working; and (11) the development of a right foot condition after she stopped working.

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 that arose out of and in the course of her employment. All benefits are denied.

In support of the Arbitrator's decision relating to issue (E), whether timely notice of the accident was given to Respondent, the Arbitrator finds the following:

A claimant is required to provide notice of his injury within 45 days of his accident or manifestation date. 820 ILCS 305/6(c). For the reasons previously discussed, Petitioner is not entitled to benefits because she failed to prove accident and causation. *Arguendo*, the Arbitrator finds that Petitioner's entitlement to benefits would also be barred due to her failure to give timely notice of work accidents on or around May 30, 2012, and September 28, 2012.

There was no evidence that any of Petitioner's alleged injuries occurred or manifested on or around May 30, 2012; nevertheless, if Petitioner had incurred an injury that manifested on or around this date, she would have been required to provide Respondent with notice of it by July 14, 2012. The manifestation date for Petitioner's alleged left foot injury and right bunion was September 28, 2012. To be timely, she had to give notice of these injuries to Respondent by November 12, 2012.

Petitioner testified that she provided Respondent with notice of her work injuries right after her appointment with Dr. Gunzel on September 28, 2012. She claimed to have notified her supervisors, Charlie Newton and Lisa Woodside, by providing a piece of paper from Dr. Gunzel. Petitioner did not read the paper. She did not provide Mr. Newton or Ms. Woodside with any information concerning the alleged work accidents or injuries; she just produced the paper from Dr. Gunzel. Thereafter, Petitioner did not speak to her supervisors about her accidents or injuries.

Steve Landholt investigated the alleged work accidents for Respondent. He searched for accident reports and spoke with Petitioner's supervisors to see if there was any record of the alleged injuries. Mr. Landholt concluded that Respondent had no notice of the alleged accidents prior to receiving the Applications for Adjustment of Claim. Thus, Respondent did not have notice of a left foot injury on September 28, 2012, until after January 22, 2013. Respondent did not learn that Petitioner's right foot was also allegedly injured on September 28, 2012, until after June 4, 2013. Respondent was unaware of the alleged injuries to Petitioner lower extremities and feet on May 30, 2012, until after August 22, 2013. Mr. Landholt's testimony was supported by the following facts: (1) the First Report of Injury for the September 2012 left foot injury was prepared seven days after Petitioner signed the Application; (2) the Application for the September 2012 right foot injury was signed on June 4, 2013, which was one day after Petitioner was diagnosed with right plantar fasciitis; and (3) Dr. Gunzel's treatment records did not include work slips, documents to be given to Respondent, and/or office notes discussing causation. Additionally, the Arbitrator found Mr. Landholt to be more credible than Petitioner.

The Arbitrator finds that Petitioner did not provide timely notice of a work accident on May 30, 3012, or September 28, 2012. There was no evidence showing that Petitioner notified Respondent about the alleged accident on May 30, 2012, within 45 days of its manifestation or that Respondent was aware of the accident before receiving the Application in 2013. Further,

although Petitioner claims to have notified Mr. Newton and Ms. Woodside of a work accident after she saw Dr. Gunzel on September 28, 2012, the record lacks credible evidence supporting her testimony. Even if Petitioner's testimony was given credence, the evidence still does not establish the provision of timely notice. By her own admission, Petitioner submitted a document from Dr. Gunzel and did not converse with Mr. Newton or Ms. Woodside about a work accident. Petitioner could not testify as to the contents of the submitted document and did not produce a copy of it at the hearing. Respondent's file did not contain a work slip or doctor's slip from around September 28, 2012. Dr. Gunzel's records are devoid of any document from around September 28, 2012, that would have notified Respondent of a work injury on May 30, 2012, or September 28, 2012. Thus, the record lacks any evidence that the paper, if truly submitted, would have informed Respondent that Petitioner had incurred work related injuries. Petitioner did not give notice of the alleged accidents within the time allowed by law and is barred from recovering benefits for any injuries related to her work on or around May 30, 2012 and/or September 28, 2012.

In support of the Arbitrator's decision relating to issue (I), Petitioner's marital status at the time of the accident, and issue (O) number of Petitioner's dependents at the time of the accident, the Arbitrator finds the following:

On her Applications for Adjustment of Claim, Petitioner alleged that she was married with two dependents that were under 18 years old. At the hearing, she testified that she was married in 2012 and had two sons, Juan and Alejandro. She also claimed two nephews as dependents.

The Arbitrator finds that Petitioner has not proven that she was married in 2012. Petitioner's passport and tax returns contain only her maiden name. Instead of filing her taxes as a married individual, she designated herself as "single or head of household" in 2012 and as "head of household" in 2011 and 2013. Petitioner did not provide a marriage certificate or any other evidence that would support her allegation. Her husband also did not appear at the hearing.

The Arbitrator further finds that Petitioner failed to prove that she had any dependents that were under 18 years old in 2012. Petitioner's sons turned 32 and 18 years old in 2011. Additionally, Petitioner's nephews were not dependents in 2012. They did not live with Petitioner and her "support" of them consisted of occasionally giving her sister money. Periodically providing money to a sibling does not turn that sibling or that sibling's children into dependents.

In support of the Arbitrator's decision relating to issues (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, (K), Petitioner's entitlement to prospective medical care, and (L), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

In light of the Arbitrator's finding with respect to issue (C), the Arbitrator finds that Petitioner is not entitled to an award of past medical care, prospective medical care, or temporary total disability benefits. All benefits are denied.

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF WILLIAMSON	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mariela Valencia,
Petitioner,

vs. NO: 13WC 18973

Gilster-Mary Lee Corporation,
Respondent.

19IWCC0029

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, temporary total disability, permanent partial disabilityand being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 1, 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: JAN 18 2019
o011419
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

VALENCIA, MARIELA
Employee/Petitioner

Case# **13WC018973**

13WC003744
13WC028349

GILSTER-MARY LEE CORPORATION
Employer/Respondent

19IWCC0029

On 2/1/2018, 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:

1437 DARELL DUNHAM & ASSOCIATES
208 W WALNUT ST
CARBONDALE, IL 62901

0693 FEIRICH MAGER GREEN & RYAN
BRANDY L JOHNSON
2001 W MAIN ST PO BOX 1570
CARBONDALE, IL 62903-1570

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MARIELA VALENCIA
Employee/Petitioner

v.

GILSTER-MARY LEE CORPORATION
Employer/Respondent

Case # **13** WC **18973**

Consolidated cases: **13 WC 3744 & 13 WC 28349**

19IWCC0029

An *Application for Adjustment 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 **Herrin**, on **July 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. [x] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [x] 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 **Number of Dependents**

FINDINGS

On the date of accident, **September 28, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident on **September 28, 2012.**

In the year preceding the injury, Petitioner earned $**18,253.99**; the average weekly wage was $**389.21**.

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 $**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 $**305.41** 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 that arose out of and in the course of her employment on September 28, 2012. All benefits are denied.

Respondent shall receive credit of $305.41 pursuant to Section 8(j).

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

January 29, 2018
Date

ICArbDec19(b)

FEB 1 - 2018

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mariela Valencia,
Petitioner,

vs. NO: 13WC 28349

Gilster-Mary Lee Corporation,
Respondent.

19IWCC0030

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, temporary total disability, permanent partial disabilityand being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 1, 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: JAN 18 2019
o011419
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

VALENCIA, MARIELA
Employee/Petitioner

Case# **13WC028349**

13WC003744
13WC018973

GLISTER-MARY LEE CORPORATION
Employer/Respondent

19IWCC0030

On 2/1/2018, 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:

1437 DARRELL DUNHAM & ASSOCIATES
208 W WALNUT ST
CARBONDALE, IL 62901

0698 FEIRICH MAGER GREEN RYAN
BRANDY L JOHNSON
2001 W MAIN ST PO BOX 1570
CARBONDALE, IL 62903-1570

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MARIELA VALENCIA
Employee/Petitioner

v.

GILSTER-MARY LEE CORPORATION
Employer/Respondent

Case # 13 WC 28349

Consolidated cases: 13 WC 3744 & 13 WC 18973

19IWCC0030

An *Application for Adjustment 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 **Herrin**, on **July 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. ☒ 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 **Number of Dependents**

FINDINGS

On the date of accident, **May 30, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident *was not* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the accident on May 30, 2012.

In the year preceding the injury, Petitioner earned $**18,253.99**; the average weekly wage was $**389.21**.

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 $**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 $**305.41** 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 that arose out of and in the course of her employment on May 30, 2012. All benefits are denied.

Respondent shall receive credit of $305.41 pursuant to Section 8(j).

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

January 29, 2018
Date

ICArbDec19(b)

FEB 1 - 2018

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donna Miller,
Petitioner,

vs. NO: 14WC 24329

Caterpillar,
Respondent.

19IWCC0031

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 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.

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

DATED: JAN 18 2019
o011419
MJB/jrc
052

Michael J. Brennan

Kevin W. Lambor

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MILLER, DONNA
Employee/Petitioner

Case# **14WC024329**

CATERPILLAR
Employer/Respondent

19IWCC0031

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:

1824 STRONG LAW OFFICES
MICHAEL K BRANDOW
3100 N KNOXVILLE AVE
PEORIA, IL 61603

5411 CATERPILLAR INC
AMANDA WATSON
100 N E ADAMS ST
PEORIA, IL 61629

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Donna Miller
Employee/Petitioner

v.

Caterpillar
Employer/Respondent

Case # **14** WC **24329**

Consolidated cases: **N/A**

19IWCC0031

An *Application for Adjustment 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 **Peoria**, on **6/21/17**. 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. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **6/10/14**, 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 **$37,190.40**; the average weekly wage was **$715.20**.

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 $**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** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $89,875.52, as set forth in Petitioner's exhibit 11, as provided in Sections 8(a) and 8.2 of the Act.

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

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of **$429.12**/week for a further period of **62.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **12.5% loss of use of the person as a whole.**

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

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

Michael K. Nowak, Arbitrator

5/23/18
Date

ICArbDec p. 2

MAY 29 2018

FINDINGS OF FACT

On June 10, 2014, Petitioner was employed as a boring specialist in Respondent's Building KK in what is commonly known as the "pocket face area." She has been an employee of Respondent since 2007 (T11). Petitioner testified her job duties from the time she began as a boring specialist in September 2007 to June 2014 were essentially the same (T12).

Petitioner provided a detailed explanation of her job duties during her testimony. In summary, she worked in an area with 4 boring machines. It was her responsibility to operate two of the machines throughout her work day. Each machine could bore parts of various sizes, but had to be set up to accommodate each type of part. At times the machine would already be set up for the first type of part she would run during the day, at other times she would be required to set the machine up before beginning to run parts.

Respondent offered into evidence a video which shows two types/sizes of parts being run on one of the machines which is helpful in understanding both the part running process and the layout of the work area. (Rx3) It does not, however show the break down or set up procedure. The large stationary portion of the machine generally to the left of the screen in the video is where a part called a "fixture" is located. The running of each different type of part requires a different fixture. The part to we worked is attached to the fixture. The smaller horizontal portion of the machine contains the "bar" and removable holder. For some jobs there may be two bars. Some jobs require only one.

If Petitioner arrived at work and the machines were not set up for the parts she was to run, she would first have to "break down" both portions of the machine. She would remove the fixture by hooking it to a jib crane using "I" bolts in the fixture. She would then remove the bolts holding the fixture to the machine with the crane supporting the weight of the fixture. Once loose Petitioner would pull the fixture off the machine and push it to a cart where it would be lowered with the crane. It was then manually pushed to its storage rack where the crane would lift the fixture and she would manually push the suspended fixture into place on the rack. The opposite procedure would be followed when obtaining and installing the required fixture. The fixtures weigh 100 to 200 pounds. She would then remove the bar, which is the tool that cuts the parts, which involves removing the retaining bolts and moving the bar by hand onto a cart. Bars weigh between 25-30 pounds. She would next remove the holder by removing its retaining bolts and manually placing it on the cart. Holders weigh between 40-45 pounds. The bar and holder would be taken by cart to their storage place and the needed bar and holder would be retrieved. She would then take them back to the machine and install them by reversing the procedure described above.

Once the setup of the machine and proper fixture is complete Petitioner manually takes a number of measurements and then entering information into a computer so parts can be loaded onto the fixture and machined. The part has to be aligned properly and weights of the parts can vary from 35-600 pounds. As depicted in the video, the hoist was used to put the larger parts on the fixture. Once the part is properly placed, Petitioner starts the machine and the machine cuts the part according to specifications and measurements. Petitioner ran two machines in her workstation. Machining times varied depending on the part being run but for smaller parts the machine would do the work for 5-7 minutes with bigger parts taking 15-20 minutes.

Once the machine was done with its work, Petitioner would unload the part, either by hand or using the crane, spray it off to get all the chips off of it and get it on a table to deburr. After removing the nuts holding the part to the fixture the part would be removed. On the larger parts the weight was suspended by the crane and Petitioner would manually pull the part from the fixture and manipulate it to the table. Deburring may require use of a sander. The part is then lifted, either by hand or using the crane, and placed in a tub. Petitioner then retrieves another part and starts the process over again.

Petitioner testified that depending on the size of the part in the order, she could run anywhere from 15-50 parts per day per machine. Petitioner also testified the number of setups of the machine she would have to do each day depended on the number of different sizes of parts she would run that day. If she was going to run the same part all day, she would only do one setup. She also indicated there could be days she didn't have to do a setup at all because the machine was already setup properly for the part she would run all day.

Petitioner testified that she had previously reported pain in her right shoulder from manipulating parts and fixtures in 2011 resulting on her being placed on restricted duty, where she performed a desk job, for a couple of months. She testified the pain went away and she returned to her regular duties. Then, leading up to June of 2014, she began to notice pain developing in her right shoulder again which was noticeably worse when manipulating parts and fixtures into place.

Records of Heartland Community Health Clinic indicate Petitioner's primary care physician, Dr. David Holden, ordered an MRI of the right shoulder on October 25, 2013, due to suspected chronic rotator cuff tear or tendonitis (Rx6). An October 24, 2013 office visit note of Dr. Holden indicated Petitioner complained of pain in her right shoulder. The examination indicated no deformity with full range of motion of the left shoulder, but the right shoulder had tenderness and severely reduced range of motion. A letter from Petitioner's group insurance carrier in 2013 indicates the request for an MRI was denied. It does not appear Petitioner returned to her primary care physician until June 20, 2014, when she again made complaints of right shoulder pain (Rx6).

By June 10, 2014, the pain in her right shoulder became concerning enough to report). She filed a Caterpillar employee incident report on June 11, 2014. Petitioner saw a Caterpillar physician on June 12, 2014 (Rx4). She reported having intermittent pain in the right shoulder for a number of years, which was consistent with her testimony on the date of hearing (Rx4, T39). She reported previously seeing her primary care physician who ordered an MRI (Rx4). She complained of pain in the right shoulder radiating down to the waist. She noticed an increase in pain the previous day, which would have been June 10, 2014. The medical records indicate that the employee works on two boring machines for the past six years and the parts weighed between 60 to 150 pounds using a lifting machine; <u>but she still does a lot of pushing and pulling.</u>

The following day, when she returned to Caterpillar Medical, Petitioner stated that she saw Dr. Miller in 2011, but that she had intermittent problems for a couple years. Later, when she discussed her injury with safety, per the Caterpillar Medical records, she was informed that her job involved low force exposure not consistent with aggravation of a pre-existing shoulder injury.

On June 20, 2014, Petitioner went to Heartland Community Clinic and saw Dr. Holden. Dr. Holden ordered an MRI of the right shoulder which was denied by Caterpillar.

On July 30, 2014, the MRI of the right shoulder took place. It showed a small rent tear at the far anterior footprint of the supraspinatus tendon with mild tendonisis. There was also some mild subacromial bursitis.

The Petitioner saw Dr. Rhode on July 16, 2014. She indicated that this was a self-choice to be examined for the right shoulder. She described the activities that she performed at work including loading parts into the machine and to burring the parts. The Petitioner received an injection. Dr. Rhode reviewed the MRI that took place on July 30, 2014 and performed surgery on September 9, 2014. The surgical procedure was sub acromial debridement and acromio-clavicular arthroplasty. The diagnosis was right shoulder impingement/bursitis and acromio-clavicular pain.

Following surgery Petitioner underwent physical therapy for a period of time, eventually being released to full duty as of January 15, 2015. At that point, physical therapy was discontinued and she was to return as needed.

Respondent presented the testimony of Brett Beck, Environmental Health & Safety Supervisor in Respondent's Building KK.. In his role in Safety, Mr. Beck would investigate injuries alleged on the shop floor. He was put on notice of Petitioner's June 2014 report of a right shoulder injury and investigated Petitioner's workstation, which in the building is identified as "pocket facers." As part of his investigation, he spoke to the Petitioner with regard to the incident, measured push/pull forces and also, in this case, took video of the complained of job duties at the workstation. He testified Petitioner complained specifically of using the hoist to move part #362-60445. Based upon his discussion with her and the incident report, he measured push/pull forces of part #362-60445. He testified the initiation forced with two hands was measured at 20 pounds and the continuation force for movement with the hoist was measured at 10-15 pounds. The initial force is the amount of force required to get the part moving on the hoist, while the sustained force is the amount of force required to keep the parts moving. He did not testify as to the weight of the part tested. He did however testify that it was easier to move material on the jib hoist as load weight increases, which the Arbitrator found both perplexing and seemingly contrary to the laws of physics. At that time he determined this was low force exposure not consistent with an aggravation of Petitioner's pre-existing right shoulder condition; therefore, it was determined not compensable.

Mr. Beck also discussed the job video he prepared as part of his investigation. His testimony in this regard largely corroborated that of Petitioner. Mr. Beck also described the two different parts displayed in the video, one weighing 70 pounds and the other weighing 270 pounds, which demonstrates a spread of weights between the different parts run at the station. Mr. Beck also testified there is a maximum personal lift restriction of 18 pounds in Building KK, despite the fact that the male worker in the video lifted the 70 pound part by hand. He claimed that if a part or other tool is over that weight, standard work process indicates a lifting device, such as the jib hoist, must be used.

With regard to the deburring of the machined part, Mr. Beck testified the table height is 36-42 inches standard. He indicates this generally accommodates anyone from 4'10" to 6'8" (T60). In his evaluation of Petitioner's job, there was no above-shoulder work (T62).

Dr. Rhode testified by way of deposition. Dr. Rhode provided his understanding of Petitioner's job duties in his testimony. He indicated she was a boring specialist required to manipulate large parts and she was

required to lift between 15-50 parts per day. She also cut parts and was required to lift between 60-300 pounds (Px12, p. 5). Petitioner underwent an MRI indicating a diagnosis of a partial thickness supraspinatus tear, which was already suspected by Dr. Rhode (Px8). On September 9, 2014 subacromial decompression with distal clavicle excision was performed by Dr. Rhode. He testified a review of the rotator cuff at the time of surgery demonstrated there was no evidence of a tear that required any repair (Px9; Px12, p. 9-10). Post-surgery, Petitioner participated in physical therapy and she showed improvement in function and comfort. Dr. Rhode last saw Petitioner on December 18, 2014, at which time her strength had recovered and she was ready to advance to full duty (Px12, p. 13). As of her last visit with the physician assistant at Orland Park Orthopedics, she was doing well, had no deficits, had a normal exam and was placed at MMI (Px8; Px12, p. 14). Dr. Rhode's final diagnosis of Petitioner's condition was right shoulder rotator cuff impingement with tendonitis and acromioclavicular injury (Px12, p. 14). In his testimony, Dr. Rhode commented Petitioner has an excellent prognosis with no need for additional treatment or over-the-counter medication (Px12, p. 15).

Dr. Rhode opined the diagnosis and need for surgery was causally related to Petitioner's work for Respondent. Dr. Rhode believed manipulation of parts in a forward-reaching position could in fact cause the ultimate shoulder injury in Petitioner's case. When Dr. Rhode demonstrated the forward-reach he described, he showed it between waist and chest level at the time of his testimony (Px12, p. 18).

On December 1, 2014, Petitioner submitted to an examination by Dr. Ira Kornblatt pursuant to section 12 of the Act. Dr. Kornblatt indicated Petitioner denied any problems with the right shoulder prior to June 10. Dr. Kornblatt generally agreed with Dr. Rhode's diagnosis of impingement syndrome status post arthroscopic subacromial decompression and resection of the distal clavicle. However, based on his review of the job duties in the DVD and the history given to him by Petitioner, he did not believe there was clear causation with her right shoulder symptoms and the activities at her job (Rx1).

At the time of his deposition, Dr. Kornblatt indicated that heavy lifting was relegated to a hoist and all her work duties were done below shoulder level. Therefore, Dr. Kornblatt felt it was unlikely her shoulder problem was related to her job activities (Rx2, p. 11). Dr. Kornblatt indicated impingement can come on spontaneously as part of the aging process (Rx2, p. 11-12). Dr. Kornblatt also did not feel the job duties shown on the DVD, even if done repetitively, could have caused the injury to Petitioner's right shoulder (Rx2, p. 12). Dr. Kornblatt disagreed with the opinion of Dr. Rhode that the type of shoulder symptomology and objective findings shown in Petitioner's right shoulder could have been caused by forward flexion of Petitioner's arms at 60 degrees, or between waist and chest level (Rx2, p. 13). Dr. Kornblatt went on to explain Petitioner's objective findings did not necessarily require above shoulder work to meet his causation standard, but heavier work. With heavier lifting being relegated to a hoist, he did not believe this was possible. Dr. Kornblatt indicated if Petitioner was actually lifting 50 pounds on a repetitive basis, it could change his opinion, but using a hoist to manipulate a 50 pound part would not change his opinion that Petitioner's job duties did not cause or aggravate her right shoulder condition (Rx2, p. 20-22).

CONCLUSIONS

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

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

An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Commission*, 128 N.E.2d 718, 720 (Ill. 1955); *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (Ill. 1982). In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961 (1999). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003) (emphasis added). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000).

In *Edward Hines Precision Components v. Indus. Comm'n,* 825 N.E.2d 773, (2nd Dist. 2005). the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (2nd Dist. 1991) and *Edward Hines supra.*

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

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

524, 505 N.E.2d 1026 (Ill. 1987); *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill.App.3d 607, 531 N.E.2d 174 (3rd Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

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

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

The fact pattern in this case is precisely that envisioned by the courts in *Oscar Mayer* and *Durand*. Here Petitioner informed her employer in 2011 she was experiencing symptoms in her right shoulder which she felt were related to her employment. Respondent allowed Petitioner to work at a desk job for approximately two months at that time. There after Petitioner returned to her regular job with intermittent right shoulder symptoms. In 2013 her symptoms were progressing and by June of 2014 they had become, as she described them, "consistent" such that she could no longer perform her job duties and reported her accident.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner has met her burden of establishing she sustained accidental injuries which arose out of and in the course of her employment with respondent and that June 10, 2014 is an appropriate manifestation date under the Act.

With respect to causation, it does not appear that Dr. Kornblatt had as thorough an understanding of Petitioner's job duties as Dr. Rhode. Further, the video upon which he relied shows only part of Petitioner's job duties. The Arbitrator finds the testimony and opinions of Dr. Rhode more persuasive.

In addition, the causal connection between Petitioner's condition and her employment duties is bolstered by the chronological history. When Petitioner had difficulties with her right shoulder in 2011 and was given two months on light duty the symptoms abated. When she returned to normal duties her symptoms began to recur. She credibly described her symptoms being particularly aggravated when manipulating heavy parts suspended on the jib crane.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner has met her burden of establishing the condition of her right shoulder is causally related to her employment with Respondent.

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

Respondent did not dispute the reasonableness and necessity of the medical services provided. Petitioner offered into evidence medical bills totaling $89,875.52. (Px11) In light of the findings regarding issues C and F the Arbitrator finds Respondent is responsible for these charges.

Respondent shall pay reasonable and necessary medical services of $89,875.52, as set forth in Petitioner's exhibit 11, 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.

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 boring specialist for Respondent. She continues to use her right upper extremity to manipulate parts. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 37 years old at the time of her injuries. Petitioner have to live with the sequela from her injury for a longer period than an older worker. Furthermore, Petitioner has hand and arm intensive employment as a boring specialist. 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. As a result of her employment she sustained right shoulder impingement which required surgery. Her complaints and disability are corroborated by the medical and non-medical evidence in this case. 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 12.5% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

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

Timothy A. Lacourse,

Petitioner,

vs. NO: 11WC 30676

Chadco, Inc.,

19IWCC0032

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 April 19, 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: JAN 18 2019
o011419
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

LACOURSE, TIMOTHY A
Employee/Petitioner

Case# **11WC030676**

CHADCO INC
Employer/Respondent

19IWCC0032

On 4/19/2018, 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 1.94% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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 EDIMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

2904 HENNESSY & ROACH PC
EMILIE A MILLER
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

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

- [ ] 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)

Timothy A. Lacourse
Employee/Petitioner

v.

Chadco, Inc.
Employer/Respondent

Case # **11** WC **30676**

Consolidated cases: ___

19IWCC0032

An *Application for Adjustment 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 **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. [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] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [x] Maintenance [x] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [x] Other **Vocational Rehabilitation**

FINDINGS

On the date of accident, **7/8/11**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$13,814.33**; the average weekly wage was **$483.02**.

On the date of accident, Petitioner was **45** years of age, *married* with **1** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $322.01/week for 324-5/7 weeks, commencing 7/12/11 through 6/11/14, 6/27/14 through 8/16/14, 12/16/14 through 5/20/15, and 6/27/15 through 2/26/18 as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, totaling $267,149.91, subject to the medical fee schedule and as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for any medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

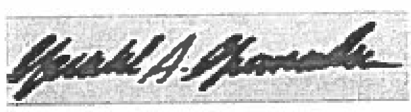
Respondent shall authorize and pay for the prospective medical care recommended by Dr. Watson, including the suggested evaluation of Petitioner's sternoclavicular joint.

Respondent shall pay for vocational rehabilitation services provided by David Patsavas.

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

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

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



Signature of Arbitrator

4/18/18
Date

APR 19 2018

FINDINGS OF FACT

This case involves a Petitioner alleging injuries sustained while working for the Respondent on July 8, 2011. Respondent disputes Petitioner's claim and the issues in dispute are: 1) accident; 2) causation; 3) medical expenses; 4) TTD/ maintenance; 5) prospective medical care; 6) vocational rehabilitation and 7) average weekly wage .

Petitioner worked for Respondent on July 8, 2011 as a concrete laborer. Respondent is a business engaged in constructing large grain storage bins, and Petitioner has continuously worked there since July 2001. Petitioner testified that on Friday, July 8, 2011, he was engaged in his work duties as a concrete laborer in a project to build tower pads for a grain leg, which involved setting wall forms to pour concrete. These forms are two foot by eight foot by two inch thick pieces of material that are put together with pins and wedges to create a wall where concrete is poured. Petitioner testified that they were lowering the forms into a 15-foot deep hole, and as the forms were only eight feet long, would lower them as far as they could into the hole and then drop them. Petitioner testified that the forms weighed about 80 pounds by themselves, and as they were already covered in mud probably weighed about a hundred pounds or a little more. On that day, Petitioner worked half of a day, lowering forms into the hold, carrying rebar, placing it into the hole, and tying it down for setting the wall forms. The rebar Petitioner carried was 5/8 inch steel measuring up to 40 feet long. Petitioner testified that they were drilling holes in the concrete foundation already poured for the wall and putting the rebar into the foundation. Petitioner testified that he was in and out of the hole throughout the workday, but was the only one carrying the forms to the hole while two co-workers remained in the hole. The job task was made more difficult because a water vein was hit, leaving 12 inches of water in the hole. Petitioner testified that after dropping the forms in to the hole, they would sink into the mud ten or twelve inches, and would have to be yanked out.

Petitioner testified that on July 8, 2011, he had picked up a form out of the mud and placed it on the concrete foundation leaning against the dirt bank. He climbed two feet upon the rebar with one foot on the rebar and the other stuck into the muddy dirt bank of the hole so he could reach higher and grab the top of the form and pull it vertical so it was plumb. While performing this task, a co-worker kicked the bottom of the form to put it in line, which caused Petitioner to lose his footing on the rebar and the dirt bank, and land on his right heel, causing his neck to whip back. Petitioner testified that he had let go and fallen at that time because he felt something in his neck and pain at the location where his clavicle meets his sternum on the left side, which made a popping sound. Petitioner testified that he did not think much of the event at the time and climbed back out of the hole to grab another form, but realized he had hurt himself when he experienced pain in the clavicle-sternum area when he went to grab another form. Petitioner testified that he then went to just sit in the truck for two or three hours until everybody else was ready to leave that day at the normal quitting time.

Petitioner testified that he complained of the pain to his supervisor foreman, Everett White. Petitioner testified that as the day wore on, as he just sat in the truck and on the ride home, the pain just got more and more intense, causing him to squirm around in his seat. Petitioner testified that the ride from the job site to the Respondent's place of business was about an hour and a half. During that ride, the Petitioner testified that the pain became unbearable, and that he was having tremendous headaches as well as pain going up his neck and into his clavicle. Petitioner testified that his neck was swelling up to the point that it was hard to swallow.

Everett White testified on behalf of the Petitioner. He was a concrete foreman for Respondent at the time he worked with Petitioner in July 2011. Mr. White testified that he recalled a time when they were setting forms and Petitioner said that he had picked a form up and thought he had pulled something in his shoulder or his neck. He acknowledged that this was at a job site north of Galesburg. Mr. White testified that Petitioner continued working "a little bit" and then had to sit down for the rest of the day because he hurt so badly. He did not recall if the Petitioner worked any more after that day. He could not recall the exact date that this conversation took place. He testified that he had worked with the Petitioner for 10 years and that he was a good, hard worker, and that it was not typical for him to just stop working and sit.

Petitioner testified on cross-examination that he acknowledged giving a statement to an investigator working for the worker's compensation insurance company on July 20, 2011. In this statement, he acknowledged having lifted 100-pound forms throughout the day on July 8, 2011 and experiencing severe neck pain during his hour and a half ride home. He also described his neck was severely swollen and he was having difficulty moving it upon arriving home later that day. Although he also reported tingling and numbness in his arm, Petitioner testified that the reference to his right arm in the investigative report was an error as those sensations were in his left arm. Petitioner stated that at the time of the incident, he had not noticed a sudden onset of pain when engaged in a particular lifting incident. He testified at that at the time of his statement, he didn't know exactly what he had done to initiate his pain, but after he started therapy he was able to piece it together. He further testified that at the time he gave the statement and during his initial treatment, his concern was in finding out what was wrong and getting it fixed and not with exactly what had happened to cause his pain.

During cross examination, Petitioner testified that he was experiencing massive pain from his shoulders to his head when he started receiving treatment and was not sure what was wrong with him. He was not sure at first what had happened and thought he might have initially injured himself yanking forms out of the mud - which he had done time after time that day. He testified that he was not sure if the incident of him slipping while holding the rebar was the cause of the injury, or whether that particular event "finished [him] off." Petitioner acknowledged on cross examination the detailed history of the incident was not given to the doctor at the initial emergency room visit and that he was not sure what happened at that time as he was in so much pain he had not discussed much with the doctor. Petitioner acknowledged that his medical treatment was initially focused on his neck, though he testified that he was having pain through his shoulder and neck and did not distinguish the areas at the time.

Petitioner testified that after going home that night on July 8, 2011, he sat down in his chair and because of his pain, he was unable to get up to go upstairs to bed or to the bathroom, and he spent the weekend sitting in his chair. Petitioner testified that he did not work that Saturday. Petitioner testified that he met with Mr. Chadderdon and his wife, the owners of the Respondent company, on the following Thursday, and they agreed to continue his wages until the worker's compensation people could contact him. Petitioner testified that Respondent paid him for Saturday though he did not work that day. He attempted to return to work on Monday, going to the place of business in Bushnell, Illinois, but was unable to report his incident that morning because the office people had not yet arrived by the time he left for the job site. Petitioner testified that his foreman suggested that the sales supervisor, Steve Schneider, would be appearing at the job site that day and he could report his injury then. Petitioner testified that at the job site he just sat in the shade in a barn-style corn crib until Mr. Schneider arrived. When Mr. Schneider arrived, Petitioner told him about his injury on Friday, stating that he felt that he needed to go to the hospital. Petitioner testified that Mr. Schneider dismissed his report as "just having too much sex that

weekend" and Petitioner spent the rest of the day sitting and hurting, until the crew left the job site at 2 p.m. Petitioner testified that he called his wife while they were on the ride back to Bushnell and asked her to meet him at the Respondent's site in Bushnell so she could take him to the emergency room - which she did.

The July 11, 2011 records from McDonough District Hospital show that the Petitioner appeared at the emergency room complaining of neck pain for the past three days that had begun the previous Friday while working. Petitioner reported pain in his left shoulder with paresthesias in both arms. Petitioner's neck was tender on examination. (PX 6, pp. 48-54) Petitioner was discharged with instructions for handling cervical strain and radiculopathy, and was prescribed Prednisone, Flexeril and Vicodin. An x-ray was performed on Petitioner's cervical spine which suggested changes at multiple levels suggesting disc protrusions and some mild to moderate bony foraminal stenosis at C4/5 and C5/6. The radiologist suggested that an MR scan would be useful to further evaluate possible disc disease. (PX 6, p. 57) Petitioner testified that he was taken off work at that time and that he was told that his "neck was broken" and that he needed to see a specialist.

Petitioner followed up with his physician assistant Gretchen Fawcett on July 14, 2011 complaining of neck pain. (PX 3, p. 283) Petitioner described doing a lot of heavy work, climbing in and out of a 6-foot hole, working with concrete, and developing neck pain. He complained of continued pain that was worsened by moving his head. He complained of heaviness in his arms but no other neuropathy. His shoulders had a popping sensation. An appointment was made for an MRI of Petitioner's neck, though Petitioner was initially unable to complete it due to claustrophobia. Petitioner continued to follow-up periodically with that office, and began attending physical therapy at their direction. Petitioner reported persistent neck and shoulder pain with numbness in his arms. The office continued to keep him off work and provided an off work until further notice as of August 22, 2011. (PX 3, pp. 210-217)

An MRI completed on August 22, 2011 at OSF Healthcare System revealed a relatively shallow, but broad-based central disc protrusion resulting in substantial effacement of the anterior subarachnoid space at C2-3. (PX 3, pp. 208-209) At C3-4, there was a central disc protrusion resulting in substantial effacement of the anterior subarachnoid space and asymmetrical encroachment on the left C2-3 neural foramen. At C5-6, there was posterior endplate spurring and annular bulging resulting in partial effacement of the anterior subarachnoid space and some minimal bilateral C5-6 foramen encroachment.

Gretchen Fawcett referred Petitioner to Dr. Todd McCall of Illinois Neurological Institute, whose records indicate an impression of cervical spondylosis and recommendation for four weeks of therapy, including massage therapy and traction, and pain management. (PX 5, pp. 2-3) Fawcett also referred Petitioner to Dr. Brian Russell for a second opinion regarding the neck, and to Dr. Greatting regarding his shoulder. (PX 3, p. 97, 103)

Petitioner began seeing Dr. Brian Russell on December 13, 2011. Dr. Russell ordered an EMG done on December 22, 2011 that showed severe bilateral carpal tunnel syndrome but no cervical radiculopathy. On January 14, 2012, Petitioner first saw Dr. Mark Greatting, who opined that Petitioner had a possible sprain injury to the sternoclavicular joint, as well as pain and crepitation in the left shoulder - both related to his work injury. A CT scan on January 24, 2012, ordered by Dr. Greatting showed mild degenerative change of the AC joints bilaterally (PX 2, p. 118). An MRI arthrogram completed the same day showed outlet impingement secondary to degenerative arthrosis of the supraspinatus with distal supraspinatus tendinosis or perhaps bursal surface partial tear. No full thickness tears were identified. (PX 2, p. 120) When Petitioner's shoulder pain failed to respond to an injection, Dr. Greatting recommended an

arthroscope with subacromial decompression as well as an injection in the left sternoclavicular joint. This surgery was completed on May 15, 2012, during which a partial thickness tear of the superior edge of the subscapularis tendon was found and debrided. (PX 2, pp. 88-90) Therapy was prescribed following this procedure, though Petitioner continued to complain of popping in the AC joint area as well as discomfort and prominence in his sternoclavicular joint area. Dr. Greatting opined on October 11, 2012 that he felt that Petitioner's shoulder was improved though he continued to complain of some tenderness over the AC joint and sternoclavicular joint. He noted good motion and strength of the shoulder and felt that Petitioner could use his left arm and shoulder without specific restrictions as far as those injuries were concerned.

Respondent obtained a records review by Dr. Edward Kolb on September 26, 2012. Dr. Kolb opined that the Petitioner did not suffer an injury to his left shoulder as a result of his work duties on July 8, 2011 and questioned the diagnosis of impingement syndrome in the shoulder, stating that he felt that Petitioner's complaints were related to a cervical condition. (Ex 2 to RX 1)

Petitioner had continued to follow up with Dr. Russell concerning his neck injury while under Dr. Greatting's care. On July 27, 2012, Petitioner reported daily neck pain and headaches with occasional numbness and tingling down his arm. (PX 2, p. 70) Petitioner underwent an occipital block on September 19, 2012 with only temporary relief. Dr. Russell advised Petitioner as of January 18, 2013 to continue conservative management and try to increase his activities as he could. Petitioner testified that he attempted to live with his pain for a time but continued to experience severe headaches and numbness down his left arm as well as the pain in his sternoclavicular joint. Petitioner continued to follow up with Dr. Russell and eventually underwent an anterior cervical discectomy and interbody fusion at C4/5 and C5/6 on April 23, 2014. (PX 2, pp. 16-19, PX 1, pp. 304-306) Petitioner was re-admitted for post-operative swelling in his neck from April 25, 2014 to April 28, 2014. (PX 1, p. 451 et seq.)

Petitioner testified that he did attempt to return to work in June 2014. Petitioner testified on cross-examination that he had initially attempted to return to work for Respondent when he was released to light duty by Dr. Russell, but that Respondent's owner, Mr. Chadderdon told him to sign up for unemployment as he had already laid everyone off. Petitioner testified, that he was unable to get unemployment because Mr. Chadderdon told unemployment that he had only worked there four months and he did not know why the Petitioner had left work - all of which Petitioner testified was false.

Petitioner testified that he returned to light duty working for Blout Farms, where they had him take it easy during June of that year, driving farm equipment to do spraying and mowing. Petitioner testified that he operated a tractor pulling a grain cart during the harvest months from August to December, with no lifting involved. The tractors had air ride seats and the auger used to empty grain carts was operated by the push of a button. The tractors had swivel seats so that if he needed to look to the side he could turn his whole body. Petitioner could tolerate the work at Blout for a couple of days, but several days together would bring on headaches and pain. Petitioner testified that he missed a few days during that time due to pain in his neck, sternum and head. He attempted to return to work with Blout Farms in 2015 but was unable to do so at that time, because of his pain. Petitioner therefore told Mr. Blout that he could not continue to work for him.

Petitioner continued to follow up with Dr. Russell on December 10, 2014, March 31, 2015 and November 24, 2015 reporting ongoing neck pain and headaches. Petitioner testified that Dr. Russell moved from the area after this last appointment. (PX 1, pp. 17-18, 30, 263)

From at least December 13, 2014 through the present, Petitioner has been prescribed ongoing pain medication, being primarily Hydrocodone-Acetaminophen, on a regular and consistent basis.

Petitioner saw Dr. Greatting on a number of occasions with regard to ongoing shoulder discomfort as well as numbness in his left arm and both hands. (PX 1, pp. 19-20, 34-35) An EMG on February 19, 2015, revealed bilateral carpal tunnel syndrome and also left cubital tunnel syndrome. (PX 1, p. 31) Petitioner testified that the numbness in his left arm at this time was the same that he had been experiencing since the onset shortly following his accident on July 8, 2011. On that date, Dr. Greatting noted Petitioner continued to suffer from pain in his left AC joint and popping and discomfort in his sternoclavicular joint. (PX 1 pp. 32-33) Petitioner underwent surgical releases of his left cubital and carpal tunnels on April 14, 2015, as well as an injection in his left AC joint. (PX 1, pp. 26-27) Petitioner was released by Dr. Greatting on April 30, 2015. (PX 1, p. 11)

Petitioner underwent Functional Capacity testing on August 3, 2016 at Midwest Rehab. (PX 10) A history of injury while working with concrete forms was recorded, with resultant pain in left clavicle and into shoulder as well as across left chest and shoulder. Petitioner demonstrated lifting capacities of 70 pounds from floor to shoulder level and 50 pounds from shoulder to overhead on an occasional basis. Petitioner was noted to be able to carry up to 60 pounds in a two hand carry and 40 pounds in a one-hand carry. Work overhead was limited to one minute 50 seconds prior to termination complaining of fatigue and numbness in the left upper extremity. The therapist noted gradual decline of twisting/screwing task overhead consistent with fatigue. Petitioner's performances were rated as consistent. He was advised to follow-up with his physician due to high blood pressure measurements at the conclusion of testing.

Petitioner continues to follow up with Gretchen Fawcett for prescriptions for pain medication for his persistent pain. Fawcett referred Petitioner to Dr. Feather for further pain management. (PX 3, pp. 316-330) Petitioner continues to treat with Dr. Feather for his pain management, which includes medication of Meloxicam, Flexeril, and Norco.

Dr. Greatting testified via evidence deposition on January 8, 2013. He affirmed his post-operative diagnosis of Petitioner's shoulder condition as impingement syndrome with a partial tear of his subscapularis tendon and sternoclavicular joint arthritis. (PX 7, pp. 11-12) He opined that these diagnoses were caused or aggravated by the Petitioner's described work related injury and that the arthroscopic surgery he performed was related to that work injury. (PX 7, p. 12) Dr. Greatting testified that the Petitioner had been off work at the time that he initially saw him, though the first time that he himself had taken the Petitioner off work was at the time of surgery on May 15, 2012. (PX 7, p. 13) He testified that the Petitioner was kept off work at the time of his May 30, 2012 and July 12, 2012 follow-up appointments. (PX 7, pp. 13-14) Dr. Greatting testified that he released Petitioner without restrictions as far as his shoulder was concerned on October 11, 2012. (PX 7, pp. 14-15) Dr. Greatting also testified on cross-examination that he felt that Petitioner had some arthritis in the sternoclavicular joint and that the work accident had aggravated that arthritis. (PX 7, p. 22) Dr. Greatting testified that the tear identified in the Petitioner's subscapularis tendon could not be the result of his arthritis and had to be related to some type of trauma. (PX 7, p. 23)

Dr. Kolb testified on January 18, 2013. Dr. Kolb agreed with Dr. Greatting's diagnosis of left shoulder impingement syndrome and arthritis of the sternoclavicular joint, but did not feel that these conditions were causally related to the Petitioner's work injury. (RX 1, p. 13) Dr. Kolb did not feel that the

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histories that were recorded in the course of the Petitioner's medical treatment during the firsts three months of treatment were consistent with those diagnoses. (RX 1, p. 13-14) Dr. Kolb did agree that the treatment that the Petitioner had received for his left shoulder was reasonable and necessary to treat those conditions. (RX 1, p. 15) On cross-examination, Dr Kolb acknowledged that he did not meet with the Petitioner or obtain any history from him and relied only on the history in the medical records he had available. (RX 1, pp. 16-17) He acknowledged that the initial emergency room visit was not contained within the list of records that he indicated that he had reviewed. (RX1, p. 17) He acknowledged that complaints of shoulder pain contained in the initial emergency room record could be a symptom of impingement syndrome. (RX 1, p. 18) He acknowledged that complaints of a popping sensation in the shoulders recorded in the Petitioner's initial visit with his principal care provider 6 days after the date of injury could be evidence of a shoulder injury. (RX 1, pp. 18-19) Respondent offered a supplemental report of Dr. Kolb dated March 16, 2017 documenting his review of several additional records but involving no new examination of the Petitioner. (RX 5) In this report he reiterated his opinions that Petitioner's conditions in his left shoulder, cervical spine, left carpal tunnel, and left cubital tunnel were all not related to his alleged work accident.

Dr. Russell testified on March 21, 2014. , Dr. Russell opined that the Petitioner's work activities of lifting and carrying heavy forms on July 8, 2011 had aggravated the degenerative changes in his neck and that aggravation continued to contribute to the Petitioner's complaints. (PX 8, p. 15) Based upon the Petitioner's history, Dr. Russell opined that the cervical discectomy and fusion that he was contemplating at that time would be causally related to the Petitioner's work accident. (PX 8, p. 16) Dr. Russell testified that he would have restricted the Petitioner to light duty work during the course of his treatment and that he would have been unable to do the type of heavy work that he was doing on July 8, 2011. (PX 8, pp. 16-17) He testified that "light duty" would have meant restrictions of lifting no more than 20 to 25 pounds and avoiding overhead work. (PX 8, p. 17) On cross-examination, Dr. Russell testified that his opinion on causation would not change if the Petitioner began noticing neck pain on the date of injury after his work day ended and while driving home, and that sometimes when a person has an injury, the nerve roots will swell and muscles start to have spasms a few hours later. (PX 8, p. 23) Dr. Russell could not say that the Petitioner would have required surgery on the degenerative changes in his neck absent the work injury as some people with such degeneration have flare-ups that resolve with time - though Petitioner's had not. (PX 8, p. 24)

Dr. Zelby testified on March 19, 2014. Dr. Zelby conducted a Section 12 examination of the Petitioner on October 31, 2011. (RX 2) Dr. Zelby opined that the Petitioner was suffering from degenerative conditions in his cervical spine that were not caused or aggravated by his work activities on July 8, 2011. (RX 2, p. 10) On cross-examination, Dr. Zelby acknowledged that the type of activities that the Petitioner described could hypothetically aggravate a "disc osteophyte complex" as he had diagnosed, though Dr. Zelby indicated that did not apply to the Petitioner as there was no finding of a fracture or herniated disc. (RX 2, pp. 16-17) Dr Zelby felt that the Petitioner's symptoms were the manifestation of his underlying degenerative disc disease, but when asked how that condition causes pain, Dr. Zelby testified that "it may have something to do with inflammation or irritation around the spine" though "that entire mechanism is not completely understood". (RX 2, p. 18)

Dr. Watson testified on February 22, 2017. He had conducted an independent medical examination at Petitioner's request on November 14, 2016. (PX 11) Based upon his review of records and examination, Dr. Watson diagnosed Petitioner as status post cervical fusion at two levels, residual left shoulder impingement consistent with residual rotator cuff tendinitis and impingement, carpal tunnel syndrome

and cubital tunnel syndrome that had resolved due to successful surgery and sternoclavicular joint instability that was post traumatic as well as some likely arthritis in the sternoclavicular joints on both sides. (PX 11, pp. 15-16) Dr. Watson testified that was a causal relationship between each of these diagnoses and the Petitioner's work related accident that he described, noting that the Petitioner was not experiencing the symptoms of any of these conditions prior to his accident but experienced those symptoms following the accident that continued through his treatment for those conditions. (PX 11, p. 16-17) With regard to the carpal and cubital tunnel syndrome, Dr. Watson noted the Petitioner's medical records documenting complaints of numbness and tingling at three weeks after the alleged date of accident and that these conditions had resolved due to successful surgery. Dr. Watson agreed with the findings of the FCE, but felt Petitioner was more restricted in that he should not do any overhead work with the left arm, should not do any pulling or lifting above shoulder height with the left arm and could lift only 20 pounds occasionally and avoid any frequent or repetitive lifting with his upper extremities. (PX 11, p. 22) Dr. Watson felt that the Petitioner was a MMI, but agreed that the visit that he had scheduled at the time of the IME exam with Dr. Feather was appropriate. (PX 11, p. 24)

Petitioner testified that he has not worked anywhere since he attempted to work at Blout Farms, and was seen by David Patsavas for a vocational assessment on August 3, 2017 at the request of his counsel. (PX 12) Based upon a review of the medical records and Dr. Watson's report, Mr. Patsavas concluded that Petitioner was able to perform at a sedentary to light physical demand level and could not return to the very heavy work of concrete laborer, nor any of the other types of work Petitioner had been doing in the past 30 years. Mr. Patsavas spoke with Janet Young, a GED counselor/instructor who indicated that the Petitioner was reading at a grade level of 8.2 and could complete a GED program in 12 to 18 months . Mr. Patsavas recommended that vocational rehabilitation services be provided to the Petitioner to assist him in obtaining training in basic computer skills and complete a GED, as well as to provide training in Job Readiness, Job Seeking and Job Placement Assistance. He concluded that with authorization, he would be able to prepare a specific vocational rehabilitation plan to attempt to meet these goals program at Spoon River Community College in Macomb.

Paul Chadderdon also testified as the president and owner of Respondent. He confirmed that the Petitioner has worked for him since 2004 and confirmed that Petitioner was working on a grain tower on July 8, 2011. Chaddredon was not on the job site on the alleged accident date. Chadderdon also testified that the Petitioner's time cards show he was working on July 9, July 11, July 13, 2011, but Chadderdon did not actually see him those days. Chadderdon confirmed that Petitioner filled out an accident on July 19, 2011 and provided Chadderdon with an off work note from Gretchen Fawcett.

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 unrebutted testimony and the medical evidence which provide a consistent history of Petitioner injuring himself while working for the Respondent on July 8, 2011. Though the Petitioner's histories to medical providers in the early stages of his treatment as well as his statement to the Respondent's investigator shortly after the injury are somewhat vague as to the precise mechanism of his injury, he clearly attributed the onset of his symptoms to his work activities that day – all of which involve lifting and moving large, heavy pieces of concrete and steel rebar while working in a muddy hole. In reviewing the evidence and Petitioner's testimony, it is very clear to the Arbitrator that the Petitioner is not a very good historian and had difficulty in even describing his job duties during his direct examination. Despite his communication

challenges, the Arbitrator found the Petitioner credible. Accordingly, the Arbitrator concludes that the Petitioner sustained an accident while working for the Respondent on July 8, 2011.

2. Regarding the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's credible, unrebutted testimony and the preponderance of the medical evidence. The Arbitrator finds persuasive the opinions of Petitioner's treating physicians and experts on this issue – all of whom relate Petitioner's conditions in his cervical spine, left shoulder, cubital tunnel and carpal tunnel to his July 8, 2011 work accident. The Arbitrator notes the Respondent's experts in this matter attribute Petitioner's current complaints to pre-existing, degenerative conditions. However, it is very reasonably foreseeable that those pre-existing conditions would be permanently aggravated by the Petitioner's heavy work activities that he ineloquently described occurring on July 8, 2011. Thus, the Arbitrator adopts the conclusions of Petitioner's various medical experts in concluding that the Petitioner's current condition of ill-being is causally related to his July 8, 2011 work accident.

3. Based on the Arbitrator's conclusions with regard to the issues of accident and causation, the Arbitrator further finds that the Petitioner is entitled to TTD. Petitioner testified that he was taken off work by the emergency room doctor on July 11, 2014, and Gretchen Fawcett's records of July 14, 2014 establish that he was continued off work at that time. He continued off work under active care through June 11, 2014 when he attempted to return to accommodating light duty work for Blout Farms. He underwent a cervical fusion on April 23, 2014 and was released to return to work with a 20 pound lifting restriction as of June 3, 2014. Wage records show that Petitioner was provided work by Blout Farms from June 12, 2014 through June 26, 2014, and again during the harvest season from August 17, 2014 through December 14, 2014. Petitioner also attempted to return to work at Blout Farms briefly from May 21, 2015 through June 26, 2015 but testified that his frequent headaches prevented him from working consistently at that time, and the wage records for 2015 show that he was not working full hours. Petitioner testified that he has remained off work since that time, and Dr. Watson has testified that Petitioner was limited to light work due to his work related injuries, with no overhead work with the left arm, no pulling or lifting about shoulder height with the left arm and no lifting more than 20 pounds on an occasional basis and no frequent or repetitive lifting with his upper extremities. These restrictions are consistent with the physical limitations Petitioner described in his testimony. Respondent has not provided any vocational rehabilitation services as required by Section 9110.10 of the Rules of the Illinois Worker's Compensation Commission. A vocational assessment obtained by the Petitioner established that Petitioner was able to perform in the light to sedentary range of duties but was unable to return to any of his previous forms of employment within those restrictions, and required vocational rehabilitation services to assist in obtaining basic computer skills and a GED and determine whether he could return to the workforce with job seeking training and assistance. It therefore is established that the Petitioner is entitled to TTD and/or maintenance through the present pending vocational rehabilitation services. It is also noted that Petitioner remains under active care of Dr. Feather for pain management and that Dr. Watson had recommended an evaluation by an upper extremity specialist of Petitioner's sternoclavicular joint that had not been addressed and may require further treatment. It therefore does not appear that Petitioner is truly at maximum medical improvement pending further medical treatment. The Arbitrator therefore awards TTD from 7/12/11 to 6/11/14, 6/27/14 to 8/16/14, 12/16/14 to 5/20/15 and 6/27/16 to the date of hearing on February 26, 2018, those periods representing 324 5/7 weeks of TTD/maintenance benefits to date.

4. Based on the Arbitrator's findings above, the Arbitrator further finds that the Petitioner's medical treatment as indicated in the medical evidence has been reasonable and necessary in addressing Petitioner's work-related injuries. Petitioner offered in to evidence as Petitioner's Exhibit 9 copies of related medical expenses for the Petitioner's injuries and multiple surgeries totaling a gross amount of $267,149.91. Of that amount, $8,367.68 had been paid by Medicaid; $73,661.68 written off by Medicaid; $2,744.84 paid by Blue Cross Blue Shield; $282.58 written off by Blue Cross Blue Shield; $762.18 paid by Petitioner; and $181,330.95 remained outstanding. Having found in the Petitioner's favor on accident and causation, Respondent is ordered to reimburse payments by Medicaid, Blue Cross Blue Shield and Petitioner, and pay the outstanding balances subject to reductions under the Medical Fee Schedules.

5. Consistent with the Arbitrator's conclusions above, the Arbitrator further finds that the recommendation for prospective medical care recommended by Dr. Watson to evaluate Petitioner's ongoing problems with his sternoclavicular joint for possible treatment to stabilize that joint is reasonable and necessary in addressing Petitioner's work-related condition. Accordingly, Respondent shall authorize and pay for said treatment.

6. With regard to the issue of vocational rehabilitation, the Arbitrator finds that the Petitioner is entitled to vocational rehabilitation services as recommended by Mr. Patsavas, who is a certified vocational rehabilitation counselor retained by Petitioner. In this matter, the evidence shows that Petitioner is physically unable to return to his previous occupation as a construction laborer and the medical evidence, including the FCE and Dr. Watson's findings have clearly set forth the Petitioner's physical restrictions. Petitioner's desire to try to return to some type of work, coupled with his limited education and work experience in addition to his physical restrictions, make him an ideal candidate for vocational rehabilitation. The Arbitrator notes that Respondent has not provided vocational rehabilitation based on the various disputed issues in this case. Therefore the Arbitrator adopts the opinions of Petitioner's retained vocational expert – Mr. Patsavas. Mr. Patsavas has opined that vocational rehabilitation services are required to aid the Petitioner in obtaining further training in the form of a GED and basic computer skills training, as well as training in job seeking and job placement assistance. Respondent is ordered to pay for the services of Mr. Patsavas to pursue the services he has outlined in his report. Respondent is directed to continue the payment of maintenance benefits from the date of hearing forward during Petitioner's participation in vocational rehabilitation.

7. Regarding the issue of average weekly wage, the Arbitrator finds that the Petitioner's average weekly wage is $483.02. This finding is based on the wage records put into evidence. Respondent submitted a wage statement showing that Petitioner worked during 31 weeks prior to his work related accident, there being an apparent seasonal gap in earnings between weeks ending 12/4/10 and 5/7/11. It was shown by testimony that the regular work week was five days with occasional work on Saturdays. The Act requires that if the injured employee lost 5 or more calendar days during the 52 weeks prior to his accident, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. It appears that there are missed days resulting in partial weeks amount the 31 weeks shown the wage statement. Specifically, it appears that Petitioner missed one day in weeks ending 7/2/11, 6/25/11, 6/18/11 and 9/11/10 and missed two days in the weeks ending 5/28/11, 11/27/10, 10/9/10 and 7/24/10 for a total of 12 days or 2.4 weeks missed. The total weeks worked is therefore 28.6 weeks. Dividing total earnings of $13,814.33 during the period from 7/10/10 to 7/2/11 by 28.6 weeks yields an average weekly wage of $483.02.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeff Huber,
Petitioner,

vs. NO: 17WC 28311

19IWCC0033

Contract Transport, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 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: JAN 1 8 2019

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Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

HUBER, JEFF
Employee/Petitioner

Case# **17WC028311**

CONTRACT TRANSPORT INC
Employer/Respondent

19IWCC0033

On 7/5/2018, 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 2.08% 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

1723 LITCHFIELD & CAVO LLP
BRAIN K McBREARTY
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
19(b)

Jeff Huber
Employee/Petitioner

v.

Contract Transport, Inc.
Employer/Respondent

Case # 17 WC 28311

Consolidated cases: _____

19IWCC0033

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **May 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, **July 6, 2017**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$46,923.17**; the average weekly wage was **$977.67**.

On the date of accident, Petitioner was **57** 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 **$N/A** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$N/A** for other benefits, for a total credit of **$N/A**.

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

ORDER

Petitioner has failed to prove a causal connection between his condition of carpal tunnel and his employment with Respondent. All other issues regarding medical and TTD are therefore moot. Respondent shall not be liable for any TTD nor past or future medical bills.

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

6/30/18
Date

ICArbDec19(b)

JUL 5 - 2018

JEFF HUBER V. CONTRACT TRANSPORT, INC.

IWCC NO.: 17-WC-28311

FINDINGS OF FACT

Petitioner is pursuing a claim for bilateral carpal tunnel injuries that he alleges arise out of his work activity with Respondent, Contract Transport.

The issues for decision are: accident, causal connection and entitlement to medical benefits.

Petitioner testified that he has been an over-the-road trucker for Contract Transport for 18 years. (T. 8). For the last five years, he has been running the same route every week, from St. Louis, Missouri to Chicago, Illinois and back. (T. 8-9). The vehicle he is driving is a tractor trailer. (T. 9). He picks up the truck in St. Louis on Hall Street, proceeds to the federal post office in downtown St. Louis and from there to Romeoville, Illinois. (T. 10). The total time that he is gone is approximately 11 hours. When he arrives in Romeoville, he testified that he parks his trailer, drops it and then takes his tractor to go get a new trailer and hook it up. He then takes a 30 minute break and then he leaves to go back to St. Louis. (T. 11).

According to the petitioner, he believes that it is pretty tough to drive from St. Louis to Romeoville. He testifies that he has to "hang on. . .pretty good". This is due to the wind. He testified that the route it is flat, treeless and the wind just blows all the time. (T. 11). It involves grabbing the steering wheel forcefully. While doing this, he testified that his hands started getting numb. (T. 12). He testified that the reason he has to grip hard is because the wind pushes the truck around quite a bit. (T. 13). He testified that "I got to hang on to it to make sure I keep it on the road". He has never been completely off the road, however, he believes the wind pushes him around. (T. 13). He testified that he tries to keep both hands on the wheel the entire five hour trip. (T. 13). He further stated that he believes the wheel (possibly the steering wheel) vibrates. He does have an arm rest on the left side. (T. 14). He still has symptoms of tingling, burning and a little numbness. (t. 15).

He testified that Dr. Kutnik has recommended surgery on his wrist. (T. 17). On cross examination, he testified that the vehicle he drives is a 2007 Volvo. He admitted that he picks up the trailers that are already loaded. (T. 19). He said there is no lifting involved in terms of any of the equipment that is in the trailers. (T. 20). His job essentially is hooking and unhooking the trailers at the beginning of the trip, but other than that, it is just driving. (T. 20).

He also admitted on cross examination that he has hypertension, diabetes (for which he takes medication, Metformin). (T. 21). In addition, he is taking medication for gout known as Allopurinol. (T. 22). He has not had to load or unload anything in more than five years. (T. 22).

Respondent's witness, Alan Bergman, also testified on behalf of the respondent. He testified that he is the operations manager for Contract Transport. He disagreed with petitioner's testimony in a critical aspect. He testified that trucks that they have used since the late 70s have been Volvo trucks. He testified that they are the safest truck on the road. He also noted that it is the most comfortable truck on the road. The trucks have pioneered power steering and they pioneer air ride. Not only the seat but the cab is under air. (T. 28, 29). He also testified that the petitioner is incorrect about the steering effort. He stated that having to grip the wheels with both hands tightly is just not true. He testified that the steering wheel is very low on a Volvo tractor. He is more like driving a pick-up truck or a car. (T. 29). He knows this because he has driving that corridor before. He has also driven Des Moines to St. Paul, and while he acknowledges that the wind does blow, it is not a wrestling match. (T. 30).

He testified that it does not matter whether you are in Omaha, Bloomington or St. Paul, those are all places where the wind blows. (T. 30).

He did state that the trailers can move around when they are light but it is not a wrestling match. (T. 31). The last time he has driven that route was the week prior to St. Paul. He disagrees with the effort level required to operate the vehicle. (T. 31). He would know this better than the petitioner, Mr. Huber, because he has more experience than Mr. Huber.

He further reiterated that the job involves no lifting. It is no-touch driving. (T. 32).

In support of his argument that the carpal tunnel is work related, petitioner submitted the deposition of Dr. Shawn Kutnik's. (Petitioner's Ex. 6). Dr. Kutnik diagnosed the petitioner with carpal tunnel syndrome. (Petitioner's Ex. 6, Pg. 12). He also believes that he has cervical radiculopathy. (Petitioner's Ex. 6, Pg. 12). He did not relate the cervical radiculopathy to his employment. (Petitioner's Ex. 6, Pg. 14). He noted that he had multiple risk factors for carpal tunnel syndrome which were not work related. He noted he is obese, diabetic, for which he is on medication. The cervical radiculopathy, which is not work related, increased his risk to some degree. (Petitioner's Ex. 6, Pg. 14, 15). Interestingly, Dr. Kutnik believed that petitioner's job was a contributing factor to the carpal tunnel. This is based upon his history from the petitioner that the truck itself vibrates quite heavily when he grips the steering wheel to keep in on the road. (Petitioner's Ex. 6, Pg. 11). He also based his opinion, in part, on the assertion that the petitioner's job involves frequent to constant grasping, pinching, occasional frequent lifting, carrying, pushing and pulling up to 50 to 100 pounds, which is substantial weight. (Petitioner's Ex. 6, Pg. 17).

On cross examination Dr. Kutnik admitted that the petitioner was referred to his care by his attorney, Tom Rich. (Petitioner's Ex. 6, Pg. 22). This is not the first referral from Mr. Rich. (Petitioner's Ex. 6, Pg. 22). He admitted that both he and Dr. Rotman state petitioner have carpal tunnel syndrome. (Petitioner's Ex. 6, Pg. 22). He admitted that petitioner had three factors relating to carpal tunnel: diabetes, gout and obesity. (Petitioner's Ex. 6, Pg. 23). With regard to

work, it is the fact that he was allegedly grabbing a vibrating steering wheel, combined with loading and unloading, (which is not done) for over five years. (Petitioner's Ex. 6, Pg. 24). He admitted that if the steering wheel does not vibrate, it would change his opinion on causation. (Petitioner's Ex. 6, Pg. 25). He admitted that gripping the steering wheel does not involve forceful flexion and extension, which is a contributing factor for carpal tunnel. (Petitioner's Ex. 6, Pg. 26).

Respondent submitted their Exhibit 1 which is the deposition of Dr. Mitchell Rotman. Dr. Rotman conducted an independent medical examination on behalf of the respondent on petitioner. He is a fellowship trained orthopedic surgeon specializing in hand surgery. (Respondent's Ex. 1, Pg. 7). Carpal tunnel is the most common condition that he treats. (Respondent's Ex. 1, Pg. 8). He did diagnosis the petitioner with severe carpal tunnel on the right and mild to moderate carpal tunnel on the left, along with cervical radiculopathy on the left, more so than the right. (Respondent's Ex. 1, Pg. 13, 14). X-rays of petitioner's neck showed pretty bad arthritis. (Respondent's Ex. 1, Pg. 14). The cervical radiculopathy on the left makes his carpal tunnel worse on the left. (Respondent's Ex. 1, Pg. 15). He testified that none of the conditions that he diagnosed with regard to petitioner's neck were related to his employment. (Respondent's Ex. 1, Pg. 17). He did testify that he believed that petitioner had carpal tunnel syndrome. (Respondent's Ex. 1, Pg. 18). He testified that holding a steering wheel in a truck, even as long as driving from St. Louis to Chicago and back all week is not an aggravating factor, causing carpal tunnel. It is not a forceful, heavy activity. (Respondent's Ex. 1, Pg. 18). He does, though, have several risk factors in which he agrees with Dr. Kutnik, that is his diabetes and obesity are more likely factors in causing his carpal tunnel. (Respondent's Ex. 1, Pg. 19).

Dr. Rotman did admit on cross examination that if the petitioner's job was to load and unload a truck, doing that all day instead of driving all day, then that could have been an aggravating factor. (Respondent's Ex. 1, Pg. 26). However, the evidence does that support that hypothetical. With regard to repetitive, forceful gripping, if he had to do repetitive, forceful gripping on the road, 11 hours a day because it is so windy and heavily gripping the steering wheel, Dr. Rotman said that might be a tough case. (Respondent's Ex. 1, Pg. 28). He did admit that if the petitioner drove 11 hours a day against horrendous wind, with super strong vibration going into the steering wheel, that could be an aggravating factor. (Respondent's Ex. 1, Pg. 36). He admitted that petitioner needs carpal tunnel releases. (Respondent's Ex. 1, Pg. 38).

On re-direct, Dr. Rotman stated that petitioner said his symptoms began to get worse culminating on July 26, 2017.

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

It did not occur for at least five years prior to the onset of his symptoms.

This case comes down to which of the witnesses were more credible and which of the medical witnesses were more credible. In the case herein, petitioner wants the arbitrator to believe that driving the tractor trailer unit from St. Louis to Chicago involves heavy, forceful, constant gripping of the steering wheel to maintain the truck on the road against bucking winds. Respondent's expert noted, in a bit of common sense, that this simply is not so. Respondent's witness has driven the same route and similar routes for Contract Transport for a lot longer than the petitioner has. He notes that trucks drive more like a car or a pick-up truck. They have power steering and air ride suspension. They do not involve constant, heavy, forceful gripping of the steering wheel. Petitioner's attempted description of hanging on to the steering wheel for dear life to maintain the truck on the road defies common sense. Respondent's expert was credible and straight forward admitting that it is a windy route but the effort is not what petitioner describes it as being.

Dr. Kutnik's opinion is undercut by his assumption that the petitioner drove under such conditions and further that there was heavy lifting involved with his employment. Petitioner is quite explicit that there is no heavy lifting involved with his employment. Petitioner is quite explicit that there is no lifting at all involved in his occupation. The only risk factor that he can point to is having both hands on the wheel of his steering wheel. The question, therefore, is whether or not it is required that he grip the steering wheel with such force, to cause carpal tunnel syndrome.

The more logical explanation is the petitioner has three risk factors for carpal tunnel syndrome. He is obese, he has diabetes, for which he is on medication, and he has gout. There is a fourth factor which Dr. Kutnik and Dr. Rotman point to, that is also overlooked in causation with regard to petitioner's carpal tunnel and that is petitioner's advanced degenerative arthritis in his neck. Both Dr. Rotman and Dr. Kutnik agree that the cervical condition is not employment related. Both agree, however, that it is an aggravating factor in causing carpal tunnel and both agree that he has a phenomenon known as "Double Crush Syndrome". Simply put, there are multiple factors that are non-work related that could cause petitioner's carpal tunnel syndrome in whole or in part. Common sense evidence does not suggest that his employment required him to drive with a death grip on the steering wheel for 11 hours a day.

Work certainly does not need to be the sole cause of his condition. The evidence does not support that work is any cause given the exaggerated nature of petitioner's testimony. Dr. Kutnik readily admitted that if his assumptions about the petitioner's forceful gripping of the steering wheel were incorrect, he would have to change his opinion.

Based on this, the Arbitrator finds that the petitioner has not meet his burden of persuasion in establishing that he sustained accidental, repetitive injuries, causing bilateral carpal tunnel syndrome that was out of the course of his employment as a truck driver.

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 petitioner's failure to establish a causal connection from his employment and admitted condition of carpal tunnel syndrome, the issues J and K are moot and respondent is not liable for pay for any past or future medical care for the petitioner.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eric Flynn,
Petitioner,

vs.

NO: 17WC 12194

19IWCC0034

Omni Specialized,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical 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 10, 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: JAN 18 2019

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KWL/jrc
042

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

FLYNN, ERIC
Employee/Petitioner

Case# **17WC012194**

OMNI SPECIALIZED
Employer/Respondent

19IWCC0034

On 4/10/2018, 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 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:

0568 WINSTEIN KAVENSKY & CUNNINGHAM
CRAIG L KAVENSKY
PO BOX 4298
ROCK ISLAND, IL 61204-4298

2461 NYHAN BAMBRICK KINZIE & LOWRY
DANIEL R EGAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Eric Flynn
Employee/Petitioner

v.

Omni Specialized
Employer/Respondent

Case # 17 WC 12194

Consolidated cases: N/A

19IWCC0034

An *Application for Adjustment 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 **Rock Island**, 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other ____________

FINDINGS

On the date of accident, **December 15, 2016,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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.

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned **$46,800.00**; the average weekly wage was **$900.00**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **0** dependent children.

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 shall be given a credit of **$AMOUNTS TO BE DETERMINED** 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 that his current condition of ill-being is casually related to his alleged accident. 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 **$AMOUNTS TO BE DETERMINED** in medical bills 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. Rowe-Sullivan
Signature of Arbitrator

4/9/18
Date

ICArbDec19(b)

APR 10 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Eric Flynn
Employee/Petitioner

Case # 17 WC 12194

v.

Consolidated cases: N/A

Omni Specialized
Employer/Respondent

19IWCC0034

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that on December 15, 2016, he was employed by Respondent as a local truck driver for about 8 years, although he acknowledged that during this time the company had changed hands several times. He testified that his job duties during this time were about the same. He testified that his job was to pick up and deliver items on a local basis. He testified that his job did not simply consist of driving and that he was also required to load, secure and unload his cargo. He further testified that his cargo could consist of items such as steel, machinery or construction equipment.

Petitioner testified that in a typical shift of 10-12 hours per day, he would spend up to 4 hours driving and up to 8 hours chaining, strapping and tarping his cargo. He testified that he would use chains, straps, tarps and bungee cords to secure his loads. He further testified that he also used a ratchet binder to tighten chains, a winch bar to tighten straps and a long bar to push/pry his load into place on the trailer.

Petitioner testified that he would chain or strap his cargo to his trailer. Petitioner testified that when chaining the load down, he would use a ratchet binder that resembled a large socket wrench. He testified that he would place one hand on the ratchet and use the other hand at the end of the bar to tighten down (or loosen) the chain.

Petitioner testified that using a winch bar was like using a tire jack that would go up and down rather than rotate. He testified that the strap would be run through the winch and that he would push down or lift up on the winch bar to tighten (or loosen) the strap. He testified that each load would require between 5-10 straps and that he would repeat the process with the winch bar to tighten down the straps. He testified that he would haul 1-5 loads per day. He testified that when arriving at his destination, he would roll the straps up by hand once they were removed from the cargo.

Petitioner testified that once the load was secured, he would cover it with a tarp and that the tarp weighed in the range of 75 pounds. He testified that once the tarp was unrolled, he would secure the tarp to his trailer using bungee cords. He testified that upon arrival at his destination, he would unhook the bungee cords, remove the tarp and roll it up. He testified to using one or two tarps per load.

Petitioner testified to driving a stick shift 10-speed truck. He testified that he shifted with his right hand only, and that it was not possible to shift gears using his left hand.

When asked what he would notice about hands while doing this work, Petitioner responded that he had a lot of numbness in hands and that his hands would fall asleep while driving. Petitioner testified that after he underwent the EMG, he talked to Alexa Hensley in HR. He testified that the date that he told her of his work accident was the day after the EMG, which was that of December 16, 2016. He testified that he told Ms. Hensley about his diagnosis and that it was work-related.

Petitioner testified that he has not yet had surgery. He testified that his problems now include numbness and tingling and the lack of feeling in his fingers. He testified that wants to have the surgery done. He testified that he has numbness and tingling all the time.

Petitioner testified that he also drives a motorcycle and that he operated it before the alleged date of accident in this case. He testified that the frequency of his motorcycle riding was that of approximately 5-6 times per year.

On cross examination, Petitioner testified that he no longer works for Respondent and that he currently works for Diamond Transport. He testified that he started working for Diamond Transport one month after Respondent went bankrupt and that he believed it was end of April or beginning of May of 2017. He testified that he is a local driver for Diamond as well and that he has the same job duties. He testified that he still does wraps and chains and that he still uses long bars and winches.

On cross examination, Petitioner testified that he owns a 2007 Kawasaki motorcycle. He testified that he was not required to use his hands to shift gears and that he has a throttle that requires hand movement. He testified that he has calipers on each side that he has to grip for the brakes. He testified that he wears vibration gloves when driving his motorcycle.

On cross examination, Petitioner agreed that when he went to ORA Orthopedics he was required to fill out a patient history form which was the Initial Patient Evaluation. He testified that the notation on the form about his hands getting numb with his motorcycle was not his handwriting and that he was not sure if he told this to the nurse. He agreed that the questions on the third page talking about his job duties consisting of tarping and chaining load and the reference to 4-11 hours of sitting was in his handwriting, as were the answers provided as to his job requiring 1-4 hours of standing and lifting 80 pounds. He testified that when he was using ratchet binders and winches, he was not sitting and that the reference to sitting was when he was driving.

On redirect, Petitioner testified that when securing items with the chains, tarps or straps, he had to use both hands. He testified that he worked 12-hour days at times, and that on some days he would chain, tarp and strap for 8 hours and would drive for 4 hours.

On redirect, Petitioner testified that when he first went to ORA Orthopedics, he at that point did not know what was wrong with his hands.

The Medical Bills Exhibits were entered into evidence at the time of arbitration as Petitioner's Exhibits 1A through 1E.

The medical records of Medical Arts Associates/Dr. Horani were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on November 2, 2016 for a comp evaluation, at which time it was noted that the numbness of his hands continued. It was noted that Petitioner had been experiencing issues for six months on and off and that he denied weakness. It was noted that Petitioner had tender left upper cervical paraspinal muscles. Petitioner was recommended to undergo an EMG. The records reflect that Petitioner underwent x-rays of the cervical spine on November 2, 2016, which were interpreted as revealing degenerate [*sic*] change most pronounced at C6-7; no acute abnormality. The reason for the examination was noted to be that of paresthesias in the hands. (PX2).

The medical records of ORA Orthopedics were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen on December 1, 2016, at which time it was noted that he was referred for surgical consultation by Dr. Horani. It was noted that Petitioner reported that for several months he had had stiffness and numbness in his hands, that he had some neck pain and that an x-ray of his neck was obtained and that he was referred for a possible cervical origin of his symptoms. It was noted that Petitioner stated that his neck pain had largely resolved, that he denied radicular pain, that he denied dropping objects and that he denied balance changes. It was noted that Petitioner stated that when riding his motorcycle he got a lot of numbness in his hands and that sometimes during particular activities his hands would get numb and tingly. It was noted that Petitioner stated that this involved mostly the hands and somewhat maybe more the long and ring fingers. The assessment was noted to be that of possible carpal tunnel syndrome. It was noted that because Petitioner was not exhibiting symptoms of specific cervical radiculopathy, Dr. Berry did not think that an MRI of the cervical spine was warranted. It was noted that if Petitioner had a change and developed radiating discomfort consistent with a nerve root distribution, then he would not hesitate to proceed with that study. It was noted that Petitioner was having issues with his hands that were more consistent with potentially peripheral nerve entrapment such as carpal tunnel syndrome and that an EMG of the bilateral upper extremities was recommended. (PX3).

The records of ORA Orthopedics reflect that Petitioner was seen on December 22, 2016, at which time it was noted that he indicated that he had reported his symptoms to his employer and that it was now a worker's compensation injury. It was noted that Petitioner stated that for the past two years his symptoms had been progressive and had been caused or aggravated by hand rolling straps, that he stated that he drove a truck and frequently had to strap down objects, that there was a ratchet on the straps that he had to use multiple times a day and that he was now having a difficult time driving, holding the steering wheel and sleeping at night and always felt that he had to shake out his hands. It was noted that Petitioner stated that his hands were weak. The assessment was noted to be that of severe bilateral carpal tunnel syndrome. It was noted that a discussion was had with Petitioner that his job duties, especially the manipulation of the straps with multiple forceful contractions through wrist flexion, could compress the median nerve and contribute significantly to carpal tunnel syndrome. Petitioner was offered a carpal tunnel release. It was noted that Petitioner stated that his left hand seemed to be more symptomatic than the right and that he would like to perform one at a time. It was noted that Petitioner would be scheduled at his convenience. (PX3).

The medical records of Quad City Neurology & Spine were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner underwent an EMG on December 15, 2016, which was interpreted as an abnormal study with electrophysiological evidence of severe bilateral compressive neuropathies of both median nerves at the wrists. (PX4).

The medical records of Orthopaedic Specialists were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner was seen by Dr. Cobb on March 21, 2017, at which time it was noted that he had complaints of bilateral numbness and tingling and discomfort in both hands. It was noted that Petitioner was a semi-truck driver full-time, that he stated that the left was worse than the right, that he first saw his family physician in November 2016 and was referred to ORA and that he was then sent to Chicago for an IME and was denied. It was noted that Petitioner was seeking a second opinion. It was noted that Petitioner stated that he had had the symptoms for approximately the last six months, worse in the last few months, that he was not taking anything for the pain, that he was given a brace for the left wrist which he wore only occasionally and that he stated that he had had numbness and tingling for approximately 8-9 months. It was noted that Petitioner had been a truck driver for 22 years working for the same company for 7 years and that his job duties consisted of a lot of driving, tarping, chaining and strapping and that he occasionally had to unload the truck but that it was not often. The impression was noted to be that of bilateral carpal tunnel syndrome, left worse than right. It was noted that Petitioner denied neck pain and that due to examination findings, Dr. Cobb did not believe it was related to

his cervical spine. It was noted that a discussion was had that forceful gripping and driving were common provocative activities and that Petitioner's weight could be related to his symptoms but did not actually cause the carpal tunnel. A discussion was had regarding various treatment options and it was noted that Petitioner wished to proceed with left endoscopic carpal tunnel release with ultrasound guidance and that the right side would be scheduled following the left. (PX5).

The IME Report of Dr. Richard Kreiter dated August 22, 2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The report reflects that Petitioner was seen on August 22, 2017, at which time it was noted that he had worked for Omni Specialized for more than 8-9 years in generalized commodity hauling, regional and not over-the-road from coast-to-coast. It was noted that it included flatbed hauling of steel and transporting agricultural equipment, which required the use of chains or straps torqued manually to stabilize the load. It was noted that this meant loading and unloading within the day and that this was much repetitive force and awkward positions to safely transport equipment at highway speeds and that some equipment even required removal of the tires and strapping during transport on the flatbeds, which was extremely physical during load and unload. It was noted that Petitioner was not morbidly obese, that he was built more like a weightlifter and that Dr. Kreiter imagined that it was the result of the daily physical work required as a general commodity hauler with significant daily strenuous loading and unloading, resting only while driving. It was noted that Petitioner was working regularly even with his very symptomatic median nerve entrapments with permanent numbness and chronic pain. (PX6).

The report reflects that it was noted that Petitioner had been exposed to occupational risk factors for median nerve entrapment at the wrists. It was noted that Petitioner had high upper extremity physical demands requiring manual exertion of the distal upper limbs and that he did this daily in loading and unloading and securing extremely heavy loads with chains and straps. It was noted that forceful hand and wrist work showed very strong evidence toward median nerve entrapment. It was noted that although his BMI showed evidence of non-occupational risk factors, Petitioner was more built like a muscular competitive weightlifter and was not diabetic, which was another non-occupational risk factor. It was noted that if there had been any preexisting risk factors, they had been aggravated and accelerated by the manual work. It was also noted that Petitioner had no evidence of arthritic changes in the wrists, MP or IP joints and that he had no swollen deformities which sometimes contributed to median nerve entrapment. It was noted that Petitioner needed carpal tunnel releases done as soon as possible to prevent any further impairment. (PX6).

The Report of Dr. Tyson Cobb dated September 15, 2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The report reflects that a causation opinion was solicited by Petitioner's counsel. It was noted that Petitioner was not diabetic, that he had no thyroid conditions and that he had no neck complaints. It was noted that Dr. Cobb did not believe that the numbness and tingling in Petitioner's hands was related to his cervical spine and that his high BMI could contribute to the symptoms, but did not actually cause the carpal tunnel syndrome. It was noted that Dr. Cobb opined that the cause of carpal tunnel syndrome was multifactorial and that Petitioner's job duties including forceful gripping and driving were common provocative activities. It was noted that Dr. Cobb believed that there was a causal relationship between Petitioner's work activities and his carpal tunnel syndrome with at least 51% probability. (PX7).

The transcript of the deposition of Dr. Richard Kreiter taken on October 25, 2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 8. Dr. Kreiter testified that he is a board-certified orthopedic surgeon. (PX8).

Dr. Kreiter testified that he saw Petitioner at the request of his attorney on August 22, 2017. He testified that Petitioner gave a history that he had had painful, numb hands, that he had been working for some 25 years as a truck driver and for 7 or 8 years for Omni Specialized and that his work was primarily local rather than over-the-road. He testified that Petitioner stated that he would transport combines, planters and the like from one location to the other but that they were not long distances and that there was a lot of

loading, unloading, tarping, tying and ratcheting them down. He testified that Petitioner indicated that sometimes the combines had to have the tires taken off, that tires had to be tied down as well and that this was a repetitive activity that he did and was very physical. He testified that Petitioner stated that about a year prior, he started to develop numbness in his hands, usually more at night, and then it gradually got worse. He testified that Petitioner stated that he was noticing that he was having trouble reading the paper, talking on the telephone and even driving, and that his hands would go numb with pain going into the forearms. He testified that Petitioner denied any significant neck pain and that this was primarily upper extremity discomfort. (PX8).

Dr. Kreiter testified that Petitioner stated that he saw Dr. Horani and that Dr. Horani felt that this was more on the basis of a cervical problem and obtained x-rays of the neck although there was never any radiculopathy. He testified that Dr. Horani then sent Petitioner to Dr. Berry because he thought it was more of a cervical problem and that Dr. Berry thought it was more on the basis of an entrapment of the median nerve at the wrist and ordered and EMG and nerve conduction studies, which verified the diagnosis of median nerve or carpal tunnel entrapment at the wrists on both sides. He testified that Petitioner then went to Dr. Cobb on his own and that that they agreed that he had positive Tinel's and Phalen's tests and numbness of the thumb, index and long fingers. He testified that when he saw Petitioner, he was having night pain and permanent numbness of his thumbs, index and long fingers primarily of his hands. (PX8).

Dr. Kreiter testified that his diagnosis was that of median nerve entrapment at the wrists or carpal tunnels. He testified that both Dr. Cobb and Dr. Berry had recommended carpal tunnel releases and that he thought that the nerves needed to be released and the pressure taken off the nerves on both hands. He testified that he thought that the carpal tunnel condition was causally related to the type of work that Petitioner did with his hands while working for Omni. He testified that he thought that that type of work with a lot of repetitive, physical upper extremity trauma to the hands and wrists frequently could lead to contusions and irritation at the wrist and pressure on the nerve. He testified that he did not feel that Petitioner's weight was a factor in his development of carpal tunnel and that he noted that he looked more like a weightlifter than anything. (PX8).

On cross examination, Dr. Kreiter testified that he last performed surgery 3-4 years ago and that he no longer maintained an active orthopedic practice. He testified that he was a general orthopedist. (PX8).

On cross examination, Dr. Kreiter denied knowing the length of Petitioner's typical workday. He testified that Petitioner was working full-time. He testified that he did not know how much of Petitioner's day was spent chaining, strapping, torqueing or using tarps, but that he had seen combines and tractors being strapped down on the highway and getting ready to be sent out. Dr. Kreiter denied knowing how much time it would take for that activity to be completed during the day, but testified that it had been done for over 8 or 9 years. He agreed that Petitioner was not strapping and tarping for the entire day and testified that Petitioner would secure whatever he was transporting, that he would take it to the destination, that he would then unstrap it and that he would probably go back for another load. (PX8).

On cross examination, Dr. Kreiter testified that he did not know how much force Petitioner was required to use when he was doing the strapping or torqueing, but that he had a tree farm and frequently strapped things. He testified that it took quite a bit of force sometimes to get things secured. (PX8).

On cross examination, Dr. Kreiter agreed that he described Petitioner as muscular and did not describe him as being morbidly obese. He testified that he did not know if his description was consistent with the other doctors in the case. He testified that he did not know whether Petitioner was a weightlifter as a hobby. He testified that he was not aware of any correlation between weightlifting and the development of carpal tunnel syndrome. (PX8).

On cross examination, Dr. Kreiter testified that his discussion of the *AMA Guide to the Evaluation of Disease and Injury Causation* in his report was based on the Second Edition. He agreed that one of the causes of carpal tunnel syndrome was that of use of vibratory tools or exposing the hands to vibration. He agreed that it could involve motorcycle riding. He testified that he thought that Petitioner was a motorcycle rider. He testified that he did not know how often Petitioner rode his bike prior to December 15, 2016. He testified that he was aware that Dr. Berry noted that Petitioner developed numbness and tingling while riding a motorcycle. He testified that he could not say that riding a motorcycle caused carpal tunnel and that it may be a combination of all the things that Petitioner was doing, but that he thought that he was working more loading and unloading than riding a motorcycle. (PX8).

The 19(b) Response Filed August 17, 2017 was entered into evidence at the time of arbitration as Respondent's Exhibit 1.

The IME Report of Dr. Vender dated January 24, 2017 was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The report reflects that Petitioner was seen on January 23, 2017 for an IME, at which time he stated that he developed symptoms in both upper extremities approximately six months ago. It was noted that Petitioner at that time had noted a feeling of numbness or tingling and pain in the fingertips, that he did not have a history of a specific injury and that he described various activities he performed as a truck driver, including rolling straps and securing loads. It was noted that Petitioner continued with symptoms in both hands, that he had numbness and tingling in the fingertips, that he had a feeling of weakness and that it was not clear if he had night symptoms. The diagnosis and impression was noted to be that of bilateral carpal tunnel syndrome. (RX2).

The report reflects that Dr. Vender had reviewed a written job description for the job title of "Truck Driver" and that he discussed with Petitioner his job activities. It was noted that Petitioner indicated that he had to strap down loads which was exertional and that most of his work time involved driving. It was noted that infrequently, Petitioner would have to do more exertional work. It was noted that in looking for a contribution of work activities to the development of carpal tunnel syndrome, one would look for forceful and exertional activities performed on a persistent basis throughout the day, that Petitioner's activities would not be considered contributory to carpal tunnel syndrome and that this would not represent an aggravating factor to preexisting carpal tunnel syndrome. It was further noted that Petitioner had risk factors for the development of carpal tunnel syndrome in the way of his increased BMI. (RX2).

The report reflects that Dr. Vender opined that Petitioner had objective findings of carpal tunnel syndrome in the way of positive electrodiagnostic studies, that the prognosis after surgery for carpal tunnel syndrome was good and that with the complaints and findings, it would be appropriate to treat definitively with a carpal tunnel release but that the need for surgery was not based on a work-related condition or work-related injury. It was noted that after a carpal tunnel release therapy would be indicated and that Petitioner was capable of performing his normal work activities. It was noted that Dr. Vender opined that maximum medical improvement after a carpal tunnel release would be approximately three months post-operatively, but that he did not identify an actual work-related condition or work-related injury for which to determine maximum medical improvement. It was also noted that there was no anticipation of any significant permanent partial impairment or disability and that Dr. Vender did not expect the need for restrictions after performing a carpal tunnel release. (RX2).

The medical records of ORA Orthopedics were entered into evidence at the time of arbitration as Respondent's Exhibit 3. The records were effectively duplicative of those as contained in Petitioner's Exhibit 3, but also contained the Initial Patient Evaluation form completed on November 30, 2016. (RX3; PX3).

CONCLUSIONS OF LAW

With respect to disputed issues (C), (D) and (F), given the commonality of facts and evidence relative to these issues, the Arbitrator addresses those concurrently.

At the outset, the Arbitrator notes that an employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner seeking a single, definable accident. *Nunn v. Indus. Comm'n*, 157 Ill.App.3d 470 (4th Dist. 1987). The petitioner must prove a precise, identifiable date when the accidental injury manifested itself. "Manifested itself" means the date on which both the fact of injury and the causal relationship of the injury to the petitioner's employment would have become plainly apparent to a reasonable person. *Peoria County Belwood Nursing Home v. Indus. Comm'n*, 115 Ill.2d 524 (1987). The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each case. *Luttrell v. Indus. Comm'n*, 154 Ill.App.3d 943 (2nd Dist. 1987).

As applied to the instant case, based upon the Petitioner's testimony one could conclude that the alleged date of December 15, 2016 is an appropriate date of accident for this matter. However, based upon the testimony of Petitioner, the description of Petitioner's work activities and a thorough review of the medical evidence, the Arbitrator finds that Petitioner has not met his burden of proving that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on December 15, 2016, and that his current condition of ill-being is causally related to his work activities for Respondent.

The medical evidence reveals that at the time of his first known medical visit on November 2, 2016, Petitioner had been complaining of continuing numbness in his hands of six months' duration. (PX2). The Arbitrator notes that there is nothing in this initial visit to indicate that Petitioner's hand numbness was in any way work-related, nor was any reference made to Petitioner's hands having been affected by his job duties. (*Id.*). The medical evidence reveals that when he first saw an orthopedic physician, Dr. Berry, Petitioner did not complain of numbness in his hands due to any of his work activities but instead noted that he had numbness in his hands when riding his motorcycle. (PX3; RX3).

On the Initial Patient Evaluation at ORA Orthopedics, Petitioner described a work schedule that was inconsistent with that to which he testified at trial. At the time of the initial visit with Dr. Berry on December 1, 2016, Petitioner on the Initial Patient Evaluation described a work day that primarily involved driving. (RX3). Dr. Berry at the time of this visit - with knowledge of Petitioner's motorcycle and work activities, did not provide a work-related nexus to Petitioner's condition of ill-being. (PX3; RX3). Rather, the evidence reveals that it was not until after the EMG on December 15, 2016 that Petitioner changed the reason for his condition to a work-related one and that reference was made within Dr. Berry's note of Petitioner's duties of hand rolling straps, strapping things and use of a ratchet. (PX4; PX3). Furthermore, the Arbitrator is not persuaded by the causation opinion given by Dr. Cobb, as his records do not reflect that he had an understanding of the specifics of Petitioner's job nor of the frequency with which he performed his various job duties. (PX5; PX7). The Arbitrator notes, however, that even Dr. Cobb indicated that Petitioner occasionally had to unload the truck, but that it was not often. (PX5).

The Arbitrator finds to be significant in this case that Dr. Vender was provided with a written job description to consider and that he also discussed Petitioner's work activities directly with him. Specifically, Dr. Vender noted that Petitioner indicated that he had to strap down loads which was exertional and that most of his work time involved driving. He further noted that infrequently, Petitioner would have to do more exertional work. (RX2). The Arbitrator notes that these activities were more consistent with what Petitioner first told Dr. Berry on the Initial Patient Evaluation. (RX3). The Arbitrator also finds it concerning that Petitioner could tell Dr. Berry a version of his work activities that was so different from what he testified to at the time of arbitration.

Based upon the foregoing and the record as a whole, the Arbitrator concludes that Petitioner has failed to prove that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on December 15, 2016, and that his current condition of ill-being is causally related to his work activities. All benefits are denied. The remaining issues of notice, reasonable and necessary medical services and prospective care are moot, and the Arbitrator makes no conclusions as to those issues.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SARAH HEDTKAMP,

Petitioner,

vs. NO: 13 WC 37697

GILSTER-MARY LEE CORP.,

Respondent.

19IWCC0035

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, temporary disability, medical expenses, and permanent disability, and being advised of the facts and law, adopts the statement of facts as set forth by the Arbitrator in her decision and incorporates such facts herein, but reverses the Decision of the Arbitrator on the threshold issues of accident and causation. The Commission finds Petitioner sustained an accidental injury arising out of and in the course of her employment on October 9, 2013, and her condition of ill-being is causally related to the accidental injury.

I. Accident

To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that she sustained an accidental injury arising out of and in the course of her employment. *820 ILCS 305/1(d)*. Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799 (2006).

The "in the course of employment" element refers to the time, place, and circumstances surrounding the injury; "[t]hat is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment." *Sisbro, Inc. v. Industrial Commission*,

207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). It is uncontroverted Petitioner was at her designated production line station during her shift when the injury occurred. Therefore, Petitioner was in the course of her employment.

"The 'arising out of' component is primarily concerned with causal connection" and is satisfied when the claimant has "shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc.*, 207 Ill. 2d at 193. To determine whether a claimant's injury arose out of her/his employment, "we must first determine the type of risk to which [s/he] was exposed." *Baldwin v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 472, 478, 949 N.E.2d 1151 (2011). There are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the general public is commonly exposed. *Springfield Urban League v. Illinois Workers' Compensation Commission*, 2013 IL App (4th) 120219WC, ¶27, 990 N.E.2d 284. 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. *Illinois Institute of Technology Research Institute v. Industrial Commission*, 314 Ill. App. 3d 149, 163, 731 N.E.2d 795 (2000). Employing a neutral risk analysis, the Arbitrator focused on the biomechanical motion involved and concluded "the act of placing her wrist into extension and exerting a small amount of force was not a risk particular to Petitioner's work with Respondent" but instead was a physical maneuver Petitioner would have performed "multiple times a day" when closing doors, cabinets, or drawers, wiping countertops, pushing out of a chair, sofa, bed, or the floor. Therefore, finding Petitioner was equally exposed to the risk of injury outside of work, the Arbitrator concluded Petitioner's accident did not arise out of her employment. The Commission believes a different analysis is required under the law.

The first step in analyzing risk is to determine whether the claimant's injuries resulted from an employment-related risk. *Steak and Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC, ¶38, 67 N.E.3d 571. Risks are distinctly associated with employment when, at the time of injury, "the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 58, 541 N.E.2d 665 (1989). As the Court explained in *Young v. Illinois Workers' Compensation Commission*, 2014 IL App (4th) 130392WC, ¶23, 13 N.E.3d 1252, "*when a claimant is injured due to an employment-related risk *** it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public.*" (Emphasis added). Petitioner was a line worker at Respondent's facility. Petitioner's unrebutted testimony established her job was to pack bags of noodles into 30- by 12-inch boxes then, once each box was packed, she rotated the box and pushed it onto the conveyor. Petitioner's injury occurred when a box she was pushing got lodged against a metal support stanchion so that rather than continuing to slide onto the conveyor, the box became suddenly-immovable, causing her wrist to "snap[] back". T. 21. To be clear, Petitioner alleges, and the medical records all document, an acute hyperextension injury, not a cumulative trauma caused

by simply "extending and compressing" her wrist. As Dr. Mirly explained, there is a significant distinction between the two terms:

> There is extend and hyperextend. There is a normal typical range of motion and a typical wrist flexion arc is 150 degrees, 75 degrees each way is normal. There are ranges of 60 to 50. Hyperextend means beyond that amount. I don't think we typically hyperextend which would cause ligamentous damage. You can extend it up to normal extremes...You can extend within the limits of the ligament. Hyper would imply beyond the normal amount. PX7, p. 37.

The act of "extending and compressing her wrist" is not what caused Petitioner's injury; instead, the risk Petitioner encountered was the box jamming against the machinery and hyperextending her wrist.

The evidence establishes Petitioner was pushing a packed box onto the conveyer, *i.e.*, performing an act she was instructed to perform by her employer, when the box got stuck, causing her wrist to hyperextend. Therefore, the Commission finds Petitioner's injury resulted from a risk distinctly associated with her employment. Pursuant to *Young*, once it has been determined the claimant's injuries resulted from an employment-related risk, the risk analysis ends. The Commission finds Petitioner sustained an accidental injury arising out of and in the course of her employment on October 9, 2013.

II. Causation

Finding normal daily activities could have aggravated Petitioner's condition and constituted an overexertion, the Arbitrator concluded Petitioner failed to prove the work injury caused a compensable aggravation. Our analysis yields a different result.

In preexisting condition cases, "recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease 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." *Sisbro, Inc.*, 207 Ill. 2d at 204-5. There is no question Petitioner had a preexisting scaphoid nonunion. We observe, however, this is not an instance where Petitioner's condition had so deteriorated that daily activities aggravated her condition. To the contrary, aside from the single episode in 2010, there is no evidence Petitioner was in any way symptomatic prior to her work injury. Petitioner credibly testified she did not experience wrist discomfort between 2010 and 2013, and she was able to "still pretty much do everything," up to and including cartwheel competitions with her younger sister. T. 49. Petitioner's testimony is corroborated by the treating physicians' records which all document an absence of symptoms prior to the work injury, and even Dr. Howard repeatedly observed Petitioner's scaphoid nonunion was asymptomatic prior to the October 9, 2013 injury: in his Section 12 report, he memorialized, "She has had this since age 16. She has been able to live her life with minimal problems from this" (RX1); in his first deposition, he testified, "She's been tolerating it pretty well now for eight years. She may have another eight years until her next episode." (RX2, p. 22); and in his second deposition, Dr. Howard conceded there was "no evidence Petitioner was having ongoing pain, complaints,

problems or symptoms prior to the time she was injured at work" (RX3, p. 15). Moreover, Dr. Howard plainly and repeatedly agreed the work accident aggravated Petitioner's preexisting condition. RX2, p. 17; RX3, p. 15. As such, there is no question the work accident aggravated Petitioner's condition. The Commission emphasizes that when a work-related accidental injury is shown to be an *actual* causal factor in bringing about an employee's disabling condition, recovery will not be denied simply because normal daily activity *could have* brought on the claimant's disabling condition; stated another way, once a causal connection is found to exist between work and injury, "it is never found, in a further analytical step, that workers' compensation recovery is denied based on a 'normal daily activity exception' or a 'greater risk exception.'" *Id* at 212. Having concluded Petitioner's work injury aggravated her preexisting condition, the Commission must determine whether the aggravation was persistent, as Dr. Mirly opined, or temporary, as Dr. Howard opined.

Dr. Mirly concluded the work injury caused a persistent aggravation: "If it was a temporary exacerbation that got better, one could opine that no further treatment would be needed. However, she, throughout my course of treatment, remained symptomatic. It did not become temporary. It became a persistent aggravation." PX7, p. 10-11. Dr. Mirly explained if the aggravation was truly temporary, it would have resolved prior to surgery:

> I ended up seeing her in February. This happened in October. Even from that length of time, we are looking at at least four months. Then she had the completion of her pregnancy. I didn't see her again until May 20, 2014, an additional three months. She was still symptomatic. By that time it was seven months. I would say the likelihood of it resolving, being persistent for seven months, was very unlikely. It was kind of speaking that it was going to be persistent at seven months of symptoms. PX7, p. 11.

In contrast, Dr. Howard consistently asserted Petitioner sustained a temporary aggravation. Asked how long a temporary aggravation should last, Dr. Howard stated, "Well, it could be a matter of hours or days." RX2, p. 17. Yet Dr. Howard acknowledged Petitioner had "continuing, unremitting pain" in her wrist from the date of her work accident up until her surgery. RX3, p. 15-16. The Commission finds it is impossible to reconcile Dr. Howard's opinion of a temporary aggravation with the record, as at no point between Petitioner's accident and her surgery did Petitioner return to her pre-injury asymptomatic baseline. We also find it notable that Dr. Howard's opinions are internally inconsistent: he opined Petitioner would have become "symptomatic to a significant degree whether she worked at Gilster Mary Lee or not" (RX1), yet Dr. Howard testified the natural history is the nonunion becomes "progressively arthritic but not necessarily progressively symptomatic. So some patients have an x-ray that looks quite advanced and they have remarkably little pain." RX2, p. 24-25. The Commission finds Dr. Howard's opinions questionable and affords them little weight.

The Commission finds Dr. Mirly's opinions are highly persuasive. We note Dr. Mirly's conclusion of a persistent aggravation is consistent with the ongoing complaints as testified to by Petitioner and documented in the medical records. The Commission finds the credible evidence establishes Petitioner's condition of ill-being remains causally related to her work accident.

III. Temporary Disability

On the Request for Hearing, Petitioner alleged she was temporarily and totally disabled from January 7, 2015 through March 16, 2015. ArbX1. The Commission observes this corresponds to the period Petitioner was authorized off work following surgery albeit with one exception: Dr. Mirly's records reflect he released Petitioner to full duty as of March 16, 2015. PX6, RX5. As such, Petitioner's period of temporary total disability extended only through March 15, 2015.

The parties stipulated Petitioner's average weekly wage was $343.89. This yields a temporary total disability rate of $229.26, however the Commission notes this rate falls below the minimum as calculated pursuant to Section 8(b)1. *820 ILCS 305/8(b)1.* The statutory minimum benefit rate for a claimant with one dependent for Petitioner's date of accident is $253.00. Therefore, the Commission finds Petitioner entitled to temporary total disability benefits of $253.00 per week for a period of 9 5/7 weeks, representing January 7, 2015 through March 15, 2015.

IV. Medical

Petitioner submitted a lien from Illinois Department of Healthcare and Family Services totaling $4,349.60 (PX8), as well as a receipt for Petitioner's out-of-pocket payment of $100.00 to Dr. Mirly on January 18, 2016 (PX9). The IDHFS lien documents payments made for the treatment rendered at Memorial Hospital and Sparta Community Hospital, as well as the expenses incurred from Dr. Mirly's interventions, including office visits as well as ancillary diagnostic imaging, and surgical and pharmacy costs. The Commission finds these expenses are related to Petitioner's work injury and are reasonable and necessary as provided in Section 8(a).

V. Permanent Disability

As Petitioner's accident occurred after September 1, 2011, §8.1b applies. Section 8.1b(b) requires permanent partial disability be determined following consideration of five 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. *820 ILCS 305/8.1b(b).*

<u>Section 8.1b(b)(i) – §8.1b(a) impairment report</u>

Neither party submitted a §8.1b(a) impairment report. As an impairment report is not a prerequisite to an award of permanent partial disability benefits (*Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC, ¶47, 56 N.E.3d 1101), the Commission will assess Petitioner's permanent disability based upon the remaining enumerated factors.

Section 8.1b(b)(ii) – occupation of the injured employee

Petitioner was terminated by Respondent shortly after her work accident and did not return to her pre-injury job as a line worker (T. 42), however the Commission notes Petitioner subsequently obtained a manufacturing position at Spartan Light Metals; Petitioner worked with parts weighing approximately 10 pounds, and she testified she was able to perform all her job duties. T. 39. Although Petitioner was not working at the time of arbitration, Petitioner's ability to perform manufacturing work indicates she is able to perform her pre-accident occupation of production/assembly work. The Commission finds this factor weighs in favor of decreased permanent disability.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 24 years old on the date of her accidental injury. Petitioner is a young woman and will therefore face her residual disability for a longer period. The Commission finds this factor is significant and weighs in favor of increased permanent disability.

Section 8.1b(b)(iv) - future earning capacity

No evidence was offered to suggest the injury had an adverse impact on Petitioner's future earning capacity. Although Petitioner was not working at the time of trial, the Commission observes Petitioner testified her earnings at both Spartan Light Metals and the gas station were equivalent to her earnings at Respondent. T. 61. The Commission finds this factor weighs in favor of decreased permanent disability.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

Petitioner underwent an open reduction internal fixation of the right scaphoid with distal volar radius bone graft followed by an extended course of recuperative care, including immobilization and activity modification. Dr. Mirly expressed concern regarding possible "loosening" in July of 2015, however Petitioner reported her wrist was "not hurting her too bad," so Dr. Mirly recommended observation and advised Petitioner to return as her symptoms warranted. PX6, RX5. Petitioner returned to Dr. Mirly on one further occasion, January 18, 2016. At that time, Petitioner reported she had experienced some pain and numbness following a high-five with a co-worker, but she was able to perform all her duties and requested the doctor release her to return to work. Physical examination findings included tenderness to deep palpation over the scaphoid, but Petitioner moved her wrist "quite readily"; memorializing Petitioner had "very minimal pain" to warrant further treatment, Dr. Mirly provided the full duty release. PX6.

Petitioner testified her wrist range of motion is "almost non-existent…Compared to my left and the range of motion I had [pre-accident], I don't have much," and further stated her wrist throbs when the weather is cold and damp. T. 35-37. Petitioner takes Aleve two or three times per

week to ameliorate her symptoms. T. 58. She has difficulty lifting her youngest child and described being unable to participate in activities with her children:

> Anymore, my daughter is six now, and so she wants to play. I can't play sports with her. I used to play sports all the time. I can't do a lot of things with her anymore...I was in gymnastics when I was young, very young, and I can't teach her how to do cartwheels or back somersaults anymore. Well, I can't do them, so I can't really teach her, and so sports bothers me a lot...I have three older [brothers] who learned to play sports. I was very athletic. I was on the volleyball team, basketball team. I don't touch them. I let my brothers teach her. T. 40-41.

The Commission notes Dr. Mirly's records are consistent with Petitioner's description of minor pain complaints but a considerable functional deficit in terms of range of motion. The Commission finds these facts evidence a questionable surgical outcome on Petitioner's dominant arm and weigh in favor of increased permanent disability.

Based on the above, the Commission finds Petitioner sustained permanent partial disability to the extent of 35% loss of use of right hand under Section 8(e)9. The Commission notes the statutory minimum permanent partial disability rate under Section 8(b)2.1 is implicated. Petitioner's PPD award is to be paid at $253.00 per week. *820 ILCS 305/8(b)2.1.*

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 9 5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 71.75 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the 35% loss of use of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary and causally related medical expenses incurred in the care and treatment of Petitioner's right wrist injury, as detailed in Petitioner's Exhibit 8, pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall pay Petitioner the sum of $100.00 as reimbursement for her out-of-pocket co-pay to Dr. Mirly as documented in Petitioner's Exhibit 9. The parties stipulated Respondent is entitled to a credit of $3,230.40 for medical expenses paid; Respondent shall hold Petitioner harmless from any claims from any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 1 8 2019

LEC/mck

O: 11/27/18

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L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HEDTKAMP, SARAH
Employee/Petitioner

Case# **13WC037697**

19IWCC0035

GILSTER MARY-LEE CORP
Employer/Respondent

On 11/13/2017, 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 1.30% 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:

4593 LAW OFFICE OF JAMES PARROT
1221 LOCUST ST
SUITE 1000
ST LOUIS, MO 63103

0693 FEIRICH MAGER GREEN & RYAN
BRANDY L JOHNSON
2001 W MAIN ST PO BOX 1570
CARBONDALE, IL 62903-1570

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SARAH HEDTKAMP
Employee/Petitioner

Case # 13 WC 37697

v.

Consolidated cases: ____

GILSTER-MARY LEE CORP
Employer/Respondent

19IWCC0035

An *Application for Adjustment 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 **Herrin**, on **January 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. [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 **October 9, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**1,650.66**; the average weekly wage was $**343.89**.

On the date of accident, Petitioner was **24** 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 $**3,230.40** 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 that arose out of and in the course of her employment on October 9, 2013, and that her current condition of ill-being is related thereto. All benefits are hereby denied. All other issues are moot and the Arbitrator makes no conclusions as to those issues.

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

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

Signature of Arbitrator

November 7, 2017
Date

NOV 13 2017

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SARAH HEDTKAMP
Employee/Petitioner

v. Case #: 13 WC 37697

GILSTER-MARY LEE CORP.
Employer/Respondent

19IWCC0035

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On October 9, 2013, Petitioner was 24 years old, single, and had one dependent child. She testified she was employed by Respondent as a line worker and had been so employed since August 8, 2013. Her job duties required her to place packages of noodles into boxes. She stood behind the conveyor belt and, after filling a box; she would place her hand flat against the center of the box and push it using the top portion of her palm. The filled boxes did not weight a lot. Petitioner testified that on October 9, 2013, the person assigned to assemble the boxes kept leaving and so she was both assembling and packing boxes. One of the filled boxes she pushed became misaligned, hit the side of the conveyor belt line, and caused her hand to extend "pretty far" backward. She could not say how far back her hand bent, but she felt pain immediately. She reported a work accident and an accident report was prepared. PX1. She is right-handed.

Petitioner testified she went to Chester Memorial Hospital and followed up with her family physician, Dr. Lakatos. He referred her to Dr. Chien, who placed her hand in a splint and restricted her to one-armed duty. She continued in that capacity for a couple of weeks. Petitioner testified she was terminated by Respondent shortly thereafter. She eventually began treating with Dr. Harvey Mirly in February 2014. During that time period she became pregnant with her second child, who was born on September 30, 2014. Following delivery of her child, she underwent an MRI. Dr. Mirly recommended surgery, and sought direction from Dr. Goldfarb as to the best approach. Petitioner ultimately underwent surgery by Dr. Mirly on January 7, 2015, consisting of a bone graft with screw fixation. She was off work 9 5/7 weeks following surgery and did not receive temporary total disability benefits for that time.

Petitioner testified that following surgery she followed up with Dr. Mirly but continued to have problems with her wrist and reported those to Dr. Mirly. She currently continues to have pain and throbbing, takes Aleve and Naproxen, and has "almost non-existent" range of motion of

her wrist. She has trouble lifting her two-year old child, who weighs about 30 pounds, and she usually just lifts her with her left arm.

Petitioner testified that since March 16, 2015, she had worked in manufacturing at Spartan Light Metals, where her hourly wage was similar to what she earned with Respondent. She also worked as a cashier at Huck's, but when buffing the floors there she wore a wrist brace because the vibrations made her wrist sore. She was also unable to lift the soda syrups.

Petitioner testified that in 2006, at the age of 17, she fractured her right scaphoid bone when she fell onto her outstretched hand. She underwent eight months of treatment that included casting and a bone growth stimulator. She testified that in early 2010 she injured her right wrist again when she tripped and landed on her outstretched hand. On March 8, 2010, x-rays showed a nonunion of her right scaphoid (RX1) and she was told she had a sprain. She testified she had pain for about a week. She further testified that she did not have any right wrist discomfort between 2010 and 2013 and that she could "still pretty much do everything." She worked as a waitress, a kitchen worker, and a certified nursing assistant during that period of time. She testified she had her first child when she was 21 years old, and her nonunion did not cause her to have any problems caring for her firstborn.

On cross-examination, Petitioner explained that when she pushed the filled boxes down the conveyor belt, she would primarily use the pad area just below the fingers on the palm of her hand. Petitioner acknowledged that she was terminated by Respondent during her trial period of employment due to attendance issues. She testified she left Huck's for personal reasons and was currently unemployed. She became pregnant sometime shortly after her work accident. She testified that between the time she became pregnant and had her surgery, she did not really use her right hand except for writing. She testified she did not use her right hand to push herself out of chairs (even while heavily pregnant), pick up her children, change diapers, brush her hair, drive, exercise, or perform recreational activities She did not open or close jars, containers, drawers, cabinets, or doors. She testified she did not use her right hand to dress herself, and her mother bathed her children and did their hair. She conceded that she imagined that she used her right hand when doing things with her children. She acknowledged that she continued to smoke four to five times a week, but could get a pack of cigarettes to last over two weeks.

Following the accident, on October 9, 2013, Petitioner presented to Chester Memorial Hospital and reported she had was packing and making boxes at work and hyperextended her right wrist. Wrist x-rays showed an old, ununited navicular fracture. Petitioner was diagnosed with a wrist sprain and old navicular fracture nonunion. She was splinted and referred to Physician's Assistant Dana Lakatos. PX2.

On October 14, 2013, Petitioner presented to PA Lakatos and reported she had hyperextended her right wrist at work. On examination, she had pain and stiffness at the right wrist. Assessment was hyperextension and old ununited fracture of the navicular bone. It was noted Petitioner had smoked one pack of cigarettes a day for 13 years. She was referred to orthopedist Dr. Chien and a new splint was applied. She was restricted to no use of her right hand until re-evaluated on October 18. Records include a work slip dated November 4, 2013, indicating Petitioner had contacted the office to obtain a work excuse from October 30 to

November 4, 2013. The work excuse restricted her to no use of her right hand. PX4. The Arbitrator notes this is the final record from PA Lakatos.

On October 18, 2013, Petitioner presented to Dr. Tony Chien and reported right wrist pain from pushing a case down the belt when she heard a "snap" in her wrist. The Arbitrator notes this is the first time Petitioner reported having heard a snap. She reported she had previously injured the wrist several years prior and was treated for a scaphoid fracture, but had been asymptomatic since then. On exam, there was pain to palpation over the snuffbox region of the right wrist, pain with resisted flexion and extension, and noticeable swelling. Wrist x-rays taken that day showed a nonunion of the right scaphoid fracture with noticeable displacement over the fracture site and transverse lucency through the waist of the scaphoid associated with sclerosis. It was noted there was no significant change when compared to prior x-rays taken March 8, 2010. Dr. Chien's assessment was fracture over the right scaphoid secondary to work injury, fracture nonunion of the right scaphoid, right wrist pain, and chronic tobacco abuse. He recommended surgery of open reduction internal fixation with a vascularized bone graft. He placed Petitioner in a short arm thumb spica cast, prescribed Norco, and restricted her to no use of the right upper extremity at work. PX3.

Petitioner testified that she continued working for Respondent in a light duty capacity until she was terminated. Her personnel file indicates she was terminated during her "Introductory Period", effective November 4, 2013, due to general attendance issues. The file also indicates she received a "First Warning/Disciplinary Action" on September 25, 2013, for an unexcused absence on September 20, 2013. The form states the action was taken due to "unexcused absence-failure to bring slip for absence-hurt arm". PX1. The Arbitrator notes this was about two and a half weeks prior to her incident of October 9, 2013.

On November 1, 2013, Petitioner returned to Dr. Chien and reported right hand pain and swelling, worse at work. On exam, there was pain with palpation and with flexion and extension, as well as noticeable swelling. Dr. Chien opined Petitioner appeared to have an injury over the previous fracture nonunion over the right scaphoid. He again recommended surgery, kept her in the cast, and continued her work restrictions. PX3.

On November 15, 2013, Petitioner underwent repeat wrist x-rays, which showed a chronic fracture of the scaphoid navicular without evidence of healing. An MRI was recommended for further evaluation of possible avascular necrosis. PX5.

On November 25, 2013, Petitioner was evaluated by Dr. Richard Howard, Respondent's Section 12 examiner. She reported that on October 9 she hyperextended her wrist, felt something pop, and experienced pain. Dr. Howard noted that she smoked one pack of cigarettes a day. He further noted he was unable to examine her wrist directly, due to the presence of the cast, but that she indicated pain on the radial aspect of the wrist. Dr. Howard reviewed x-ray films from March 8, 2010, October 18, 2013, and November 15, 2013. He opined that all of the films showed a well-established scaphoid nonunion with widening at the nonunion site, increased density of the proximal pole of the scaphoid, and some mild arthritic changes near the tip of the radial styloid. RX1.

Dr. Howard opined it was well-established that Petitioner had a pre-existing nonunion. He noted it was present in the x-rays of March 2010 and, by history, had been present since Petitioner was 16 years old. Dr. Howard did not believe Petitioner incurred a work-related injury, and explained that a violent extension of her wrist would cause it to be painful temporarily, before returning to an asymptomatic state. He noted that was what occurred in 2010. He recommended against surgical intervention, especially considering the nonunion was eight years old and was already showing early arthritic changes. He opined there was only about a 50% probability of a successful union, even with a vascularized graft. He recommended the cast be removed and that Petitioner be allowed to return to full duty with no restrictions. RX1.

On December 13, 2013, Petitioner underwent repeat right wrist x-rays at the request of Dr. Chien. Impression was chronic fracture of the scaphoid navicular with increased sclerosis within the proximal pole, suggesting avascular necrosis. PX5.

On February 27, 2014, Petitioner presented to Dr. Harvey Mirly of Belleville Hand Surgery, upon referral by PA Lakatos. Dr. Mirly reviewed x-rays from October, November, and December 2013, and obtained updated x-rays that day. He noted Petitioner had recently discovered she was pregnant, such that any consideration of surgery or significant testing should be delayed until completion of the pregnancy. On examination, she was tender to palpation in the anatomic snuffbox and had pain with attempted wrist extension. Dr. Mirly noted Petitioner had an established scaphoid union which was present prior to her injury at work, and he opined that it was aggravated by the incident. He advised Petitioner that it was a significant problem and that if there was avascular necrosis it may require vascularized bone graft and even then may not heal. He noted if he did not do the vascularized bone graft, he would do the conventional open reduction and internal fixation and bone grafting. PX6.

On March 25, 2014, Dr. Mirly authored a letter to Respondent's counsel, upon request to do so and with agreement by Petitioner's counsel. He reviewed Dr. Howard's report of November 25, 2013, as well as the transcript from his deposition, wherein he recommended a steroid injection. Dr. Mirly generally agreed with Dr. Howard's findings and opinions, but disagreed with his opinion on causation. He opined that, while Petitioner certainly had a chronic problem, it was aggravated by her hyperextension injury at work. He agreed with Dr. Howard that surgery was fraught with complication and nonunion rates, but cited Petitioner's age as a good reason to proceed. He agreed, however, to follow the recommendation for a steroid injection to give Petitioner temporary relief of symptoms while she was pregnant. Dr. Mirly administered the injection on May 20, 2014. Petitioner continued with work restrictions of no lifting, pushing, or pulling greater than five to ten pounds. She completed an injection response form two weeks later and noted she had no improvement. PX6.

Petitioner testified she gave birth on September 30, 2014. On October 21, 2014, she underwent a right wrist MRI upon referral by Dr. Mirly. It showed nonunion of the transverse fracture of the mid scaphoid and low T1 signal of the proximal dorsal aspect of the proximal pole fracture fragment, indicative of avascular necrosis. It was noted that comparison was made to prior MRI of August 16, 2005, and that overall there was no significant change. PX6.

On October 24, 2014, Petitioner returned to Dr. Mirly, who recommended a cancellous bone graft with screw fixation. He further recommended requesting an opinion from Dr. Charles Goldfarb regarding the need for a vascular bone graft versus a conventional bone graft. Petitioner followed up with Dr. Mirly on December 23, 2014, who advised that Dr. Goldfarb had reviewed the MRI films and opined she would be a reasonable candidate for a conventional bone graft versus a vascularized bone graft. PX6.

On January 7, 2015, Petitioner underwent open reduction and internal fixation of the right scaphoid with distal volar radius bone graft, performed by Dr. Mirly. She followed up on January 15 and was advised to minimize her activities, maintain digital motion, avoid exposure to vibration, and avoid any nicotine products. She followed up on February 5 and reported her cast was loose and sliding up and down her arm. The case was removed and replaced with a splint. She reported she was down to only two or three cigarettes a day. She followed up on March 12 and x-rays showed no hardware migration or loosening. There appeared to be some bridging trabeculae ulnar to the screw. Dr. Mirly recommended a graduated weaning from the splint and noted she could still use it with heavier activity. Petitioner requested a slip to return to work without restrictions, although reported she had recently had a child and had no immediate plans of returning. PX6.

On July 23, 2015, Petitioner returned to Dr. Mirly and reported she had some symptoms in her wrist with heavier activity or when her daughter pulled on it. It was noted she had scheduled an appointment in April but did not keep it. FluoroScan projections showed there was possibly some loosening, particularly on the distal pole of the scaphoid, as well as some lucency around the screw. Dr. Mirly noted he was concerned that this represented a nonunion. He advised Petitioner that options included (1) activity modification; (2) revision with bone grafting and placement of a slightly larger screw and reconstructive procedures including a proximal row corpectomy; or (3) excision of scaphoid and 4-corner arthrodesis. Petitioner advised her wrist was not hurting too back and she was going to just observe it. PX6.

On August 24, 2015, Dr. Howard authored a supplemental report after reviewing additional records, the MRI films, and the deposition of Dr. Mirly. He believed the MRI showed changes at the tip of the radial styloid and the distal scaphoid that suggested arthritic changes. He explained that, over time, a scaphoid nonunion will develop into a condition known as scaphoid nonunion advance collapse arthritis. He further explained that activities of daily living would aggravate a scaphoid nonunion, which included activities like lifting, pushing, pulling, and anything that puts the wrist into extension or under load. He opined that Petitioner's work injury was no more aggravating than her activities of daily living and, therefore, the alleged accident would not be considered a causative factor of her condition of ill-being. He believed that Petitioner's accident could have caused a temporary aggravation, and that such aggravations were part of the natural history of a chronic scaphoid nonunion. He indicated that Petitioner's wrist would have become symptomatic to a significant degree regardless of whether she worked for Respondent. Dr. Howard did not believe that Petitioner's need for surgery was related to a work injury, but rather was part of the natural history of a nonunion. He opined that Petitioner did not incur any permanent partial disability from the work accident. RX1.

On January 18, 2016, Petitioner returned to Dr. Mirly and reported having numbness and pain after her right wrist extended back when she did a "high-five" at work at Sparta Light Metals on December 19, 2015. She had x-rays at Sparta Hospital, which showed the nonunion of the scaphoid. She further reported she was smoking six to ten cigarettes a day. On exam, she moved her wrist quite readily and was tender to deep palpation over the scaphoid. She reported she was able to perform her duties at work and requested a return to work slip. Dr. Mirly noted, "I advised her that if she does injured it would not be related to her work to be a pre-existing illness and she understands that (sic)." Dr. Mirly's impression was nonunion of right proximal pole scaphoid fracture. He noted that if she became more symptomatic a proximal row corpectomy would be an option, but that "she's having very minimal pain to warrant that procedure at this point". Petitioner was permitted to return to full duty work. PX6. The Arbitrator notes this is the final treatment record.

Dr. Howard testified by way of deposition on February 10, 2014, and on March 7, 2016. He is board certified by the American Osteopathic Board of Orthopedic Surgery, with an additional certificate of added qualification in hand surgery. He testified consistent with his reports. Dr. Howard testified that Petitioner had a scaphoid nonunion and avascular necrosis. He explained that avascular necrosis referred to changes within the bone that occur because of a loss of blood supply to one end of the scaphoid bone; the bone becomes more brittle, shows specific changes that are visible on x-ray, and eventually collapses. He noted that Petitioner's 2013 x-rays showed only minimal changes from her 2010 x-rays. Dr. Howard testified that Petitioner's accident was not a cause or a causative factor of her condition. He explained that: (1) Petitioner had a pre-existing nonunion; (2) the fracture looked the same in 2010 and 2013; (3) the degree of arthritic changes would have taken 5 or more years to develop; and (4) the work accident did not cause any more than a temporary aggravation of her pre-existing condition. Addressing the assertion that Petitioner was asymptomatic prior to the work accident, he testified that patients with a scaphoid nonunion will have symptomatic periods and asymptomatic periods and that, much like what occurred in 2010, anything that puts Petitioner's wrist into extension would aggravate her condition and cause pain. He noted that placing stress on the area would cause the arthritis to become inflamed and more painful and activities of daily living would cause problems and would aggravate Petitioner's nonunion. He testified that patients can go for many, many years unaware that they have a problem until it reaches a stage where it becomes painful. As the wrist becomes increasingly arthritic, patients reach a point where the pain does not stop. He testified that Petitioner's pain was coming from arthritic changes, and the fact that she continued to have pain four months after the aggravation would be related to the natural history of the disorder rather than the incident itself. He noted her condition would become more symptomatic over time and eventually reach a point where it was so painful that she would require a proximal row corpectomy or a four-corner fusion. Dr. Howard did not believe Petitioner's need for treatment was related to a work accident on October 14, 2013. RX2.

On cross-examination, Dr. Howard agreed he had no history that Petitioner had suffered off and on pain since her injury at age 16 or 17. RX2.

Dr. Mirly testified by way of deposition on May 8, 2015. He is a Board Certified Orthopedic Surgeon. Dr. Mirly testified consistent with his treating records. He testified that Petitioner's hyperextension injury on October 9, 2013, aggravated her underlying scaphoid

nonunion. He further opined that because Petitioner remained symptomatic since the accident date, the aggravation was not temporary, but was persistent. He testified that the reparative surgery became necessary because Petitioner did not respond to conservative treatment. He noted that Petitioner may have limitations on her wrist flexion and extension, decreased strength, and decreased fist compression. PX7.

On cross-examination, Dr. Mirly explained that the scaphoid bone was a small bone in the wrist that is shaped like a peanut and it moves vertically with wrist extension and flexes horizontally. When a scaphoid nonunion exists, there can be symptomatic periods and asymptomatic periods. He testified that Petitioner had a chronic scaphoid nonunion and that the work accident caused a permanent aggravation of her pre-existing condition. He opined that the work accident probably would not have caused a problem had the fracture not existed. He noted that Petitioner told him she had pain all of the time and that the pain was worse with activities and use of her hand. He testified that when there is a scaphoid nonunion, any motion can aggravate it and cause symptoms and that flexion, extension, and radial deviation (*i.e.,* moving the wrist toward the thumb) can be painful. Pain can also be caused by compression and/or putting weight or load on the wrist. Dr. Mirly agreed that activities of daily living require wrist extension, load, and/or compression; this includes opening jars, brushing one's hair, opening doors, pushing upward, pushing up from a chair (especially while pregnant), pushing up from the floor, and lifting items. He further agreed that any use of the hand creates force across the wrist. Dr. Mirly acknowledged that Petitioner's activities of daily living would cause her to extend and compress her wrist multiple times a day. He was "sure [Petitioner] used her hands daily" and noted that "[a]nything you do does cause some loading across the wrist." Further, Petitioner's use of her right hand for activities of daily living post-accident could have continued to aggravate her condition and prevented it from abating completely. Dr. Mirly did not believe there were arthritic changes on the x-rays and related Petitioner's need for surgery to pain from the work accident. He agreed that smoking can contribute to a nonunion and Petitioner continued to smoke post-surgery. PX7.

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).

An injury is compensable under the Workers' Compensation Act only if it "arises out of" and "in the course of" the employment. *Orsini v. Industrial Comm'n,* 117 Ill.2d 38, 44 (1987). An injury "arising out of" one's employment may be defined as one which has its origin in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury. *Chmelik v. Vana,* 31 Ill.2d 272, 277 (1964). The injury need not have been foreseen or expected, but, after the event, it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence. *Chmelik*, 31 Ill.2d at 277. The fact that an injury is incurred in the course of the employment and occurs at the place of employment is insufficient to establish that the injury "arose out of" the employment. *Greene v. Industrial Comm'n*, 87 Ill.2d 1, 5 (1981). 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 claimant is exposed to a greater degree than the general public by reason of his employment. *Chmelik*, 31 Ill.2d at 278. If the injury results from a hazard to which the claimant would have been equally exposed apart from the employment, then it does not arise out of it. *Rogers v. Industrial Comm'n*, 83 Ill.2d 221, 224 (1980).

There are three types of risks to which an employee may be exposed: (1) risks distinctly associated with the employment; (2) personal risks; and (3) neutral risks that have no particular employment or personal characteristics. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill.App.3d 149, 162 (2000). Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the claimant was exposed to the risk to a greater degree than the general public. *Illinois Institute of Technology*, 314 Ill.App.3d at 163. 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 claimant is exposed to a common risk more frequently than the general public. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill.App.3d 113, 117 (2007).

Petitioner's job required her to place packages of noodles into boxes, turn the boxes, and then propel them down the line. Petitioner would move the boxes by putting her hand into extension and pushing with the top portion of her palm. On October 9, 2013, one of the boxes Petitioner sent down the line became misaligned and caused her hand to go back further in extension. The act of placing her wrist into extension and exerting a small amount of force was not a risk particular to Petitioner's work with Respondent. The risk was neutral and Petitioner's exposure to it would not have been greater than the general public's exposure.

Petitioner would have been equally exposed to the risk at issue outside of work. Dr. Mirly testified that Petitioner's activities of daily living would cause her to extend and compress her wrist multiple times a day. Examples of activities that require placing one's hand into extension and exerting a small amount of pressure include closing doors, cabinets, and/or drawers; washing items like windows, mirrors, and cars; wiping down countertops and tables; dusting; pushing out of a chair, sofa, bed, or the floor; and pushing items like a grocery cart, stroller, or lawn mower. The average person uses his or her hand for such activities numerous times throughout the day and, therefore, Petitioner would have been equally exposed to the risk of injury outside of work. This finding is supported by Petitioner's report of pain from her daughter pulling on her wrist and the aggravation that occurred when she high-fived someone on December 18, 2015.

Similarly, there was no objective evidence that Petitioner's work placed her at a greater risk of sustaining a traumatic wrist injury than that faced by the general public. The general public would perform activities that require hand extension and the application of a small amount of pressure numerous times a day. Using one's hand in this specific manner would not typically place the average person at risk of injury. Dr. Mirly's testimony that the work activity at issue probably would not have caused a problem had Petitioner not had a chronic nonunion substantiates this conclusion.

As Dr. Mirly noted after the high-five incident, Petitioner had a pre-existing condition and, if she did injure her wrist, it would not be related to her work. Although Petitioner was working for a different manufacturing company when Dr. Mirly offered this opinion, Petitioner suffered from the same condition while working for both Respondent and Spartan Light Metals. Both jobs were hand intensive. Thus, the basis of Dr. Mirly's conclusion following this incident would also apply to her work for Respondent.

Based upon the foregoing and the record in its entirety, the Arbitrator finds that Petitioner failed to meet her burden of proof that her injury arose out of her employment with Respondent. Her alleged injury was the result of a neutral risk and she was not exposed to the risk to a greater degree than the general public. Petitioner's claim for benefits is denied.

In support of the Arbitrator's decision relating to issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

A claimant has the burden of proving by a preponderance of the credible evidence all elements of the claim, including that any alleged state of ill-being was caused by a workplace accident. *Parro v. Industrial Comm'n*, 260 Ill.App.3d 551, 553 (1st Dist. 1994). To prevail on a claim for benefits, a claimant must establish that his or her current condition of ill-being is causally connected to a work-related injury. *Elgin Bd. of Educ. School Dist. U-46 v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d 943, 949 (1st Dist. 2011).

The accidental injury need be neither the sole or primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 205 (2003). Although a preexisting condition does not prevent recovery of benefits if that condition was aggravated or accelerated by claimant's employment, recovery is denied where the claimant's health has so deteriorated that any normal daily activity is an overexertion, or where the activity engaged in presents risks no greater than those to which the general public is exposed. *Sisbro*, 207 Ill.2d at 208-15.

For the reasons discussed above, Petitioner's claim is barred by her failure to prove a compensable accident. Even if this element had been proven, however, the claim would still be denied on the basis of causation.

It is undisputed that Petitioner fractured her scaphoid in 2006 and subsequently developed a nonunion. It is also undisputed that the scaphoid nonunion was essentially the same

in 2010 as it was in 2013. The question at issue is whether the alleged work accident caused a compensable aggravation of Petitioner's pre-existing condition. The Arbitrator finds that any aggravation of Petitioner's pre-existing nonunion was not compensable because her condition was such that normal daily activities were an overexertion and her work presented no greater risk than that faced by the general public.

The scaphoid bone connects the proximal and distal rows of bone in the wrist and helps with wrist movement. It moves horizontally with flexion and vertically in extension. (PX7 at 23). The evidence established that when there is a scaphoid nonunion, any motion can aggravate it and cause symptoms. (PX7 at 35; RX1 at 2). Any use of the hand creates force across the wrist. (PX7 at 39, 46). Flexion, extension, and radial deviation (*i.e.*, moving the wrist toward the thumb) can be painful. (PX7 at 35-36; RX1 at 2; RX2 at 17; RX3 at 9). Putting weight on the wrist, loading, and compression can also cause pain. (PX7 at 36). The evidence further established that activities of daily living would have aggravated Petitioner's condition. (PX7 at 36-38; RX1 at 2; RX3 at 9, 14-15). Activities of daily living require wrist extension, load, and/or compression. (PX7 at 29, 36-39). Thus, any use of Petitioner's right wrist could have aggravated her nonunion and caused symptoms.

The experts agreed that when a scaphoid nonunion exists, there can be symptomatic periods and asymptomatic periods. (PX7 at 40; RX2 at 16-17, 21). Dr. Howard testified that Petitioner's accident caused only a temporary aggravation and that such aggravations were a part of the natural history of a chronic scaphoid nonunion. He found Petitioner's work accident was no more aggravating than her activities of daily living and, therefore, would not be considered a causative factor of her condition of ill-being. He explained that Petitioner's wrist would have become symptomatic to a significant degree regardless of whether she worked for Respondent. (RX1 at 1). Dr. Mirly opined that the alleged work accident caused a permanent aggravation. (PX7 at 11). However, he was "sure [Petitioner] used her hands daily", thought her activities of daily living would cause her to extend and compress her wrist multiple times a day, and acknowledged that Petitioner's use of her hand for activities of daily living post-accident could have continued to aggravate her condition and prevent it from abating completely. (PX7 at 36-37, 40, 46). Dr. Mirly also stated that the work activity at issue probably would not have caused a problem if the nonunion had not been present. (PX7 at 18).

Any motion involving Petitioner's right hand affected the scaphoid nonunion and her activities of daily living constantly put her at risk of an aggravation. Her condition was such that the performance of daily tasks would have been an overexertion. Additionally, Petitioner was not exposed to a risk of injury that was greater than that faced by the general public.

This case is similar to *Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill.App.3d 284 (3rd Dist. 1991). In that case, the claimant suffered an injury to her knee when rising from a children's chair at work. She had a pre-existing knee condition and eventually underwent surgery for a meniscal tear. Her surgeon found that the tear could have been causally related to an injury or an aggravation of a pre-existing condition. The employer's expert testified there was no causal connection and the injury could have happened at any time. The arbitrator and Commission held the work injury aggravated a pre-existing condition and was compensable. *Hansel & Gretel*, 215 Ill.App.3d at 292. The decision was reversed on appeal based on evidence

that, with the claimant's history of knee locking, her right knee could have locked or gone out while she was walking, turning, getting out of bed or, in short, performing the activities of everyday life. *Hansel & Gretel*, 215 Ill.App.3d at 294. The Court held the claimant did not establish that she was exposed to a risk greater than the general public. *Id.*

As in *Hansel & Gretel,* given Petitioner's condition, her performance of activities of daily living could have caused her to become symptomatic at any time. The continued use of her hand would have then kept it aggravated. Petitioner risked an aggravation every time she performed activities like closing a door, a cabinet, and/or a drawer; washing items like windows, mirrors, and cars; wiping down countertops and tables; opening jars; dusting; vacuuming; changing sheets; making a tight fist; pushing out of a chair, sofa, bed, or the floor; picking up toys, lifting, turning a steering wheel, dressing and grooming herself; and pushing items like a grocery cart, stroller, or lawn mower. This conclusion is supported by Petitioner's report of pain when her daughter pulled on her wrist and the aggravation that occurred when she high-fived someone on December 18, 2015. Further, Dr. Mirly testified that Petitioner's work activity probably would not have caused an injury if the scaphoid had not already been fractured. This testimony indicates that the alleged work accident would not have been injurious to members of the general public. The Arbitrator notes that Petitioner denied really using her right hand except for writing after the work accident. The Arbitrator finds this testimony to be lacking in veracity, especially in light of the fact that Petitioner had two young children and her concession that she used her right hand to do things with her children.

Based on the foregoing and the record in its entirety, the Arbitrator finds that Petitioner has failed to prove that the alleged work accident caused a compensable aggravation. Although she asserted she was asymptomatic before her the alleged work accident, the Arbitrator finds that normal daily activities could have aggravated Petitioner's condition and constituted an overexertion. In addition, her work for Respondent did not present a risk that was greater than that faced by the general public.

All other issues are rendered moot and the Arbitrator makes no findings regarding same.

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 CHAMPAIGN)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☒ Modify: Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHAWN SMITH,

Petitioner,

19IWCC0036

vs. NO: 16 WC 2184

DANVILLE SCHOOL DISTRICT 118

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact and Conclusions of Law

1. On the accident date, Petitioner was employed by Respondent as a custodian, a position he held since May 2005. Petitioner's job duties included cleaning classrooms, mopping, dusting, stripping floors, carrying garbage, emptying trash cans, cleaning windows, setting up for events, and moving desks, boxes and lunch tables. These duties required Petitioner to lift and move heavy objects, such as students' desks weighing 15 to 20 pounds and larger teachers' desks, garbage bags weighing 20 to 60 pounds, boxes of copy paper weighing 40 to 75 pounds, and at least ten to 15 boxes per week arriving from UPS and vendors. The building where Petitioner worked lacked an elevator; therefore, Petitioner used the stairs, and often a dolly, if objects needed moved to different floors. The building also did not have a cafeteria, making Petitioner further responsible for setting up tables in the gym twice each day for breakfast and lunch and then taking them down twice each day. Per its job description, this position required one to be physically fit and able to lift at least 50 pounds.

2. Petitioner alleged he sustained a left inguinal hernia on May 4, 2015 from his repetitive

lifting of heavy objects at work. Petitioner first reported left groin discomfort to Dr. Timothy Horner, his family physician, on May 4, 2015 during a wellness check. Dr. Horner diagnosed Petitioner with a left inguinal hernia, and at Petitioner's June 3, 2015 visit, opined that the hernia was newly onset and work-related. Petitioner thereafter underwent a left inguinal hernia repair with mesh on July 15, 2015.

3. Dr. William Bowen, Petitioner's treating doctor at Danville Polyclinic, subsequently released Petitioner to regular work without restrictions as of August 10, 2015. Petitioner returned to full duty work for Respondent at that time and has remained working as of the hearing date. Petitioner last treated for his hernia on August 11, 2015, at which time Dr. Bowen administered an injection in response to Petitioner's pain complaints but found no abnormality nor evidence of reoccurrence on examination.

4. At hearing, Petitioner testified he still occasionally experiences burning or sharp pain but considers himself to be fine and works through the pain. Petitioner specifically notices pain when going up stairs or moving heavy objects. Petitioner testified that when he feels pain, he just continues to go on and tries to bear it. When asked if his pain or any sensation interferes with his job, Petitioner responded that he still does his job very well. Petitioner currently makes more money than he did in 2015.

5. Dr. Dru Hauter conducted a records review at Respondent's request, and Respondent entered Dr. Hauter's April 25, 2017 report and subsequent deposition into evidence. Dr. Hauter, who has a background in internal and occupational medicine, opined that Petitioner's hernia was caused by a combination of being born with a weak abdominal wall and increased pressure within Petitioner's abdomen from a frequent cough associated with asthma and smoking. He believed there was no evidence that Petitioner's hernia was caused or aggravated by his work.

6. Following a hearing on November 16, 2017, the Arbitrator found Petitioner sustained an accident that arose out of and in the course of his employment and said accident caused his current condition of ill-being. Upon consideration of the five enumerated criteria set forth by §8.1(b) of the Illinois Workers' Compensation Act, the Arbitrator awarded Petitioner 4% MAW in permanent partial disability. The Arbitrator further awarded seven weeks of temporary total disability and specific reasonable and necessary medical expenses pursuant to §8(a) and §8.2 of the Act.

Following a careful review of the record, the Commission respectfully disagrees with the Arbitrator's permanent partial disability award of 4% MAW and finds an award of 2.5% MAW to be appropriate based on its analysis of the §8.1(b) statutory factors.

In reviewing permanent partial disability, the Commission must consider the §8.1(b) enumerated criteria, including: (i) the reported level of impairment pursuant to (a) [AMA "Guides to 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 as corroborated by treating medical records.

Regarding criterion (i), no AMA impairment rating was provided. Thus, no weight can be given to this criterion.

Regarding criterion (ii), Petitioner was a custodian on the accident date and continues to work in the same occupation. Petitioner returned to regular duty without restrictions on August 10, 2015 and has worked consistently with no restrictions ever since. Petitioner's testimony described his job as very physically demanding, but when asked if his current pain ever interferes with this job, Petitioner reported that he is still able to do his job very well. Petitioner indicated he simply works through any pain.

Regarding criterion (iii), Petitioner was 61 years old at the time of hearing and 58 years old on the accident date. There was no testimony as to whether Petitioner's age affected his disability or how many years Petitioner intends to remain in the workforce.

Regarding criterion (iv), Petitioner testified to earning more money at the time of hearing than he did in 2015. As such, Petitioner did not suffer any loss of earning capacity.

Regarding criterion (v), Petitioner last treated for his hernia on August 11, 2015. Examination at that time revealed no abnormality nor evidence of reoccurrence. Petitioner's records show positive post-surgical results. Petitioner testified to having some ongoing burning and sharp pain, but stated he is fine and works through it. Petitioner did not indicate that he has any problems performing his job.

Upon consideration of these factors, the Commission puts great weight on factors (ii), (iv) and (v). Petitioner continues to perform his same physically demanding job. Petitioner earns more today and simply works through any pain. Petitioner testified that he is fine and has not required any treatment since August 2015. As such, the Commission finds Petitioner sustained a loss of 2.5% MAW for his surgically repaired left inguinal hernia. The Commission so modifies the Decision of the Arbitrator accordingly.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 22, 2017, is modified as stated herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $348.00 per week for a period of 12.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 2.5% 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

19IWCC0036

the sum of $4,500.00. 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: JAN 18 2019

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/met
o: 12/6/18
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0036

SMITH, SHAWN
Employee/Petitioner

Case# **16WC002184**

DANVILLE SCHOOL DISTRICT 118
Employer/Respondent

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:

1937 TUGGLE SCHIRO LICHTENBERGER
TODD D LICHTENBERGER
510 N VERMILION
DANVILLE, IL 61832

0522 THOMAS MAMER & HAUGHEY LLC
ERIC CHOVANEC
PO BOX 560
CHAMPAIGN, IL 61824

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Shawn Smith
Employee/Petitioner

v.

Danville School District 118
Employer/Respondent

Case # 16 WC 02184

Consolidated cases: ____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Urbana, Illinois**, on **November 16, 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 **May 4, 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 $**30,160.00**; the average weekly wage was $**580.00**.

On the date of accident, Petitioner was **58** 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 $**monies previously paid by group health insurance** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $345.00 to Christie Clinic, and $3,268.00 to Danville Polyclinic, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given credit for medical benefits that have been paid by petitioner's group health insurance, and 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.

Respondent shall pay petitioner temporary total disability benefits of $386.67 / week for 7 weeks, commencing May 28, 2015, through June 5, 2015, and June 20, 2015, through July 3, 2015, and July 15, 2015, through August 9, 2015, as provided in Section 8(b) of the Act.

Respondent shall pay petitioner permanent partial disability benefits of $348.00 / week for 20 weeks, because the injuries sustained caused the 4% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

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Signature of Arbitrator

12/18/2017
Date

ICArbDec p. 2

DEC 2 2 2017

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged that he sustained accidental injuries arising out of and in the course of his employment for Respondent on May 4, 2015. The Application alleges that Petitioner sustained an inguinal hernia as a result of the repetitive lifting of heavy objects.

Petitioner works for Respondent as a custodian and started working for Respondent in 2005. Petitioner testified he started working at the Garfield building around 2012 and was still working at that building in May 2015. Petitioner testified his job duties include cleaning, mopping, dusting, stripping floors, emptying trash cans, carrying garbage, moving desks, cleaning windows, moving boxes, moving lunch tables, setting up for after-school events and thing of that nature. The general duties of a custodian working for Respondent are documented in a written job description (Px. 6 and Rx. 1, Exb. 2).

Petitioner testified he moved and rearranged furniture consisting of large teachers' desks as well as students' desks that weigh fifteen (15) to twenty (20) pounds each. Petitioner testified he works in a building which consists of a basement, a main floor, and an upstairs, but has no elevators. Petitioner testified that sometimes he was required to move desks from one floor to another using the stairs.

Petitioner testified he moved dining tables in and out of the gym, on a daily basis, because the building he works in does not have a cafeteria.

Petitioner testified he moved garbage bags frequently during the course of a normal day which weigh anywhere from twenty (20) to sixty (60) pounds, and sometimes had to carry the garbage bags up and down stairs.

Petitioner testified he regularly moved boxes delivered to his building to various locations which required going up and down stairs. The boxes he moved included copy paper which weighed forty (40) to seventy (70) pounds.

Petitioner testified he was responsible for shoveling snow and ice from the sidewalks during the winter months.

Petitioner testified he started noticing discomfort in his groin area while at home in late April 2015. Petitioner testified the next Monday he called Dr. Horner for an appointment and then saw Dr. Horner on May 4, 2015.

Petitioner presented to the office of Dr. Timothy Horner on May 4, 2015, complaining of discomfort in his left groin near the left testicle. Dr. Horner diagnosed a left inguinal hernia and referred Petitioner to Dr. Bowen at Danville Polyclinic (Px. 1).

Petitioner presented to the office of Dr. William Bowen on May 21, 2015. Dr. Bowen confirmed the diagnosis of left inguinal hernia and scheduled a surgical repair with mesh on June 4, 2015 (Px. 2).

On May 22, 2015, Petitioner completed and signed a First Report of Injury which indicates an injury of hernia to the left lower groin which he believed was caused by repetitive labor at work such as lifting tables, pulling boxes up stairs, and lifting heavy garbage bags (Px. 5).

Petitioner returned to Dr. Horner on June 3, 2015. That note indicates Petitioner started noticing discomfort in the groin area around April 24, 2015, and that on April 28, 2015, Petitioner set up the initial appointment on May 4, 2015. That note also indicates that Petitioner works as a custodian which involves extensive lifting of trash bags, tables, etc. but does not partake in any other strenuous physical activity. Dr. Horner opined that the hernia is new in onset and directly related to Petitioner's work as a custodian (Px. 2).

Petitioner saw Dr. Bowen again on July 2, 2015, to discuss the hernia and reschedule the surgery. Dr. Bowen performed a repair of left inguinal hernia with mesh on July 15, 2015. Petitioner returned to Dr. Bowen on July 21, 2015. Petitioner last saw Dr. Bowen on August 11, 2015, at which time Petitioner reported an increase in pain at his incision and down towards his testicle. Petitioner informed Dr. Bowen he had returned to work because he was out of sick days. Dr. Bowen advised caution of not doing too much (Px. 2).

On April 25, 2017, Dr. Dru Hauter, an independent medical examiner hired by Respondent, issued a medical report based upon his review of Petitioner's medical records. (Rx. 1, Exb. 4).

On October 9, 2017, Dr. Hauter gave his evidence deposition. Dr. Hauter testified he reviewed certain medical records but did not perform an examination of Petitioner. Dr. Hauter testified Petitioner's left inguinal hernia was not caused or aggravated by work. Dr. Hauter testified that Petitioner's hernia was caused by a congenital weakness in the abdominal wall combined with increased pressure within the abdomen from frequent coughing associated with smoking and asthma (Rx.1).

Petitioner testified he last smoked cigarettes twenty (20) years ago. Petitioner testified that Dr. Horner is his family doctor and has been for at least seven (7) or eight (8) years. Petitioner testified that Dr. Horner's medical note of May 4, 2015, indicating Petitioner is a non-smoker and non-alcohol user, is correct. Petitioner testified that Dr. Bowen's initial visit record is incorrect where it indicates Petitioner is a smoker who also uses alcohol. Petitioner testified he never told Dr. Bowen he was a smoker and a drinker, and that Dr. Bowen never even asked about those issues. It should be noted that Dr. Bowen's final note, dated August 11, 2015, indicates Petitioner is a "Former smoker."

Petitioner testified he sometimes notices burning and sharp pain in the groin but is otherwise "fine." Petitioner testified he works through the pain which he mostly notices when moving heavy objects or going up a stair case.

Conclusions of Law

In regard to the disputed issues (C) and (F) the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that Petitioner's accident did arise out of and in the course of his employment by Respondent and that the left inguinal hernia is causally related to the accident.

In support of these conclusions the Arbitrator notes the following:

It is undisputed that Petitioner worked as a custodian and that his job involved numerous duties which required heavy lifting and the use of significant bodily force. Petitioner testified, as indicated in Dr. Horner's medical records, that he started experiencing discomfort in the groin area in late April 2015 and very soon thereafter set up an appointment with Dr. Horner to discuss. Petitioner saw Dr. Horner on May 4, 2015, at which time the hernia was diagnosed.

Because this is a repetitive trauma case, the date of injury may be the date on which the injury "manifests itself." *Peoria County Belwood Nursing Home v. Industrial Comm'n, 115 Ill.2d 524, 531, 106 Ill.Dec. 235, 505 N.E.2d 1026, 1029 (1987).* "Manifests itself" means 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. *Belwood, 115 Ill.2d at 531, 106 Ill.Dec. 235, 505 N.E.2d at 1029.* Petitioner's claimed manifestation date is the date of his very first doctor's appointment which occurred within a week to ten (10) days following the onset of symptoms. This clearly meets the reasonable person standard for establishing an onset date in a repetitive trauma case.

Dr. Horner, in his medical record dated June 3, 2015, clearly indicates his knowledge of Petitioner's work activities and unequivocally causally relates the left inguinal hernia to Petitioner's work as a custodian.

Although Dr. Hauter opines that Petitioner's hernia is not work related, the basis of that opinion is flawed. Dr. Hauter's opinion is premised first upon on a congenital abdominal wall weakness but he admitted there is no medical evidence to support such a finding (Rx. 1, p. 20). His opinion is premised next upon frequent coughing due to smoking and asthma. Petitioner's testimony and the totality of the medical records strongly suggests that Petitioner was not smoking at any time associated with this claim. Moreover, when asked to identify anywhere in the medical records that indicated a diagnosis of asthma he could not do so (Rx. 1, p. 23). There only evidence that Petitioner ever had treatment for coughing is apparently in a medical report from September 29, 2010. According to Dr. Hauter, the Petitioner was seen by his family doctor on that date for a chronic cough (RX 1, p. 23). There is no evidence to suggest that Petitioner was ever suffering from coughing coupled with any hernia symptoms. Dr. Hauter testified that the primary causes of an inguinal hernia are increased pressure within the abdomen, a pre-existing weak spot in the abdominal wall, or some combination of those two factors (Rx. 1, p. 18). Dr. Hauter also conceded that part of Petitioner's job duties required him to lift up to fifty (50) pounds which is the type of thing that would cause increased pressure in the abdominal wall (Rx. 1, p. 23). Dr. Hauter denied the possibility of the heavy lifting as a contributing factor because the injury was "deemed an acute hernia" (Rx. 1, pp. 24-25). It is noted that the word "acute" does not appear anywhere in any of the treatment records. The word "acute" does not appear in Dr. Hauter's medical report dated April 25, 2017. The word "acute" does not even appear in Dr. Hauter's direct examination. The only time the word "acute" appears anywhere in this record is during cross-examination at a time when Dr. Hauter was attempting to avoid a clear inconsistency in his opinions. The only bonafide evidence in this case that would fit into Dr. Hauter's list of causes is the heavy lifting done by Petitioner as a custodian. Even if it is assumed there was a pre-existing weakness in the abdominal wall, we are still left with the combination of that condition, with increased pressure due to heavy lifting at work, as the only explanation for Petitioner's hernia. The Arbitrator finds the opinion of Petitioner's treating physician, Dr. Horner, to be more persuasive on the issue of causation.

Based upon the above analysis, the Petitioner has shown by a preponderance of the evidence that his accident arose out of and in the course of his employment, and that his current condition of ill-being, namely the left inguinal hernia is causally related to his work activities as a custodian.

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

The Arbitrator concludes that the medical services provided to Petitioner are reasonable and necessary. Respondent shall pay reasonable and necessary medical expenses as identified in Petitioner's Exhibits 3 and 4. Respondent shall be given credit for medical bills already paid by Petitioner's group medical insurance and 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.

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

The Arbitrator concludes that Respondent shall pay temporary total disability in the amounts of $386.67 / week for 7 weeks, commencing May 28, 2015, through June 5, 2015, and June 20, 2015, through July 3, 2015, and July 15, 2015, through August 9, 2015, as provided in Section 8(b) of the Act.

In support of this conclusion the Arbitrator notes the following:

Respondent's dispute as to claimed temporary total disability benefits is based solely upon their denial of liability. Given the Arbitrator's finding that this is a compensable claim it therefore follows that temporary total disability benefits are owed to Petitioner.

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

Section 8.1b of the Act requires consideration of the following criteria in determining the level of permanent partial disability:

i. The level of impairment reported by a physician;
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 respect to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. Therefore, the Arbitrator gives no weight to this factor.

With respect to subsection (ii) of §8.1b(b), the Arbitrator notes that Petitioner was employed as a school custodian at the time of the accident and continues to work as a school custodian for Respondent. Petitioner's work duties involve a great deal of lifting and carrying of various items including but not limited to boxes, trash bags, desks, furniture, and lunch tables. Petitioner testified he sometimes notices burning and sharp pain in the groin when he is moving heavy objects or going up a stair case. Petitioner testified those are routine daily activities he is required to do as a custodian. Petitioner's testimony was credible and undisputed. Therefore, the Arbitrator gives a great deal of weight to this factor.

With respect to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 58 years old at the time of the accident and concludes that ongoing pain and discomfort, as described by Petitioner, may affect him at work for a shorter time frame than a younger individual. Therefore, the Arbitrator gives some weight to this factor.

With respect to subsection (iv) of §8.1b(b), the Arbitrator notes that Petitioner's future earning capacity appears to be undiminished as a result of the injuries because he continues to work as a school custodian and is earning a higher wage now than he was at the time of the accident. Therefore, the Arbitrator gives no weight to this factor.

With respect to subsection (v) of §8.1b(b), the Arbitrator notes that as of Petitioner's last medical appointment on August 11, 2015, with Dr. Bowen, he had been experiencing increased pain at his incision and down towards the testicle upon returning to work. He received a Marcaine injection that day and was advised not to do too much. Dr. Bowen indicated that more activity will result in more soreness. The medical records also corroborate Petitioner's testimony. Therefore, the Arbitrator gives significant weight to this factor.

STATE OF ILLINOIS)		
) SS.	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
COUNTY OF SANGAMON)	☒ 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

GERALD STEWART

Petitioner,

vs. No. 16 WC 020198

CUMBERLAND CUSD #77

Respondent.

19IWCC0037

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, prospective medical care, maintenance and penalties and fees and being advised of the facts and law, corrects 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, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission corrects the clerical error in the Order part of the Arbitrator's Decision to be consistent with the arbitrator's findings and award of reasonable and necessary medical services in the amount of $290.00 as provided in Sections 8(a) and 8.2 of the Act. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 10, 2018, is hereby corrected as 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 bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 2 2019
o-12/6/18
SM/msb
44

Stephen J. Mathis
Stephen Mathis

David L. Gore
David L. Gore

Deborah L. Simpson
Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19 (b-1) ARBITRATOR DECISION

STEWART, GERALD
Employee/Petitioner

Case# **16WC020198**

19IWCC0037

CUMBERLAND CUSD #77
Employer/Respondent

On 9/10/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

Unless a party does the following, this decision shall be entered as the decision of the Commission:

1) Files a Petition for Review within 30 days after receipt of this decision; and
2) Certifies that he or she has paid the court reporter $ 438.00 for the final cost of the arbitration transcript and attaches a copy of the check to the Petition; and
3) Perfects a review in accordance with the Act and Rules.

If the Commission reviews this award, interest of 2.24% 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:

0143 CRAIG & CRAIG LLC
JOHN L BARGER
1807 BROADWAY AVE PO BOX 689
MATTOON, IL 61938

0507 RUSIN & MACIOROWSKI LTD
NICOLE Z BRESLAU
10 S RIVERSIDE PLZ SUITE 1950
CHICAGO, IL 60606

19 I CC0037

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b-1)

Gerald Stewart
Employee/Petitioner
v.
Cumberland CUSD #77
Employer/Respondent

Case # **16** WC **20198**

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. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **4/23/18**. Respondent filed a *Response* on **5/7/18**. The Honorable **Michael Nowak**, Arbitrator of the Commission, held a pretrial conference on **5/21/18 and 8/22/18**, and a trial on **8/23/18** in the city of **Springfield**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☐ TTD

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

N. ☐ Is Respondent due any credit?

O. ☐ Other ______

FINDINGS

On the date of accident, **4/9/15**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**65,970.84**; the average weekly wage was $**1,268.67**.

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

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

Respondent shall be given a credit of $**51,230.10** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**51,230.10**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $[illegible], as provided in Sections 8(a) and 8.2 of the Act.

Because Petitioner failed to prove that his current condition of ill-being is causally related to the accident of 4/9/15 prospective medical benefits and maintenance are denied

In no instance shall this award be a bar to subsequent hearing and determination of permanent disability, if any.

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter $**438.00** or the ***final*** cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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

9/8/18
Date

ICArbDec19(b-1) p. 2

SEP 10 2018

FINDINGS OF FACT

This matter was on August 23, 2018 in Springfield on Petitioner's Petition for 19(b-1). The parties agreed that the issues to be determined were limited to causation, prospective medical, maintenance, and penalties.

Petitioner was called as the first witness. He testified that he is married and that he is not presently employed. He testified that at the time of the accident on April 9, 2015, he was employed by the United States Post Office as well as the Cumberland School District #77. He testified that he had worked for the post office for approximately 18 years. He testified that he worked for the post office generally six days a week, starting at 8:00 a.m., and usually completed by 12:30. He stated that his lifting requirements for that job were 70 pounds.

He further testified that he began working for the Cumberland School District in 1996 and had worked for them for approximately 20 years. He indicated that his job for the school district was a custodian in the elementary school. His job consisted of gathering trash, sweeping floors, mopping floors, washing chalkboards, sinks, bathrooms, as well as hanging shelves and moving furniture. He testified that his lifting requirements for that job were 90 pounds, and that generally, he worked from 3:30 p.m. to midnight.

He testified that he had prior back surgery in February of 1998, but had no other surgery to his back. He further testified that in the 10 years before April 9, 2015, he had no further medical care for his back and no incidents of back pain other than occasional pain.

Petitioner testified that on the date of the accident, at approximately 7:30 p.m., he was attempting to empty a trash can inside of a paper shredder in the principal's office. He testified that as he was pulling it out, he had a pain in his lower back. He described the paper shredder as approximately 2 feet to 30 inches tall, approximately 16 inches thick, and possibly 2 feet long. He further described that there is a trash can inside of the shredder, and the shredded paper drops into the trash can. He testified that you have to pull the trash cut out to dump it, and that it is always quite full.

He further testified that as he was pulling the trash can out, he experienced back pain "in the lower back" when the trash can kind of stuck. When asked to describe the pain, he testified that the pain was "just about my belt line; right about the middle of my back." He was asked if it changed during the time that he was working for the rest of the day, to which he answered no.

He went on to testify that he worked the following day at both the post office job and at the school district. He was asked if he remembered anything unusual at that point, and testified that he had noticed nothing out of the ordinary other than he still had some pain in his back.

Petitioner testified that he reported the incident to the principal, Ms. Keyser, at that time. He continued to work his shift, and testified that he noticed that with a lot of the movements, he could feel the pain like he had previously described. He advised that he just took it easy and slouched on some of the mopping rooms, and other things he did the next day because his back had bothered him.

He went on to testify that he worked the following day at the post office which would have been a Saturday. He testified on that Saturday, he had "just the same thing; just had some back pain." He testified that over the weekend, he did as little as possible; just laid around and took it easy without doing much of anything. He testified that at that point, his back pain was pretty much the same all the time.

He testified that he worked both jobs yet again on Monday, and when asked what he recalled about his work at the post office, he testified that he just had the same thing; still had the pain. He testified that he then went to the school district job, and at that time, had a discussion once again with Ms. Keyser at approximately 3:30 p.m. He testified that he told her at that time that it was still bothering him and he was having some leg trouble, kind of numbness in the leg and the bottoms of his feet hurt. When asked when the problem with his legs started, he testified that he was not exactly sure if it was Monday or when it actually started. He testified that it was both legs, but the right was way worse than the left. He went on to discuss that the bottoms of his feet hurt, and the leg felt swelled up and numb and the bottoms of the feet hurt.

He testified that he contacted the doctor on Tuesday morning; however, could not get in to see the doctor on that date. He finally saw Diana Oakley on Wednesday in Casey, Illinois. Ms. Oakley apparently is an advanced nurse practitioner. He advised that Ms. Oakley is his normal family doctor. He testified that Ms. Oakley sent him to get physical therapy, and at some point, he had an MRI and received medication.

He testified that he saw Dr. Mitry for the back problems, and was given a shot in the back and medication. He testified that he got no improvement from the shot in the back or the physical therapy.

He next saw Dr. Nardone. He advised that Dr. Nardone took another MRI because he told him that it had been too long since the first one, and after that MRI, Dr. Nardone recommended surgery. He testified that his treatment with Dr. Nardone began sometime in March of 2016. He advised he has not seen Dr. Nardone since that time, and that he still had pain in the back and the legs were still bothering him, as well as his feet.

He testified that he could not walk distances, and that he could tell he was taking smaller steps than he usually does. He testified that it is uncomfortable to sit, and after a period of time, he starts fidgeting and has to stand up. He testified that the same thing was true about standing for a period of time; his legs begin to bother him, and he has to sit down.

He also testified that it was uncomfortable lying down. He rolls from side to side and up and down for half the night. He testified he simply cannot get comfortable.

As of the date of the hearing, he testified that nothing has really changed. He testified that he first noticed all of these symptoms from the date of the accident until he went to the doctor, and that it was constant.

He testified that he saw Dr. Harms in Champaign at Carle Hospital as he wanted to get a second opinion on his back injury and whether he needed surgery. He testified that he also saw Dr. Zelby for an examination at the request of Respondent.

He was asked specifically, if he had seen several other doctors including Dr. Jaribeck, Dr. VanPoppering, and Dr. Eubanks. He was asked if he had ever treated with Dr. Eubanks for his back, to which he replied no. He was further asked whether or not he had ever told Dr. Eubanks he had back pain all the time, to which he also replied no. He further indicated that at the time he saw Dr. Eubanks, he did not have back pain all the time.

He went on to testify that he provided the school district with copies of his restrictions and was paid TTD until June 6, 2016, at which time he was notified by Respondent that TTD was terminated. Petitioner testified that on August 10, 2018, he was called in and advised that work comp wanted to put him back to work on light-duty, but that there was no light-duty available for him, nor did they have any alternative jobs. At that point in time,

Petitioner retired from the school district. He testified that he is currently receiving Social Security Disability. He also testified that he wanted the surgery proposed by Dr. Nardone.

On cross examination, Petitioner confirmed that he had in fact retired from the post office voluntarily as well. He also confirmed after the date of the accident, he worked two days at the school district and three days additionally at the post office. He also confirmed that after the initial accident, he had only pain across the belt line on the right side; however, after the accident, he initially had no radiation or no radicular symptoms. He confirmed that some time over the next three days after the initial accident, he developed additional pain down the legs; however, he was unable to say what caused that pain down the legs.

He further testified that the weight restrictions given to him initially were "like 5 pounds." He went on to testify that they "gradually went up a little bit and they ended now they put me on a 40 pound weight restriction permanent." He further testified that he had a functional capacity evaluation, but could not say what the evaluation indicated.

Petitioner's attorney then called Petitioner's wife who testified consistently with Petitioner.Summer20169

CONCLUSIONS

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

The parties have stipulated that Petitioner suffered an accident arising out of and in the course and scope of his employment on April 9, 2015. However, Respondent disputes the causal relationship between Petitioner's current condition of ill-being and the work accident.

For the reasons set forth below, the Arbitrator finds that Petitioner's current condition of ill-being, specifically, pain in his back and down both legs including numbness in the bottoms of both feet are not causally connected to the injuries sustained in the accident of April 9, 2015.

The Arbitrator notes that in Petitioner's testimony, he testified initially that he did in fact have previous spine surgery in February of 1998. (Tx 28) He further testified that in the 10 years prior to the April 9, 2015 accident, he had no medical care for his back, and that he had instances of back pain only occasionally. (Tx 29)

When initially recounting his version of events on the date of the accident, Petitioner testified that as he was pulling a trash can out of a shredder in the principal's office, he had a pain in his lower back. (Tx 31) When asked to describe exactly where it was located, he testified "just about by belt line; right about the middle of my back." He was further asked whether or not the pain changed during the time he was working that day. To that he answered, "No." (Tx 35) He went on to testify that he worked the following day at both his post office job and the school job and noticed "Nothing out of the ordinary other than I still had some pain in my back." He went on to testify that he worked the following day, yet again, at the school district. He worked that shift in its entirety and indicated that he worked the following day at the post office which would have been a Saturday. When asked about whether he noticed anything unusual during the post office job, he testified "Just the same thing: just had some back pain." He testified that he did as little as possible over the weekend and that he noticed no change about his back pain at that point. He went on to testify that he worked the following Monday at both jobs and was asked, once again, what he recalled about his work at the post office, to which he replied, "Just the same thing. Still had the pain." (Tx 38)

He was asked whether he worked the school district job, to which he replied yes and that he had spoken with the principal, Mrs. Keyser, at approximately 3:30. He testified that "I told her that it was still bothering me and I was having some leg trouble, kind of numbness and stuff in my leg, and the bottoms of my feet hurt; she asked if I needed to see a doctor and I said yes." Petitioner was specifically asked when the problem with the legs started, to which he replied, "I am not exactly sure what – I do not know if it was Monday some time, or I am not real sure when it actually started." (Tx 39)

His testimony continues, to include complaints of numbness and pain at the bottoms of the feet and swelling of the leg. None of those symptoms were evident for the first several days after the accident.

Medical records detail Petitioner's receipt of an epidural steroid injection which provided no improvement in Petitioner's condition, as well as a course of physical therapy which also did not appear to change his symptomology.

Eventually, he was referred to Dr. Emilio Nardone who is a board-certified neurosurgeon. Dr. Nardone testified via deposition. His deposition testimony was admitted into evidence as Petitioner's Exhibit 6. The deposition transcript as well as medical records of Dr. Nardone's treatment records indicates that he saw Petitioner two times, first on March 2, 2016 and again on March 16, 2016.

The doctor testified that the conditions identified in Petitioner's MRIs dated June 4, 2015 and March 10, 2016 are degenerative in nature, and that the majority of the findings in the MRIs pre-existed the work accident. (Px. 6 at 14)

He further testified that he has not seen Petitioner since March 16, 2016 in spite of him testifying that he advised Petitioner to return if he had additional problems, and to let him know how he wanted to handle his treatment. (Px 6, 12-13)

When asked if he had reviewed any of Petitioner's medical records from other providers prior to his initial meeting with Petitioner on March 2, 2016, he advised that he could not remember any of those details. (Px 6 at 13)

When asked if Petitioner had had problems with back pain prior to the work accident, and whether or not that would change his causation opinion, the doctor advised that it would, as it is another factor that needs to be considered. (Px 6 at 20)

Finally, he was asked on cross examination whether it is possible that Petitioner's current complaints of back pain might or could be a natural progression of his pre-existing degenerative condition to which the doctor replied, "It could be." (Px 6 at 21)

The doctor was then asked a series of questions regarding how long it typically takes for a lumbar strain to resolve to which he answered, "Usually 6-8 weeks." He was then asked if pre-existing back pain can be made worse by climbing bleachers at a football game or catching one's toe in a baby gate that also causes aggravation of back pain, both of which he answered in the affirmative. (Px 6 at 21-22)

Despite the lack of Dr. Nardone's knowledge regarding Petitioner's treatment pre-dating the accident, as well as additional potential aggravating incidents, he none the less espoused an opinion that Petitioner's need for

the recommended surgery, although there were no acute findings on any of the diagnostic studies, is related back to the accident.

Petitioner was examined at the request of Respondent on July 5, 2017 by Dr. Andrew Zelby. Dr. Zelby is a board-certified neurosurgeon.

Dr. Zelby testified via deposition and the transcript of his evidence deposition was entered into evidence as Respondent's Exhibit 1.

Dr. Zelby took a thorough history from Petitioner who advised Dr. Zelby that he had a history of a disc herniation and underwent a discectomy surgery in 1998. He went on to tell the doctor that he did well after the surgery, and afterwords, he had no real problems with his back until April of 2015. He indicated to the doctor that he did occasionally get back pain from what he said was a pulled muscle and "had no real treatment for those episodes, just relaxed for a couple of days and the pain would all go away." (Rx 1 at 10)

After examining Petitioner, Dr. Zelby testified that he thought Petitioner had presented with essentially a normal neurologic exam and a normal spine exam. He testified that he reviewed the lumbar spine x-rays from April 15, 2015, standing flexion and extension lumbar spine x-rays from March 10, 2016, and an MRI of the lumbar spine from June 4, 2015, as well as the MRI done of the lumbar spine from March 10, 2016. (Rx. 1 at 14) He indicated that the diagnostic studies show degenerative changes. He advised that he saw some mild changes from Petitioner's previous surgery and no evidence for instability. He went on to testify that there was no indication of acute or post-traumatic abnormalities, only extensive and chronic degenerative changes, as well as mild changes from the prior surgery. (Rx. 1 at 15)

Dr. Zelby also testified that he reviewed records from Dr. Jarabek, Dr. Eubanks, Dr. Oakley, Dr. Mitry, Dr. Cahill, Dr. Nardone, Dr. Harms, and a job description as well as an FCE that was performed in February of 2016. When asked if anything significant was indicated in those records, he indicated that there was an indication that in May of 2014, Mr. Stewart reported that he had complaints of joint pain all the time, said his back hurt all the time. Then shortly before his injury in March of 2015, he complained of a many year history of osteoarthritis. Although, at that time, he did not have a specific complaint of back pain, and then the rest of the records were related to complaints following his reported injury as well as recommendations from Dr. Nardone about possible treatment. (Rx. 1 at 15-16)

After a review of the records, both current as well as those pre-dating the accident, the doctor espoused an opinion based on his review of the medical records that the injury Petitioner sustained was a lumbar strain in the context of a pre-existing and long symptomatic degenerative condition that was not affected in any manner as a consequence of his reported back injury. He went on to indicate that the basis of that opinion was that Petitioner had a condition of degeneration, and his report in 2014 of back pain all the time is very consistent with that condition.

His diagnostic studies following his injury revealed no acute or post-traumatic abnormalities to suggest that he exacerbated, aggravated, accelerated, or altered his pre-existing condition in any way. He did have symptoms radiating into the legs, but his stenosis was predominantly at the L2-3 and L3-4. The doctor went on to advise that the symptoms that he described into the backs of his legs and the numbness and pain in the feet does not localize

neurologically to the level of his stenosis. The doctor opined that he thought his symptoms did not correlate with the findings on the MRI. (Rx. 1 at 17-18)

Finally, when asked if he could form an opinion as to whether or not any future medical treatment was reasonable, necessary, and related as a result of the April 9, 2015 work injury, the doctor advised that Petitioner required no additional diagnostic studies or any further directed treatment for his spine or nervous system because of his reported work injury of April 9, 2015. He indicated that there was no medical evidence to suggest that any further treatment including any surgery would be necessary or more likely to become necessary because of any infirmity arising from his reported work injury.

The doctor also went on to espouse an opinion that there are no objective findings to relate any failure to return to full-duty work any later than June or July of 2015 as it relates to the April 9, 2015 work injury when taking in the context of his longstanding history of back problems, and the exclusively degenerative changes seen on his diagnostic studies. He testified that by June or July, Petitioner could have safely returned back to all of the same vocational and avocational activities that he performed prior to April 9, 2015.

The doctor further found that based on the objective medical findings, Petitioner had reached maximum medical improvement for any infirmity related to his April 2015 work injury by June or July of 2015. (Rx. 1 at 19-20)

The Arbitrator further notes that Dr. Zelby indicates that clearly, the fact that Petitioner returned to his baseline condition does not mean that it is a condition of being pain-free. But that there is no medical evidence that can point to anything other than a return to his baseline. (Rx. 1 at 20)

While Dr. Zelby saw Petitioner only one time, his opinion is markedly better informed than that of Dr. Nardone, who in point of fact, has only seen Petitioner on two dates. His review of pre-accident records and knowledge of the Petitioner pre-accident condition is superior to that of Dr. Nardone, and thus places him in a better position to opine on the issue of whether the Petitioner's current condition of ill being is related back to the work accident.

Additionally, according to Dr. Nardone's testimony, the last time he saw Petitioner was March 16, 2016 while Dr. Zelby's examination was held July 5 of 2017, just over 15 months after Petitioner had last seen Dr. Nardone.

Based on the issues discussed above, the Arbitrator finds the opinions and testimony of Dr. Zelby more persuasive than those of Dr. Nardone.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds that Petitioner has failed to meet his burden of establishing that his current condition of ill-being is related to the April 9, 2015 accident, and that he had reached MMI as a result of that accident in either June or July of 2015 as indicated by Dr. Zelby.

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

Respondent stipulated on the record prior to trial that any of the medical bills contained in Exhibit 8u that have not been paid previously would be paid by Respondent in accordance with the fee schedule.

19IWCC0037

Further, the parties represented that all of the bills at issue have been paid by Respondent with the exception of a Carle Physicians charge in the amount of $290.00, and an additional charge of $37.97 which Petitioner's attorney indicated was related to care by Dr. Mitry at Sarah Bush Lincoln.

A review of Petitioner's Exhibit 8u does in fact indicate an unpaid bill from Carle Physicians in the amount of $290.00. The additional bill in the amount of $35.97 alleged to be unpaid charges to Dr. Mitry does not appear to be documented by any evidence in Petitioner's Exhibit. Accordingly, payment of that bill is denied. The bill from Carle Physician Services of $290.00 is awarded. Respondent is ordered to pay that bill directly to the provider pursuant to the fee schedule. The Arbitrator finds that all other charges for reasonable and necessary medical services submitted as of the date of the hearing have been paid in full by Respondent.

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

Based upon the Arbitrator's finding with regard to issue F, above, the Arbitrator further finds that Petitioner has failed to prove that his current condition of ill-being, including the need for perspective medical care, if any, is not related to the April 9, 2015 work accident. Petitioner's request for perspective medical care is therefore denied.

Issue (L): **What temporary benefits are in dispute?**

Evidence introduced at trial and stipulated by both sides indicates that Petitioner's TTD benefits were terminated by Respondent on the basis of an IME report from Dr. Petkovich as of June 6, 2016. Petitioner seeks maintenance benefits between that date and his retirement. Having previously found that Petitioner reach MMI from the work accident in July 2015, at the latest, maintenance benefits in 2016 are denied.

Issue (M) **Should penalties or fees be imposed upon Respondent?**

Petitioner has filed a Motion for Penalties and Attorney's Fees under Section 19(l) and Section 16 of the Act.

Petitioner's Petition, contained in the record as Petitioner's Exhibit number 5, alleges in part that Respondent "failed and refused to pay certain medical expense for care and treatment of Petitioner." However, during the course of preliminary discussions during trial, a representation was made by Respondent's attorney that the reason the medical bills were not paid initially was that Respondent's carrier had never received the bills. Instead, they had received piecemeal documents consisting of explanations of benefits, but no medical billings in the proper formats, as required by the Act, to be processed for payment.

Respondent's attorney further stated that once the billings were brought to his attention by Petitioner's attorney, he contacted the adjuster on the file and instructed them to reach out to the providers to have them submit the bills in the proper format. Evidence entered by Respondent at trial consisting of medical payments made contained in Respondent's Exhibits 3, 4, and 7 clearly show that once the issue was brought to the attention of Respondent's attorney, Respondent pro-actively sought out the bills, in the proper format, from the medical providers and processed them for payment in a timely manner.

Further, when Petitioner's attorney was queried by the Arbitrator at the preliminary stage of the trial, he specifically inquired of Petitioner's attorney, "Is it your allegation that you provided them with HCCFA's and all the information prior to filing the (b-1)?," to which Petitioner's attorney responded, "Any of the bills would have

been submitted directly by the medical providers to his carrier. How they did it and what they did, I do not know. I mean, we do not have first-hand knowledge of any of that." (Tx at 8-9)

Clearly, Petitioner's attorney's allegations of bad faith in refusing to pay medical bills are made with no knowledge, by his own admission, of whether or not those bills had in fact been submitted properly. This, weighed against the actions of Respondent once the issue was brought to their attention, and Respondent pro-actively reached out to the providers to obtain information necessary to pay the bills demonstrates good faith on the part of Respondent.

The second issue brought up in Petitioner's Penalties Petition is Respondent's refusal to provide authorization for the surgery recommended by Dr. Nardone. The Appellate court has held that penalties may not be assessed for the Respondent's failure to authorize medical treatment. *Hollywood Casino-Aurora, Inc. v Illinois Workers' Compensation Commission*, 2012 IL App.2d 110426WC, 967 N.E.2d 848 (2d. Dist. 2012) Further, the Arbitrator found Petitioner is not entitled to prospective medical care or maintenance for the reasons set forth above.

Accordingly, the Arbitrator finds that the actions of Respondent were reasonable. Accordingly, Petitioner's Petition for Penalties and Fees is denied.

STATE OF ILLINOIS)
) SS.
 COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Black, Sr.,

Petitioner,

vs. NO: 13 WC 19986

19IWCC0038

Bridgestone Firestone,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability and nature and extent, reverses the Decision of the Arbitrator, for the reasons stated below.

Findings of Fact

Petitioner, a 52-year old laborer, testified that he began working for Respondent as a tire shaper in the curing department on 3/12/89. (T.19-20). He indicated that he worked in this job for five years. (T.20). He noted that other than a pry bar and a wrench, to lock and unlock the assembly, the rest of the work was done by the machine. (T.21). He stated that he then went on to final inspection, where he's worked for the past 23 years, inspecting tires and trimming vent plugs off tires. (T.21). He noted that in the final inspection department he also performed the job of trimmer and tire repairer. (T.22). He stated that he worked on all sizes of tires, all of which were off road, "... from 1300-25 all the way up to the GLTs, which is 13 and a half feet tall." (T.22). He noted that the smallest tire would be the 1300-25, which is about 4 feet tall. (T.23).

Petitioner testified that he would roll the tires around and load them up on the high-speed trimmer which "... turns the tire at a considerable speed, and then you trim it by hand, manually trim the vent plugs off with a sponge and a trim knife." (T.23-24). He described the hand trimmer as "a sharp blade" which would trim off the vent plugs as the tire moves around. (T.24). He noted

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that he would hold the trimmer in his gloved right hand. (T.24). He also indicated that the trimmer is set in a locked position and that the tire would spin forward towards him. (T.25). He noted that there are two methods of trimming – one by hand and the other using an arm that constantly goes in and out with the rotation of the tire. (T.25).

Petitioner testified that you need "effort and balance" to hold the trimmer against the tire, and that "[t]here's vibration all the time, especially on the tread side." (T.26). He indicated that "... you have to use two hands" to hold the trimmer "[a]nd you have to keep your arm locked; otherwise, it's going to beat it. And it's constantly like that, especially when you get cold tires." (T.27). He stated that the motion and shape of the tires pushes the trimmer away, and that "[i]t's just riding with it." (T.27). When asked whether all the work is at, below or above chest level, Petitioner testified that "[i]t all depends on which tire it is... Smaller tires, basically the arm is locked in one position... Not unless it grabs, then it jerks down; but that was a safety precaution." (T.28). He then agreed that it depended on the size of the tire as to where he holds his arms. (T.29). He noted that "... it's in a locked position. So it's basically chest level or above. And then when you're trimming, you're trimming up." (T.29). He indicated that when you're trimming manually "... you're taking the sponge and you're... wiping all the trim and vent plugs off", and that "... the big noes, the GLTs and the bigger tires..." are all done manually. (T.32). In describing this action, counsel noted that "... Petitioner demonstrated a trimming motion starting at the center of his body and moving up." (T.32). Petitioner noted that the time it takes to trim a tire depends on the size of the tire, and that "[i]t would take hours" to trim a giant loader tire completely. (T.33).

Petitioner was shown PX4, a photograph of himself standing next to a tire at the high-speed trimmer III station. (T.33). He agreed this is the machine that moves the tire around. (T.34). He indicated that when he stands next to this tire he would be trimming up, and that the trimming action would take place "... basically, like you see on that picture, it's about my chest level, above." (T.34). He noted that the tire in the photo appeared to be a "29.5-29", which he indicated was not the largest tire he would trim. (T.35). He noted the largest tire would not fit on that machine, and "[t]he two largest fit – works on different machines by their self, and that's all manual trimming." (T.35). He agreed he worked in this finish department for 23 years. (T.35).

Petitioner testified that on 12/18/12 he was repairing tires – which he noted involves "... buffing or whatever defect is on the tire, to fix it." (T.36). He indicated that "[b]uffing is done with a manual buffer. It's about a six-inch barrel – maybe about four or five-inch, and it's on a machine that has a motor..." that has a rotary shaft in it. (T.36). Petitioner testified that at the end of that day he "... noticed my arm was hurting real bad." (T.37). He noted that this had bothered him "[o]n and off" prior to the date of accident. (T.37). He indicated that he was at work that day "for overtime... prior to [Christmas] shutdown", when the plant would be shut down for the last week of the year, and that he was not scheduled to work the next day. (T.37). He indicated that the plant would reopen after New Year's, and that he believed the first day he was to be back at work was on 1/3/13. (T.38).

Petitioner noted that during the shutdown "... it was bothering me so bad, I went to the emergency room" at BroMenn Hospital. (T.39). He indicated that he did not receive any treatment at the emergency room. (T.40).

Petitioner indicated that he completed an Employee Report of Injury when he returned to work in January of 2013. (T.42). He was shown a copy of this report (PX2) and agreed that he signed and dated it on 1/4/13. (T.42). In addition, he agreed that he spoke to his supervisor, Lynn Cook, who completed a Supervisor Injury Report. (T.43). He also agreed that he was seen by a nurse at Respondent who advised him that he had to get medical treatment on his own. (T.43-44). He indicated that he then made an appointment to see Dr. Hanson at McClean County Orthopedics. (T.44-45).

In a Bridgestone "Employee Report of Injury" signed and dated 1/4/13, Petitioner noted a date of injury of 12/18/12, a time of injury of "1855" and a place of injury of "buffing stand." (PX2). He indicated that he had suffered "strain, soreness" of his right shoulder as the result of "[b]uffing too many tires with barface & tread cracks 360° top & bottom on tires, and some apron cracks too. Also the coupler on the belt sander hit me on the top of my right shoulder." (PX2). When asked what object or substance directly injured him, Petitioner noted: "the quick connect coupler on belt sander." (PX2). He also stated Steve Adler witnessed the injury. (PX2).

In a Bridgestone "Supervisor Injury Report" signed and dated 1/4/13, Lynn Cook noted the date of injury of 12/18/12 and the date and time it was reported as "1/3/2013 7:20." (PX3). The location of the injury was recorded as "Final Buffing Stand." (PX3). In describing the injury, Ms. Cook noted that "Employee stated that while working the buff stand on 12/18/12 he was required to work several 360 degree tread cracks. He stated that he became sore after a long day of buffing. He also stated that there wasn't a specific occurance [*sic*] when he injured himself." (PX3). In addition, Ms. Cook noted that "Employee mentioned that during the shift, he hit his shoulder with the quick connect couple on a belt sander. He also stated that he didn't feel this contributed to his injury. Employee[']s report to the shift supervisor was a complaint of soreness from buffing, there was no mention of injury." (PX3).

Petitioner agreed that he first saw Dr. Mark Hanson on 1/16/13. (T.45). In an office note on that date, Dr. Hanson recorded that Petitioner presented "... for evaluation of right shoulder injury. The injury occurred at work on approximately December 19th. He was doing extensive tire repair and buffing all day. The pain slowly developed in his shoulder and near the end of the day he was also hit with a quick-connect coupler in the shoulder. He has had shoulder pain since that time and it is getting worse, not better, and is located anterolaterally and is worse with use and overhead." (PX7). Dr. Hanson's assessment was possible rotator cuff tear, right shoulder. (PX7). He ordered an MRI and prescribed Norco at that time. (PX7).

An MRI of the right shoulder performed on 1/21/13 was interpreted as revealing "[n]o rotator cuff tear. Changes at the AC joint likely due to severe osteoarthritis. Small subacromial enthesophyte." (PX8).

In an office note dated 1/24/13, Dr. Hanson recorded that Petitioner continues to have pain, and that he continues to work. (PX7). Dr. Hanson's assessment was impingement with AC arthritis. (PX7). He administered an injection on that date and noted that "[w]e will get him into therapy and we will let him work if he can for the next month, but if he continues to have trouble, we may have to restrict him... I will see him in a month and if his pain is not gone, we could consider decompression and distal clavicle resection." (PX7).

In a McLean County Orthopedics "Therapy Report" dated 2/7/13, physical therapist Abby Curtis recorded that Petitioner "… has had some aching and shoulder pain in his right shoulder. Patient reports he had done a lot of buffing of tires on December 18, 2012. He reports he was raising his arm and heard a loud pop. Patient reports that had concerned him. He also reports having trouble sleeping that night secondary to right shoulder pain. Patient reports he had mentioned this to a supervisor at Bridgestone Firestone. Patient reports however they had a 2 week break at work. He reports he then went to the hospital and had his right shoulder looked at… Patient reports he continues to have pain in the front of his shoulder. Patient reports he does have some restrictions. He continues to work. He does report he is using mainly his left upper extremity. Patient reports he is trimming tires at work currently. He is working at waist and chest level. He is not working overhead. Patient reports any pressure through his right upper extremity irritates his right shoulder. Patient reports he has bone spurs on his right shoulder and any kind of repetitive movement seems to really aggravate his right shoulder." (PX7).

In an office note dated 2/26/13, Dr. Hanson recorded that Petitioner's "… pain is not improved; the shot did not give him lasting relief. He does not feel that he can live with this level of pain; it makes work difficult." (PX7). Dr. Hanson's assessment was "[r]ight shoulder impingement with AC arthritis; possible labral tear or biceps tearing. I think he has exhausted non-operative options. I recommended right shoulder arthroscopy, subacromial decompression, distal clavicle resection, and possible biceps tenodesis." (PX7).

Petitioner agreed that the company nurse sent him to see Dr. Kolb before the surgery. (T.46-47). He indicated that the company also sent him to see Dr. Hauter in Bloomington as well as Drs. Karlsson and Candido. (T.47-48).

In an office note dated 3/22/13, Dr. Edward Kolb recorded that "[p]atient complains of right shoulder pain that started on December 18, 2012. He states he was buffing tires at that time when he felt a pop in his shoulder. He has had decreased range of motion and increased pain since the injury. He states he really has not been using his right arm a lot because of the pain since the injury. He denies any neck pain. He has been working with Bridgestone Firestone for the past 24 years. He has been in the finishing department for the past 18 years. He is having night pain. He has tried physical therapy and a subacromial injection without relief. Most of the pain is in the anterior aspect of the right shoulder. He denies any numbness or tingling or pain that radiates down the right arm past his elbow." (PX9). Dr. Kolb's assessment was 1) right shoulder bicipital tendinitis; 2) right shoulder impingement syndrome; and 3) right AC joint arthritis. (PX9). Dr. Kolb noted that "I do feel that his work has exacerbated his right shoulder pain as per his history with us today he does repetitive motions with his upper extremities and overhead activities. I do agree with moving forward with surgical intervention as he has failed conservative treatment measures. Surgical intervention would include right shoulder arthroscopy with biceps tenotomy and possible tenodesis with subacromial decompression and distal clavicle excision." (PX9).

In an operative report dated 4/16/13, Dr. Hanson noted that Petitioner underwent a right shoulder arthroscopy, arthroscopic subacromial decompression, distal clavicle resection, biceps tenotomy, debridement of labrum and biceps stump with mini-open rotator cuff repair and biceps tenodesis. (PX7). The postoperative diagnosis was subacromial impingement, AC arthritis, labral tear and greater than 50% partial thickness rotator cuff tear. (PX7).

In a McLean County Orthopedics "Therapy Report" dated 4/23/13, physical therapist Rick Bauersfeld recorded that Petitioner "... injured his right shoulder at work. He works at Firestone and one day he was doing a lot of buffing of tires and he became very painful and sore following that day. This was on 2/18/12. They had a two week layoff after that day for shutdown. He ended up having to go to the ER the next day because of pain. He eventually saw Dr. Hanson..." (PX7).

On 8/12/13 Petitioner underwent manipulation under anesthesia of the right shoulder by Dr. Hanson. (PX11). The postoperative diagnosis was adhesive capsulitis of the right shoulder. (PX11).

An MRI of the right shoulder performed on 9/27/13 was interpreted as evidencing subacromion subdeltoid bursitis; supraspinatus tendinosis, status post repair; rupture intra-articular long biceps with tenodesis; and tear, superior glenoid labrum. (PX14).

In an encounter report dated 11/5/13, Dr. Paul Naour recorded that Petitioner had been referred by Dr. Hanson "... for concerns of right shoulder pain. He underwent a right rotator cuff repair on 4-16-13 with a biceps tendon and also an injection and a manipulation under anesthesia on 8-12-13 without a significant improvement of pain... He points to the area of the anterior right shoulder in the area of the biceps tendon as a main component of pain. He does, however, describe some pain extending down his arm into the hand and into the thumb and forefinger aspect. The pain is made worse with essentially any movement of the right shoulder. It is improved with pain medications and lack of movement. He's not had any weaknesses and he does feel as though the range of motion is improved." (PX7). Dr. Naour concluded that "[t]his may actually represent a concomitant concern of right shoulder pathology in addition to cervical spine disease in the context of a positive Spurling's test." (PX7).

In a McLean County Orthopedics "Daily Note" dated 11/7/13, occupational therapist Kayla Ulrich recorded that "[p]atient states when [*sic*] he saw Dr. Naour Tuesday and he thinks there might be a pinched nerve maybe in his neck. Dr. Nauor wants patient to have an MRI to his neck. Patient explains he received records describing the smell of ETOH on his breath last week when he went to Dr. Hanson's office after the medication refill was not refilled at Kmart. He was disgruntled about this and requested a copy of this therapist's statement regarding treatment that day of accusation. He notes he has an appointment with Dr. Newcomer this morning for a second opinion. He states the shoulder still has the same pain and popping without change." (PX7).

In an encounter report dated 11/7/13, Dr. Joseph Newcomer recorded that Petitioner "... presents for a second opinion regarding a work related aggravation to Rt shoulder resulting in surgery in April of this year. Then underwent a MUA rt shoulder for adhesive capsulitis 4 months later. Now having persistent pain and popping anterior Rt shoulder with crepitation in motion and attempted movement. MRI recently reviewed and discussed with patient. Do not believe any of his symptoms are coming from his superior labral tear. He is still recovering from RCR and I believe some of his symptoms are coming from his bicipital groove. Do not believe he has been injected into the bicipital groove and would consider that to delineate how much symptomatology is present from that. It[']s possible also that the pain generator may be an adhesion or spot weld from the deltoid to the biceps or cuff as there is discomfort with gentle rotation with the arm at his

side. Recommend continue with Dr[.] Naour and at this point I don't believe this is radicular in nature. Radiographs look normal and AC jt looks well preserved. Would continue his LD only restriction with left handed use only, continue rehab in anticipation of improvement over the next couple of months and if no improvement may consider injection anteriorly vs second look arthroscopy. Refer back to Dr[.] Hanson." (PX7).

In an encounter report dated 11/26/13, Dr. Naour noted that he "... place[d] [Petitioner] on Lyrica as an effort to reduce his overall Norco usage which he did state helped some of his pain in his shoulder and on his right thoracic wall. It is difficult to know at this stage what real benefit he's had as he is not continuing to take that medication. He was taking upwards of 6-7 tablets a day of his Norco." (PX7).

In an attending physician statement dated 12/5/13, Dr. Hanson noted permanent light duty restrictions of no work above shoulder level and no lifting greater than 10 pounds. (PX7). This form also notes that Petitioner was unable to work from 4/16/13 through 9/17/13. (PX7).

An MRI of the cervical spine performed on 1/3/14 revealed degenerative changes at C5/6 and C6/7 as described in the report. (PX7).

On 1/9/14 Petitioner received a cervical epidural steroid injection at C7-T1 by Dr. Naour. (PX16).

Petitioner visited Dr. Joseph Norris on 2/19/14. (PX7). In a report following his encounter, Dr. Norris recorded that Petitioner "... suffered a work-related injury in December of 2012 which led to a right shoulder surgery in April of 2013 by my partner Dr. Hanson. He had a subsequent manipulation and is never felt that he has had complete pain relief following his surgery. He is here today for an opinion about whether or not a surgical procedure could improve his pain symptoms today. In my opinion there is no surgical intervention that would treat any specific pathology that I feel Gary shows on exam and history today. I directed him back to Dr. Hanson for further treatment plan and expressed by opinion to him as well as I will to Dr. Hanson that surgery is not indicated." (PX7).

Petitioner underwent an FCE at WorkWell Systems, Inc. on 4/10/14 and 4/11/14. (PX7). At that time it was noted that Petitioner provided consistent and maximal effort and that "[h]e reported increased right shoulder pain with most lifts and carries. He is unable to lift his right arm over shoulder height and maintain it for any length of time. There is audible popping in the right shoulder with movement." (PX7). The FCE found that Petitioner was able to perform at the "Light" Physical Demand Level exerting up to 20 pounds of force occasionally and/or up to 10 pounds of force frequently and/or negligible amount of force constantly. (PX7). It also noted that Petitioner demonstrated lifting a maximum of 25 pounds waist to floor and 25 pounds bilateral front carry. (PX7).

Petitioner agreed that prior to returning to work he underwent an FCE in April of 2014, and that as a result of this evaluation he was given permanent restrictions. (T.49). He indicated that following surgery he was off work "[f]rom April 12th, 2013 until September – it was right after Labor Day 2015." (T.48).

In a letter to Petitioner dated 7/23/14, Respondent's human resource manager Betsy Morgenroth advised Mr. Black "... that the company has identified a job consistent with your current restrictions as we know them. The job is that of a Curing Press Room Assistant... We expect you to return to work on a full time basis in this position effective Sunday, August 3rd at 11:00 PM. We are unaware of any medical reason that would prevent you from performing this activity." (PX7).

Petitioner agreed that he received a job offer from Respondent by letter dated 7/23/14. (T.49). He indicated that he did not report for that job, noting that he called the union president who in turn told safety that he was on narcotic medication. (T.49-50). He agreed that the job offer was then rescinded for that reason. (T.50). He agreed that he continued off work until September of 2015 when Respondent found a job for him. (T.50-51). He noted that he was allowed to work at that time "... as long as I didn't take medication six hours before I go to work." (T.51). He noted that the medication he was not allowed to take prior to going to work was Norco. (T.51).

In an encounter note dated 9/8/14, Dr. Naour recorded that Petitioner was being seen "... for concerns of right shoulder and neck pain. I initially treated him for concerns of cervical radiculopathy. These treatments were not beneficial. He continues with right shoulder pain and has been followed somewhat by Dr. Hanson. He has undergone an FCE... He does not feel at this stage that he can work and he also feels that he needs pain medication on a daily basis to help him maintain his activities of daily living. Aside from ADL's, he does feel as though his right shoulder precludes him from really doing anything that needs lifting above the level of 20-25 lb.; this is also documented in his FCE. He describes weakness of the right upper extremity as well as persistent and anterior shoulder pain and crepitus with any movement. The pain is continuous. It is rated as 6-7 out of 10. His medication helps him anywhere between 30 and 45%. He denies any red flag symptoms." (PX7). Dr. Naour indicated that Petitioner was to continue his Norco at 4 times a day increased to 7.5/325 and provide a urine sample as part of his opiate agreement. (PX7).

In an encounter note dated 2/10/15, Dr. Naour recorded that Petitioner complained of "... continued pain of his right upper extremity particularly at the shoulder... especially with abduction. He has definite crepitus on extension and rotation... He is using Norco 10/325 four tablets per day. He continues to smoke. He has not participated in pain psychology but he has done physical therapy and he's completed this. He is no longer working but he is not disabled. The pain is fairly well localized to the shoulder and anteriorly. He has no radiation of the pain. He also does have some pain of the shoulder blade and this is aggravated by any motion of the right arm." (PX7).

Currently, Petitioner notices that his right arm is "[s]till damaged" and that "[t]he strength of my right arm is not full strength." (T.51). He also noted that "... it hurts pushing and pulling, and I can't raise it above the shoulder and do any type of work I used to do." (T.52). In addition, he indicated that "I can't really push a broom. I can't hammer. I can't do my job I used to do, because of repetitive motion. I can't work on cars like I used to do because of the pulling, because of the injury..." (T.53). Petitioner also noted that he has constant pain in his right arm which he described as being a "[s]ix, seven" on a 1/10 scale. (T.55). He indicated that he presently takes hydrocodone/Norco for his right arm, and that he takes it when he gets home after work. (T.55).

He noted that he usually takes 1 to 1-1/2 pills twice a day depending on how much pain he is in, and that the dosage is "75/325." (T.56). He stated this medication is prescribed by Dr. Naour. (T.56). Petitioner noted that when he does not work he takes it four times a day. (T.56).

Petitioner testified that he is currently back at work for Respondent as a "[t]rucker; picking up tires and final – curing and bringing them back to final" using a fork truck. (T.57). He indicated that he is not required to lift anything physically using his arms, and that he is not required to do any trimming or buffing of tires. (T.57-58). He did note, however, that "... it hurts now pushing and pulling levers" while operating the fork truck. (T.58).

On cross, Petitioner indicated that at the time of his arbitration testimony he was not under the influence of narcotic medication. (T.59). He also agreed that the last time he had physical therapy was in October of 2013, and that Dr. Hanson told him in September of 2013 that he did not think Mr. Black would need any more surgery for his shoulder. (T.59).

Petitioner agreed that he saw Dr. Norris in February of 2014. (T.60). When asked whether Dr. Norris said he didn't need any surgery, Petitioner replied: "He said it's a possibility that I would need surgery." (T.61). However, he stated that he would not disagree with Dr. Norris' records if they indicate he told him he did not need any further surgery. (T.61). Petitioner also maintained that Dr. Norris "... didn't tell me I didn't need any further treatment. He just said – he had revised [*sic*] it back to Dr. Hanson." (T.62). When asked whether Dr. Norris told him in February of 2014 that he felt Mr. Black had reached MMI, Petitioner responded: "It wasn't improvement, because my arm still pops and everything. That's why I went to Norris, for a second opinion." (T.62). He also repeated his assertion that Dr. Norris "... said it's a possibility I could need another surgery." (T.62).

When asked whether his treating physician (Dr. Hanson) released him to work with restrictions on 8/20/13, Petitioner replied: "Not to my recollection..." (T.64). When asked whether Dr. Hanson released him to return to work with restrictions when he was seen on 9/17/13, Petitioner responded: "No, because I was still having problems with my arms." (T.64). However, when asked whether he was denying that he was released with restrictions at that time, Petitioner replied: "No." (T.65). He also could not recall being released with restrictions by Dr. Hanson on 11/12/13. (T.65). When shown Dr. Hanson's note dated 11/12/13 (PX22) and asked whether he was denying he was released to work as of 11/18/13, Petitioner responded: "I was still under his care with the shoulder." (T.66-67). However, he agreed that after the FCE in April of 2014 he was released by Dr. Hanson to return to work with the restrictions set forth in the FCE. (T.67-68).

Petitioner agreed that since the FCE he has not received any additional physical therapy, and the only treatment he's received has been the prescription of medication. (T.68). He also agreed that the only treatment he's received since October of 2013 was a cervical injection in January of 2014. (T.68). In addition, he agreed that he saw pain doctor Dr. Naour in November of 2013. (T.68). He claimed that his surgeon, Dr. Hanson, has prescribed some medication since October of 2013, but that it wasn't pain medicine. (T.69). He also indicated that when he first saw Dr. Naour in November of 2013 he "... had pain in my neck. I had a pinched nerve." (T.69). He agreed that he then had x-rays and an MRI of his neck followed by an injection to his neck by Dr. Naour in January of 2014. (T.70).

Petitioner denied telling Dr. Naour in November of 2013 that he was not interested in getting off the Norco. (T.71). He agreed that Dr. Naour, who treated him for pain, never gave him an injection for his shoulder. (T.72). He also agreed that the only treatment he is receiving now is pain medication from Dr. Naour. (T.72). He denied that Dr. Naour ever suggested that he wean himself off the Norco, only admitting that "[w]e had a conversation about Lyrica." (T.73-74). He testified that "[t]he Lyrica came up because of a judge, but I took Lyrica for seven days and had a headache for seven straight day; and I never had a headache for seven straight days in my life." (T.74). He agreed that he told Dr. Naour the only reason he did not return to work in the light duty position initially offered by Respondent was because he was taking Norco. (T.74). However, he denied Dr. Naour told him he could give him non-opiate drugs at that time to help with his pain instead of Norco. (T.75).

Petitioner acknowledged that he received the letter of 7/23/14 (RX6) offering him employment. (T.76). He testified that he "... went in to comply for that job and met Betsy and Sheril." (T.77). However, he testified that he did not "... know what the job was. They just said they had a job." (T.77). Petitioner agreed that in a report dated 7/30/14 (RX7), Dr. Hanson indicated that he was capable of returning to work eight hours a day, five days a week, consistent with the FCE. (T.78). He also agreed that he then met with the union president, Mr. Tucker, and told him that he was taking pain medication every four hours. (T.78). He likewise agreed that he told Mr. Tucker at that time that he was not willing to try to come back to work without taking his pain medication. (T.78-79). Petitioner testified that between the first and second offers of employment "... the company didn't get in touch with me about nothing." (T.79-80). He agreed, however, that he continued to take narcotics when he became aware that he could not do the job offered by Respondent. (T.81). He also agreed that he never asked Dr. Naour whether there was any substitute for the Norco so he could return to work. (T.82).

Petitioner agreed that in July of 2014 he did not have any restrictions on his ability to drive a vehicle. (T.84). He also agreed that at that time he had a racing car, although he noted that it wasn't working at the time. (T.85). He indicated that the last time the car worked was "[w]hen I put it up in '94... I used to race at U.S. 30 in Gary, Indiana, which closed up in '84." (T.86). He denied racing it down in Peoria, noting that "I have not drove that car since '88." (T.86). He also denied that he works on it, or that he has several different engines that he puts in and takes out of that car. (T.86). He admitted, however, that he "... started it up once..." (T.87).

Petitioner acknowledged that he did not look for work elsewhere from October of 2013, when he was released by Dr. Hanson with restrictions, through October of 2014, other than the job at Respondent. (T.88). He agreed that he was released by Dr. Hanson, but he could not remember being released by Dr. Norris in February of 2014. (T.88-89).

Petitioner testified that he now lives at home by himself, after his fiancé passed. (T.90). He agreed that he takes out the garbage and "attempt[s] to" clean the house. (T.90). In addition, he noted that he "[s]ometimes" cooks his meals, does the dishes, vacuums and does the laundry. (T.90-91).

Petitioner agreed he is claiming that he injured his shoulder in December of 2012 when he was buffing too many tires, noting that "[t]hat's when I felt the substantial damage..." (T.91). When specifically asked, Petitioner agreed that all he did on the day of the accident was buffing, noting that he had been doing the trimming job "... every day, except for that day." (T.91-92). When asked to describe the buffing, he stated that "... it's a motor buffer. A motor sits on a cart, and you got a cable or cord about that long that you have to wrap around your arm, and up and down motion. And then after, you use sandpaper. You use 65 grit – 45 grit first, 60 to smooth that out. Then you use a ragger ... like a polisher." (T.92). He indicated that it takes some pressure to push the buffing machine against the tire "... and just to hold it... Because once you cut it on, the thing jumps. And if you don't hold it tight and let it loose, it will run on you." (T.92-93). He indicated that the tire is fixed while he works on it, and that "[i]t's just the buffer going around... [a]t a fast rate of speed..." (T.93).

Petitioner agreed that he talked to the therapist when he attended physical therapy. (T.94). However, he denied telling the therapist that all his work was done at chest level or below "... because you start high and then you come down. So I know I didn't tell her that." (T.94). Petitioner was then shown the therapist's note from 2/7/13 (RX18) wherein it notes that he was working at waist and chest level and not overhead, to which he stated "[t]hat's what it says down here, what it has right there..." (T.95).

Petitioner indicated that the tires he works on using the buffer are on some sort of rack or device, and that some of the devices can be moved. (T.95-96). He agreed that there's a foot pedal that allows you to turn the tire to expose the area he wants to work on. (T.96). Petitioner also agreed that he has been working full-time since September of 2015 and that his current supervisors are Corey Toepke and Barry Starkey. (T.96). When asked whether ever complained to Mr. Toepke about any problems at work, Petitioner responded: "Yeah. Yeah. Everybody knows... Corey knows, yes. I've told him about my arm." (T.96-97). When asked if he's never been unable to do any of the tasks assigned to him, Petitioner replied: "Push a broom, but not for the fork truck." (T.97). He also agreed that he has not had somebody else do any of the jobs assigned to him, noting that "[i]t's been basically light and within restrictions." (T.97).

On re-direct, Petitioner indicated that Dr. Hanson referred him to Dr. Naour and that Dr. Hanson handled his pain medication until his care was transferred over to Dr. Naour. (T.98). He also noted that he has remained on Norco since at least 2014, although the dosage has changed. (T.98). He described his current pain as "constant" and "chronic", noting that he does not take anything other than Norco to relieve it. (T.99). When asked about his apparently conflicting testimony as to whether he visited Respondent's office following the first offer, Petitioner agreed that everything went through Mr. Tucker, the union official, following the offer in 2014 but that he visited the office himself after receiving the offer in 2015. (T.101).

Petitioner noted that he bought the race car he previously mentioned in 1978, or right out of high school. (T.101). He agreed that he's had that car as a hobby ever since. (T.102). However, he indicated that he has not driven that car since 2000. (T.102). He also noted that when he currently does any cooking and house cleaning he does so with his left arm. (T.102). Petitioner stated that he is right-handed. (T.102).

Petitioner agreed that when he was doing the high-speed trimming the tire was moving continuously. (T.103). However, he noted that when he is doing the buffing "... you move it manually." (T.103-104). When asked whether he did more buffing or trimming over the 23 years he worked in that department, Petitioner responded: "It was a lot of – well, throughout. Because when I first started there, it was buffing. You picked up a tire; you were on that tire from start to finish. So if it needed to be repaired, you had to repair it... '95, I was strictly a trimmer up until 2011, except for overtime was buffing... I came in and did a lot of buffing." (T.105-106).

On re-cross, Petitioner agreed that his Employee Report of Injury (PX2) indicates he was buffing when he developed complaints of pain, and that it says nothing about trimming. (T.106-107). He also agreed that he did not tell Dr. Hanson anything about trimming "[t]hat day...[w]hen it finally went..." (T.107).

Petitioner was later recalled to testify at which time he indicated that he had seen the videos admitted at RX1 and RX1A. (T.132). He indicated that the first video does not accurately show how he buffed a tire, noting that "[y]ou have to make nice and even strokes on the buff because with that barrel, which you saw the blue, is turning at a high rate of speed. If you just hold it right there, it's going to burn into the rubber and make dips. So it's going to be uneven. So everything has to be nice and smooth to be feathered. The way – how he was doing that, no. That's not how anybody would have been trained in the final department to buff. (T.133).

With respect to the second video, Petitioner likewise felt that it was an inaccurate representation of ragging or polishing a tire. (T.134). As to the third video, Petitioner similarly felt that it was not an accurate depiction of sanding a tire, noting that "... what they showed is just sanding little light cracks ... not deep tread cracks, which you use that barrel sander for deep tread cracks and water cracks." (T.134-135). He indicated that you would use the belt sander shown for the little blemishes. (T.135). Finally, he noted that he has not used a broom since he's been back at work in Mr. Toepke's department. (T.135-136).

Corey Toepke was called to testify by Respondent. (T.108). He noted that he is employed by Respondent and currently works as a crew leader in the radial/final departments. (T.108-109). He indicated that Petitioner was one of the people that he supervised. (T.109). Mr. Toepke testified that in December of 2012 he was a crew leader and that the buffing machine was one of the machines under his supervision. (T.109). He agreed that this was the machine that Petitioner worked on. (T.109).

Mr. Toepke was shown the job videos (RX1) at arbitration. (T.110). He noted that the blue hand-held device shown in the first video (labeled "buffing") is a belt sander, and that the employee in the video is "... buffing a tire there, the side of the tire. He'll buff it with the sander first, and then they usually go over the top of that with a ragger." (T.110-111). He agreed that the activity being down is all chest level or below with the elbows, noting that "[m]ost of the buffing is done close to the body ... [because] [i]t's just easier to control the buffer that way." (T.111). He agreed that the tire was not moving "on this particular tire..." during the buffing activity. (T.112). He indicated that this video truly and accurately represents the way the job is done. (T.112). He also stated that he has "... never seen one buff over their shoulders... [because] [t]here's really no need to. I mean, that's kind of the reason why the tire rotates, so they can get it down into a manageable

work area.... It's easier to see right in front of you, than it would be to be looking up overhead. So everything I've ever seen has been down at chest level." (T.112).

In the second video (labeled "ragging"), Mr. Toepke noted that "[i]t looks like he's changing out the head to the buffer. So he's putting on a ragger right there... He's going to go over what he just buffed, and that will smooth it out. So it will take the buffing marks out of it." (T.113). He indicated that this process is called ragging a tire, which he noted some call polishing or smoothing out. (T.113-114). He stated that this activity is also done at chest level and that the elbows are positioned below the chest. (T.114). He indicated that he's never seen this work done with the arms locked straight out. (T.114).

In addition, Mr. Toepke was shown footage (labeled "sanding") of a belt sander being used to buff tread cracks, which he noted was "... just kind of smoothing out the tread or the tread crack" as opposed to simply buffing the side of the tire as seen in the previous video. (T.115). He indicated "[a]ll the sanding is done about chest level" and below shoulder level, and "[t]hey're usually holding it right up tight, so the elbows would be towards the side." (T.116).

Mr. Toepke testified that he was also familiar with a trimmer's job, noting that "... on a high-speed trimmer, they have a trimming arm that comes down; and they hold it in front of them as that tire is rotating, and it trims off all the trim vents. So there again, it's right up front, about chest level." (T.119). He indicated that the elbow would be below chest level, and that when using the stationary arm the worker would just have to hold onto the handle of that trim arm. (T.120). He also stated that there would be occasions to use a small hand trimmer instead of the trim arm, noting that "[i]t's not on an arm, that they'll go back in and finish up ones that they missed or some that need to be trimmed down a little bit." (T.120). He indicated that the arms and elbows would be positioned in "... pretty much the same location. They're always working in front of them." (T.120). He noted that he did not know why they would have to use the manual trimmer at shoulder level or above with their elbows, and that he had never seen anyone do that. (T.120-121).

Mr. Toepke stated that he is Petitioner's current supervisor, and that the latter has not come to him in the few past years and complained that his current job was causing him any physical problems. (T.121). He noted that Petitioner's current job is "forklift truck" and that he also "... helps prepare for quality keeping and housekeeping... [which involves] mostly cleaning up machines, possibly does some painting for us. Quality keeping, he's going around making sure everything is labeled, everything has identification, everything is in its proper place." (T.122). He indicated that as part of housekeeping he would have to use a broom, but that he has never complained to him that he has a difficult time using a broom. (T.122). Mr. Toepke noted that Petitioner also uses a brush on a handle to wipe the machines down. (T.122).

On cross, Mr. Toepke testified that he began working for Respondent in January of 1998 as a bias tire builder, becoming crew leader in the radial final department in October of 2007. (T.123). He noted that he was also a crew leader in the bias tire room for about six months in roughly 2009. (T.124). He indicated that his job duties in the bias tire room was to oversee and direct the work force. (T.124). He noted that when he was an employee his job was that of actual bias tire builder, and that he did not do any trimming or buffing. (T.125). He testified that he became responsible for supervising tire trimmers and buffers when he first went back to the radial department in 2007, which is where he works now. (T.125). He agreed that this department

includes fork trucks as well as trimmers and buffers. (T.125-126). Mr. Toepke conceded that he "... didn't actually get any training to buff or trim." (T.126). He also did not believe that he was Petitioner's supervisor prior to 2015. (T.126). In addition, he indicated that he did not believe he ever watched Petitioner trim a tire with the high-speed trimmer or buff a tire, noting that "I don't think he's actually worked for me." (T.126). He also acknowledged that there would be some vibration with trimming and buffing a tire as well as some force to keep the trimmer or buffer against the tire. (T.126-127). Likewise, he agreed that there could possibly be some kick when using the trim arm on the high-speed trimmer. (T.127).

When asked whether Petitioner's performance in his current position was satisfactory, Mr. Toepke responded: "[a]bsolutely." (T.127). Mr. Toepke also indicated that Petitioner has made general complaints to him about his shoulder hurting since he's been working for him. (T.128). In addition, he noted that he has never witnessed Petitioner using a broom in clean-up. (T.128-129). He also indicated that he has no knowledge whether Petitioner has actually used a broom in that capacity. (T.129).

On re-direct, Mr. Toepke stated that during the time he's supervised Petitioner the latter has not complained to him about any of the jobs he was assigned were causing problems in his arm or shoulder. (T.129). He also noted he has never seen anyone performing the jobs depicted in the videos above shoulder height or with they're arms locked straight, noting that he thought "... it'd be very difficult to do with your arms locked out... [given that] you'd do more damage to the tire; and I think it'd be hard to control the tools with your arms locked out." (T.130-131).

At his evidence deposition held on 4/30/14, Dr. Mark Hanson testified that he is board certified in orthopedic surgery with a subspecialty in sports medicine. (PX19, p.5). He indicated that his practice consists mostly of treating shoulders, hips and knees, both arthroscopy and replacement, as well as broken bones when he is on trauma call. (PX19, p.5).

Dr. Hanson noted that he first saw Petitioner on 1/16/13 at which time he recorded a history of injury to the right shoulder at work on 12/19/12 after doing extensive tire repair and buffing all day. (PX19, p.7). In addition, he indicated that the pain developed slowly, and that he was also hit directly on the right shoulder with a quick connect coupler near the end of the day. (PX19, p.7). Dr. Hanson noted a diagnosis of possible rotator cuff tear, ordered an MRI and prescribed Norco for pain. (PX19, p.8). He indicated that the MRI showed no cuff tear but significant AC joint changes. (PX19, p.8). Dr. Hanson noted the diagnosis at that time was impingement with AC arthritis. (PX19, pp.8-9). He stated that the usual non-operative options – injections, therapy and anti-inflammatories – were offered and Petitioner was allowed to continue working at that time. (PX19, p.9).

After these modalities failed to relieve Petitioner's symptoms, Dr. Hanson recommended surgery, which was eventually performed on 4/16/13. (PX19, p.10). This included right shoulder arthroscopy with subacromial decompression, distal clavicle resection, biceps tenotomy, debridement of the labrum and biceps stump with a mini open rotator cuff repair and biceps tenodesis. (PX19, p.11). He noted that the postoperative diagnosis was subacromial impingement, AC arthritis, labral tear and greater than 50 percent partial thickness rotator cuff tear. (PX19, p.11). He also indicated that he did a manipulation of the shoulder under general anesthesia in August of 2013 to break up adhesions. (PX19, p.13). In addition, Dr. Hanson noted that Petitioner was

referred to Dr. Naour for help with controlling the pain, which had been an issue throughout the process, and to look at the cervical spine. (PX19, p.15). He indicated that Petitioner also saw Dr. Newcomer for a second opinion. (PX19, p.15). After that, he sent him to Dr. Norris, as sort of a tie-breaker, who felt that surgery would not help the patient. (PX19, pp.17-18). In addition, he noted that Petitioner was sent for an FCE, which was performed on 4/10 and 4/11 [2013]. (PX19, p.19). Dr. Hanson testified that he accepted the recommendations found in the FCE and "... would make that my permanent restriction." (PX19, p.22).

Dr. Hanson agreed that he let Petitioner work up to the date of surgery, and thereafter kept him off work for "... a fair amount of time." (PX19, p.23). He also believed that the treatment he provided Petitioner was reasonable and necessary. (PX19, p.25).

On cross, elicited at the second deposition setting held on 12/10/14, Dr. Hanson agreed that he had never been out to the Bridgestone plant or seen Petitioner's job. (PX21, p.33). He likewise agreed that his opinion regarding causation is based upon the history that Petitioner gave him. (PX21, pp.33-34). As far as Petitioner's job was concerned, Dr. Hanson testified that "[g]oing from memory, he worked on tires. I think he had to do some repairs on them. It required varying degrees of force and repetitive motions with the arms out in front, is my understanding." (PX21, p.34). He noted that "... I don't think he and I ever specifically discussed where his arms were. I think I just assumed, if you're working on a tire, they would be in front of you... Meaning it would probably have to be, at least to some degree, extended. I don't think you could do it with your elbows at your side." (PX21, pp.34-35). When asked what aspect of his job was at shoulder level or above, Dr. Hanson responded: "... I don't know if he and I ever even got this much into the details. But my impression is, if you're working on a tire, it's out in front of you, and your arms are extended in front of you. So a good portion of his job would be with his arms extended." (PX21, p.35). He also stated that "... it would make sense to me that he would have his arms at shoulder level or above at some point," although he couldn't say how much of Petitioner's day would be spent with his arms extended, or at shoulder level or above. (PX21, pp.35-36).

When asked whether Petitioner's work would have to be at shoulder level or above to be relevant in terms of causation, Dr. Hanson testified that "... having your arms at shoulder level certainly can aggravate a shoulder, but you can injure, aggravate, cause pain in a shoulder without it being at shoulder level. It's not an all or nothing." (PX21, p.36). Dr. Hanson indicated that we are talking about overuse in this case, and for overuse to be a relevant factor it doesn't have to be at shoulder level or above. (PX21, p.37). When asked about any medical journals that would support this claim, Dr. Hanson noted he doubted "... there's a study that looks at if something has to be at shoulder level or not. I don't think it exits." (PX21, p.37). Dr. Hanson then challenged defense counsel, stating that "... I think you're looking at it wrong. You're hanging your hat on shoulder level, whereas, really, you have to look at, is he using his shoulders. If your elbows are at your side, you're not using your shoulders at all. If you're at shoulder level, you're using them quite a bit. But if it's even halfway out and you're still holding your arm out all day, that requires the rotator cuff, the deltoid muscles and tendons about the shoulder. So he could never reach shoulder height and still aggravate his shoulder. And that's just common sense. You don't need a study for that." (PX21, pp.37-38). However, he agreed that there would be minimal use of the shoulders if the job was done with the elbows at his side. (PX21, p.38).

Dr. Hanson acknowledged that he did not know the weight of the tools Petitioner used or how long he worked on tires each day. (PX21, p.39). However, he noted that he and Mr. Black "... talked a lot about it. The reason I know it by memory is because I know him well. He talked to me about it. I remember him describing how he had to work around the tire, repair it specifically; him telling me that he felt that what he had to do to repair these tires aggravate his arms, and it did require enough force that caused pain." (PX21, p.39). He went on to state that "[k]nowing that he's working on tires all day long, or assuming that he is, while he's working, working in a circular motion, working with his arms extended, that's all I need to know to know that that could cause pain, aggravate, tear a cuff, tear a labrum." (PX21, p.40).

Dr. Hanson acknowledged that all the findings at surgery could have predated the claimed injury, but noted that "[t]here are no findings in any patient that you can definitely say when it happened." (PX21, pp.42-43). He also believed that the 1/21/13 MRI may not have shown a torn rotator cuff. (PX21, p.43). He indicated that someone with a Type III acromion -- which he repaired during surgery and which predated the accident – can predispose one to a rotator cuff tear, whether it be partial or full. (PX21, p.44). Likewise, he agreed that the severe osteophytes he removed preexisted December of 2012. (PX21, p.44). In addition, he testified that the labral tearing, which he described as extensive, "... could be partially degenerative. That could be traumatic as well. It could be overuse. It's impossible to know." (PX21, p.44).

Dr. Hanson testified that "[a] lot of things can cause popping. A labral tear can pop and hurt. Impingement, rotator cuff impingement. Irregularity in the bursa as, again, part of impingement." (PX21, p.45). Dr. Hanson indicated that the history he recorded shows "... that he said that it occurred after a long day of tire repair and buffing, and the he had pain ever since, but no popping." (PX21, p.46). He noted that if there was a popping event "[i]t might or might not" have triggered his symptoms, stating that "[i]t's, again, one of those things we'll never know." (PX21, p.46). Dr. Hanson testified that "... I guess if you have a hypothetical where he specifically said, 'My shoulder was fine. I had a pop, and it's hurt ever since,' that would strongly suggest that the pop had something to do with it. But if – I think what's probably missing is him saying, 'My shoulder was never fine after the pop.'" (PX21, p.48). He also told defense counsel that "I think you think popping is more important than I do." (PX21, p.49).

Dr. Hanson agreed that he released Petitioner to work without restrictions up to the point of surgery. (PX21, p.50). He also agreed that he referred Petitioner to pain management specialist Dr. Naour to help Petitioner get off Norco. (PX21, pp.54-55). Likewise, he agreed that when he saw Petitioner on 11/21/13 he believed Mr. Black was at MMI for the shoulder. (PX21, pp.55-56). He also agreed that at that point he was no longer prescribing medication to Petitioner, delegating that responsibility to Dr. Naour. (PX21, p.56). In addition, he noted that by that point he had already released Petitioner to light duty and was talking about making it permanent. (PX21, p.56). He also stated that it was "safe to say" that treatment for Petitioner had ended at that point as far as he was concerned. (PX21, p.56).

Dr. Hanson agreed that as of his visit of 3/5/14 there was no reason Petitioner could not drive a forklift truck, noting that "[t]he reason we would say a permanent restriction is just his pain. And, you know, I think we took the recommendation of the therapist [FCE]. You know, you can see I just circled the whole thing and said that's his permanent restriction, going with what

they said." (PX21, p.76). He also agreed that it "sounds right" that he stopped prescribing Norco in October of 2013 when he transferred care to Dr. Naour, and that he is no longer involved in Petitioner's pain management. (PX21, p.77). However, Dr. Hanson stated that "... it would not be unusual to be [on Norco] three months, up to four [after surgery]. Beyond that, it's getting too long. And after a manipulation, a month. Two months is on the long side after that. I think Mr. Black is clearly on the long side. Most people would be off by now." (PX21, p.78).

Dr. Hanson agreed that he discharged Petitioner from his care on 4/23/14, and that he was clearly at MMI at that point. (PX21, pp.79-80). He agreed that he did not schedule any follow up visits for Petitioner at that time, but that Petitioner subsequently returned in July of 2014 with complaints of continued pain. (PX21, p.80). However, Dr. Hanson noted that his exam was basically the same at that time and that "[n]othing had really changed." (PX21, p.80). He agreed that at that time, as with his prior exams of the last six months, he did not find any structural basis for his ongoing complaints of pain. (PX21, p.80). He also noted, given the findings of no atrophy in the shoulder by Drs. Norris and Naour, that "... it's safe to say he was using the limb to some degree, yes." (PX21, pp.81-82).

On re-direct, Dr. Hanson indicated that you can't always find a structural basis every time there's a complaint. (PX21, p.83). He also noted that "... it's not unusual to have some lingering pain after a shoulder surgery. In fact, I would say most people have some lingering symptoms after surgery." (PX21, p.84). In addition, Dr. Hanson agreed that a Type III acromion means that an individual's shoulder may be subject to injury at a lower threshold than someone with a different type acromion. (PX21, p.85). Dr. Hanson then reiterated his opinion that there was a causal relationship between the work activities and the condition of ill-being for which he treated Petitioner. (PX21, pp.85-86).

On re-cross, Dr. Hanson indicated that he believed Petitioner "... is in less pain now than he was before surgery" and that he "... would like to believe that he is better off now..." (PX21, p.91). However, he conceded that before the surgery Petitioner was capable of full duty work without narcotics. (PX21, p.92).

At his evidence deposition held on 8/22/14, Dr. Edward Kolb testified that he is board certified in orthopedic surgery, and that he has a general orthopedic practice treating various musculoskeletal conditions, including shoulder problems. (PX20, p.5). He indicated that Petitioner was referred to him by the nurse at Bridgestone Firestone. (PX20, p.7). At the time of his examination on 3/22/13 he recorded a history of right shoulder complaints that started on 12/18/12 after buffing tires when he felt a pop in his shoulder. (PX20, pp.7,9). He noted that Petitioner had worked for Respondent for the past 24 years and that he had been in the finishing department for the past 18 years. (PX20, p.8). Following his exam and review of diagnostic studies, including an MRI of the right shoulder on 1/21/13, Dr. Kolb diagnosed right shoulder bicipital tendinitis, right shoulder impingement syndrome and right shoulder AC joint arthritis. (PX20, pp.10-12). Dr. Kolb indicated that he felt Petitioner would benefit from surgical intervention, since it appeared he had failed conservative treatment. (PX20, p.12).

Dr. Kolb testified that "[i]n my plan, I did state that I do feel that [Petitioner's] work has exacerbated his right shoulder pain as per his history with us today, as he did do repetitive motions with his upper extremities and overhead activities." (PX20, p.13). He indicated that he would have reviewed notes from McLean County Orthopedics for treatment prior to his visit, but that he has not reviewed any treatment notes since his examination. (PX20, p.14).

On cross, Dr. Kolb noted that he believed he was a treating physician in this case in that he was a second opinion. (PX20, p.15). He also indicated that while Petitioner told him he felt a pop in his shoulder and developed pain thereafter, he did not specifically see a pop being mentioned in histories recorded by other doctors. (PX20, p.16). In addition, he stated he would have a low suspicion Petitioner had a cervical issue given he denied neck pain and numbness/ tingling down the right arm past the elbow when he saw him on 3/22/13. (PX20, pp.16-17).

Dr. Kolb testified that per the MRI Petitioner had severe osteoarthritis of the acromioclavicular joint, and that the arthritic changes in that area would have been present prior to the injury date. (PX20, p.18). He agreed that given the severity of the osteoarthritis, the underlying disease itself can result in symptoms without a trauma. (PX20, p.19). He also noted that it can at times contribute to impingement, and it could have contributed to the impingement in this case. (PX20, p.20). Dr. Kolb went on to state that he "... believe[d] the symptoms [Petitioner] had in his shoulder were due to multiple entities, including the bicipital tendinitis, his impingement, and potentially related to the AC joint arthritis." (PX20, p.20).

When asked what activities at work would have exacerbated his condition, Dr. Kolb testified that "[f]or bicipital tendon pain, any activity that required any type of forward elevation movement with the arm, any rotation of the arm, such as going from a pronated to supinated position. Certainly overhead work could aggravate those types of conditions as well. The AC joint arthritis, that could be aggravated with any type of cross-body-type activities." (PX20, p.22). In addition, he noted that "[a]ny type of forward elevation-type activities" could have exacerbated the impingement. (PX20, p.22). He also stated that "[i]f somebody has an underlying condition, oftentimes it does not require a lot of shoulder motion to aggravate such a condition." (PX20, p.22). In addition, he noted that "... both the repetitive motion with the shoulder and the overhead activities were relevant" in arriving at his opinion as to causation. (PX20, p.23). However, Dr. Kolb would not agree with the statement that from an impingement standpoint, repetitive activities are only relevant to the extent that they are performed at or above shoulder level. (PX20, p.24). He noted that "[i]t's not only above shoulder height, yes, I would agree. If somebody has an underlying impingement syndrome, they don't necessarily have to be overhead to aggravate such a condition." (PX20, p.24).

When asked whether a job where one's elbows were at his sides and at chest level or below could aggravate a preexisting condition such as this, Dr. Kolb testified that "I think if a patient has an inflamed shoulder from an underlying impingement syndrome, that any significant shoulder activity could aggravate that." (PX20, p.25). However, Dr. Kolb conceded that he did not have any information that suggested Petitioner had an inflamed shoulder prior to December of 2012. (PX20, p.25).

When asked if he had ever evaluated Petitioner's actual job, Dr. Kolb noted that "I actually have been out to Bridgestone and toured the various jobs that they do there." (PX20, p.25). However, he indicated that "I did not go to his specific job place, but it probably is one of the jobs that I've seen out there." (PX20, pp.25-26). He agreed that he did not have knowledge of Petitioner's job from his own experience, and that the only thing he knows about his job is what Mr. Black told him. (PX20, p.26). When asked if his causation opinion would be affected if what Petitioner told him was inaccurate, Dr. Kolb testified that "I can't comment on the degree of inaccuracy without knowing what information is inaccurate." (PX20, p.27).

Dr. Kolb indicated that he did not have the specific number of hours Petitioner worked each day on this job, but noted that "[h]is job duties were listed as trimming tires, repairing, buffing on tires that have cracked from water, heat. That's the information I had." (PX20, p.27). He also noted that the level at which these activities were performed was not specifically listed. (PX20, p.27). When asked what weights Petitioner dealt with on a daily basis, Dr. Kolb stated "I know the tires that they work on at Bridgestone can be very large, some of the largest tires in the world, actually." (PX20, pp.27-28). When asked how often Petitioner would perform a particular function, Dr. Kolb noted that "[a] specific time or amount of time he does a specific job is not something we typically record." (PX20, p.29). However, he noted that "... I have toured the plant and have seen the jobs that are done, and I would base my opinions on the information the patient provided, as well as my experience with seeing firsthand the type of jobs that are done there." (PX20, p.29). Dr. Kolb stated that he was not aware of any videotape depicting Petitioner performing his job. (PX20, p.31).

When asked whether Petitioner could have aggravated his preexisting condition reaching or lifting something outside of work, Dr. Kolb testified that "[t]ypically osteoarthritis in the AC joint, which is very different from osteoarthritis in the glenohumeral joint, is aggravated, as I previously mentioned, by cross-body adduction-type activities." (PX20, p.32). He also noted that Petitioner's history of having a popping sensation was "[s]omething we keep in mind. It's a sign of a possible mechanical irritation." (PX20, p.32). Dr. Kolb indicated that he had no reason to believe Petitioner's bicep tendinitis or tendinosis condition predated the accident on 12/18//12. (PX20, p.32). He likewise agreed that the impingement syndrome he diagnosed could possibly be from a developmental bone structure, noting that "[a]nything is possible." (PX20, p.33). He noted that it was also possible that you can aggravate your shoulder based on the way you sleep. (PX20, p.36).

At the request of Respondent, Petitioner was examined by Dr. Dru Hauter on 4/8/13. (RX2, pp.7-8). At his evidence deposition held on 3/4/15, Dr. Hauter testified that he had practiced in internal medicine for ten years and then changed to occupational medicine, which he has been doing "... for roughly the last 14 years." (RX2, p.5). He indicated that he was board-certified in internal medicine and as an independent medical examiner. (RX2, pp.5-6). He noted that his practice is limited to occupational medicine and that "[t]he vast majority of my practice is taking care of injured workers. I do not only injury evaluations but I do postoperative evaluations, Fitness For Duty evaluations, those type of things dealing with workers." (RX2, p.6).

Dr. Hauter noted that at the time of Petitioner's visit his tech recorded a history of pain at the end of his shift and a pop in his shoulder when he was reaching. (RX2, p.9). Dr. Hauter stated

that he personally recorded a history that included a gradual onset of pain in the right shoulder after sanding and doing tire repair on 12/18/12, and that Petitioner denied a specific injury. (RX2, p.10). He noted that he was fatigued and off for two weeks when "... he noticed shoulder pain when he was at home while sleeping on his right side. The next morning after sleeping he was in the bathroom and reached out to remove a towel from, that was hanging over a door, and he felt a pop in his shoulder. He told me that since that time the pain had been present in his right shoulder." (RX2, p.10).

Dr. Hauter stated that the MRI showed Petitioner had a Type 3 acromion which he noted "... causes impingement syndrome" and which he did not believe could be aggravated by repetitive activities. (RX2, p.11). In addition, Dr. Hauter indicated that the MRI revealed no tear of the rotator cuff, but it did show some arthritic changes with spurring at the acromial clavicular joint. (RX2, p.12). He noted that the significance of the spurring is that it would be "... an arthritic type of change, a degenerative process, and the combination of those two, you know, cause impingement syndrome." (RX2, p.12).

Upon examination, Dr. Hauter noted that the AC joint was enlarged and tender even with very light palpation, which he stated was "... typically a sign of significant arthritis." (RX2, p.13). Dr. Hauter's opinion was that Petitioner did have impingement syndrome, and that "... the cause of this impingement syndrome was the developmental or congenital abnormality of the acromion accompanied by the spurring taking up that space in that subacromial area." (RX2, pp.15-16). He explained that "[t]here are cases where impingement syndrome can be caused by work, and what you find there are thickened rotator cuff tendons in that area from either a past injury, chronic tendonitis, something like that that take up the space. That wasn't present here as evidenced on the MRI." (RX2, p.16). He concluded that he found "... no evidence of a work-related or an injury causing his impingement syndrome, but rather an anatomical abnormality and defect." (RX2, p.17). He agreed that a bony structure is an anatomical abnormality, and that there was no evidence that that bony structure was in any way aggravated by his claimed work injury. (RX2, pp.16-17).

Dr. Hauter testified that he had a chance to go to the plant at Bridgestone and view Petitioner's job. (RX2, p.17). He indicated that he did not "... remember the exact title of his job, but what he actually does is repair defects, most of them cosmetic, that are left, I believe, from water escaping the mold when they're curing the tire. These little cosmetic defects or cracks in the tire are sanded off." (RX2, p.17). He noted that several types of sandpaper are usually used "... in a circular motion [to] typically remove those defects. I believe it's done in two separate locations..." (RX2, pp.17-18). Dr. Hauter opined that "... the pre-existing problem we're talking about here would not be aggravated by the mechanics of this job, specifically because the work is done without the use of the rotator cuff. It's done at chest height in front. It doesn't involve abduction of the shoulder. It doesn't involve firing of the rotator cuff at arm's height of shoulder level or above to potentially thicken those tendons, so I don't believe there is any cause or aggravation to this pre-existing shoulder problem." (RX2, pp.18-19).

In addition, Dr. Hauter testified that the "... MRI was done fairly close to the claimed injury, and if there had been an aggravation present fluid may have been seen, there may have been an irritation to the muscles immediately below the spurs and abnormally shaped acromion. There was none on the MRI report." (RX2, p.19). He noted that this "[s]ignifies that there was no

aggravation." (RX2, p.19). He also indicated that the MRI showed "... there was no partial tear, chronic tendonitis or disruption of those muscles of the rotator cuff." (RX2, pp.19-20).

Dr. Hauter indicated that he specifically asked Petitioner if his complaints of pain were caused by an injury at work, and that Mr. Black "... told me he did not have an injury at work but felt that over time this was caused. He did report to me that he had an injury at home." (RX2, p.20). Once again, Dr. Hauter stated that Petitioner related that he was "... reaching out to take this towel off of the top of the door at his home [when] he felt a pop, and from that point on he felt pain in his shoulder." (RX2, p.20). Dr. Hauter believed that this activity would have required him to reach above his shoulder, given that the towel was "... above the door kind of over the door is what he told me..." (RX2, p.21). He also believed that this kind of activity would be the type that would have fired the rotator cuff. (RX2, p.21). However, he noted that the reference to hearing a pop "... doesn't necessarily mean anything" and that "... his pop was more likely from the muscle being rubbed against the spur and the downsloping acromion." (RX2, p.21).

Dr. Hauter believed that the impingement he diagnosed was chronic. (RX2, p.21). He also reiterated his opinion that the impingement was "... not caused by the work activities but was caused by the anatomic abnormalities in this, in this patient." (RX2, p.22). He also noted that he "... found no evidence of aggravation and the mechanics described are not consistent with the type of work required to aggravate." (RX2, p.22). In addition, Dr. Hauter noted a secondary assessment of tendonitis which he believed was not caused or aggravated by work, noting that Petitioner "... did not claim an injury at Bridgestone that would have aggravated the biceps. I mean, there was no injury reported. He did have the injury at home." (RX2, p.22). Dr. Hauter agreed with the orthopod that surgery was likely. (RX2, p.23).

With respect to the use of Hydrocodone, Dr. Hauter indicated that "... the use of narcotics for acute injuries is indicated up to about two weeks. Chronic pain, which this gentleman had, there is no indication for narcotics. It is commonly used but there is no indication for it." (RX2, p.23). He stated that he thought "... the use of narcotics in this case are appropriate at the initial injury and then perhaps at the point where he had the surgical intervention. Long-term narcotics would not be appropriate in him. Long-term I would probably classify as past the postoperative period or past two weeks of injury." (RX2, p.24). He noted that "... this surgery involved the bone, so like a fracture [it] would be healed at six weeks roughly. Typically you wouldn't need and wouldn't have an indication for narcotics past around four weeks." (RX2, p.24).

On cross, Dr. Hauter testified that he did not agree with the opinion of Dr. Kolb, who had likewise been retained by Bridgestone to examine Petitioner. (RX2, p.28). Dr. Hauter indicated that he knows Dr. Kolb and that "... his definition of exacerbation is the, is the, is based upon the complaints of the worker or his patient that said hey, look, I didn't have pain and now I do. So in Dr. Kolb's area of expertise of orthopedic surgery he has not had training in work related causation, so I believe that is where his opinion came from." (RX2, p.29).

When asked whether he believed there needed to be a change in the underlying physical structure for an aggravation to occur, Dr. Hauter responded: "... I'm not sure there has to be a change to the underlying physical structure, but I believe there should be evidence objectively of an aggravation." (RX2, pp.29-30).

Dr. Hauter believed that he saw Petitioner before he had the surgery. (RX2, p.32). When asked whether the surgical finding of a greater than 50 percent partial thickness tear of the rotator cuff would be different than what was demonstrated on the MRI, Dr. Hauter testified that he "... believe[d] it would be different"; however, he noted that "... this process is progressive, meaning that with as much impingement as he had any activity, you know, such as combing his hair, reaching above his shoulder to pick up something, puts significant pressure on the rotator cuff." (RX2, p.33).

Dr. Hauter testified that "... in reviewing the activities of a tire buffer, that work is not performed about the shoulder or even at shoulder height, and therefore I don't feel that the rotator cuff is fired in a way, when I say fired I mean activated, to push it against the acromion to worsen or aggravate the symptoms. I don't believe you could aggravate the bony structures without a significant trauma." (RX2, p.34-35). When asked whether the rotator cuff is impacted by work that's done below shoulder level but with one arm held straight away from the body, Dr. Hauter indicated that "... flexion is not at a point to where the humeral structures, meaning the top bone and the rotator cuff are in an alignment to force it against the acromion until it's at 90 or greater degrees of flexion", which would be at the forearm and elbow. (RX2, p.35).

When asked about the history contained in the employee accident report of a quick connect coupler hitting Petitioner's shoulder, Dr. Hauter testified that such a mechanism of injury could "... cause a bony edema, cause some type of change, that might cause inflammation. However, in this patient we did not see that." (RX2, p.37).

With respect to the use of narcotics for chronic pain, Dr. Hauter conceded that "[a] normal practitioner may use narcotics out of the proven indication... It's not indicated but it's not a deviation from the standard of care to where he's committed malpractice." (RX2, p.39).

On re-direct, Dr. Hauter testified that he did not believe that any of the findings made during surgery were caused by a blow to the top of the shoulder or the repair type work he was doing, including the shoulder impingement or the labral tear, if it was a SLAP tear. (RX2, p.44). Dr. Hauter reiterated his believe that the reaching for a towel at home incident was "... more likely than not a cause or aggravation ..." (RX2, p.45). Dr. Hauter also agreed that the bony structure that Petitioner had might cause the impingement without any trauma, resulting in pain. (RX2, p.46).

When asked whether all of the findings noted in the operative report were consistent with a pre-existing condition, Dr. Hauter stated that "... I'm not sure I can say that. There is evidence of a partial thickness tear. That is consistent with tendonitis." (RX2, p.47). However, he agreed that it would be fair to say that he could not date when the partial tear occurred, but that "I would have to say it's more likely after [the accident] as there was no evidence on the MRI." (RX2, p.48). He noted that the same would be true of the labral tear. (RX2, p.48). Dr. Hauter testified that "[i]t would be unusual" for Petitioner to continue to receive narcotic medication for his shoulder through the present time, noting that "...it would not be indicated to continue the narcotics for over a year or approaching a year. No, almost two years." (RX2, pp.48-49).

On re-cross, Dr. Hauter testified that "[t]here is no test for pain. Like I said before, job, one of the jobs of a physician in determining causation is to look for consistent things." (RX2, p.49).

At the request of Respondent, Petitioner was seen by board certified orthopedic surgeon Dr. Troy Karlsson on 11/18/14 for evaluation of his right shoulder. (RX3, p.7). At his evidence deposition held on 3/2/15, Dr. Karlsson testified that he performs primarily surgery of the shoulders, hips and knees as well as some ankle, wrist and hand surgery. (RX3, pp.5-6). He also noted that he sees people for degenerative conditions such as arthritis as well as for trauma, and that he does everything from arthroscopic surgery to joint replacement as well as non-operative treatment for musculoskeletal problems. (RX3, p.6). In addition, he indicated that about 5% of his practice is legal-medical evaluations, mostly for the defense. (RX3, p.6).

Dr. Karlsson testified that he recorded a history of injury to the right shoulder on 12/18/12 while working for Bridgestone as a tire finisher and repairman, which he had been doing since 1989. (RX3, p.9). Dr. Karlsson noted that "… on this particular day he was buffing and repairing tires, and he said they had deep water damage and described them as being fairly severely damaged so he had to do more work than usual on each tire. He said he used a power buffer for a 12-hour shift and was applying this to the tire to get down to the base of the defects. He said that he was doing this continually during that shift and that there wasn't any single injury but it was the repetitive use that he felt was a problem. He said this was a common type of activity that he would do at work, but the tires that he was working on on that particular day had a lot of damage and they were large tires. They were up on a stand, and he had to move his arm up and down with the buffer and continued to do that at or above shoulder level. When he was doing it, he said he reported the injury to the company that day and he was told that he should follow up with his own physician." (RX3, pp.9-10).

Dr. Karlsson noted that on the day of his examination he also reviewed a CD entitled "Department 39 Tire Repair Position, Buffing and Ragging a Tire." (RX3, p.10). He noted that it included two video clips of someone working with a large tire. (RX3, pp.10-11). He noted that "[t]he tire was mounted on a device that allowed rotation of the tire so that the work while on that video was being done between waist level and chest level. In other words, the tire went up much higher than the person's shoulder and head, but the tire was rotated so that the work would be at a lower level. There was no extension of the arms to full length. There was no using the arms overhead within either of the two video clips… At no time in either of these videos were the arms used at or above shoulder height, and at no time did they have to be used in full extension with the arms held well out to the side." (RX3, p.11).

Dr. Karlsson's diagnosis was "… partial thickness rotator cuff tear, labral fraying, degenerative AC arthritis, bicipital tendonitis and subacromial spur." (RX3, p.12). Based on the history given and his review of the CD, Dr. Karlsson opined that "… there was not a relationship between [Petitioner's] work duties or any single date or injury and his need for surgery or what was done at the surgery." (RX3, pp.12-13). He noted that this would be based "[p]artially [on] the findings at the time of surgery, some of which are degenerative, some of which could be either degenerative or traumatic. And that combined with the lack of any trauma or lack of a repetitive use that would be high risk for the shoulders. Things that would be high risk would be things such

as repetitive working overhead or having to do repetitive lifting at a distance from the body, in other words, with the arms extended and lifting far out to the side as opposed to using a tool at a comfortable level and not far from the body." (RX3, p.13).

Dr. Karlsson also noted that Petitioner complained of pain all the time and numbness in "... the entire arm from the shoulder down to all [his] fingers...", which he noted "... would not fit a pattern of irritation of one nerve or even several nerves... and would be inconsistent with any single diagnosis or combination of diagnoses to explain the area that he was having numbness and tingling." (RX3, pp.14-15).

In addition, Dr. Karlsson testified that Petitioner "... told me he had been taking Norco since prior to surgery, and he told me there were no other medications that he took." (RX3, p.15). Dr. Karlsson stated that Norco is "... for short-term pain relief", and that in his opinion Petitioner "... absolutely should not be taking it, especially for this long of a period and this far out from his surgery. He's well past the point where he should be getting it postsurgery. Again, there are risks and problems with doing it for long-term pain relief both from an effectiveness standpoint and a risk standpoint." (RX3, pp.15-16). He noted that Petitioner should have taken it for a maximum of two to three months. (RX3, p.17).

Furthermore, Dr. Karlsson noted that "[f]or the amount of disuse that [Petitioner] claimed to me in his subjective complaints and on the surveys ... I would expect him to have significant atrophy in his arm, and he did not have that in this arm, which was his dominant arm which was actually slightly greater in circumference than the other side." (RX3, p.19).

As far as a return to work in a light duty capacity is concerned, Dr. Karlsson felt Petitioner would have been able to do very light duty with one-arm a couple weeks out from injury, and "... some use of the arm, that would be at about six weeks out from surgery where he would be able to do light tasks such as handling paper, answering phones, things like that." (RX3, p.25). He indicated that the very earliest he could see anyone returning to regular work after rotator cuff repair would be three months, but "[m]ost people need a longer time period than that. It's usually about four to six months." (RX3, p.26). For Petitioner, Dr. Karlsson opined that "... very conservatively he could be back to normal work about six months out from [surgery], so that would put him at mid-October." (R.3, p.26). Based on the video of the job, Dr. Karlsson felt "[t]here was nothing heavy that he was lifting. He was lifting a sander. Certainly, within the FCE that he had later, he was able to lift that sort of weight." (RX3, p.27). As far as lighter duty work driving a forklift, Dr. Karlsson noted that "... he'd need to have both arms for fairly rigorous use. Probably at the very earliest it would be three months for that." (RX3, p.27).

Dr. Karlsson noted that he did not see any need for Petitioner to be on any narcotics. (RX3, p.27). He also noted several inconsistencies that he observed during the course of his examination, including the previously mentioned lack of atrophy as well diminished internal and external rotation compared to the FCE. (RX3, pp.27-28). In addition, Dr. Karlsson felt that Petitioner was at maximum medical improvement, and that "[t]here was no physiologic explanation for his pattern of pain or his complaints of pain or his level of described dysfunction." (RX3, pp.29-30). More to the point, Dr. Karlsson did not believe that Petitioner's subjective complaints correlated with his examination. (RX3, p.30).

Dr. Karlsson noted that as part of his evaluation he did an AMA rating. (RX3, p.30). He noted that he arrived at an impairment rating of 6% of the upper extremity, which converted to 4% impairment of the whole person. (RX3, p.31-32).

On cross, Dr. Karlsson noted that the two video clips that he saw were approximately 1-1/2 minutes in length each. (RX3, p.33). He acknowledged that he did not know if those videos reflected the entire scope of the employee's work, noting that "I do not know if there were other duties that he would have to do." (RX3, pp.33-34). He indicated that he viewed these videos after he evaluated Petitioner and that he did not talk to him to verify that those were the duties that he was performing. (RX3, p.34). He stated that he believed the video was of another individual and not Petitioner. (RX3, p.34). He also noted that the tire shown in the video "... went well over his head height. It was a very large tire that seemed to be consistent with what Mr. Black described to me." (RX3, p.34). He indicated that he did not ask Petitioner to physically pantomime the actions he says he performed on the job, but that he "... described it as being at and above head level and having to move up and down with his arms." (RX3, pp.34-35). He noted that he also received a one-page job description for a curing pressroom assistant for Location 132 Curing. (RX3, p.35). He indicated that the written job description was not specific about the actual weights or positions that the arm would be used. (RX3, p.35).

Dr. Karlsson stated that he did not receive copies of the Employee's Report of Injury or the Supervisor's Injury Report. (RX3, p.36). When asked to assume the details contained in those reports and whether that information would change his opinion, Dr. Karlsson testified "[n]o, it wouldn't. A blow to the shoulder could certainly cause pain to the shoulder, but it would not be something that would cause the rotator cuff tear. It's not the mechanism of injury that would lead to that. It can certainly cause a contusion, muscle pain, but should not lead to a rotator cuff tear from a blow to the shoulder." (RX3, p.37). Dr. Karlsson also noted that he has never been to the job site where Petitioner works. (RX3, p.39). He agreed that his causation opinions are based on his understanding of the job duties, and if the job duties were different it might change his opinion, noting that "[i]t would be dependent on to what degree they were different and how different they were. In other words, if someone had to occasionally use a tool overhead, that would be much different than constantly using a heavy tool overhead or having to manipulate objects overhead or at a far distance from the body. It's a matter of if it's different and how different it is." (RX3, p.40).

On re-direct, Dr. Karlsson noted that he had picked up on the quick connect coupler striking Petitioner's shoulder when he reviewed the medical records, specifically one of the notes of Dr. Hanson. (RX3, pp.40-41). However, he indicated that there is nothing about that history or description that would cause him to change his causation opinion. (RX3, p.41).

<u>Conclusions of Law</u>

An employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner alleging a single, definable accident. *<u>Three "D" Discount Store v. Industrial Commission</u>*, 144 Ill.Dec. 794, 797, 556 N.E.2d 261, 264 (Ill.App. 4 Dist. 1989); citing *<u>Nunn v. Industrial Commission</u>*, 157 Ill.App.3d 470, 109 Ill.Dec. 634, 510 N.E.2d 502

(1987). The petitioner must prove a precise, identifiable date when the accidental injury manifested itself. "Manifested itself" means the date on which both the fact of the injury and the causal relationship of the injury to the petitioner's employment would have become plainly apparent to a reasonable person. *Three "D" Discount Store*, 556 N.E.2d at 264; citing *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 106 Ill.Dec. 235, 505 N.E.2d 1026 (1987). The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each case. *Id.*, at 264; citing *Luttrell v. Industrial Commission*, 154 Ill.App.3d 943, 107 Ill.Dec. 620, 507 N.E.2d 533 (1987).

In the present case, Petitioner testified that he had worked for Respondent since 3/12/89, first as a tire shaper in the curing department and eventually in the final inspection department where he inspected, trimmed and repaired tires ranging in size from 4' to 13-1/2' tall. (T.19-23). This job involved rolling tires around and loading them on a high-speed trimmer, then using a sharp blade to trim the tire either manually by hand or using an arm that would go in and out with the rotation of the tire. (T.23-25). Petitioner noted that he would have to hold the trimmer with two hands and keep his arm locked as he pushed the trimmer against the spinning, vibrating tire. (T.26-27). He also indicated that where he held his arms depends on the size of the tire, but that the work was basically at chest level or above, noting that "... when you're trimming, you're trimming up." (T.29). Petitioner worked in this department for 23 years. (T.35).

Petitioner testified that on 12/18/12 he was repairing tires, which he noted involves "... buffing or whatever defect is on the tire, to fix it." (T.36). He indicated that "[b]uffing is done with a manual buffer. It's about a six-inch barrel – maybe about four or five-inch, and it's on a machine that has a motor..." that has a rotary shaft in it. (T.36). Petitioner testified that at the end of that day he "... noticed my arm was hurting real bad." (T.37). He noted that this had bothered him "[o]n and off" prior to the date of accident. (T.37).

The Commission finds that Petitioner's job, both during the 23 years he worked in the finish department, and on the date of the alleged accident when he was performing buffing activities, involved sufficient forceful and repetitive motion so as to aggravate the underlying arthritic condition in his right shoulder. Indeed, it would appear that Petitioner's job of trimming, buffing and repairing tires, some as tall as 13-1/2 feet tall, at a minimum required the extended use of both his arms at chest level. While the Commission doubts that the bulk of this activity was performed above chest level, there is no reason to believe that an aggravation of Petitioner's condition could only be achieved if such activity was at shoulder level or above, as posited by Respondent's second and third IMEs, Drs. Hauter and Karlsson. In fact, common sense would dictate that Petitioner's shoulders would still be involved and stressed even with his arms at chest height, particularly when his arms are extended, which would appear to be the way in which one would have to perform the buffing task in question, given the size of the tires being repaired. Indeed, treating board certified orthopedic surgeon Dr. Hanson testified as much, noting that "... having your arms at shoulder level certainly can aggravate a shoulder, ***but you can injure, aggravate, cause pain in a shoulder without it being at shoulder level. It's not an all or nothing [proposition].***" (Emphasis added) (PX21, p.36). Likewise, fellow board certified orthopedic surgeon Dr. Kolb (Respondent's initial IME) noted that "[i]f someone has underlying impingement syndrome, ***they don't necessarily have to be overhead to aggravate such a condition***." (Emphasis added) (PX20, p.24).

Based on the above, and the record taken as a whole, the Commission reverses the decision of the Arbitrator and finds that Petitioner proved by a preponderance of the credible evidence that he sustained accidental, repetitive trauma-type injuries to his right shoulder that arose out of and in the course of his employment with Respondent, with a manifestation date of 12/18/12, based on Petitioner's credible testimony as to his job activities as well as the opinions of Drs. Hanson and Kolb.

The Commission also finds that Petitioner's current condition of ill-being is causally related to the accident in question, based once again upon the credible testimony of Petitioner with respect to the repetitive and forceful activities he performed during the course of his 23 years of employment with Respondent, his right shoulder condition eventually manifesting itself on 12/18/12 while performing extensive buffing activity utilizing his upper extremities, as well as the persuasive medical opinions of Drs. Hanson and Kolb.

Furthermore, the Commission finds that Petitioner was temporarily totally disabled from 4/12/13, when he was taken off work prior to surgery, through 2/10/15, or the date of Dr. Naour's last progress note, for a period of 95-5/7 weeks. The Commission notes that while Dr. Hanson found Petitioner to be at MMI in November of 2013 and released him to light duty work at that time, it appears that he ultimately based Petitioner's permanent restrictions on the FCE performed five months later, on 4/10 and 4/11/14. (PX19, p.22). In addition, Dr. Hanson stated that at the time of his release he had transferred Petitioner's care to pain management physician Dr. Naour, including the responsibility for Petitioner's ongoing need for pain medication. Respondent subsequently offered Petitioner a light duty position within his restrictions in a letter dated 7/23/14. However, legitimate concerns existed at that time as to Petitioner's ability to safely perform his job duties while on narcotics. Thereafter, Petitioner continued to treat with Dr. Naour until 2/10/15 at which time the latter recorded that Mr. Black was "... no longer working but he is not disabled." (PX7). Given Dr. Naour's apparent belief that Petitioner was no longer disabled from work at the time of this last visit, and in light of the fact that Petitioner presented no evidence that he sought work within his permanent restrictions at that time, the Commission chooses to cut off TTD benefits at that time.

In addition, the Commission finds that Petitioner is entitled to reasonable and necessary medical expenses as set forth in PX23 pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act. Furthermore, the Commission finds that Respondent is entitled to a credit for any and all amounts paid on account of said injuries pursuant to §8(j) of the Act, with Petitioner being held harmless for any outstanding balances relating to the expenses for which Respondent is receiving this credit.

Finally, the Commission notes that since the date of accident (12/18/12) occurred subsequent to the effective date of the amendment (9/1/11), an analysis pursuant to §8.1b of the Act will be necessary.

With respect to factor (i), the reported level of impairment, the Commission notes that Dr. Karlsson, Respondent's third IME, provided an AMA rating, showing an impairment rating of 6% of the upper extremity, which converted to 4% impairment of the whole person. (RX3, p.31-32). The Commission finds that this factor is entitled to moderate weight.

With respect to factor (ii), the occupation of the injured employee, the Commission notes that Petitioner worked for Respondent as a trimmer/buffer for 23 years. He currently works in a light duty job for Respondent as a forklift truck driver. Given that Petitioner was unable to return to his former job following the incident, the Commission accords this factor greater weight.

With respect to factor (iii), the age of the employee at the time of the injury, the Commission notes that Petitioner was 52 years old at the time of the incident. Given Petitioner's relatively advanced age, and the added difficulties associated with his work injury, the Commission accords this factor moderate weight.

With respect to factor (iv), the employee's future earning capacity, the Commission notes, once again, that Petitioner was unable to return to his prior job as a trimmer/buffer. However, he continues to work for Respondent in a light duty capacity at the same salary. One would imagine that if Petitioner were to lose this job, his job prospects would be limited by his restrictions, not to mention his age and lack of experience and education. As a result, the Commission finds that this factor should be accorded greater weight.

Finally, with respect to factor (v), evidence of disability corroborated by the treating medical records, the Commission notes that Petitioner underwent surgery on 4/16/13 consisting of a right shoulder arthroscopy, arthroscopic subacromial decompression, distal clavicle resection, biceps tenotomy, debridement of labrum and biceps stump with mini-open rotator cuff repair and biceps tenodesis. (PX7). The postoperative diagnosis was subacromial impingement, AC arthritis, labral tear and greater than 50% partial thickness rotator cuff tear. (PX7). Petitioner subsequently underwent manipulation under anesthesia of the right shoulder by Dr. Hanson. (PX11). The postoperative diagnosis was adhesive capsulitis of the right shoulder. (PX11). Petitioner participated in a program of physical therapy and was eventually released with permanent light duty restrictions and returned to light duty work for Respondent in September of 2015.

Currently, Petitioner notices that his right arm is "[s]till damaged" and that "[t]he strength of my right arm is not full strength." (T.51). He also noted that "... it hurts pushing and pulling, and I can't raise it above the shoulder and do any type of work I used to do." (T.52). In addition, he indicated that "I can't really push a broom. I can't hammer. I can't do my job I used to do, because of repetitive motion. I can't work on cars like I used to do because of the pulling, because of the injury..." (T.53). Petitioner also noted that he has constant pain in his right arm which he described as being a "[s]ix, seven" on a 1/10 scale. (T.55). He indicated that he presently takes hydrocodone/Norco for his right arm, and that he takes it when he gets home after work. (T.55). He noted that he usually takes 1 to 1-1/2 pills twice a day depending on how much pain he is in, and that the dosage is "75/325." (T.56). He stated this medication is prescribed by Dr. Naour, a physician at McLean County Orthopedics. (T.56). Petitioner noted that when he does not work he takes it four times a day. (T.56).

Petitioner testified that he is currently back at work for Respondent as a "[t]rucker; picking up tires and final – curing and bringing them back to final" using a fork truck. (T.57). He indicated that he is not required to lift anything physically using his arms, and that he is not required to do any trimming or buffing of tires. (T.57-58). He did note, however, that "... it hurts now pushing

and pulling levers" while operating the fork truck. (T.58).

Based on the above, and the record taken as a whole, the Commission finds that Petitioner suffered the permanent partial loss of use of 12.5% person-as-a-whole pursuant to §8(d)2 of the Act for his right shoulder injury.

All other aspects of the Arbitrator's decision are otherwise affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $484.96 per week for a period of 95-5/7 weeks, from 4/12/13 through 2/10/15, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the reasonable and necessary medical expenses set forth in PX23 pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $436.46 per week for a period of 62.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused permanent partial disability to the extent of 12.5% person-as-a-whole relative to the right shoulder.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury, including a credit pursuant to §8(j) for non-occupational disability benefits paid.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $52,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 23 2019
o:12/4/18
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. I would affirm and adopt Arbitrator Gallagher's thorough and well-reasoned decision. I find the Arbitrator's numerous findings and conclusions regarding the medical records and Petitioner's job activities to be ultimately persuasive. I would affirm and adopt this decision

Kevin W. Lamborn

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christy Swan,

Petitioner,

vs. NO: 17 WC 9666

JBS USA,

19IWCC0039

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 the 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 June 4, 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.

19IWCC0039

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,900.00. 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: JAN 2 3 2019
TJT:yl
o 1/14/19
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SWAN, CHRISTY
Employee/Petitioner

Case# **17WC009666**

JBS USA
Employer/Respondent

19IWCC0039

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:

2934 BOSHARDY LAW OFFICE PC
JOHN V BOSHARDY
1610 S 6TH ST
SPRINGFIELD, IL 62703

2461 NYHAN BAMBRICK KINZIE & LOWRY
JASON H PAYNE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

19IWCC0039

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Christy Swan
Employee/Petitioner

v.

JBS USA
Employer/Respondent

Case # **17** WC **9666**

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Springfield**, on **2/27/18**. By stipulation, the parties agree:

On the date of accident, **7/1/14**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**30,103.12**, and the average weekly wage was $**590.26**.

At the time of injury, Petitioner was **34** years of age, ***single*** with **2** dependent children.

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

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

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

19IWCC0039

ORDER

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $354.16/week for 41.8 weeks, because the injuries sustained caused the 10% loss of the right hand (19 weeks), 10% loss of the left hand (19 weeks), and 5% loss of the left thumb (3.8 weeks),as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from **7/1/14** through **2/27/18**, 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.

Michael K. Nowak, Arbitrator

5/29/18
Date

ICArbDecN&E p.2

JUN 4 - 2018

FINDINGS OF FACT & CONCLUSIONS

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 Respondent offered the deposition testimony of Dr. Joseph Monaco. Dr. Monaco performed an impairment examination and rating for this case after examining Petitioner on October 6, 2017. (RX 1, p. 9) 60% of Dr. Monaco's practice involves IMEs and impairment rating exams and 99% are done at the request of Respondents. (RX 1, p. 5) Dr. Monaco performs approximately 120 such exams a year and charges $1,500.00 per exam, or $375.00 per hour. (RX 1, p. 38) Dr. Monaco charged $2,625.00 for the impairment exam in the present case. (RX 1, p. 38) Dr. Monaco's deposition fee is $750.00 per hour with a two hour minimum charge. (RX 1. P. 38) Dr. Monaco admitted that he makes more money performing impairment ratings and IMEs rather than seeing patients in his private practice. (RX 1, p. 57)

Dr. Monaco testified that when he examined Petitioner she complained of numbness and aching involving the entire left and right hands from the wrists to the fingers. (RX 1, p. 12) Dr. Monaco noted Petitioner's pain was a 6 out of 10 on the day of his exam, and she was taking diclofenac, but her pain could go up to an 8 out of 10 with using her hands. (RX 1, p. 13, 48) Dr. Monaco recorded that Petitioner had difficulty with grasping, lifting, writing, typing. (RX 1, p. 13, 48) Petitioner also complained of her hands going to sleep at night and being awakened from sleep two times a night for tingling and numbness. (RX 1, p. 49)

On examination, Dr. Monaco noted a positive median nerve compression test causing tingling into the 3rd and 4th digits of the left and right hand. (RX 1, p. 15, 50) Dr. Monaco felt the Petitioner's left DeQuervain's or trigger thumb had resolved. (RX 1, p. 18)

Dr. Monaco rated Petitioner's impairment, according to the AMA Guide to Evaluating of Permanent Impairment, Sixth Edition. Dr. Monaco determined that Petitioner's bilateral carpal tunnel syndrome deserved a rating of 2% of the left upper extremity and 2% impairment to the right hand. (RX 1, p. 23- p. 23- 34, Dep. Ex 2, p. 17-19) Dr. Monaco concluded that under the AMA Guides, 6th Edition, that Petitioner's bilateral hand injuries deserved a combined impairment rating of 2% of a body as a whole. (RX 1, 23-34, Dep. Ex. 2 p. 18) Dr. Monaco determined that the left thumb deQuervain's tenosynovitis and trigger thumb was not amenable to rating under the AMA Guide to Evaluating of Permanent Impairment, Sixth Edition. (RX 1, 23-24, Dep. Ex. 2)

Dr. Monaco did not rate the thumb separately because he felt it was captured in the hand impairment rating. (RX 1, p. 46) Dr. Monaco agreed that the 6th Edition Guides did allow for the rating of impairment for tenosynovitis or triggering of the thumb and that Petitioner had been diagnosed with those conditions. (RX 1, p.47)

Dr. Monaco admitted that impairment was not synonymous with disability. (RX 1, p. 7-8, 40) Dr. Monaco agreed that the severity of the EMG findings does not necessarily correlate to the degree of symptoms one experiences. (RX 1, p. 39-40)

Dr. Monaco also claimed to have tested Petitioner's grip strength however he admitted that he never used any devices to measure the grip strength and just had Petitioner squeeze his hand. (RX 1, p. 53) Moreover, Dr. Monaco admitted that he had no baseline grip measurement to compare to his own grip test to determine if there was any change from Petitioner's pre-injury status and grip strength. (RX 1, p. 61)

Dr. Monaco also admitted that the AMA Guide to Evaluating of Permanent Impairment, Sixth Edition did not permit him to consider the post-surgery EMG findings showing continued slowing of the nerve in assessing impairment. (RX 1, p. 60) The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes Petitioner resumed her employment for the Respondent in her previous position. Petitioner stated that there is a portion of her production line that involves only packing ribs into boxes and she performs that work more since it is easier on her hands than bagging the ribs. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 34 years of age at the time of her accident. Petitioner has a substantial amount of her work life remaining. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. Petitioner underwent a left carpal tunnel release on March 14, 2016 and a right carpal tunnel release on March 25, 2016. (PX 3) The surgeries were performed by Dr. Brett Wolters. (PX 3) Dr. Wolters released Petitioner from his care on June 17, 2016. (PX 3)

Petitioner was seen at the plant by Midwest Occupational Health Associates physician Dr. Robert Gordon, the company physician, on June 23, 2016. On that date Dr. Gordon noted Petitioner had a loss of grip strength and left thumb pain. (PX 2) Dr. Gordon injected the left thumb and ordered physical therapy. (PX 2)

Petitioner underwent physical therapy from June 28, 2016 through July 14, 2016. (PX 5) The physical therapy ended on July 14, 2016 and the therapist commented that upon discharge from the physical therapy programs the Petitioner still exhibited decreased grip strength bilaterally, decreased left thumb strength and diminished light touch sensation in the right hand. (PX 5)

On September 1, 2016 Dr. Gordon injected the left thumb again. (PX 2)

On April 19, 2017 Petitioner returned to Dr. Brett Wolters complaining of numbness in Petitioner's right hand with gradually increasing night symptoms. (PX 3) Dr. Wolters recommended repeat EMG/NCV studies. A second EMG was performed by Dr. David Gelber which confirmed the continued presence of mild, residual, bilateral carpal tunnel syndrome. (PX 3)

Dr. Wolters reviewed the EMG findings but did not offer further care apart from medications including diclofenac. (PX 3)

Petitioner continues to experience pain in both hands and swelling in her hands. Petitioner also has noticed a significant drop in her grip strength. Petitioner estimates that she lost approximately 50% of the strength in her hands and has difficulty opening jars or pressing the restraint button for her child's car seat to release her child. The Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of each hand and 5% of the left thumb pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Barbara Beschorner,

Petitioner,

vs. NO: 15 WC 30794

O'Reilly Auto Parts,

19IWCC0040

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 8, 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 $5,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 3 2019
TJT:yl
o 1/14/19
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

BESCHORNER, BARBARA
Employee/Petitioner

Case# **15WC030794**

O'REILLY AUTO PARTS
Employer/Respondent

19IWCC0040

On 2/8/2018, 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 1.65% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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

2904 HENNESSY & ROACH PC
PAUL N BERARD
415 N 10TH ST SUITE 200
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

BARBARA BESCHORNER
Employee/Petitioner

v.

O'REILLY AUTO PARTS
Employer/Respondent

Case # **15** WC **30794**

Consolidated cases: ____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Peoria**, on **January 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

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

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

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

K. [ ] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other ____

FINDINGS

On the date of accident, **07/25/15**, 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 with respect to her right hip *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**45,138.50**; the average weekly wage was $**868.05**.

On the date of accident, Petitioner was **49** years of age, *married* with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0.00**.

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

ORDER

Respondent shall pay Petitioner temporary total disability of $578.69/week for 8 5/7 weeks, commencing 04/19/17 to 06/18/17.

Respondent shall pay reasonable and necessary medical services pursuant to the Medical Fee Schedule for the amounts approved in the Conclusions of law, attached, as provided in Section 8(a) of the Act.

Respondent shall pay for prospective medical as provided in Section 8(a) of the Act.

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

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

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

D. Dylan McCarty

Signature of Arbitrator

2/2/2108

Date

FEB 8 - 2018

Barbara Beschorner vs O'Reilly Auto Parts
15 WC 30794

19IWCC0040

DECISION

FACTS:

Petitioner testified she worked for Respondent as a manager. As part of her duties she had to load batteries into a return gaylord. On July 25, 2015, Petitioner testified she was taking a 35 lb. battery from a shelf and putting it into a gaylord. Petitioner stated she had immediate onset of severe pain in her right hip area, with specific reference to the groin and thigh.

On July 27, 2015, Petitioner prepared an accident report. The accident report states Petitioner was loading batteries into a return gaylord. Petitioner felt a sharp pain in her thigh and groin area. (Px 2) The accident report has an anatomical drawing in which Petitioner circled the right groin/hip area as the body part injured. (Px 2)

Petitioner followed-up with Dr. Bruns for chiropractic treatment on July 26, 2015. Petitioner stated she had significant discomfort, 10 out of 10. Pain consisted of lumbar, right pelvic, right buttocks, right knee, left buttocks and left leg pain. (Px 5)

Petitioner followed-up with Proctor First Care on July 27, 2015. Petitioner states while at work on July 25, 2015, and was loading a 35 lb. battery into a container while she was doing this she felt a pop over the right anterior hip area. Since then it is painful to move her right leg and painful to walk. Petitioner also complained of shooting pains down the groin region and medial aspect of her knee. The pain was intermittent and associated with movement. Her examination revealed pain with motion of the right hip. She had tenderness from the right anterior hip to the medial groin. The medical provider noted the reason for the treatment was a work-related injury. (Px 3)

Petitioner continued to treat with Dr. Bruns. On September 15, 2015, Dr. Bruns wrote a letter to the nurse case manager, Nicki Beebe. Dr. Bruns summarized his medical treatment as treating the Petitioner 3-4 times per week consisting of chiropractic adjustments with adjunctive physical therapies. (Px 5) Dr. Bruns explained Petitioner was working long hours lifting and was not able to take any time off. Dr. Bruns stated he continued this treatment to assist with her recovery and meet work demands. Dr. Bruns felt Petitioner was getting favorable responses to some of her symptoms. (Px 5)

On September 16, 2015, Respondent had a utilization review completed in regard to Dr. Bruns' chiropractic treatment. (Rx 2) The utilization review was not complete due to a lack of medical information. Another utilization review was completed on September 24, 2015. (Rx 2) The utilization review's diagnosis was low back and right hip pain. The

prior 29 chiropractic manipulations with physical therapy and the additional chiropractic manipulations with physical therapy 3-4 times per week was not certified. The only certification was six (6) sessions with physical therapy modalities to the right side of the back, groin, lumbar spine starting on July 26, 2015, was certified. Dr. Bruns filed a timely appeal. (Px 2) A repeat utilization review was completed on October 23, 2015, had the same findings as the prior utilization review. (Rx 3) Timely appeal by Dr. Bruns was filed.

Dr. Bruns evidence deposition was taken on June 13, 2017. (Px 9) Dr. Bruns testified he was a practicing chiropractor and received his chiropractic degree at Palmer College. He stated he had hospital privileges at Proctor, Methodist and Pekin Hospital. (Px 9 pg 4) Dr. Bruns testified Petitioner was a prior patient of his. Dr. Bruns testified the last time he saw Petitioner prior to the accident in question was September 30, 2014. (Px 9 pg 5) Dr. Bruns testified Petitioner did not make any complaints of hip pain or problems at that time. (Px 9 pg 6) Dr. Bruns testified after the accident in question he saw Petitioner on July 26, 2015. Petitioner gave him a history of placing batteries and rotors in return totes and felt sharp, stabbing pain in the right hip from around the groin. (Px 9 pg 8) Dr. Bruns diagnosis was lumbargia, sciatica, lumbar sprain/strain. Dr. Bruns explained his diagnosis was sprain/strain as well as radiation pain down the leg, which he thought was sciatica. (Px 9 pg 8) Dr. Bruns testified to a reasonable degree of chiropractic certainty that the July 25, 2015, accident caused the lumbar and radiating hip pain. (Px9 pg 8) Dr. Bruns testified he did not specifically name the right hip in his diagnosis because Petitioner was complaining of generalized pain coming from the right all the way down the leg. As treatment progressed, Dr. Bruns felt the generalized pain was coming from degeneration of the hip. (Px 9 pg 9)

Dr. Bruns also testified he felt his on-going treatment was important due to the 60 some odd hours she was working to keep her functioning. (Px 9 pg 10) Dr. Bruns testified that one piece of information the utilization reviews failed to take into account was Petitioner's long working hours. He states his treatment was able to maintain her ability to work the long hours she was working. (Px 9 pg12-13) Dr. Bruns felt it was a significant error in the utilization review's analysis.

Dr. Bruns testified on November 11, 2015, he referred Petitioner to Dr. O'Leary, a spine surgeon at Midwest Orthopaedic Center. (Px 9 pg 20) Dr. Bruns testified the reason he referred Petitioner to a spine surgeon was because she was having low back pain radiating down her right hip. Thus, it was unclear to him if she had a low back or a specific hip injury. (Px 9 pg 20)

On March 3, 2016, Petitioner saw Dr. O'Leary at Midwest Orthopaedic Center. (Px 4) She testified that it took a long time for the referral from Dr. Bruns to be approved which was why she hadn't seen Dr. O'Leary earlier. Petitioner gave a history of injuring herself on July 25, 2015, she lifted a battery onto a pallet and developed excruciating pain in her right hip. Dr. O'Leary noted Petitioner had symptoms in her back and also in her hip, but most of the pain was in her right hip. After examination and reviewing x-rays, Dr. O'Leary diagnosed Petitioner with right hip arthritis. He felt her hip injury was

aggravated at work. He said that she had an underlying arthritic condition, but it did not become symptomatic until she was working. He referred the Petitioner to a hip specialist, Dr. Luetkemeyer. (Px 4)

On July 7, 2016, Petitioner followed-up with Dr. Luetkemeyer's physician assistant Isaac Schafer. Petitioner gave a history of having complaints of right hip pain starting when she was working as a manager for the Respondent. She was lifting batteries and felt a snap or pop in her hip and thigh, felt immediate pain and fell. Petitioner stated she had seen a chiropractor who was performing adjustments that helped the pain but was still having significant problems. Physician assistant Isaac Schafer recommended an injection. On September 29, 2016, Petitioner followed-up with physician assistant Isaac Schafer. Petitioner underwent a right intra-articular hip injection with Dr. Colen. Petitioner had short term relief but was returned to baseline after 20-30 minutes. Due to the failed conservative care, including an injection, Dr. Luetkemeyer recommended a total hip replacement surgery. (Px 4)

On May 1, 2017, Petitioner underwent total hip arthroplasty performed by Dr. Luetkemeyer. (Px 4) Petitioner has continued post follow-up visits and her next visit is in March 2018. (Px 4)

On March 14, 2017, Dr. Luetkemeyer's deposition was completed. (Px 7) Dr. Luetkemeyer testified he was an orthopedic surgeon specialized in hip surgery. (Px 7 pg 5) Dr Luetkemeyer testified the first time he saw Petitioner was July 7, 2016, when he took the history Petitioner had injured herself at work and was referred to him by Dr. O'Leary. (Px 7 pg 7) Dr. Luetkemeyer stated Petitioner was lifting batteries with a twisting type injury and felt pain in her hip and thigh area. (Px 7 pg 7) He felt her main complaint was pain in the anterior groin which was worsened with internal rotation. X-rays demonstrated severe osteoarthritis of the right hip. (Px 7 pg 8) Dr. Luetkemeyer recommended a intra-articular injection in the right hip. (Px 7 pg 9) Dr. Luetkemeyer testified to a reasonable degree of medical certainty Petitioner had arthritis in her hip prior to the injury but the injury at work was an acute event that worsened her pain and worsened the chronic nature of the arthritis. (Px 7 pg 9) Dr. Luetkemeyer explained the Petition had no problem with her right hip prior to the accident and then the lifting and twisting accident worsened her condition. (Px 7 pg 10) Dr. Luetkemeyer testified after the injection did not improve her condition he recommended a right hip arthroplasty. (Px7 pg 11) Dr. Luetkemeyer testified to a reasonable degree of medical certainty the work accident caused the need for the hip replacement. (Px7 pg 13) Dr. Luetkemeyer expected Petitioner to be off work 6-8 weeks. (Px 7 pg 15)

Respondent had Petitioner seen by Dr. Li, an orthopedic surgeon, for an independent medical examination and his deposition was taken on April 3, 2017. (Px 1) Dr. Li stated he was given a history of Petitioner working for Respondent as a general manager and part of her duties included installing batteries as well as wiper blades. Petitioner reported on July 25, 2015, she was loading batteries into a return gaylord, which is a box, and felt severe pain in her right hip. After an examination, Dr. Li diagnosed Petitioner with right hip strain superimposed on age-related osteoarthritis and chronic

right side lumbar pain. (Rx 1 pg 11) Dr. Li causally connected the right hip strain to the July 25, 2015, work injury. He did not causally connect the chronic lumbar pain. (Rx 1 pg 12) Dr. Li recommended x-rays.

On July 7, 2016, Dr. Li reviewed the updated x-rays and prepared a addendum report. (Rx 1 pg 13) Dr. Li diagnosed Petitioner with osteoarthritis. He felt it was age related and due to her being overweight. Dr. Li opined the osteoarthritis in her hip was pre-existing but could be aggravated due to certain trauma and mechanism of injury that was severe enough. (Rx 1 pg 14) Dr. Li stated a car accident or if someone fell down significantly and literally jammed their hip it could be a possibility. (Rx 1 pg 14) Dr. Li could not causally connect anything more than hip strain because he felt the mechanism of injury from the July 25, 2015, accident was not significant enough to be a permanent aggravation to necessitate a total hip replacement. (Rx 1 pg 17)

On cross-examination Dr. Li admitted Petitioner had consistent pain complaints from July 25, 2015, until he saw her for his initial IME on May 27, 2016. (Rx 1 pg 20) Dr. Li also testified he felt Petitioner had right hip problems prior to the accident in question. (Rx 1 pg 21) Dr. Li stated when he made his causation opinion he did not know the weight of the battery. (Rx 1 pg 25) He felt the accident in question could have manifested the pain in her hip. (Rx 1 pg 27) Dr. Li also admitted he did not review any prior medical records or x-rays that would show the condition of Petitioner's arthritic hip condition. (Rx 1 pg 31) Dr. Li does not perform hip replacements. (Rx 1 pg 32)

Petitioner testified at trial she was working a substantial amount of hours at work after the accident in question. She stated since the Respondent denied her workers' compensation case she was forced to work long hours as part of her regular work duties. Petitioner stated Dr. Bruns' chiropractic treatment allowed her to maintain this level of function with her hip condition. Petitioner also testified after her hip replacement she has had a good recovery and feel significantly better.

CONCLUSIONS:

F. In support of the Arbitrator's Decision relating to (F) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Petitioner testified at trial on July 25, 2015, she was lifting batteries from a shelf to a tote in a twisting manner and felt severe pain in her right hip/groin area. The accident occurred on a Saturday, and the Petitioner said she was working alone that day. She said the severe pain continued throughout the week-end, and on Monday she notified her district manager of the accident.

She was seen by her chiropractor, Dr. Bruns, on Sunday, July 26. His office notes contain no history of any accident on the previous day. The Petitioner was unable to recall whether she told him about her accident at that time. The office notes from that visit appear to be a continuation of treatment to many parts of the Petitioner's body, including the cervical, thoracic and lumbar spines. The Petitioner does however mention a sharp, stabbing pain from the right thigh to the hip around to the groin. (PX 5)

Her accident report filed on July 27 and her history and findings from the emergency room at Unity Point the same day are consistent with her accident testimony and with an injury to the right hip.

Petitioner testified that she continued to work and continued to have hip pain. She saw Dr. Bruns on multiple occasions, and his notes reflect ongoing treatment for multiple body parts without any direct care of the right hip. He saw her six days in a row beginning on July 26 and his notes appear to be identical for each visit. She did not report or show any improvement. Eventually Dr. Bruns referred her to Dr. O'Leary. This referral was made on November 11, 2015. Unfortunately for the Petitioner, she was not seen until March 3, 2016. However, it is clear from Dr. O'Leary's notes that she had a hip injury which he felt was aggravated by her accident.

The Petitioner was then referred to Dr. Luetkemeyer and had hip replacement surgery. She testified that her condition has gotten much better since surgery and Dr. Luetkemeyer's notes show the improvement. Dr. Luetkemeyer's testimony on causation was like the written opinions expressed by Dr. O'Leary. He felt she had some pre-existing arthritis and her injury lifting the battery worsened her symptoms and condition.

Dr. Li diagnosed Petitioner with a low back and right hip strain. Dr. Li causally connected the right hip strain to the work accident in question. Dr. Li did not causally connect the need for the hip replacement to the accident in question. Dr. Li felt the mechanism of injury was not significant enough to cause the permanent aggravation of the hip condition. Arbitrator does note Dr. Li admitted he did not know the weight of the battery when he made his causation opinion. Also, Dr. Li assumed Petitioner was having right hip issues prior to the accident in question. This is rebutted by Dr. Bruns' testimony. Finally, Dr. Li could not explain the Petitioner's on-going hip problems nine (9) months after the accident in question. If it was a temporary aggravation of the arthritic condition and a hip strain, the pain complaints would have subsided.

There was no evidence that the Petitioner had prior hip treatment in the areas where she complained of after the accident in question. There were no gaps in her complaints and treatment post- accident which weren't adequately explained.

Based on the foregoing, the Arbitrator finds Dr. O'Leary and Dr. Luetkemeyer's opinions on causation more persuasive than Dr. Li's. Thus, Arbitrator finds Petitioner's injuries and the need for hip replacement are related to the July 25, 2015, work accident.

For reasons which will be discussed below, the Arbitrator does not believe the accident was causally related to any type of lower back injury. Her initial complaints, mentioned above, all focused on her hip.

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

The findings and conclusions of the Arbitrator relating to the issue of causation are adopted and incorporated herein.

The Petitioner introduced evidence of the following medical expenses:

Provider	Charges
Dr. Bruns #18176 7/26/15-4/18/17	$ 64,777.12
Proctor First Care East Peoria #400036030 7/27/15	$ 269.60
MWO #333049 3/3/16, 7/7/16 & 8/25/16	$ 999.00
MWO #333049 9/29/19, 4/5/17, 4/19/17, 7/13/17	$ 6,853.10
UP Methodist 4/6/17 #330180631	$ 1,567.10
UP Methodist #329411943 4/19-20/17	$ 61,243.60
Methodist Anesthesiologists Services #4450-329411943.1 4/19/17	$ 3,600.00
Specialists in Medical Imaging #76696-SMIG 7/27/15 & 4/6/17	$ 129.00
TOTAL:	$139,438.52

The Arbitrator does not believe that the majority of Dr. Bruns' treatment to be reasonable in light of the utilization reviews. The first six visits, which were certified, are reasonable though they were aimed at the wrong parts of the Petitioner's body. It is

understandable, given the Petitioner's prior back problems, for the doctor to initially feel that the back was the source of her symptoms. However, given the fact that she showed no improvement, the Arbitrator agrees with the utilization review opinions. The Arbitrator further does not believe the majority of Dr. Bruns' care was for injuries causally related to the accident. He was primarily treating her spine and her injury was to her hip.

The medical bills from Dr. Bruns after July 31, 2016 are not the Respondent's responsibility. The remainder of the above bills are to be paid, pursuant to the Fee Schedule.

K. In support of the Arbitrator's Decision relating to (K) What temporary benefits are in dispute, TPD/Maintenance/TTD, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to causation are adopted and incorporated herein.

The parties stipulate the Petitioner was temporarily totally disabled from April 19, 2017, to June 18, 2017. Based on the Arbitrator's findings in regard to causation, the Arbitrator awards 8 5/7 weeks of TTD commencing April 19, 2017, to June 18, 2017.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

[X] 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	[X] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Czeslaw Wynimko,
Petitioner,

vs.

NO: 10 WC 46490
19IWCC0041

Midwest Masonry Inc.,
Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 1, 2016 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: JAN 2 3 2019

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CJD/rlc
049

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WYNIMKO, CZELAW
Employee/Petitioner

Case# **10WC046490**

MIDWEST MASONRY INC
Employer/Respondent

19IWCC0041

On 6/1/2016, 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 0.47% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0786 BRUSTIN & LUNDBLAD LTD
CHARLES E WEBSTER
10 N DEARBORN ST 7TH FL
CHICAGO, IL 60602

0075 POWER & CRONIN LTD
DANIEL J ARTMAN
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Czeslaw Wynimko
Employee/Petitioner

v.

Midwest Masonry, Inc.
Employer/Respondent

Case # **10 WC 46490**

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 **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **February 17, 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 *August 16, 2010*, 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.

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

In the year preceding the injury, the Petitioner earned $**14,901.00**; the average weekly wage was $**1,490.10**.

On the date of accident, Petitioner was **57** years of age, *married* with **0** children under 18.

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

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

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

ORDER

The Arbitrator finds that Petitioner failed to prove that he suffered an accidental injury which arose out of and in the course of his employment with Respondent. In addition, Petitioner has failed to prove a causal relationship between his condition of ill-being and his work for Respondent. Therefore, all benefits are denied.

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

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

Deborah L. Simpson

Signature of Arbitrator

June 1, 2016
Date

JUN 1 - 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Czeslaw Wynimko,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 10 WC 46490
	)	
Midwest Masonry,	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on August 16, 2010, the 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 that in the year preceding the injuries, the Petitioner earned $14,901.00, and that his average weekly wage was $1,490.10.

At issue in this hearing is as follows: (1) Did an accident occur that arose out of and in the course of the Petitioner's employment with Respondent; (2) Was timely notice of the accident given to Respondent; (3) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (4) Is Petitioner entitled to TTD; (5) Has the respondent paid all appropriate charges for all reasonable and necessary medical services (Respondent denies liability); and (6) What is the nature and extent of the injury.

The Petitioner does not speak English, his native language is Polish. He testified with the assistance of Adam Klecyngier, an interpreter who has been certified for medical interpretation for 10 years and who worked for multiple agencies during that time. He is currently training for court interpretation and has been working as an interpreter in Du Page county for the past four years. He translates Polish to English and English to Polish in those positions. After being duly qualified and accepted by both parties as an interpreter Mr. Klecyngier served as an interpreter for the Petitioner.

STATEMENT OF FACTS

The Petitioner is a mason; he is a member of Mason's Union, Local 21. As a mason, Petitioner testified that he lays bricks and blocks. He was working for the Respondent on August 16, 2010, lifting buckets all day which he claimed weighed over 50 pounds each. He stated that it was very hard. Petitioner testified that he used Petitioner's exhibit number 11, a green plastic bucket from Menards to determine how much the material he was lifting weighed.

He obtained the bucket from Menards. According to the Petitioner it is the same size bucket he was using working for Respondent. He bought two bags of concrete at Menards, mixed it with water in the bucket and weighed it. He marked the bucket with tape and markers, indicating where to fill the bucket so that it weighs thirty-five pounds, the line with one stick person denotes where it is thirty-five pounds and can be lifted by one person, over that line according to the Petitioner two people are needed to lift the bucket.

Petitioner testified that before August 16, 2010 he had no prior accidents and no prior pain. He was able to do his job. He did have a work accident in 2003 when the strap on the bricks he was carrying broke and he fell, landing on his back. After the accident the Petitioner took pills and had massages and was able to work as a mason from 2004 through 2008.

According to the Petitioner, on August 16, 2010, he was lifting buckets of grout from 6:30 a.m. to 2:30 p.m. and he lifted two hundred buckets, maybe more. He was pouring the grout on the bricks and blocks to make them solid. He had to lift the bucket to his chest, and then up over his head to tip the bucket and pour it. Petitioner stood up with the bucket demonstrating dumping it on the desk of the Arbitrator several times. August 16, 2010, was an unusually heavy day for the Petitioner according to his testimony. After working that day the Petitioner noticed that his back was very sore and he felt that he would need to see a doctor. He stated that his leg was numb, on the left side very painful and he had cramps on the right leg.

On August 17, 2010, a Tuesday, the Petitioner went to work for the Respondent. On that day they were working with bricks, not cement or grout. Petitioner also worked on Wednesday August 18, half of the day working with bricks and the other half of the day working with blocks. When Petitioner went to work on Thursday, August 19, 2010, the foreman, Edward Mucha, told the Petitioner to grout the bricks. The Petitioner stated that from 6:30 a.m. until 12:00 he was lifting buckets of grout weighing fifty-six to fifty-eight pounds. At noon time he went to his foreman, Mr. Mucha and told him his back hurts and he cannot work anymore. Petitioner's friend took his bag from the scaffold and Petitioner stated that he went to see the doctor. According to the Petitioner he asked Mr. Mucha to prepare an injury report, but Mr. Mucha told him that Wesley is the superintendent and he would write the report when he got there, he would be there some time before the end of the day. According to the Petitioner he was told to call at the end of the day and find out what happened. He stated that when he called that night he was told by Wesley that there was no ambulance, there was no accident, I am not writing a report.

On cross examination the Petitioner testified that he had worked for the Respondent a few days the week before the accident, he thinks it was August 12, 13 and 14.

Mr. Mucha was called to testify by the Respondent. He testified that Petitioner made no reference to any work related injury on August 19, 2010, when he left early for the day. He stated that the Petitioner told him it was a very hot day and that he had not worked as a mason for some time and he was getting tired.

The Respondent showed the Petitioner the Weekly Time Sheet which reflects that Petitioner worked eight hours on August 16, 17, and 18 and worked five and a half hours on August 19. (RX7) The Employee Safety Logs reflect that Petitioner signed each log in the

column titled "not injured" for the week of August 16. (RX8) The Petitioner is a native Polish speaker, the Daily Safety Logs are written in English, Spanish, and Polish. The Petitioner agreed that it was his signature on the time sheet and the safety log and that he did sign in the portion of the sheet where it stated not injured. Petitioner explained this inconsistency away by claiming that he was told that if he signed that he was injured, he would be terminated from his job. The August 16, 2010 document reflects that an employee did sign out as being injured. (RX 8) Mr. Mucha testified that that person was not terminated by Midwest Masonry and continued to work for Midwest Masonry for years after the alleged injury before he went to work for another employer.

A review of the medical records establishes that the Petitioner saw his treating physician, Dr. Roman Dachewycz, on September 22, 2009, nearly 11 months before his claimed work accident. At that time, he made the following complaints: low back pain; and symptoms radiating into both legs. (RX 9)

Dr. Dachewycz's records reflect that he told Petitioner on September 30, 2009 that Petitioner should either be off work or work with the following restrictions: no lifting, no bending and no straining of spine. (RX9) At the hearing the Petitioner denied this conversation took place.

Petitioner returned to Dr. Dachewycz on August 10, 2010. At this time, he made the following complaints: bilateral leg pain, bilateral leg numbness, his right leg felt weak and his right leg would buckle. (PX1, RX9) At that visit Dr. Dachewycz told Petitioner that he should avoid bending, lifting and straining of his spine. He was also referred to Dr. Sobczak for an EMG on that date. (Id.)

Between his August 10, 2010 visit with Dr. Dachewycz, and his August 23, 2010 visit with Dr. Sobczak, Petitioner returned to work at Midwest Masonry. Petitioner testified that he saw Dr. Dachewycz on August 20, 2010. According to the Petitioner, when he went to the doctor on August 20, 2010, Dr. Dachewycz, gave him stronger pills and a referral to the physical therapist. According to the Petitioner at that time he was told that he cannot go to work, cannot work anywhere, that he needed surgery otherwise he would be in a wheelchair. This visit, conversation and the medication and physical therapy recommendation are not contained in the medical records that were offered into evidence by the Petitioner or the Respondent. This office visit is not documented in any of the medical bills submitted at trial. There is a notation dated August 20, 2010 which states that: "Pt. came in requesting an off work note until his next appt. 9/7/10 because he is still in pain and he did not have his EMG yet." (RX9) There is no reference to a work related injury in August of 2010. The note references that Petitioner is still in pain as he was when he saw the doctor on August 10. It also references the EMG which was recommended before the claimed work injury.

Petitioner saw Dr. Sobczak on August 23, 2010; her records reflect that Petitioner did not provide any information or reference to a work related injury on August 16, 17, 18, or 19, 2010. Dr. Sobczak's records state the following: His symptoms started seven years prior; He had low back pain with radiation into the right lower extremity which have been worse in the past year; The pain was described as sharp going down from the buttock to the right knee area; Petitioner described numbness and tingling in the same area, when walking he tends to drag his right lower extremity; and Numbness and tingling on and off on the top of his right foot. (RX5)

According to the Petitioner, Dr. Sobczak speaks Polish and Petitioner communicated with Dr. Sobczak in his native language. Her records make no reference to a work related injury. According to the information provided by the Petitioner the symptoms have been getting worse over the previous year, around the time when Petitioner was seen by Dr. Dachewycz in September 2009. (RX 5)

Petitioner returned to Dr. Dachewycz on September 7, 2010. His complaints were similar to those he made in September 2009 and on August 10, 2010. He was referred for a MRI. That MRI was completed in 2010. When compared to the August, 2009 MRI the 2010 showed no changes in Petitioner's lumbar spine according to the doctors.

Petitioner was eventually seen by Dr. Wesley Yapor in 2014. Dr. Yapor's medical records reflect a history of Petitioner complaining of back pain for several years after blocks fell on his back. There was no reference made to an August, 2010 accident or work-related incident. (PX7, RX6) Dr. Yapor's note of April 29, 2014 reflects that Petitioner has been "having back pain since 2003 and has been getting worse especially over the last few months." Petitioner testified that he has not worked since August 2010, over 3 years.

It is noted that Petitioner filed an Application for Adjustment of Claim for a February 3, 2003 accident under case number 12 WC 9474 wherein Petitioner injured his low back. (RX10)

Petitioner was examined at the request of the Respondent by Dr. Thomas Gleason, a board certified orthopedic surgeon, on December 13, 2013, pursuant to Section 12 of the Act. According to Dr. Gleason, the findings on the MRIs of the lumbar spine both before and after the alleged August 10 incident do not reflect any change in the condition of Petitioner's spine. There is no causal relationship between the condition of Petitioner's lumbar spine and any work incident of August 2010 or Petitioner's work for Midwest Masonry. Petitioner's work with Midwest Masonry did not exacerbate or accelerate Petitioner's lumbar spine condition. The EMG reflected chronic findings, consistent with many years of symptoms before 2010, and any treatment or time Petitioner lost from work would not be related to any claimed work injury with Midwest Masonry. (RX1, RX2)

The Respondent also had Petitioner's records reviewed by Dr. R. Hennessy, a board certified orthopedic surgeon. Dr. Hennessy opined as that: Petitioner has a Grade II spondylolisthesis which represents a significant slippage. It is highly likely that the spondylolisthesis predated even 2009 by several years. There is no causal relationship between Petitioner's condition of ill being in his lumbar spine and his work for Midwest Masonry. There were no interval changes between the "pre" and "post" August 2010 MRIs. Any treatment or time off would not be related to any work-related incident with Midwest Masonry. (RX3, RX4)

In his evidence deposition Dr. Dachewycz, Petitioner's treating physician testified that Petitioner's work with Midwest Masonry aggravated or exacerbated his preexisting condition. However, as reflected in Petitioner's testimony, his medical records and Dr. Hennessey's report and deposition, Petitioner had the same symptoms both before and after any claimed August 16, 2010 incident. Additionally, the restrictions that Dr. Dachewycz placed upon the Petitioner were substantially the same on September 30, 2009 and on August 10, 2010, before the claimed accident of August 16, 2010. The Arbitrator finds that Dr. Dachewycz's opinion is not supported by any of the medical records admitted as evidence.

The Petitioner testified that he has not returned to work since August 20, 2010 because Dr. Dachewycz told him not too. There are no off work slips in the medical records to support this testimony. He stated that he went for the MRI and has been careful with his back since that time. He walks with a cane because the doctor told him too. He had physical therapy and was taking Norco three times a day. At physical therapy they had him riding a bike, walking massaging him and giving him an electric current. He stated that after the physical therapy he felt good for a few days. He still does the exercises. He reported that currently he cannot lift anything heavy; he was told by a doctor not to lift more than six pounds. He cannot work as a mason because the job is too heavy. He cannot walk more than six or seven minutes, he must stop and rest; when standing still he has to shift his weight. He still receives physical therapy twice a week, is paying for it out of his pocket.

At the hearing the Petitioner did not appear to have any difficulty moving around. He was up out of the chair several times, lifting the empty green bucket, PX 11, from the floor to his chest, then shifting his hands and lifting it over his head before turning it upside down as if emptying it on the Arbitrator's desk. He was bending without difficulty, moving in the chair and pounding on the desk without any difficulty.

CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987).

Longstanding Illinois law mandates a claimant must show that the injury is due to a cause connected to the employment to establish it arose out of employment. *Elliot v. Industrial Commission*, 153 Ill. App. 3d 238, 242 (1987).

The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission*, 44 Ill. 2d 214 (1969).

The burden of proving disablement and the right to temporary total disability benefits lies with the Petitioner who must show this entitlement by a preponderance of the evidence. *J.M. Jones Co. v. Industrial Commission*,71 Ill.2d 368, 375 N.E.2d 1306 (1978)

In support of the Arbitrator's decision with regard to whether Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent, and whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

The Petitioner has failed to prove by a preponderance of the evidence that he sustained an accidental injury that arose out of and in the course of his employment and that his current condition of ill being is causally related to the claimed work accident. The Petitioner testified that he worked for the Respondent on August 12, 13, and 14 of 2010 and again on August 16, 17, 18, and 19 of 2010. The Petitioner testified that he did not have any problems or pain with his back prior to the 16th of August when he lifted two hundred or more buckets of grout weighing 50 pounds. However the medical records admitted by the Petitioner and the Respondent indicate that the Petitioner sought medical treatment for his back and legs on August 10, 2010, two days before he worked for the Respondent and six days before the claimed accident. Petitioner's MRI of one year before the claimed accident is identical in the findings to the MRI taken one month after the claimed work accident. (PX6, RX1, RX3)

The Petitioner was told, by Dr. Dachewycz, on two separate occasions, that he should avoid the heavy type of work associated with being a mason. This occurred before Petitioner returned to work at Midwest Masonry. This is indicative of the fact that Petitioner's condition had deteriorated to such degree that he was incapable of doing his job as a mason safely. Petitioner testified that Dr. Dachewycz never told him this before August 16, 2010. However, the records of Dr. Dachewycz reflect that he did. (RX9) Petitioner attributes Dr. Dachewycz statement that he should not work as occurring on August 20, 2010, and that it was he cannot work at all, anywhere. This opinion, advice or medical order is not reflected in the notes from the contact that the Petitioner had with Dr. Dachewycz's office on August 20, 2010.

The medical records of Dr. Sobczak do not support the Petitioner's claim of a work injury either. The Petitioner was seen by Dr. Sobczak on August 23, 2010, one week after his claimed work accident. Dr. Sobczak's records reflect no notation of a claimed work injury on August 16, 2010. This appointment, with Dr. Sobczak, was recommended after the August 10 visit with Dr. Dachewycz which predates Petitioner's work with Respondent. (RX5) The Petitioner told Dr. Sobczak the following: his symptoms started seven years prior and he had low back pain with radiation into the right lower extremity which has been worse in the past year. The EMG of August 24, 2010, which was completed 8 days after the purported accident, shows chronic radiculopathy. (PX2)

The records from Dr. Yapor and the postoperative physical therapy both reflect the history given by Petitioner with reference to the 2003 injury that Petitioner testified to, however there is no reference made to a 2010 injury. (PX7, RX9, RX6)

The Petitioner signed daily logs on August 16, 17, 18, and 19 stating that he was not injured. (RX 8) The Arbitrator finds the Petitioner's attempt to explain away this fact to be not credible.

Based on the above, the Arbitrator finds the Petitioner did not suffer an accident arising out of and in the course of his employment with the Respondent and there is no causal relationship between his claimed work injury and his current condition of ill-being.

In support of the Arbitrator's decision with regard whether Petitioner gave timely notice of the accident to Respondent, whether Petitioner is entitled to TTD, whether the Respondent is responsible for payment of the outstanding medical bills and the nature and extent of the injury the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment with Respondent therefore the above listed issues are moot.

ORDER OF THE ARBITRATOR

The Petitioner failed to prove a compensable accident within the meaning of the Act. Benefits requested pursuant to Section 8 are therefore denied.

Deborah L. Simpson
Signature of Arbitrator

May 31, 2016
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 MCHENRY)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jason Saunders,

Petitioner,

vs. NO: 13 WC 25692

Creekside Tree Service, Inc.,

19IWCC0042

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 17, 2017 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.

19IWCC0042

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

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

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

DATED: JAN 23 2019

o011619
CJD/rlc
049

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

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

SAUNDERS, JASON
Employee/Petitioner

Case# **13WC025692**

CREEKSIDE TREE SERVICE
Employer/Respondent

19IWCC0042

On 5/17/2017, 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 1.02% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0013 DUDLEY & LAKE LLC
THOMAS M LAKE
325 N MILWAUKEE AVE SUITE 202
LIBERTYVILLE, IL 60048

0507 RUSIN & MACIOROWSKI LTD
EVAN KLUG
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF MCHENRY)

- [ ] 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)

Jason Saunders
Employee/Petitioner

Case # **13** WC **25692**

v.

Creekside Tree Service
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Woodstock**, on **April 6, 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. [ ] Were the 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, **July 2, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**50,000.08**; the average weekly wage was $**961.54**.

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

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

Respondent shall be given a credit of $**117,217.21** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $**117,217.21**.

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

ORDER

Respondent shall authorize and pay the reasonable, necessary, and causally related medical expenses associated with the prospective medical treatment recommended by Dr. Avi Bernstein in the nature of a L5-S1 lumbar fusion.

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

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

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

Arbitrator Anthony C. Erbacci

May 15, 2017
Date

MAY 17 2017

FACTS:

On July 2, 2013 the Petitioner sustained undisputed accidental injuries arising out of and in the course of his employment with the Respondent as an arborist. The Petitioner testified, and the records demonstrate, the Petitioner was struck in the back by a large tree limb that had been cut from a tree. The Petitioner estimated the weight of the tree limb to be approximately 3,000 pounds.

As a result of the tree falling on Petitioner, he sustained injuries to his left ankle and left knee, rib fractures, vertebral fractures and a spleen injury. He has undergone multiple operations including three to his left ankle and one to his left knee as well as a splenectomy. The Petitioner testified that he is awaiting a final surgery on his ankle, which would be a fusion, but that he is trying to put off that fusion surgery for as long as he is able.

The Petitioner testified that he had no problems or issues with his low back prior to working for the Respondent and that he was not restricted at any time for his low back nor had he sought any sort of medical treatment for his low back before this incident. Initially after the accident, the Petitioner was not mobile and the focus of his medical attention was directed to his ankle and knee. He underwent the multiple surgeries to these body parts and ultimately became weight bearing. The Petitioner testified that it was upon engaging in weight bearing activities that he began to feel pain and discomfort in his low back shooting down his left leg. THe Petitioner testified that, before that time, the pain in his spine was more associated with the upper spine due to the fractures. That upper spine pain ultimately subsided leaving the low back pain as the prominent pain in his spine.

As a result of his low back and left leg pain, the Petitioner sought treatment from Dr. Avi Bernstein. His first treatment was September 12, 2013 and his last visit was January 11, 2016. Prior to seeing Dr. Bernstein, the Petitioner engaged in physical therapy for all body parts that were injured in the accident including his back. When he saw Dr. Bernstein, he was sent back to physical therapy for his low back. He also received a series of three epidural injections to his low back. The Petitioner testified that none of the conservative treatment to his low back resulted in any permanent relief of his pain. The Petitioner also testified that the significant pain medication that he was taking after his accident led to pancreatitis which required him to be hospitalized for a week. He testified that ever since then, he has been reluctant to take pain medication.

The Petitioner has also undergone a series of diagnostic tests including a lumbar MRI, a lumbar CT scan and a lumbar discogram. The discogram was performed by Dr. Strimling in December of 2015. The Petitioner testified that he vividly remembers the discogram as he received two injections. The first injection resulted in no pain. The second injection resulted in severe pain. The Petitioner testified that he related this severe pain complaint to Dr. Strimling and that he continued to experience severe low back pain for about a week following the injection.

After the discogram, the Petitioner returned to see Dr. Bernstein and the option of a lumbar fusion surgery was discussed. The Petitioner testified that he would like to undergo the surgery recommended by Dr. Bernstein with the hope that it will alleviate or eliminate his low back and left leg pain and allow him to return to work and to resume normal daily activities.

Since the accident, Petitioner has been under a number of work restrictions including restrictions from Dr. Bernstein. This has prevented him from returning to work for the Respondent.

He did work for the Respondent for about six months on a desk duty job from January through June of 2014. Since June of 2014, he has not worked for the Respondent due to his restrictions.

The Petitioner testified that he currently continues to experience constant and chronic pain in his low back and left leg. He testified that the pain is manageable when he is inactive but the pain increases and becomes severe with physical activity or prolonged standing or walking. The Petitioner testified at hearing and reiterated his desire to have the lumbar fusion surgery that Dr. Bernstein has recommended.

The deposition testimony of Avi Bernstein, M.D., was admitted into the record as Petitioner Exhibit 1. Dr. Bernstein, a board certified orthopedic surgeon whose practice concentrates in spine surgeries, testified that he is recommending a lumbar fusion surgical procedure for the Petitioner. Dr. Bernstein testified as to the history of injury he was provided and the course of treatment he rendered to the Petitioner. Dr. Bernstein testified as to the Petitioner's complaints of pain and the diagnostic tests that were performed. Dr. Bernstein testified that a lumbar spine MRI that was performed on the Petitioner on October 13, 2014, identified a degenerative disc at the L5-S1 level and was suggestive of a tear in the wall of the disc. Dr. Bernstein opined that the tear in the disc wall was a potential pain generator for the Petitioner and was causally related to the work accident. Dr. Bernstein testified that the Petitioned continued to complain of low back pain in a location that comported with the MRI findings at the L5-S1 level and that he then discussed surgery with the Petitioner. Dr. Bernstein indicated that the Petitioner's complaints of pain had been consistent throughout his treatment were consistent with a problem with the L5-S1 level verified by the MRI scan. Dr. Bernstein also testified that a discogram and CT scan performed on the Petitioner by Dr. Strimling on December 22, 2015 demonstrated a degenerative disc at the L5-S1 level with an annular tear. Dr. Bernstaien believed that the dye leaked through the annulus confirming the findings made on the MRI scan. Dr. Bernstein testified that, even though the discogram did not reproduce typical pain at the L5-S1 level, it produced severe pain, which was consistent with his opinion that the L5-S1 level was in fact the pain generator level for the Petitioner.

Dr. Bernstein testified that he last saw the Petitioner on January 11, 2016 and the Petitioner continued to complain of low back pain. Dr. Bernstein testified that he reviewed the discogram with Petitioner at that visit and that he felt that the discogram confirmed the L5-S1 level as the pain generator. Dr. Bernstein testified that as of the January 2016 visit, he was still recommending lumbar fusion surgery for the Petitioner.

Dr. Bernstein opined that the need for the lumbar fusion surgery at the L5-S1 level that he has prescribed for the Petitioner is causally related to the work accident reported to him by the Petitioner. Dr. Bernstein also opined that the medical treatment he rendered to the Petitioner, along with the diagnostic tests, physical therapy, and injections, were all reasonable methods of treating the work related accident and were directly related to the work accident. Dr. Bernstein testified that the Petitioner has gone through the appropriate course of conservative care and has exhausted all conservative measures. Dr. Bernstein opined that the Petitioner meets the criteria for a patient requiring a lumbar fusion surgery at the L5-S1 level insofar as Petitioner has chronic and continuous low back pain that interferes with the quality of his life and functional abilities and he has exhausted conservative care. Dr. Bernstein further opined that if the Petitioner does not undergo the lumbar fusion, he will likely have chronic low back pain which is not going to change in any appreciable way and that the Petitioner will likely not return to any significant physical work. Dr. Bernstein testified that

performing the lumbar surgery will, hopefully, eliminate the Petitioner's pain and allow the Petitioner to return to work.

The deposition testimony of Edward Goldberg, M.D., was admitted into the record as Respondent's Exhibit 1. Dr. Goldberg, an orthopedic spine surgeon, examined the Petitioner at the Respondent's request on October 2, 2015. Dr. Goldberg testified that he reviewed the Petitioner's lumbar MRIs, which identified a generative disc with a high intensity zone at the L5-S1 level, and that he recommended a diagnostic discogram to determine whether concordant pain could be reproduced with the injection of dye into the disc. Dr. Goldberg testified that he reviewed the discogram report prepared by Dr. Strimling and that he did not feel that the degenerative disc at the L5-S1 level was the source of the Petitioner's back pain and he, therefore, did not recommend a lumbar fusion surgery. Dr. Goldberg testified that he relied upon Dr. Strimling's interpretation that the discogram injection at the L5-S1 level did not produce concordant pain and Dr. Strimling's indication that he could not conclude that the L5-S1 level was the pain generator. Dr. Goldberg opined that the Petitioner's medical care and treatment rendered to the Petitioner was reasonable and appropriate and that the Petitioner's low back pain and left leg radicular pain complaints are causally related to the work accident.

CONCLUSIONS:

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

Based on the Petitioner's testimony and the medical records introduced by Petitioner, as well as the testimony of Dr. Avi Bernstein, the Arbitrator finds that there is a causal connection between the work accident and Petitioner's injuries and current condition of ill being. The Arbitrator notes that as a result of the work accident, Petitioner suffered a multitude of injuries. The focus of this hearing was on Petitioner's lumbar spine and particularly the L5-S1 area. Dr. Avi Bernstein, a board certified orthopedic spine surgeon, testified that the Petitioner injured his lumbar spine as well as his L5-S1 disc as a result of the tree limb falling on him and Dr. Bernstein causally relates the Petitioner's low back pain and left leg pain directly to the work accident. Dr. Bernstein has reviewed the MRI and CT scans as well as the discogram that was taken by Dr. Strimling and he testified that all of these diagnostic tests point to the same area as a pain generator which would be the L5-S1 level. He testified that these tests confirm and are consistent with the Petitioner's current complaints of pain and he opined that these complaints of pain are directly related to the Petitioner's work accident. As a result of these complaints of pain, Dr. Bernstein has placed work restrictions upon the Petitioner which are directly related to the work accident and has prescribed a lumbar fusion surgery for the Petitioner. While the Arbitrator does note the testimony of Dr. Goldberg, the Respondent's examining physician, who opined that a lumbar fusion surgery for the Petitioner was not recommended, the Arbitrator notes that Dr. Goldberg did conclude that the Petitioner's complaints of pain are a result of the work accident. Dr. Goldberg also conceded that the diagnostic tests confirm an anomaly at the L5-S1 level confirming a degenerative disc as well as a high intensity zone at that level. Like Dr.

Bernstein, Dr. Goldberg also believes that Petitioner requires work restrictions specifically for his low back.

Based on the testimony of Petitioner, Dr. Avi Bernstein and Dr. Edward Goldberg, the Arbitrator finds a causal connection exists between the Petitioner's current condition of ill-being and the work accident of July 2, 2013.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

Based on the Petitioner's testimony as well as the testimony of Dr. Avi Bernstein, the Arbitrator finds that the Petitioner is entitled to prospective medical treatment pursuant to Section 8(a) of the Act. Specifically, the Arbitrator finds that the Petitioner is entitled to and the Respondent is responsible to pay for the surgical procedure recommended by Dr. Avi Bernstein which is the lumbar fusion at the L5-S1 level. In arriving at this conclusion, the Arbitrator finds Dr. Bernstein' s testimony and opinions to be more persuasive than the testimony and opinions of Dr. Goldberg. The Arbitrator notes that the disagreement between the opinions of Dr. Bernstein and Dr. Goldberg in the instant matter centers around a single test known as a discogram. The discogram was noted to have produced severe pain at the L5-S1 level which Dr. Strimling indicated was "atypical". Dr. Bernstein construed this as identifying and confirming that the L5-S1 level was the pain generator. Dr. Goldberg felt that since the pain was reported as "not typical" and since Dr. Strimling reported that he could not conclude that this was the source of the Petitioner's pain, the fusion surgery was not appropriate. Dr. Goldberg did, however, conceded that reasonably well qualified physicians can differ on how to interpret the discogram and whether the discogram truly confirms the L5-S1 level as the pain generator. Dr. Bernstein was very sure of himself that the discogram, in fact, did confirm the L5-S1 level as the pain generator. Moreover, Dr. Bernstein concluded that the MRI scans, the CT scans and his overall physical examination of the Petitioner further confirmed symptoms that were consistent with discogenic pain at the L5-S1 level and furthermore consistent with the L5-S1 level being the pain generator.

The Petitioner testified that he is in daily pain and discomfort in his low back and left leg which increases with activity. This pain, according to Dr. Bernstein, will not improve absent surgery. Petitioner's inability to perform physical work will not change absent a surgical procedure. The surgical procedure offered by Dr. Bernstein is the only reasonable opportunity for the Petitioner to get back to work and lead a more normal pain free life. Even Dr. Goldberg concedes that the Petitioner will have permanent restrictions relative to the lumbar spine if surgery is not performed. There is no dispute that all conservative measures including physical therapy and injections have been exhausted and none of these conservative measures have appreciably improved Petitioner's lumbar condition. Therefore, the Arbitrator finds that the lumbar fusion surgery prescribed for the Petitioner by Dr. Bernstein is reasonable, necessary, and causally related medical treatment for which the Respondent is liable. The Arbitrator specifically finds that the Petitioner is entitled to prospective medical treatment pursuant to Section 8(a) of the Act in the nature of a lumbar fusion surgery at the L5-S1 level.

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 DUPAGE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Egas,
Petitioner,

vs. NO: 16 WC 5103

AMR Furniture Repair,
Respondent,

19IWCC0043

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed 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 $5,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 3 2019

o121918
CJD/rlc
049

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

EGAS, JOHN
Employee/Petitioner

Case# **16WC005103**

16WC005928

AMR FURNITURE REPAIR
Employer/Respondent

19IWCC0043

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:

0274 HORWITZ HORWITZ & ASSOC
TYLER BERBERICH
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0000 HOLECEK & ASSOCIATES
MONICA DEMBNY
215 SHUMAN BLVD SUITE 206
NAPERVILLE, IL 60563

19IWCC0043

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

John Egas
Employee/Petitioner

Case # **16** WC **5103**

v.

Consolidated cases: **16 WC 5928**

AMR Furniture Repair
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 **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Wheaton**, on **March 21, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 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 in part*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**31,441.00**; the average weekly wage was $**604.63**.

On the date of accident, Petitioner was **54** 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 reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,142.00 to Chicago Ridge Medical Imaging, and $105.00 to Loyola University Medical Center, 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.

Respondent shall pay Petitioner permanent partial disability benefits of $362.78/week for 10 weeks, because the injuries sustained caused the 2% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

June 4, 2018
Date

JUN 5 - 2018

ICArbDec p. 2

Statement of Facts

This matter was heard in conjunction with consolidated case 16 WC 5928 (DOA: January 26, 2016). A single transcript was prepared but the Arbitrator has issued separate decisions for each case number.

Petitioner John Egas testified that he was employed by Respondent AMR Furniture Repair doing furniture repair. As of November 2015, he had been so employed for approximately 2 years. He testified that his job duties included repairing scratches on wood or leather, repairing cuts, tears, broken frames on sofas, bed frames. He also cleaned furniture. He would have to lift furniture and sometimes turn it over. The furniture could weigh 50 to 100 pounds. He had to lift and carry the cleaning machine which would weigh about 50 pounds. He would use hand tools daily.

Petitioner testified he had a previous surgical procedure on his low back in the late 1990s. He had no further back treatment until after November 28, 2015. He had no other back injuries and had no work restrictions for his lower back. Petitioner testified that prior to January 26, 2016, he had no medical treatment or restrictions with respect to his neck, right wrist or hand. Petitioner was convicted of bank robbery in 2001 (RX 5).

He testified that on November 28, 2015, he was putting the cleaning machine into the van. He was at his home. He needed to lift the machine about 2 feet when he felt a pain in his lower back. He did not work that day. He told Jill what happened. Petitioner testified he was injured on Saturday. This was the Thanksgiving weekend. He believes he was scheduled to work on Friday but he did not. He does not remember the reason he did not work. He could not remember if he went out of town. He rested at home on Sunday and went to the Loyola Immediate Care on Monday. He is not scheduled to work on Mondays.

Jill Leitelt testified that she is manager of Respondent. Her father owns the company. Respondent's business is to go into consumers' homes and repair furniture. Her duties include overseeing reports to companies they work for, getting jobs and scheduling the technicians. Respondent has 7 technicians including Petitioner. When work orders come in, they are put on a map and depending on the location, they are slotted to the technician who works that area. The technicians are paid per job. They receive $25 for completion and $12 for an incompletion. Technicians are scheduled for an average of 5 to 8 jobs per day. Petitioner is provided with a vehicle to travel.

Ms. Leitelt testified that Petitioner was scheduled to work November 27, 2015, the Friday after Thanksgiving. Technicians are told they need to give two weeks' notice if they are not going to work on a holiday. Petitioner sent a text that morning saying he is not running his route. He did not make it back from Thanksgiving dinner in Minnesota in time. She testified she received a complaint from a customer. Petitioner called on Saturday November 28, 2015 and told her he hurt his back lifting the extractor into his vehicle. She testified the extractor weights about 15-20 pounds. Water goes into the machine, but the technicians are told not to fill it until they get to the customer's location. Petitioner would not normally have been scheduled on Monday, but she believes he said he would work on November 30 to make up for Friday and Saturday. Petitioner was off on Monday for his back. He returned to regular work on December 4, 2015.

Petitioner first sought medical treatment for his lower back on December 1, 2015 with Dr. John Burger at Loyola Medical Center. Petitioner's history was of low back pain since November 28. He felt sharp pain right away after lifting a bucket of water. Pain with movement was 10/10. Dr. Burger recorded radicular symptoms to the front of his leg. Petitioner reported a history of prior surgery. He has been doing well for years. The

physical examination noted positive straight leg raise on the right with normal range of motion, sensation, strength and reflexes. Dr. Burger's assessment was low back pain with radicular features, and concern for a bulging disc given his history. Dr. Burger prescribed pain medications and muscle relaxers and recommended follow-up with his personal physician. Petitioner was excused from work until December 3, 2015 (PX 2).

Petitioner testified that he returned to work for Respondent. His back was getting better. There were times he would bend over and it would hurt or stiffen up. Petitioner testified that the adjuster provided to him a list of places at which he could seek treatment, and he chose Dr. Phillips. A January 29, 2016 evaluation only, requested on December 15, 2015, was authorized on December 16, 2015 (PX 9).

Petitioner testified that on January 26, 2016, he was working on a sofa or love seat, and he was tilting it forward when it started to roll back. When he grabbed the corner with his right hand, he felt something between his shoulder blades and into his right shoulder (See the decision in consolidated case 16 WC 5928 decided in conjunction with this matter). That night, the arm was starting to get numb, in the forearm and into the hand. He had an appointment for his back so he decided he would tell the back doctor.

Petitioner was seen for his lower back by Dr. Frank Phillips at Midwest Orthopedics at Rush on January 29, 2016. Petitioner testified he told the nurse about his shoulder pain, but she told him that his shoulder was not related to his low back, and that he should notify his work. Petitioner testified that he notified Jill of what happened with the sofa on January 29, 2016. Ms. Leitelt testified that she does not remember if Petitioner called her but she knows he emailed her sometime in February explaining he hurt himself on the 26th and needed a claim number.

Dr. Phillips examined Petitioner with respect to his low back complaints on January 29, 2016 (PX 9). The history of injury is lifting a container full of water to do a furniture clean when he developed back pain radiating to the right leg. Dr. Phillips noted a history of microdiscectomy 20 years ago with intermittent back pain, but that Petitioner had been functioning at a high level. At the time of the examination, Petitioner was complaining of intermittent back pain with no radicular symptoms. The physical examination noted normal gait, mild tenderness. Range of motion noted mild end range discomfort. neurological testing was normal. Straight leg raise was positive for back pain only. Dr. Phillips diagnosed a lumbar sprain/strain and recommended one month of physical therapy. He noted that Petitioner was pushing for an MRI, but he did not believe it was necessary at the time. Petitioner was released to his regular job (PX 9).

Petitioner was seen at Loyola Immediate Care on February 1, 2016 (PX 2). The history taken by Julie Kramer notes a prior November 30, 2015 visit for lower back pain that got better but never went away. Now has upper back pain and pain and numbness in the right arm since an injury on January 26. Dr. Cardy Romeo states Petitioner is seen for follow up from his December 1, 2015 visit relative to his back. He now reports right upper back pain the past week, hand feel numb. He states was lifting something heavy prior to onset. He stated was released back to work as to his back, but he was seeking a second opinion. The physical exam was normal. Dr. Romeo assessed a sprain of neck, radicular pain and sciatica unspecified. Petitioner was to follow up with a spine orthopedist (PX 2).

Petitioner saw Dr. Bartosz Wojewnik of Loyola on February 5, 2016, for right shoulder, neck and low back pain. He reported to Dr. Wojewnik that he had developed low back pain when lifting a cleaning extractor into a van in November 2015. He was improving until last week when he was lifting a sofa and exacerbated his back and developed neck and right shoulder pain. The shoulder pain does not radiate but he has numbness and

tingling in his right hand that comes and goes. Petitioner completed a pain chart in which he marked aches in his low right back, numbness in his right trapezius area, and pins and needles in his right arm but not into either hand. Physical examination noted positive impingement in the shoulder. There was no tenderness in the cervical or lumbar spine. Straight leg was negative. Neurological testing was negative. X-rays of the cervical and lumbar spine showed multilevel spondylosis with no signs of instability. Dr. Wojewnik recommended anti-inflammatory medication and physical therapy. He placed Petitioner on 10 pound lifting restrictions. Petitioner was scheduled for 4-week follow-up. Dr. Wojewnik noted that if Petitioner has persistent symptoms, he would refer him to a shoulder specialist and obtain cervical and lumbar MRIs (PX 2). Petitioner attended physical therapy at ATI from February 11, 2016 through March 24, 2016 (PX 3).

On April 13, 2016, Petitioner was seen at Hinsdale Orthopedics for complaints of neck pain. Petitioner gave a history of the November 28, 2015 lumbar injury and stated that on January 26, 2016, while attempting to flip the sofa from the back when he felt exacerbation of his lumbar back complaints and began to place the sofa onto the ground with his right arm, taking care not to let it drop. While setting it on the ground, he felt a pull in his right arm and shoulder blade. The pain worsened that evening and he began to complain of numbness in his right arm. Dr. Lorenz' diagnosis was degenerative disk disease of the cervical spine with radiculopathy, secondary to a work-related injury on 1/26/16. Dr. Lorenz prescribed an MRI of the cervical spine. He restricted Petitioner to 10-pound lifting (PX 1). The April 21, 2016 MRI of the cervical spine impression was mild stenosis at C4-5 through C6-7 with disc bulging diffusely and superimposed bony spondylotic changes (PX 1).

On May 18, 2016, Petitioner saw Dr. Lorenz to review the MRI results. At this visit, Dr. Lorenz noted Petitioner's complaints of pain over the right trapezius and shoulder and numbness and tingling in his right fingers with intermittent radiation of numbness and pain extending proximally up his right arm especially at night. Dr. Lorenz' review of the MRI was cervical stenosis most significant at C4-C5 with radiculopathy. He recommended an EMG to rule out cervical versus peripheral neuropathy. He maintained the 10 pound lifting restrictions.

On May 18, 2016, the Petitioner also saw Dr. Lorenz for low back pain. The history was that the Petitioner was injured when he was lifting an extractor machine weighing approximately 50 pounds into his vehicle, and felt immediate pain in the lumbar spine that radiated into the right lower extremity. Dr. Lorenz noted Petitioner's history of a prior back injury over 20 years ago with an L4-5 microdiscectomy. Petitioner denied any further complaints or treatment until the injury on November 28, 2015. Petitioner noted his right leg complaints resolved after a week. He presented with 100% back pain. He denied any leg weakness, numbness or tingling. Physical examination noted pain on palpation to the lumbar spinous process and minimal pain on flexion and extension. Straight leg raise was negative. Neurologic examination was normal. Dr. Lorenz diagnosed the Petitioner with L4-5 degenerative disk disease with retrolisthesis aggravated by a work-related injury on November 28, 2015. He ordered an MRI of the lumbar spine to rule out underlying pathology (PX 1). The June 16, 2016 MRI of the lumbar spine noted degenerative changes in the lumbar spine with no obvious spondylolysis or listhesis, and multi-level disc protrusions with stenosis at L3-4 and L4-5 (PX 1). On July 13, 2016 PAC Silva recorded complaints of lumbar back pain with radiation into the left buttock. Petitioner had no improvement with therapy. He was provided a Medrol dose pack and was to follow up to reassess the left lumbar back and buttock pain (PX 1).

On July 13, 2016, Dr. Lorenz reviewed the EMG results. Petitioner complained of right arm intermittent numbness, denied neck pain, and continued to complain of numbness and tingling extending down the right

upper extremity, worse at night especially in his hand and along the 1st to 4th digits. Petitioner stated that physical therapy completely resolved pain, but not the numbness. Dr. Lorenz reviewed the EMG results as showing bilateral carpal tunnel, right greater than left, and C5-C7 radiculopathy. He diagnosed cervical stenosis most significant at C4-C5 with radiculopathy, and bilateral carpal tunnel. Dr. Lorenz referred the Petitioner to Dr. Debdut Biswas at Hinsdale Orthopedics for treatment of the carpal tunnel. He kept Petitioner on 10 lbs. lifting restrictions. (PX 1).

On July 21, 2016, Petitioner saw Dr. Biswas. He gave a history of an injury to his right shoulder and neck when he dropped a couch at work in January and it pulled on his arm. Ever since then he has had numbness and tingling in his right hand. Dr. Biswas noted that Dr. Lorenz did not think the ongoing symptoms were related to a cervical spine injury. Physical examination showed a markedly positive median nerve compression test of the right hand. Dr. Biswas diagnosed right carpal tunnel syndrome and prescribed a removable wrist brace to be worn at night. Dr. Biswas stated that since the patient reports that he has not had these symptoms prior to his work-related incident, we do believe that his work-related accident is causally related to his current clinical condition. Dr. Biswas noted that if the Petitioner continues to be symptomatic, he would likely discuss surgical decompression of the median nerve. Dr. Biswas kept Petitioner on a 10-pound lifting restrictions (PX 1).

On August 22, 2016, the Petitioner returned to Hinsdale Orthopedics. Petitioner has been wearing the wrist brace for the last 4 weeks without change in complaints. Physical examination noted decreased sensation to light touch over the lateral aspect of the right hand. Petitioner also saw Hinsdale Orthopedics on August 22, 2016 for lower back pain and was told to continue his home exercise program (PX 1).

On September 1, 2016, Petitioner saw Dr. Biswas with no change in symptoms. He complained of stiffness, numbness and tingling in the right hand. He had been experiencing nighttime dysesthesias in the median nerve distribution and the wrist splint has not relieved his symptoms. As non-operative treatment was not helping, Dr. Biswas recommended an open carpal tunnel release on the right hand. Dr. Biswas stated that given the fact that patient does not endorse any neurologic symptoms of his hand prior to his work-related injury of January 26th, we can declare with a reasonable degree of medical certainty that his current carpal tunnel syndrome was causally related to his work-related injury at AMR Furniture on 1/26/16. Dr. Biswas gave Petitioner work restrictions of no lifting greater than 5-10 pounds (PX 1).

On February 7, 2017, the Petitioner attended a Section 12 examination with Dr. Paul Papierski at the request of the Respondent. Dr. Papierski opined that the Petitioner does have right carpal tunnel syndrome. Dr. Papierski opined that the work accident of January 26, 2016 did not directly or indirectly cause the condition (RX 2).

On July 24, 2017, the Petitioner returned to Dr. Mark Lorenz for issues with his neck. Dr. Lorenz noted that the Petitioner continued to treat with Dr. Biswas for the carpal tunnel, but they were awaiting approval for surgery. Dr. Lorenz stated that from his review of the imaging and physical exam, there was nothing surgical to offer Petitioner. He kept Petitioner on a 10-pound lifting restriction. He told Petitioner to follow-up in 6 months to see if the restrictions are permanent or can be lifted. Petitioner's was also seen for his lower back on July 24, 2017. Petitioner reported a flare-up of lower back pain about 1.5 months prior to the visit. Dr. Lorenz indicated that flare-ups may continue intermittently, secondary to degenerative changes (PX 1).

On July 31, 2017, Petitioner followed-up with Dr. Biswas for right carpal tunnel syndrome. Dr. Biswas noted continued positive median nerve compression of the right hand and continued to recommend a right open carpal tunnel release. Petitioner informed Dr. Biswas that he wished to proceed with surgery (PX 1).

Dr. Biswas testified by evidence deposition taken May 9, 2017 (PX 4). He is currently board-eligible for orthopedic surgery but was not yet certified. Dr. Biswas testified that Petitioner provided a history of a traction-type injury to his right upper extremity when he was dropping a couch while working. Petitioner's complaints were sensory dysesthesias of the right hand and wrist. Petitioner demonstrated a positive median nerve compression test. He did not have any provocative cervical spine findings. The EMG indicated compression neuropathy of the median nerve or carpal tunnel on the right. This was consistent with the physical exam findings. Dr. Biswas diagnosed carpal tunnel syndrome on the right side. On September 1, 2016, he recommended surgical carpal tunnel release. Dr. Biswas opined that the carpal tunnel was an accident related aggravation because Petitioner did not complain of any sensory or neurologic symptoms in his right hand prior to the accident. He stated that the traction injury from trying to prevent a large piece of furniture from falling may have caused a potential stress-induced or sub occult traction-type injury to the median nerve which may have aggravated his carpal tunnel or compression of the nerve. There could have been an inflammatory component as a result of the injury with some structures around the median nerve which further aggravated his condition. He opined that the recommended surgery was causally related to the accident. Dr. Biswas testified that the only records he reviewed were those of Dr. Lorenz. His opinion is based upon the history that Petitioner gave him. He stated that the EMG was also positive for left sided carpal tunnel (PX 4).

Dr. Paul Papierski testified by evidence deposition taken August 11, 2017 (RX 1). He is board certified in orthopedic surgery since 1995, and in hand surgery since 1996. Dr. Papierski testified to his examination on February 7, 2017. The history was that Petitioner was lifting a couch. He went to grab the sofa and felt pain in his back. That night, he felt numbness in the right hand with aching pain in arm. At the time of the exam, Petitioner had pain in right wrist, numbness and tingling in right thumb, index, middle and long fingers but not the small finger. His left hand had similar symptoms. Dr. Papierski diagnosed right carpal tunnel syndrome. There was an EMG which indicated bilateral carpal tunnel, so Petitioner did have bilateral carpal tunnel. Dr. Papierski opined that the carpal tunnel was not related to the January 26, 2016 injury because the medical records did not indicate that there were any symptoms of carpal tunnel at that time. He testified that his carpal tunnel didn't really come about as a result of the injury. It really only came up some three or four months after the reported injury, and therefore not connected to that injury. He disagreed that inflammation or swelling caused the carpel tunnel because the records did not show that there was swelling or a wrist sprain. If that had been true he would have had carpal tunnel symptoms within 72 hours. Petitioner would not need any lifting restriction but should avoid forceful gripping (RX 1).

Dr. Papierski had not reviewed the records of Loyola Medicine from February 1, 2016 and February 5, 2016. The complaints of numbness, tingling and burning in his hand could possibly be symptoms of carpal tunnel syndrome. Without specific notation of what parts of the hand the symptoms were impairing, he is unable to tell if they were related to carpal tunnel. Dr. Papierski testified it would be odd or rare for the accident as described to cause or worsen carpal tunnel. Dr. Papierski noted that the EMG also noted cervical radiculopathy. On review of the notes from Dr. Romeo dated February 1, 2016, there is no indication of carpal tunnel syndrome and there was no indication that the doctor was thinking about carpal tunnel. The note does not support that there was inflammation in wrist or hand. If Petitioner had swelling or inflammation in the hand, it should have been noted by the examining doctor (RX 1).

Petitioner testified that he has been back to work with the 10-pound restriction. He gets an email each night with his schedule for the next day. He gets paid by the job, $12 for an inspection and $25 for a repair. Petitioner identified PX 5 as his pay stubs. He testified he gets paid for vacation, holiday and commission. He does not get paid for sick days. Vacation pay is based upon how much you make per day throughout the year. The commission varies depending on how many jobs you perform and the type of job. Since he has been on light duty he gets a lot less work. He is offered jobs within his restrictions. He is mainly touching up wood, scratches and cuts in leather, sewing jobs, inspections. He testified that his right hand goes numb with long driving. About 80% of his jobs are out of state. He has no driving restriction. When he is done for the day, he can call in to obtain more work for the day. He does not do that. He did not call in before his injury, because he had a full day. He has gotten a few calls with jobs available in his area.

Ms. Leitelt testified that the average technician is scheduled for five to eight jobs per day. Technicians can call in to see if there is more work after completing the scheduled jobs. They do not have to. Respondent has accommodated Petitioner's 10-pound restriction to an extent. Petitioner is averaging 2 to 5 jobs per day. Petitioner is limited to the jobs he can do. He cannot do a lot of the jobs because of his lifting restriction. Petitioner told her he could not drive as far because it was hurting his arm in the fall of 2016 or 2017. If he could drive farther, there would be more jobs. If he called the office, he would get more jobs. Petitioner was sick 4 days in 2016 and took his 10 days of vacation. He took his vacation in 2017 and has already taken 10 days in 2018. Vacation pay is calculated by taking the previous year commission and dividing by 52. Petitioner's vacation pay in 2018 was $283.92 per week.

The Petitioner testified that his back is currently better than it was. However, he still experiences stiffness at times, especially when sitting in a position for too long and then trying to stand up. Petitioner also testified that in his line of work, he has to drive long distances, ranging from a few hours up to even six or seven hours. The Petitioner notices his back stiffens up when he has to drive long distances to jobs

Petitioner testified that his right hand is flat at the base of his thumb and the side of the hand where the little finger is. His hand goes numb with sewing leather and fabric. When his hand gets numb, it is hard to feel things and he drops things. At night, he has pain about 3 times a week. Petitioner wishes to undergo the open carpal tunnel release recommended by Dr. Biswas.

Bill Foster testified that he is the owner of Respondent. He testified he was present at the hearing scheduled on February 9, 2018. There was quite a bit of snow that day. Petitioner was not present. He was told that Petitioner's ride could not get out of his driveway. Mr. Foster went to Petitioner's apartment building in Downers' Grove. Petitioner's name was not on the vestibule, so he rang all the bells. No one answered. He saw the company vehicle in the parking lot.

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 he 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.

Petitioner testified that he was injured on the morning of November 28, 2015 when he was putting the cleaning machine into the company provided van at his home to prepare to travel to his assigned jobs. He needed to lift the machine about 2 feet when he felt a pain in his lower back. While Respondent questioned the validity of this claimed injury, there was no convincing evidence presented to dispute the claim. Ms. Leitelt testified that Petitioner reported the incident that morning. Other than the timing of the claim, being the weekend of Thanksgiving after Petitioner had called off on Friday for unrelated reasons, she has no basis to dispute the injury occurred as reported. Petitioner sought medical treatment within a few days and provided a consistent history of accident to all medical providers. Loyola Medicine disabled him for a few days and although he returned to work, he sought additional care through Workers' Compensation within days as documented by the scheduling of the examination with Dr. Phillips. Based upon the evidence presented, the Arbitrator finds the testimony as to the occurrence of the accident persuasive.

Injuries incurred while traveling to and from the workplace are not generally considered to arise out of and in the course of one's employment. The determination whether an injury to a "traveling employee" arose out of and in the course of employment, however, is governed by different rules than are applicable to other employees. Thus, for instance, a traveling employee is deemed to be in the course of his employment from the time the employee leaves home until he returns. A "traveling employee" is one who is required to travel away from his employer's premises to perform his job. *Cox*, 406 Ill. App. 3d at 545. It is not necessary for an individual to be a traveling salesman or a company representative who covers a large geographic area to be considered a traveling employee. *Hoffman v. Industrial Comm'n*, 128 Ill. App. 3d 290, 293, 470 N.E.2d 507, 83 Ill. Dec. 381 (1984), *aff'd*, 109 Ill. 2d 194, 486 N.E.2d 889, 93 Ill. Dec. 356 (1985). In the present case, claimant did not work at a fixed job site. Rather, his duties required him to travel to various locations throughout the Chicagoland area and Wisconsin using a company provided vehicle. As such, the Arbitrator find that he qualifies as a traveling employee and the injury occurred in the course of his employment.

Petitioner testified he was injured while lifting the extractor machine into the vehicle to use in the cleaning of furniture for customers. This injury originates from a risk connected with, or incidental to, the employment as a furniture repair technician and involves a causal connection between the employment and the accidental injury.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent on November 28, 2015.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980)*. Included within that burden is proof that his current condition of ill-being is causally connected to a work-related injury. *Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (20030.*

Petitioner testified to low back pain immediately following the accident. While he had a prior L4-5 discectomy in the 1990s, He testified he had no injuries or treatment after his release. His medical histories include the prior surgery and note only intermittent back discomfort since then. Petitioner was functioning at a high level. He was performing his full duty as a furniture repair technician for two years. Following the accident, he sought treatment within days with complaints of low back pain and radiating pain into his right leg. Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

Dr. Phillips, having been given the history of the November 28, 2015 accident, diagnosed Petitioner with a lumbar sprain and recommended additional physical therapy. Dr. Lorenz opined on May 18, 2016 that Petitioner suffered an L4-5 degenerative disc disease aggravated by the work injury on November 28, 2015. The Arbitrator finds that this condition of ill-being is causally related to the accident on November 28, 2015 based both upon the medical opinions and the chain of events.

The Arbitrator notes that Petitioner had a lumbar MRI on June 21, 2016 and a follow up appointments with PAC Silva on July 13, 2016 and August 22, 2016. He was reporting intermittent pain and advised to continue home exercises. Thereafter, he did not seek additional care for his low back for nearly a year until returning to Dr. Lorenz on July 24, 2017, when he provided a history of a flair up 1.5 months before. The Commission has considered such a gap in care in determining 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.

Dr. Phillips previously diagnosed a lumbar sprain and recommended only an additional month of physical therapy. On July 24, 2017, Dr. Lorenz indicated that flare-ups may continue intermittently, secondary to degenerative changes. The Arbitrator notes that Petitioner provided histories of intermittent back discomfort prior to the accident. The degenerative disc disease pre-existed the accident. The Arbitrator finds that based upon the medical evidence presented, the Petitioner's causally related back condition reached maximum medical improvement as of the August 22, 2016 office visit. Thereafter, the condition of ill-being in the low back would be related to the pre-existing degenerative condition.

Based upon the record as a whole, the Arbitrator finds that the Petitioner has proved by a preponderance of the evidence that, as a result of the accident on November 28, 2015, he suffered a condition of ill-being to his lumbar spine consisting of a lumbar strain and aggravation of an L4-5 degenerative disc disease. The causally connected condition of ill-being reached maximum medical improvement as of August 22, 2016.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary and the expenses

incurred were reasonable. *City of Chicago v. Illinois Workers ' Compensation Commission,* 409 Ill. App. 3d 258 (1st Dist., 2011). Based upon the Arbitrator's finding with respect to Causal Connection, Petitioner is entitled to reasonable and necessary treatment through the date of maximum medical improvement. Petitioner submitted PX 8 with claimed medical bills owed on this matter as well as the consolidated claim 16 WC 5928. Respondent admitted RX 4 with payments made. PX 4 lists the provider and amount paid but does not include the date of service or payment date. Both PX 8 and RX 4 commingle treatment between the November 28, 2015 and January 26, 2016 accidents. The medical records were admitted as PX 1, PX 2, PX 3, PX 4, and PX 9.

Having reviewed the medical records, claimed medical bills and payments, The Arbitrator finds that treatment reasonable, necessary and causally related to the November 28, 2015 accident is the December 1, 2015 Loyola visit, Hinsdale Orthopedic low back treatment on May 18, 2016, July 13, 2016 and August 22, 2016 and the June 16, 2016 MRI. Although Dr. Phillips did not feel an MRI was necessary at the time of his examination on January 29, 2016, the Arbitrator finds that the MRI was reasonable given the ongoing complaints 6 months later. The remaining claimed bills will be addressed in the decision in the consolidated case 15 WC 5928 decided in conjunction with this matter. The Arbitrator notes Petitioner's visit with Dr. Phillips for the low back. Based upon the authorization by Respondent for evaluation only and the lack of any follow up despite Dr. Phillip's recommendation for additional therapy, the Arbitrator does not consider this as one of Petitioner's choices.

Reviewing PX 8, the Arbitrator finds that Respondent has paid the Loyola charges for Dr. Burger. The Loyola x-ray bill for December 1, 2015 is $105.00 with a balance of $47.25 after an adjustment. The Chicago Ridge Medical Imaging bill notes the MRI charge of $1,142.00 with no payment made and a 100% adjustment. RX 4 does not reflect any payment on these bills.

The causally related Hinsdale Orthopedic visits for the lower back through August 22, 2016 have been paid. There are two separate $171.00 charges for July 24, 2017. The Arbitrator infers that one is for the low back visit and one for the cervical spine visit documented in PX 1. Based upon the Arbitrator's finding with respect to Causal Connection, the charges for the lumbar visit are denied as not causally connected and after the date of maximum medical improvement.

Based upon the record as a whole, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $105.00 to Loyola University Medical Center, and $1,142.00 to Chicago Ridge Medical Imaging, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that may have been paid.

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 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 furniture repair technician at the time of the accident and that he returned to work in his prior capacity until the subsequent injury on January 26, 2016 which is the subject of the consolidated case 16 WC 5928. Although Petitioner is currently on restricted duty, that restriction is not related to the current claim. Because of these facts, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 54 years old at the time of the accident. Petitioner would not be considered either a younger or older worker. The Arbitrator notes that Petitioner will likely remain in the workforce for a period of years. Because of this, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner initially returned to his regular job until his subsequent injury on January 26, 2016 which is the subject of the consolidated case 16 WC 5928. Petitioner's reduced earning thereafter are attributed to the limitations provided as a result of that subsequent injury as more fully addressed in the decision in consolidated case 16 WC 5928 decided in conjunction with this matter. Because of these facts, 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 initially complained of lower back pain radiating into the right leg. He noted the right leg complaints resolved within a week. Dr. Phillips noted a normal neurologic examination and diagnosed a lumbar sprain. He felt one month physical therapy would be the only treatment needed. Dr. Lorenz also found Petitioner was neurologically normal with negative straight leg raise. He diagnosed an L4-5 degenerative disc disease aggravated by the work injury. Petitioner testified that his back is currently better than it was. It is really not an issue. He still experiences stiffness at times. 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 2% loss of use of man as a whole pursuant to §8(d)2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Egas,

Petitioner,

vs. NO: 16 WC 5928

AMR Furniture Repair,

Respondent,

19IWCC0044

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 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 5, 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 $26,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 23 2019

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Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

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

EGAS, JOHN
Employee/Petitioner

Case# **16WC005928**

16WC005103

AMR FURNITURE REPAIR
Employer/Respondent

19IWCC0044

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:

0274 HORWITZ HORWITZ & ASSOC
TYLER BERBERICH
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0000 HOLECEK & ASSOCIATES
MONICA DEMBNY
215 SHUMAN BLVD SUITE 206
NAPERVILLE, IL 60563

19IWCC0044

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

John Egas
Employee/Petitioner

v.

AMR Furniture Repair
Employer/Respondent

Case # 16 WC 5928

Consolidated cases: 16 WC 5103

An *Application for Adjustment 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 **March 21, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

C. [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?
[x] TPD [ ] Maintenance [ ] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other ______

FINDINGS

On the date of accident, **January 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 $**31,441.00**; the average weekly wage was $**604.63**.

On the date of accident, Petitioner was **54** 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 $**61.01** for TTD, $**1,160.77** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**1,221.78**.

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

ORDER

Respondent shall pay Petitioner temporary partial disability benefits totaling $20,356.68, for the period commencing February 6, 2016 through March 10, 2018, as provided in Section 8(a) of the Act. Respondent shall be given a credit $**1,221.78** for benefits paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $4330.47 to ATI Physical Therapy, $1627.80 to Loyola University Medical Center, and $1,359.00 to Hinsdale Orthopedics, 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.

Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Biswas including an open right carpal tunnel release, any post-operative treatment, physical therapy or other reasonable and necessary 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

June 4, 2018
Date

ICArbDec19(b)

JUN 5 - 2018

Statement of Facts

This matter was heard in conjunction with consolidated case 16 WC 5103 (DOA: November 28, 2015). A single transcript was prepared but the Arbitrator has issued separate decisions for each case number.

Petitioner John Egas testified that he was employed by Respondent AMR Furniture Repair doing furniture repair. As of November 2015, he had been so employed for approximately 2 years. He testified that his job duties included repairing scratches on wood or leather, repairing cuts, tears, broken frames on sofas, bed frames. He also cleaned furniture. He would have to lift furniture and sometimes turn it over. The furniture could weigh 50 to 100 pounds. He had to lift and carry the cleaning machine which would weigh about 50 pounds. He would use hand tools daily.

Petitioner testified he had a previous surgical procedure on his low back in the late 1990s. He had no further back treatment until after November 28, 2015. He had no other back injuries and had no work restrictions for his lower back. Petitioner testified that prior to January 26, 2016, he had no medical treatment or restrictions with respect to his neck, right wrist or hand. Petitioner was convicted of bank robbery in 2001 (RX 5).

He testified that on November 28, 2015, he was putting the cleaning machine into the van. He was at his home. He needed to lift the machine about 2 feet when he felt a pain in his lower back (See the decision in consolidated case 16 WC 5103 decided in conjunction with this matter). He did not work that day. He told Jill what happened. Petitioner testified he was injured on Saturday. This was the Thanksgiving weekend. He believes he was scheduled to work on Friday but he did not. He does not remember the reason he did not work. He could not remember if he went out of town. He rested at home on Sunday and went to the Loyola Immediate Care on Monday. He is not scheduled to work on Mondays.

Jill Leitelt testified that she is manager of Respondent. Her father owns the company. Respondent's business is to go into consumers' homes and repair furniture. Her duties include overseeing reports to companies they work for, getting jobs and scheduling the technicians. Respondent has 7 technicians including Petitioner. When work orders come in, they are put on a map and depending on the location, they are slotted to the technician who works that area. The technicians are paid per job. They receive $25 for completion and $12 for an incompletion. Technicians are scheduled for an average of 5 to 8 jobs per day. Petitioner is provided with a vehicle to travel.

Ms. Leitelt testified that Petitioner was scheduled to work November 27, 2015, the Friday after Thanksgiving. Technicians are told they need to give two weeks' notice if they are not going to work on a holiday. Petitioner sent a text that morning saying he is not running his route. He did not make it back from Thanksgiving dinner in Minnesota in time. She testified she received a complaint from a customer. Petitioner called on Saturday November 28, 2015 and told her he hurt his back lifting the extractor into his vehicle. She testified the extractor weights about 15-20 pounds. Water goes into the machine, but the technicians are told not to fill it until they get to the customer's location. Petitioner would not normally have been scheduled on Monday, but she believes he said he would work on November 30 to make up for Friday and Saturday. Petitioner was off on Monday for his back. He returned to regular work on December 4, 2015.

Petitioner first sought medical treatment for his lower back on December 1, 2015 with Dr. John Burger at Loyola Medical Center. Petitioner's history was of low back pain since November 28. He felt sharp pain right away after lifting a bucket of water. Pain with movement was 10/10. Dr. Burger recorded radicular symptoms

to the front of his leg. Petitioner reported a history of prior surgery. He has been doing well for years. The physical examination noted positive straight leg raise on the right with normal range of motion, sensation, strength and reflexes. Dr. Burger's assessment was low back pain with radicular features, and concern for a bulging disc given his history. Dr. Burger prescribed pain medications and muscle relaxers and recommended follow-up with his personal physician. Petitioner was excused from work until December 3, 2015 (PX 2).

Petitioner testified that he returned to work for Respondent. His back was getting better. There were times he would bend over and it would hurt or stiffen up. Petitioner testified that the adjuster provided to him a list of places at which he could seek treatment, and he chose Dr. Phillips. A January 29, 2016 evaluation only, requested on December 15, 2015, was authorized on December 16, 2015 (PX 9).

Petitioner testified that on January 26, 2016, he was working on a sofa or love seat, and he was tilting it forward when it started to roll back. When he grabbed the corner with his right hand, he felt something between his shoulder blades and into his right shoulder. That night, the arm was starting to get numb, in the forearm and into the hand. He had an appointment for his back so he decided he would tell the back doctor.

Petitioner was seen for his lower back by Dr. Frank Phillips at Midwest Orthopedics at Rush on January 29, 2016. Petitioner testified he told the nurse about his shoulder pain, but she told him that his shoulder was not related to his low back, and that he should notify his work. Petitioner testified that he notified Jill of what happened with the sofa on January 29, 2016. Ms. Leitelt testified that she does not remember if Petitioner called her but she knows he emailed her sometime in February explaining he hurt himself on the 26th and needed a claim number.

Dr. Phillips examined Petitioner with respect to his low back complaints on January 29, 2016 (PX 9). The history of injury is lifting a container full of water to do a furniture clean when he developed back pain radiating to the right leg. Dr. Phillips noted a history of microdiscectomy 20 years ago with intermittent back pain, but that Petitioner had been functioning at a high level. At the time of the examination, Petitioner was complaining of intermittent back pain with no radicular symptoms. The physical examination noted normal gait, mild tenderness. Range of motion noted mild end range discomfort. neurological testing was normal. Straight leg raise was positive for back pain only. Dr. Phillips diagnosed a lumbar sprain/strain and recommended one month of physical therapy. He noted that Petitioner was pushing for an MRI, but he did not believe it was necessary at the time. Petitioner was released to his regular job (PX 9).

Petitioner was seen at Loyola Immediate Care on February 1, 2016 (PX 2). The history taken by Julie Kramer notes a prior November 30, 2015 visit for lower back pain that got better but never went away. Now has upper back pain and pain and numbness in the right arm since an injury on January 26. Dr. Cardy Romeo states Petitioner is seen for follow up from his December 1, 2015 visit relative to his back. He now reports right upper back pain the past week, hand feel numb. He states was lifting something heavy prior to onset. He stated was released back to work as to his back, but he was seeking a second opinion. The physical exam was normal. Dr. Romeo assessed a sprain of neck, radicular pain and sciatica unspecified. Petitioner was to follow up with a spine orthopedist (PX 2).

Petitioner saw Dr. Bartosz Wojewnik of Loyola on February 5, 2016, for right shoulder, neck and low back pain. He reported to Dr. Wojewnik that he had developed low back pain when lifting a cleaning extractor into a van in November 2015. He was improving until last week when he was lifting a sofa and exacerbated his back and developed neck and right shoulder pain. The shoulder pain does not radiate but he has numbness and

tingling in his right hand that comes and goes. Petitioner completed a pain chart in which he marked aches in his low right back, numbness in his right trapezius area, and pins and needles in his right arm but not into either hand. Physical examination noted positive impingement in the shoulder. There was no tenderness in the cervical or lumbar spine. Straight leg was negative. Neurological testing was negative. X-rays of the cervical and lumbar spine showed multilevel spondylosis with no signs of instability. Dr. Wojewnik recommended anti-inflammatory medication and physical therapy. He placed Petitioner on 10 pound lifting restrictions. Petitioner was scheduled for 4-week follow-up. Dr. Wojewnik noted that if Petitioner has persistent symptoms, he would refer him to a shoulder specialist and obtain cervical and lumbar MRIs (PX 2). Petitioner attended physical therapy at ATI from February 11, 2016 through March 24, 2016 (PX 3).

On April 13, 2016, Petitioner was seen at Hinsdale Orthopedics for complaints of neck pain. Petitioner gave a history of the November 28, 2015 lumbar injury and stated that on January 26, 2016, while attempting to flip the sofa from the back when he felt exacerbation of his lumbar back complaints and began to place the sofa onto the ground with his right arm, taking care not to let it drop. While setting it on the ground, he felt a pull in his right arm and shoulder blade. The pain worsened that evening and he began to complain of numbness in his right arm. Dr. Lorenz' diagnosis was degenerative disk disease of the cervical spine with radiculopathy, secondary to a work-related injury on 1/26/16. Dr. Lorenz prescribed an MRI of the cervical spine. He restricted Petitioner to 10-pound lifting (PX 1). The April 21, 2016 MRI of the cervical spine impression was mild stenosis at C4-5 through C6-7 with disc bulging diffusely and superimposed bony spondylotic changes (PX 1).

On May 18, 2016, Petitioner saw Dr. Lorenz to review the MRI results. At this visit, Dr. Lorenz noted Petitioner's complaints of pain over the right trapezius and shoulder and numbness and tingling in his right fingers with intermittent radiation of numbness and pain extending proximally up his right arm especially at night. Dr. Lorenz' review of the MRI was cervical stenosis most significant at C4-C5 with radiculopathy. He recommended an EMG to rule out cervical versus peripheral neuropathy. He maintained the 10 pound lifting restrictions.

On May 18, 2016, the Petitioner also saw Dr. Lorenz for low back pain. The history was that the Petitioner was injured when he was lifting an extractor machine weighing approximately 50 pounds into his vehicle, and felt immediate pain in the lumbar spine that radiated into the right lower extremity. Dr. Lorenz noted Petitioner's history of a prior back injury over 20 years ago with an L4-5 microdiscectomy. Petitioner denied any further complaints or treatment until the injury on November 28, 2015. Petitioner noted his right leg complaints resolved after a week. He presented with 100% back pain. He denied any leg weakness, numbness or tingling. Physical examination noted pain on palpation to the lumbar spinous process and minimal pain on flexion and extension. Straight leg raise was negative. Neurologic examination was normal. Dr. Lorenz diagnosed the Petitioner with L4-5 degenerative disk disease with retrolisthesis aggravated by a work-related injury on November 28, 2015. He ordered an MRI of the lumbar spine to rule out underlying pathology (PX 1). The June 16, 2016 MRI of the lumbar spine noted degenerative changes in the lumbar spine with no obvious spondylolysis or listhesis, and multi-level disc protrusions with stenosis at L3-4 and L4-5 (PX 1). On July 13, 2016 PAC Silva recorded complaints of lumbar back pain with radiation into the left buttock. Petitioner had no improvement with therapy. He was provided a Medrol dose pack and was to follow up to reassess the left lumbar back and buttock pain (PX 1).

On July 13, 2016, Dr. Lorenz reviewed the EMG results. Petitioner complained of right arm intermittent numbness, denied neck pain, and continued to complain of numbness and tingling extending down the right

upper extremity, worse at night especially in his hand and along the 1st to 4th digits. Petitioner stated that physical therapy completely resolved pain, but not the numbness. Dr. Lorenz reviewed the EMG results as showing bilateral carpal tunnel, right greater than left, and C5-C7 radiculopathy. He diagnosed cervical stenosis most significant at C4-C5 with radiculopathy, and bilateral carpal tunnel. Dr. Lorenz referred the Petitioner to Dr. Debdut Biswas at Hinsdale Orthopedics for treatment of the carpal tunnel. He kept Petitioner on 10 lbs. lifting restrictions. (PX 1).

On July 21, 2016, Petitioner saw Dr. Biswas. He gave a history of an injury to his right shoulder and neck when he dropped a couch at work in January and it pulled on his arm. Ever since then he has had numbness and tingling in his right hand. Dr. Biswas noted that Dr. Lorenz did not think the ongoing symptoms were related to a cervical spine injury. Physical examination showed a markedly positive median nerve compression test of the right hand. Dr. Biswas diagnosed right carpal tunnel syndrome and prescribed a removable wrist brace to be worn at night. Dr. Biswas stated that since the patient reports that he has not had these symptoms prior to his work-related incident, we do believe that his work-related accident is causally related to his current clinical condition. Dr. Biswas noted that if the Petitioner continues to be symptomatic, he would likely discuss surgical decompression of the median nerve. Dr. Biswas kept Petitioner on a 10-pound lifting restrictions (PX 1).

On August 22, 2016, the Petitioner returned to Hinsdale Orthopedics. Petitioner has been wearing the wrist brace for the last 4 weeks without change in complaints. Physical examination noted decreased sensation to light touch over the lateral aspect of the right hand. Petitioner also saw Hinsdale Orthopedics on August 22, 2016 for lower back pain and was told to continue his home exercise program (PX 1).

On September 1, 2016, Petitioner saw Dr. Biswas with no change in symptoms. He complained of stiffness, numbness and tingling in the right hand. He had been experiencing nighttime dysesthesias in the median nerve distribution and the wrist splint has not relieved his symptoms. As non-operative treatment was not helping, Dr. Biswas recommended an open carpal tunnel release on the right hand. Dr. Biswas stated that given the fact that patient does not endorse any neurologic symptoms of his hand prior to his work-related injury of January 26th, we can declare with a reasonable degree of medical certainty that his current carpal tunnel syndrome was causally related to his work-related injury at AMR Furniture on 1/26/16. Dr. Biswas gave Petitioner work restrictions of no lifting greater than 5-10 pounds (PX 1).

On February 7, 2017, the Petitioner attended a Section 12 examination with Dr. Paul Papierski at the request of the Respondent. Dr. Papierski opined that the Petitioner does have right carpal tunnel syndrome. Dr. Papierski opined that the work accident of January 26, 2016 did not directly or indirectly cause the condition (RX 2).

On July 24, 2017, the Petitioner returned to Dr. Mark Lorenz for issues with his neck. Dr. Lorenz noted that the Petitioner continued to treat with Dr. Biswas for the carpal tunnel, but they were awaiting approval for surgery. Dr. Lorenz stated that from his review of the imaging and physical exam, there was nothing surgical to offer Petitioner. He kept Petitioner on a 10-pound lifting restriction. He told Petitioner to follow-up in 6 months to see if the restrictions are permanent or can be lifted. Petitioner's was also seen for his lower back on July 24, 2017. Petitioner reported a flare-up of lower back pain about 1.5 months prior to the visit. Dr. Lorenz indicated that flare-ups may continue intermittently, secondary to degenerative changes (PX 1).

On July 31, 2017, Petitioner followed-up with Dr. Biswas for right carpal tunnel syndrome. Dr. Biswas noted continued positive median nerve compression of the right hand and continued to recommend a right open carpal tunnel release. Petitioner informed Dr. Biswas that he wished to proceed with surgery (PX 1).

Dr. Biswas testified by evidence deposition taken May 9, 2017 (PX 4). He is currently board-eligible for orthopedic surgery but was not yet certified. Dr. Biswas testified that Petitioner provided a history of a traction-type injury to his right upper extremity when he was dropping a couch while working. Petitioner's complaints were sensory dysesthesias of the right hand and wrist. Petitioner demonstrated a positive median nerve compression test. He did not have any provocative cervical spine findings. The EMG indicated compression neuropathy of the median nerve or carpal tunnel on the right. This was consistent with the physical exam findings. Dr. Biswas diagnosed carpal tunnel syndrome on the right side. On September 1, 2016, he recommended surgical carpal tunnel release. Dr. Biswas opined that the carpal tunnel was an accident related aggravation because Petitioner did not complain of any sensory or neurologic symptoms in his right hand prior to the accident. He stated that the traction injury from trying to prevent a large piece of furniture from falling may have caused a potential stress-induced or sub occult traction-type injury to the median nerve which may have aggravated his carpal tunnel or compression of the nerve. There could have been an inflammatory component as a result of the injury with some structures around the median nerve which further aggravated his condition. He opined that the recommended surgery was causally related to the accident. Dr. Biswas testified that the only records he reviewed were those of Dr. Lorenz. His opinion is based upon the history that Petitioner gave him. He stated that the EMG was also positive for left sided carpal tunnel (PX 4).

Dr. Paul Papierski testified by evidence deposition taken August 11, 2017 (RX 1). He is board certified in orthopedic surgery since 1995, and in hand surgery since 1996. Dr. Papierski testified to his examination on February 7, 2017. The history was that Petitioner was lifting a couch. He went to grab the sofa and felt pain in his back. That night, he felt numbness in the right hand with aching pain in arm. At the time of the exam, Petitioner had pain in right wrist, numbness and tingling in right thumb, index, middle and long fingers but not the small finger. His left hand had similar symptoms. Dr. Papierski diagnosed right carpal tunnel syndrome. There was an EMG which indicated bilateral carpal tunnel, so Petitioner did have bilateral carpal tunnel. Dr. Papierski opined that the carpal tunnel was not related to the January 26, 2016 injury because the medical records did not indicate that there were any symptoms of carpal tunnel at that time. He testified that his carpal tunnel didn't really come about as a result of the injury. It really only came up some three or four months after the reported injury, and therefore not connected to that injury. He disagreed that inflammation or swelling caused the carpel tunnel because the records did not show that there was swelling or a wrist sprain. If that had been true he would have had carpal tunnel symptoms within 72 hours. Petitioner would not need any lifting restriction but should avoid forceful gripping (RX 1).

Dr. Papierski had not reviewed the records of Loyola Medicine from February 1, 2016 and February 5, 2016. The complaints of numbness, tingling and burning in his hand could possibly be symptoms of carpal tunnel syndrome. Without specific notation of what parts of the hand the symptoms were impairing, he is unable to tell if they were related to carpal tunnel. Dr. Papierski testified it would be odd or rare for the accident as described to cause or worsen carpal tunnel. Dr. Papierski noted that the EMG also noted cervical radiculopathy. On review of the notes from Dr. Romeo dated February 1, 2016, there is no indication of carpal tunnel syndrome and there was no indication that the doctor was thinking about carpal tunnel. The note does not support that there was inflammation in wrist or hand. If Petitioner had swelling or inflammation in the hand, it should have been noted by the examining doctor (RX 1).

Petitioner testified that he has been back to work with the 10-pound restriction. He gets an email each night with his schedule for the next day. He gets paid by the job, $12 for an inspection and $25 for a repair. Petitioner identified PX 5 as his pay stubs. He testified he gets paid for vacation, holiday and commission. He does not get paid for sick days. Vacation pay is based upon how much you make per day throughout the year. The commission varies depending on how many jobs you perform and the type of job. Since he has been on light duty he gets a lot less work. He is offered jobs within his restrictions. He is mainly touching up wood, scratches and cuts in leather, sewing jobs, inspections. He testified that his right hand goes numb with long driving. About 80% of his jobs are out of state. He has no driving restriction. When he is done for the day, he can call in to obtain more work for the day. He does not do that. He did not call in before his injury, because he had a full day. He has gotten a few calls with jobs available in his area.

Ms. Leitelt testified that the average technician is scheduled for five to eight jobs per day. Technicians can call in to see if there is more work after completing the scheduled jobs. They do not have to. Respondent has accommodated Petitioner's 10-pound restriction to an extent. Petitioner is averaging 2 to 5 jobs per day. Petitioner is limited to the jobs he can do. He cannot do a lot of the jobs because of his lifting restriction. Petitioner told her he could not drive as far because it was hurting his arm in the fall of 2016 or 2017. If he could drive farther, there would be more jobs. If he called the office, he would get more jobs. Petitioner was sick 4 days in 2016 and took his 10 days of vacation. He took his vacation in 2017 and has already taken 10 days in 2018. Vacation pay is calculated by taking the previous year commission and dividing by 52. Petitioner's vacation pay in 2018 was $283.92 per week.

The Petitioner testified that his back is currently better than it was. However, he still experiences stiffness at times, especially when sitting in a position for too long and then trying to stand up. Petitioner also testified that in his line of work, he has to drive long distances, ranging from a few hours up to even six or seven hours. The Petitioner notices his back stiffens up when he has to drive long distances to jobs

Petitioner testified that his right hand is flat at the base of his thumb and the side of the hand where the little finger is. His hand goes numb with sewing leather and fabric. When his hand gets numb, it is hard to feel things and he drops things. At night, he has pain about 3 times a week. Petitioner wishes to undergo the open carpal tunnel release recommended by Dr. Biswas.

Bill Foster testified that he is the owner of Respondent. He testified he was present at the hearing scheduled on February 9, 2018. There was quite a bit of snow that day. Petitioner was not present. He was told that Petitioner's ride could not get out of his driveway. Mr. Foster went to Petitioner's apartment building in Downers' Grove. Petitioner's name was not on the vestibule, so he rang all the bells. No one answered. He saw the company vehicle in the parking lot.

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 he 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.

Petitioner testified that on January 26, 2016 he was working on a sofa or love seat, and he was tilting it forward when it started to roll back. When he grabbed the corner with his right hand, he felt something between his shoulder blades and into his right shoulder. That night, the arm was starting to get numb, in the forearm and into the hand. While Respondent questioned the validity of this claimed injury, there was no convincing evidence presented to dispute the claim. Ms. Leitelt testified that Petitioner reported the incident within a few days. She has no basis to dispute the injury occurred as reported. Petitioner sought medical treatment within a few days and provided a consistent history of accident to all medical providers. Loyola Medicine placed him on restricted duty. and initialed a course of treatment for the complaints including numbness and tingling into the right hand and forearm. Based upon the evidence presented, the Arbitrator finds the testimony as to the occurrence of the accident persuasive.

Petitioner testified he was injured while lifting a sofa at a customer location. This injury occurred during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties. It originated from a risk connected with, or incidental to, the employment as a furniture repair technician and involves a causal connection between the employment and the accidental injury.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent on January 26, 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 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). As a result of the accident on January 26, 2016, Petitioner advanced immediate complaints in the cervical spine, right shoulder, arm and hand. He sought treatment within days and reported the injury to Respondent. He has provided a consistent history to the medical providers. Petitioner's unrebutted testimony was that he had not prior injury or medical care for his cervical spine, right arm or hand.

Petitioner's initial treatment focused on the cervical spine. He underwent initial care at Loyola Medical Center with physical therapy at ATI. He then sought care at Hinsdale Orthopedics beginning April 13, 2016. Dr. Lorenz' diagnosis was degenerative disk disease of the cervical spine with radiculopathy, secondary to a work-related injury on 1/26/16. Dr. Lorenz prescribed an MRI of the cervical spine. The April 21, 2016 MRI of the cervical spine impression was mild stenosis at C4-5 through C6-7 with disc bulging diffusely and superimposed bony spondylotic changes. On May 18, 2016, Petitioner's complaints were pain over the right trapezius and shoulder and numbness and tingling in his right fingers with intermittent radiation of numbness and pain extending proximally up his right arm especially at night. Dr. Lorenz' review of the MRI was cervical stenosis most significant at C4-C5 with radiculopathy. He recommended an EMG to rule out cervical versus peripheral neuropathy. On July 13, 2016, Dr. Lorenz to reviewed the EMG results. Petitioner complained of

right arm intermittent numbness, denied neck pain, and continued to complain of numbness and tingling extending down the right upper extremity, worse at night especially in his hand and along the 1st to 4th digits. Petitioner stated that physical therapy completely resolved pain, but not the numbness. Dr. Lorenz reviewed the EMG results as showing bilateral carpal tunnel, right greater than left, and C5-C7 radiculopathy. He diagnosed cervical stenosis most significant at C4-C5 with radiculopathy, and bilateral carpal tunnel. Dr. Lorenz referred the Petitioner to Dr. Biswas at Hinsdale Orthopedics for treatment of the carpal tunnel. On July 24, 2017, Dr. Lorenz stated that from his review of the imaging and physical exam, there was nothing surgical to offer Petitioner for the spine. No current treatment for the cervical spine is recommended.

On July 21, 2016, Dr. Biswas diagnosed right carpal tunnel syndrome and prescribed a removable wrist brace to be worn at night. Dr. Biswas stated that since the patient reports that he has not had these symptoms prior to his work-related incident, we do believe that his work-related accident is causally related to his current clinical condition. Dr. Biswas noted that if the Petitioner continues to be symptomatic, he would likely discuss surgical decompression of the median nerve. On September 1, 2016, Dr. Biswas recommended an open carpal tunnel release on the right hand. Dr. Biswas stated with a reasonable degree of medical certainty that his current carpal tunnel syndrome was causally related to his work-related injury. On July 31, 2017, Dr. Biswas noted continued positive median nerve compression of the right hand and continued to recommend a right open carpal tunnel release. Petitioner informed Dr. Biswas that he wished to proceed with surgery

On February 7, 2017, the Petitioner attended a Section 12 examination with Dr. Paul Papierski at the request of the Respondent. Dr. Papierski opined that the Petitioner does have right carpal tunnel syndrome. Dr. Papierski opined that the work accident of January 26, 2016 did not directly or indirectly cause the condition.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill.Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992).

Based upon the evidence presented, the Arbitrator finds the opinions of the treater, Dr. Biswas, more persuasive that those of Dr. Papierski. Dr. Biswas testified to the onset of symptoms consistent with carpal tunnel syndrome. Based upon the mechanism of accident, he opined that Petitioner suffered a traction injury from trying to prevent a large piece of furniture from falling may have caused a potential

stress-induced or sub occult traction-type injury to the median nerve which may have aggravated his carpal tunnel or compression of the nerve. Dr. Papierski's agreed with the diagnosis of carpal tunnel syndrome. His initial opinion was based upon a lack of symptoms until April 2016. He had not reviewed the Loyola records of treatment in February 2016. While he testified that there were no findings of swelling on his review of the records at deposition, he did not address the issue of the traction injury discussed by Dr. Biswas. Dr. Papierski agreed that complaints of numbness, tingling and burning in his hand could possibly be symptoms of carpal tunnel syndrome. Without specific notation of what parts of the hand the symptoms were impairing, he is unable to tell if they were related to carpal tunnel.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that his conditions of ill-being in the cervical spine and right upper extremity, being aggravation of right carpal tunnel and C5-C7 radiculopathy are causally connected to the accident on January 26, 2016.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers ' Compensation Commission,* 409 Ill. App. 3d 258 (1st Dist., 2011). Based upon the Arbitrator's finding with respect to Causal Connection, Petitioner is entitled to reasonable and necessary treatment for his conditions of ill-being in the cervical spine and right arm and hand. Petitioner submitted PX 8 with claimed medical bills owed in this matter as well as the consolidated claim 16 WC 5103. Respondent admitted RX 4 with payments made. PX 4 lists the provider and amount paid but does not include the date of service or payment date. Both PX 8 and RX 4 commingle treatment between the November 28, 2015 and January 26, 2016 accidents. The medical records were admitted as PX 1, PX 2, PX 3, PX 4, and PX 9.

Having reviewed the testimony, medical records and depositions, the Arbitrator finds the treatment rendered for the cervical spine and diagnosed carpal tunnel is reasonable, necessary and causally related to the accident on January 26, 2016. Bills for treatment for the low back have been addressed in the decision in the consolidated case 15 WC 5103 decided in conjunction with this matter. The Arbitrator has reviewed the claimed medical bills and payment log and finds as follows:

ATI Physical Therapy: PX 8 includes a bill from ATI for 12 sessions from 2/11/16 through 3/24/16 totaling $4330.47. RX 4 lists 12 payments totaling $1,457.54. There is no fee schedule calculation offered as to whether this payment pursuant to the Act. No adjustments or payment are noted on the bill.
Hinsdale Orthopedics: PX 8 includes a November 11, 2017 faxed bill showing a balance owing of $1,530.00. There are two separate $171.00 charges for July 24, 2017. The Arbitrator infers that one is for the low back visit and one for the cervical spine visit documented in PX 1. The charges for the lumbar visit are denied (See the decision in consolidated case 16 WC 5103 decided in conjunction with this matter).
Loyola Medical Center: PX 8 includes bills owing for x-rays on February 1, 2016 ($105.00) and February 5, 2016 $1,510.00 after $60.00 patient payment) and Dr. Wojewnik on February 5, 2016 ($117.80 balance after $100 patient payment and discounts). RX 4 notes payment directly to Petitioner of $160.00.

Chicago Ridge Medical Imaging: PX 8 includes charges of $2930.00 for the June 30, 0216 EMG/NCV. The bill shows adjustments and $625.00 payment leaving a $0 balance. RX 4 does not detail this payment but the bill does appear to be paid.

Based upon the record as a whole, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $4330.47 to ATI Physical Therapy, $1627,80 to Loyola University Medical Center, and $1,359.00 to Hinsdale Orthopedics, 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.

In support of the Arbitrator's decision with respect to (K) Prospective Medical, the Arbitrator finds as follows:

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. Based upon the Arbitrator's finding with respect to Causal Connection, Petitioner is entitled to reasonable and necessary treatment for his conditions of ill-being in the cervical spine and right arm and hand. There are no current recommendations for treatment for the cervical spine. Dr. Biswas has recommended that Petitioner undergo an open right carpal tunnel release. Based upon the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds the opinions of Dr. Biswas persuasive.

Based upon the record as a whole, the Arbitrator finds that Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Biswas including an open right carpal tunnel release, any post-operative treatment, physical therapy or other reasonable and necessary care.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation, the Arbitrator finds as follows:

Petitioner is not claiming any temporary total disability. Petitioner was placed on a 10-pound lifting restriction as of February 5, 2016. Respondent has provided work to Petitioner within this restriction. Petitioner is seeking temporary partial disability benefits thereafter, claiming diminished earnings as a result of his restrictions. When the employee is working light duty on a part-time basis or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits. 820ILCS 305/8(a).

Petitioner testified that since he has been on light duty he gets a lot less work. He is offered jobs within his restrictions, mainly touching up wood, scratches and cuts in leather, sewing jobs, inspections. He gets paid by the job, $12 for an inspection and $25 for a repair. Petitioner identified PX 5 as his pay stubs. The commission varies depending on how many jobs you perform and the type of job. Ms. Leitelt testified that the average technician is scheduled for five to eight jobs per day. Respondent has accommodated Petitioner's 10-pound restriction to an extent. Petitioner is averaging 2 to 5 jobs per day. Petitioner is limited to the jobs he can do. He cannot do a lot of the jobs because of his lifting restriction.

The parties stipulated that at the time of the injury, Petitioner's average weekly wage was $604.63 per week. Ms. Leitelt testified that vacation pay is calculated by taking the previous year commission and dividing by 52. Petitioner's vacation pay in 2018 was $283.92 per week. PX 5 contains Petitioner's paystubs from February 7,

2016 through March 10, 2018 a period of 109 weeks. The exhibit includes a spreadsheet to aid in the calculations from the data contained therein. Petitioner's gross pay for this period was $35,369.38 or $324.49 per week.

Respondent raised Petitioner's own conduct as a factor in reducing his earnings, including his choice that, despite the lack of a medical driving restriction, he could not drive as far because it was hurting his arm. Ms. Leitelt testified that if he could drive farther, there would be more jobs. Petitioner has not called in at the end of a scheduled day to see if there are additional jobs for the day. Ms. Leitelt testified that If he called the office, he would get more jobs. Respondent did not present any data or other evidence of the number of jobs that would have been available or of the effect on Petitioner's earnings. The Arbitrator declines to speculate as to whether there would be any effect or what additional earnings could be made. The Arbitrator finds that the two-year earnings data provided in PX 5 is the best evidence of the effect of the restrictions on Petitioner's earning capacity.

Temporary partial disability benefits shall be equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of accident and the gross amount he is earning in the modified job. The Commission has used the average weekly wage as the best evidence of Petitioner's earnings at the time of the accident. *John Brian Tripp v. Galaxy One Marketing, Inc, 17 IWCC 253, 2017 Ill. Wrk. Comp. LEXIS 292; Perski v. Meyers Aggregate 17 IWCC 5, 2917 Ill. Wrk. Comp. LEXIS 48.* The gross amount he is earning in the modified job is assessed by the earnings statements or W-2 for the light duty work. *Perski, supra; Jeffrey Roberts, v. Contech Construction Products, 16 IWCC 575, 2016 Ill. Wrk. Comp. LEXIS 469.* PX 5 documents total lost earnings for the period from February 7, 2016 and March 10, 2018 of $30,535.29. Petitioner would be entitled to temporary partial disability benefits of $20,356.86 for this period. The Arbitrator notes that the amount of temporary partial disability varies per week depending on the number and type of jobs each week and cannot address potential additional benefits owing beyond the period documented in PX 5. *Susan Bryant v. Lurie Children's' Hospital of Chicago, 17 IWCC 170, 2017 Ill. Wrk. Comp. LEXIS 208.*

Per the stipulation of the parties, Respondent has paid S1,221.78 in temporary compensation.

Based upon the record as a whole, the Arbitrator finds that Petitioner is entitled to temporary partial disability benefits totaling $20,356.86 for the period February 6, 2016 through March 10, 2018. Respondent is entitled to credit of $1,221.78 for temporary benefits paid.

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 ☐ Other (explain) penalties	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CRISTINA AVILA,
Petitioner,

vs. NO: 14 WC 37327

RONKEN INDUSTRIES, INC.,
Respondent.

19IWCC0045

DECISION AND OPINION ON REVIEW

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

The Commission affirms and adopts the Arbitrator as to the award for temporary total disability benefits, medical expenses, and denial of causal connection of the diagnosis of bilateral epicondylitis to the work accident of August 6, 2014. However, the Commission corrects the typo on the Order sheet to reflect the correct period of temporary total disability benefits shall run from September 20, 2014 through February 21, 2016, or 74 2/7 weeks. The Commission further corrects the typo on the face sheet of the decision to reflect the connected case is 14WC042516 and not 16WC042516.

The Commission reverses the Arbitrator in the denial of penalties and awards the Petitioner $10,000 in penalties under 820 ILCS 305/19(l). The Commission finds that the Respondent's failure to pay benefits while the insurance companies fought over which company was liable based on manifestation date was without good and just cause and resulted in an unreasonable delay in payment of benefits under §19(l). We find that Respondent is liable for penalties of $10,000.00 due to the delay in payment of temporary total disability benefits and medical expenses.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $320.51 per week for a period of 74 2/7 weeks, from September 20, 2014 through February 21, 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 sum of $28,286.00 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 the sum of $10,000.00 in penalties under §19(l) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $47,792.95. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 24 2019

Charles J. DeVriendt

Joshua D. Luskin

CJD/dmm
O: 112818
49

SPECIAL CONCURRENCE AND DISSENT

I concur with the majority as to its affirmation and adoption of the Arbitrator's decision as it relates to all issues other than accident. I also concur with the majority as to the award of penalties pursuant to Section 19(l) of the Act. Regarding the issue of accident, I believe the appropriate manifestation date, and thereby, accident date is August 7, 2014. As the medical records evidence, Petitioner presented to Dr. Williams on August 7, 2014 at which time Dr. Williams advised Petitioner her condition was related to the work duties performed for Respondent.

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

AVILA, CHRISTINA
Employee/Petitioner

Case# **14WC037327**
16WC042516

RONKEN INDUSTRIES INC
Employer/Respondent

19IWCC0045

On 7/7/2017, 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 1.13% 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:

0365 BRIAN J McMANUS & ASSOC LTD
MICHAEL N FOLGA
30 N LASALLE ST SUITE 2126
CHICAGO, IL 60602

2837 LAW OFFICE OF JOSEPH MARCINIAK
MICHELLE R POWELL
TWO N LASALLE ST SUITE 2510
CHICAGO, IL 60602

STATE OF ILLINOIS)
) SS
COUNTY OF LA SALLE)

- ☐ 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)

Christina Avila
Employee/Petitioner

v.

Ronken Industries, Inc.
Employer/Respondent

Case # 14 WC 37327
Consolidated with: 14 WC 42516

An *Application for Adjustment 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 Ory**, Arbitrator of the Commission, in the city **Ottawa**, on **September 29, 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. ☐ Is Petitioner entitled to any prospective medical care?

L. X What temporary benefits are in dispute?
☐ TPD ☐ Maintenance X TTD

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

N. ☐ Is Respondent due any credit?

O. ☐ Other ______

FINDINGS

On the date of accident **August 6, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$24.999.52**; the average weekly wage was **$480.76**

On the date of accident, Petitioner was **33** years of age, **married** with **3** dependent children.

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

Respondent shall be given a credit of **$14.402.12** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$14,402.12**

Respondent is entitled to a credit of **any proven payment made** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay **medical bills totaling $28,286.00** in accordance with the fee schedule and in accordance with §8 and §8.2 of the Act. The respondent shall be given credit for any payments made directly by the workers' compensation insurance carrier or any payments made by respondent's health insurance in accordance with §8 (j) of the Act.

Temporary Total Disability

Respondent shall pay TTD from **September 20, 2014 through February 24, 2016, or weeks 74-2/7 weeks @ $320.51 per week.**

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.

Christine M. Ory
Signature of Arbitrator
IC ArbDec19(b)

July 5, 2017
Date

JUL 7 - 2017

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christina Avila	)
Petitioner,	)
vs.	) **No. 14 WC 37327**
Ronken, Industries, Inc.	) (Consolidated with 14 WC 42516)
Respondent.	)
	)

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing under the provisions of §19b/§8a in Ottawa on September 29, 2016. The parties agree that on August 6, 2014, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. The parties agree petitioner earned $24,999.52 in the year pre-dating the claimed work accident and that her average weekly wage, as calculated pursuant to §10, was $480.76

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 timely notice of the accident was given to respondent in the time limits stated in the Act.
3. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
4. Whether petitioner is entitled to payment for medical treatment.
5. Whether petitioner is due TTD.
6. Whether penalties and attorneys' fees should be imposed upon respondent.

STATEMENT OF FACTS

The parties stipulated Humana was the group insurance carrier for respondent at the time of petitioner's two claimed work accidents.

Petitioner, Christina Avila Testimony

Petitioner was hired by respondent on February 22, 2005 and worked with respondent until May 31, 2016, when she was laid off. She was hired to work on the "swedge" line. As a swedger, petitioner held a stick solder and screwdriver in her left hand and a soldering iron in her right hand. She would take a wire tab, sticks it in with the screwdriver and then push it down with the hot soldering iron.

Petitioner did this to 650 to 800 capacitors per day. She described her job as heavily repetitive use of her arms and hands. Petitioner identified Respondent's Exhibit 1 as her job description as a swedger. She agreed with the statement in one of the first sentences in Respondent's Exhibit 1 that the physical demands of her job was repetitive in nature. Petitioner worked full duty in this job until August 6, 2014; thereafter she worked light duty, if at all.

Petitioner confirmed she asked for the day off on September 6, 2013 to see her primary care doctor, Dr. Cote, due to problems with her hands going numb and in pain constant pain. Dr. Cote referred her to Dr. Benavides for an EMG of both hands. After the EMG, Dr. Cote referred her to orthopedic surgeon, Dr. Meier. She saw Dr. Meier twice; he only prescribed pain killers.

Petitioner believed she told Roman of the pain in her hands in January, 2014.

Petitioner began working light duty on August 8, 2014. She was then seeing Dr. James Williams of Peoria. Petitioner identified Respondent's Exhibit 3 as the off-work request to see Dr. Williams on August 7, 2014. Dr. Williams took petitioner off the swedge line. Respondent accommodate petitioner's restrictions until September 19, 2014.

On August 8, 2014, at 6:00 AM, petitioner told her supervisor, Roman, that she was diagnosed with carpal tunnel by Dr. Williams and that it was related to her work with respondent. On September 19, 2014 Dr. Williams placed restrictions on her of no grasping or repetitive use of her hands; respondent could not accommodate these restrictions.

From September 20, 2014 through January 17, 2015 petitioner was not able to work and did not receive workers' compensation benefits. Petitioner received workers' compensation benefits from January 18, 2015 through February 21, 2016. During that period of time, petitioner underwent four surgeries by Dr. Williams. The surgeries were to her left wrist and elbow and right wrist and elbow. Petitioner was released to return to full duty work on February 22, 2016 and worked until May 31, 2016 when she was laid off.

Petitioner has not been symptom free since she began missing work on September 20, 2014. She has pain in her both elbows and weakness in her arms and hands. She returned to Dr. Williams on June 22, 2016. He placed restrictions on her working of no heavy lifting and no repetitive work. Dr. Williams treatment included pills with a consideration for a cortisone injection if the pills did not help.

Petitioner saw Dr. John Fernandez [at respondent's request] in the summer of 2016 in regard to the recent diagnosis by Dr. Williams of lateral epicondylitis.

All the surgeries were done at the Center for Health. She received post-operative physical therapy at the Center of Rehabilitation and Aquatic Center, which is part of the YMCA in Peru.

Petitioner testified that as of September 6, 2014, she was being paid $10.56 per hour, eight hours a day, five days a week.

On cross-examination by Attorney Cassano, petitioner confirmed she had not been told by a doctor that she had carpal tunnel syndrome or that the condition was work related before august 7, 2014. Petitioner confirmed she paid for her visit to Dr. Cote on September 6, 2013. She also agreed that when she saw Dr. Benavides for the EMG on November 1, 2013 she checked the box that the reason for her visit was not work-related. She agreed she worked at her regular position until August 7, 2014. She had last seen Dr. Meier on January 15, 2014 at which time Dr. Meier advised petitioner to return if her condition did not improve.

Petitioner agreed she did not report her work injury of September 6, 2013 within 45 days. She agreed she had not reported to Roman that her hands and arms conditions were work-related until August, 2014. She agreed she brought a note from Dr. Williams on August 8, 2014 advising she needed to be taken off the swedge line. She also confirmed she was taken off the swedge line and worked light duty until September 19, 2014.

On cross-examination by Attorney Powell, petitioner agreed she advised the Hartford Claims Adjuster on October 1, 2014 that her right hand symptoms had started two years before and left hand symptoms began one year before. She confirmed she had seen Dr. Cote on

September 6, 2013 and advised Dr. Cote she performed repetitive work. Petitioner did not believe Dr. Cote had diagnosed her with carpal tunnel syndrome on September 6, 2013.

Petitioner confirmed that on December 3, 2013 Dr. Cote referred petitioner to Dr. Meier for carpal tunnel syndrome, whom she saw on January 15, 2014. Petitioner denied that she was told by Dr. Meier that she had carpal tunnel condition.

Petitioner confirmed she did not make her appointment to return to Dr. Williams until after she had been laid off on May 31, 2016. At the time of her lay-off exit interview on May 31, 2016, she confirmed she did not tell Roman of any injuries to her arms and elbows.

Roman Poroshyn Testimony

Roman Poroshyn, respondent's production manager, was called to testify by Attorney Cassano in behalf of respondent. Roman has held the position of production manager since 2012. As such, he is responsible for human resources which includes hiring and firing, scheduling production and basically operating the production floor.

Respondent's rules require injured employees to report injuries to the production manager, which would be Roman. Petitioner reported to Roman in September, 2014 that her carpal tunnel syndrome was related to her employment. In August, 2014 petitioner brought Roman a doctor's note placing petitioner on restrictions. Roman offered petitioner a job that didn't require use of industrial grade irons. In August, 2014, Roman only knew petitioner was to be on restrictions. It was not until September, 2014 that petitioner advised Roman that her condition was work-related.

On examination by Attorney Powell, Roman confirmed petitioner worked full-duty from February 22, 2016 through May 31, 2016. Petitioner had not returned to work in the swedge department; instead she was retained as an operator of a winding machine. The job as a winder required petitioner to pick up the rolls of raw material, hold them on spindles, thread them through the machine. When the machine finished the cycle, petitioner would take out the mandrel by pulling it towards herself and remover the winder.

Roman confirmed petitioner did not report any problems with her hands or elbows at the time of her exit interview when laid off on May 31, 2016.

On cross-examination, Roman confirmed petitioner performed fifty to one hundred jobs a day as winder. Roman confirmed respondent could not accommodate petitioner's increased restrictions placed upon her by Dr. Williams in September, 2014.

Roman confirmed he completed a Form 45 with the date of accident of September 6, 2013 when respondent was contacted by Selective Insurance after an Application for Adjustment of Claim was received with the date of September 6, 2013.

Dr. Mario E. Cote/Peru Medical Clinic Records (PX.1)

Petitioner reported to Dr. Cote on September 6, 2013, that she had complaints of pain and numbness in both hands and that she performed repetitive activities was work. Tinnel sign was positive bilaterally; Phalen was negative. Carpal tunnel syndrome was diagnosed. Petitioner was referred for an EMG. On December 3, 2013, petitioner was referred to IV Ortho for carpal tunnel.

(The medical bill of $75.00 for services rendered on September 6, 2013, is included in Petitioner's Exhibit 11.)

St. Margaret's Health/Dr. Benavides Records (PX.2)

On November 1, 2013, she presented to Dr. Benavides for an EMG with a three-month history of hand pain and numbness. Petitioner reported nocturnal numbness when awakening in the morning. The November 1, 2013 EMG/NCV showed only right carpal tunnel syndrome.

Dr. Peter J. Meier/Illinois Valley Orthopedics Records (PX.3)

Petitioner was seen by Dr. Peter Meier on January 15, 2014 with bilateral complaints of bilateral hand pain. She also experienced occasional numbness and tingling. Her symptoms awake her from her sleep. Her exam showed a positive Tinel's sign on the left; negative on the right. She also had positive Phelan's sign on the left; negative on the right. She was diagnosed with early bilateral carpal tunnel syndrome. He prescribed night cockup splints and Etodolac. She was to return PRN.

She followed up on June 24, 2014 and again on July 8, 2014. On July 14, 2014, petitioner saw Dr. Meier. At that visit, petitioner had positive bilateral Phelan sign and negative Tinel's sign. Diagnosis on July 14, 2014 was right carpal tunnel syndrome. An injection was offered.

(The medical bills for services rendered on January 15, 2014 and July 14, 2014 totaling $257.00 are included in Petitioner's Exhibit 11.)

Dr. James R. Williams/Midwest Orthopaedics Center Records (PX.4)

Petitioner was first seen by Dr. Williams on August 7, 2014 as a referral by Dr. Cote. She had complaints of bilateral hand; in the thumb, long and right finger. The index finger was involved only on the left. The small finger was not involved. Petitioner described her swedge job.

Petitioner had positive Tinel's and Phelan sign bilaterally. Diagnosis was carpal tunnel syndrome. Dr. Williams notes he had a discussion with petitioner as to the cause of carpal tunnel syndrome. He took petitioner off the soldering "swedge" job.

Petitioner was seen again by Dr. Williams on September 22, 2014. She reported her hand symptoms continued despite being off the sledge job. Dr. Williams injected the right wrist. She was provided additional restrictions of now working the sedge line and also to avoid repetitive gripping or grasping.

Petitioner was again seen by Dr. Williams on October 30, 2014 with the same ongoing complaints. Dr. Williams kept her on the same restrictions. Surgery was to be scheduled.

On April 14, 2015, Dr. Williams wrote that petitioner's work activities of soldering up to 800 capacitors a day contributed to her symptoms of carpal tunnel syndrome.

Petitioner underwent a left carpal tunnel release by Dr. Williams on June 2, 2015. At her follow up appointment on June 18, 2015, petitioner reported good relief from her surgery. At the July 20, 2015, petitioner advised her carpal tunnel symptoms had improved; however, her cubital tunnel symptoms were not improving with splinting.

On September 1, 2015 Dr. Williams performed left ulnar nerve decompression for the left cubital tunnel syndrome. At the September 16, 2015 follow up appointment, petitioner reported an improvement of the cubital tunnel symptoms since surgery.

At the October 22, 2015 visit, Dr. Williams focused on the carpal tunnel and cubital tunnel condition on petitioner's right side. Surgery was scheduled and carried out on November 3, 2015. The surgery was a right open carpal tunnel release and right elbow ulnar nerve decompression.

At the follow up visit on November 16, 2015, petitioner reported significant improvement since the surgery. On December 17, 2015 and January 14, 2016, Dr. Williams kept petitioner completely off work.

On February 17, 2016 Dr. Williams released petitioner to unrestricted work as of February 22, 2016. She was to return to Dr. Williams as needed.

Petitioner returned to Dr. Williams on June 22, 2016 with bilateral elbow pain. There was bilateral swelling and tenderness over the lateral epicondyle. Petitioner reported pushing and pulling at work. Dr. Williams discussed the causes of epicondylitis. Cortisone injection was discussed. An MRI was ordered. She was released to return to restricted work with no heavy lifting or continuous repetitive use of left and right arm.

The July 14, 2016 right and left elbow MRI showed lateral epicondylitis in both.

(The medical bill for the period from August 7, 2014 through January 14, 2016, totaling $7,529.00 is included in Petitioner's Exhibit 10.)

Center for Health (Ambulatory Surgery Center) Records (PX.5)

These records are of the surgeries of June 2, 2015, September 1, 2015 and November 3, 2015. The operative reports were included in Petitioner's Exhibit 4. (The total charges for the four procedures done during the three surgeries, totaling $11,080.00, where included in Petitioner's Exhibit 10.)

YMCA Center for Physical Rehabilitation and Aquatics (PX.6)

Petitioner received physical therapy from June 29, 2015 through February 20, 2016.

Dr. James Williams September 24, 2015 Deposition (PX.7)

Dr. James Williams, board certified orthopedic surgeon, with sub specialty in hand and upper extremity surgery, testified in behalf of petitioner (6).

Dr. Williams examined petitioner on August 7, 2014. Petitioner's history was that she was 33 years old, right hand dominant who had complaints of pain, numbness and tingling in both hands involving the thumb, index, long and right fingers. The numbness, tingling and pain woke her up at night. She tried wrist cock-up splints which helped at night, but not during the day. She worked nine years for respondent doing soldering. She performed this job using a rod and screwdriver in her left hand and soldering iron in her right. She did 800 capacitors in a day; one takes less than a minute. (7-8)

Dr. Williams had treated solderers in the past. He testified that soldering is extensive (sic) on one's upper extremities. (8)

Examination by Dr. Williams revealed positive Tinel's, Phalen's and median nerve compression test bilaterally; all three provocative maneuvers for carpal tunnel syndrome (9). Dr. Williams assessment was bilateral carpal tunnel syndrome (9-10). Dr. Williams restricted petitioner from soldering (10). Dr. Williams believed there was a relationship with, or at least an aggravation of, petitioner's bilateral carpal tunnel syndrome and petitioner's job as a solderer (11). Dr. Williams performed a left carpal tunnel release on June 2, 2015; he was to perform a right carpal tunnel release in the future (12-13).

Petitioner did not have signs of bilateral cubital tunnel syndrome until her visit with Dr. Williams on July 20, 2015 (14). Dr. Williams opinion of left cubital tunnel syndrome was the same as his opinion on causation as carpal tunnel syndrome (15-17). Dr. Williams performed an ulnar nerve decompression to petitioner's left elbow on September 1, 2015 (18).

On cross examination by Attorney Cassano, Dr. Williams confirmed he had no other records of petitioner's treatment before his treatment on August 7, 2014, was the EMG report of November 1, 2013 [which showed right carpal tunnel syndrome] (24).

On cross-examination by Attorney Marciniak, Dr. Williams agreed that despite the November 1, 2013, negative EMG study on the left, given petitioner's complaints of bilateral pain and numbness in both hands in September, 2013, petitioner could be indicative of bilateral carpal tunnel syndrome at that time (26-28).

On further cross by Attorney Cassano, Dr. Williams agreed there was no indication of causation [of petitioner's carpal tunnel or cubital tunnel condition to petitioner's work] prior to August 7, 2014 (28-29).

Medical Bills for Case 14 WC 37327

Petitioner claims to following bills for treatment rendered as of August 7, 3014:
$10,928.00 – Dr. James Williams (August 7, 2014 to August 25, 2016)
$11,080.00 – Center for Health Ambulatory Surgery (June 2, 2015 to November 3, 2015)
$6,946.00 – Illinois Valley Community Hospital (June 30, 2015 to February 29, 2016)
$2,618.00 – Associated Anesthesiologists, S.C. (June 2, 2015 – November 3, 2015)
$5.94 – St. Margaret Health (October 15, 2014)

Medical Bills for Case 14 WC 42516

$75.00 Dr. Mario E. Cote (September 16, 2013)
$997.00 St. Margaret Health Neurology Center
$257.00 Dr. Peter J. Meier/Illinois Valley Orthopedics (January 14, 2014 to July 14, 2014)

(RX.1 through RX.5 Pertain to 14 WC 42516)

Swedger Job Description (RX.1)

This describe the physical requirements of the job of swedger.

First Report of Injury (RX.2)

This was completed for the claimed September 6, 2013 accident, per the testimony of Roman Poroshyn, at the direction of Selective Insurance.

Petitioner's Attendance Records for 2013 and 2014 (RX.3)

It shows the date petitioner was off for various reasons including a notation for the month of October, 2014 that petitioner was off for "Plant Injury".

Petitioner's Pay Records (RX.4)

The pay information was from a check dated September 7, 2012 through September 6, 2013, showed petitioner worked a total of 1,882.42 hours and was paid a total of $19,194.16.

Respondent's Calculation of Petitioner's Average Weekly Wage (RX.5)

Respondent, utilizing the information contained in Respondent's Exhibit 4, calculated petitioner's average weekly wage was $401.84 in the year pre-dating the accident.

(RX. A through RX. C Pertain to 14 WC 37327)

Dr. Charles Carroll April 10, 2015 Report and August 24, 2015 Deposition (RX. A & RX. B)

Dr. Carroll was hired by Hartford Insurance (defending respondent in case 14 WC 37327) to perform a records review and offer an opinion on causation and manifestation date of petitioner's carpal tunnel syndrome.

Dr. Carroll testified he understood the manifestation date to mean when the symptoms become present to the point where someone might seek care or the diagnosis becomes known (RX. B, p.8). Based upon the review of the medical records, Dr. Carrol placed petitioner's manifestation date around August 1, 2013 (RX. B, pp.10-11). Dr. Carroll agreed petitioner's job as a solderer for respondent caused or, at least, aggravated her carpal tunnel condition to the point that treatment and temporary totally disability was necessary (RX. B, pp.11 & 22).

Dr. John Fernandez July 26, 2016 Exam Report (RX. C)

Dr. John Fernandez examined petitioner and reviewed certain medical records and reports relative to petitioner's care and treatment of her upper extremities, which included the June 20, 2016 visit with Dr. Williams wherein petitioner complained of bilateral elbow pain. In the June 20, 2016 record, petitioner advised she pushed and pulled at work.

Dr. Fernandez diagnosed bilateral elbow pain with possible epicondylitis or simple myofascial pain. Dr. Fernandez did not believe petitioner's work activities caused or aggravated her epicondylitis condition, but may increase her symptoms of pain or discomfort.

Dr. Fernandez believed an MRI was appropriate; and if the diagnosis of epicondylitis was confirmed, then therapy would be the appropriate treatment. Dr. Fernandez believed petitioner was restricted from work only due to her subjective complaints. Dr. Fernandez believed that from an objective standpoint, petitioner was able to perform unrestricted work.

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:

Petitioner's treating physician, Dr. James Williams, as well as Dr. Charles Carroll, who examined petitioner at the request of Hartford Insurance in behalf of respondent for the August 6, 2014 claimed accident, confirmed petitioner's employment as a solderer for respondent caused the bilateral carpal tunnel syndrome.

Although petitioner was previously diagnosed with carpal tunnel syndrome and had undergone an EMG/NCV that showed carpal tunnel syndrome on the right side, petitioner continued to perform her regular job as a swedge and received minimal treatment until August 6, 2014. Dr. James Williams testified there was no indication contained in petitioner's records of causation [to her work with respondent] prior to August 7, 2014. Dr. Williams also testified petitioner's work soldering caused or aggravated both the bilateral carpal tunnel and bilateral cubital tunnel syndrome.

Based upon the foregoing, despite the fact the Arbitrator determined petitioner had sustained accidental injuries that arose out of and in the course of her employment with respondent on September 6, 2013, the Arbitrator finds petitioner condition had worsened to the point where

surgery was necessary for both the bilateral carpal tunnel and cubital syndromes, and thus suffered another repetitive work accident as of August 6, 2014.

E. With respect to the issue of notice, the Arbitrator finds the following:

Petitioner testified she notified her employer of her work-related condition in August, 2014, at which time she was taken off the swedge line. Respondent's supervisor, Roman Proshoyn, testified petitioner advised him in September, 2014 that her condition was related to the work. At the latest, the notice date would have been September 19, 2014, which is the date respondent could no longer accommodate petitioner's restrictions due to petitioner's carpal tunnel condition. As her accident date has been determined to be August 6, 2014, this would mean she reported the condition at the latest at 44 days, which is within the time limit stated in the Act.

Therefore, the Arbitrator finds petitioner provided timely notice of her work accident.

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:

Both petitioner's treating physician, Dr. James Williams, and respondent's examining doctor, Dr. Charles Carroll, confirmed petitioner's bilateral carpal tunnel condition, which required surgery, was caused and/or aggravated by petitioner's occupation as a solderer. Dr. Williams also confirmed petitioner's bilateral cubital tunnel syndrome, that necessitated surgery, was caused and/or aggravated by her work as a soldered for respondent. Respondent offered no evidence to refute Dr. Williams opinion on causation of the bilateral cubital tunnel syndrome.

Based upon the foregoing, the Arbitrator finds petitioner's bilateral carpal tunnel syndrome and the left-sided cubital tunnel was caused by petitioner's work accident of August 6, 2014.

Petitioner also claims that her recently-diagnosed bilaterally epicondylitis was caused by her work accident of September 6, 2013 and/or August 6, 2014. Petitioner had been released to return to regular employment and released from Dr. Williams' care as of February 21, 2016. On February 22, 2016, petitioner returned work for respondent as a winder, which was a completely different position than that of a solderer. Petitioner worked as a winder for respondent from February 22, 2016 through May 31, 2016 when she was laid-off. At the time she was laid off, she did not report any problems with her hands and arms.

Petitioner did not return to Dr. Williams with her elbow complaints until June 22, 2016. Thereafter, Dr. Williams diagnosed bilaterally epicondylitis. On June 22, 2016, Dr. Williams placed petitioner on restrictions of no heavy lifting or repetitive use of the left and right arm. Dr. Williams did not provide an opinion on causation as to of petitioner's bilateral epicondylitis. Respondent provided the opinion of Dr. John Fernandez, who opined petitioner's work may have increased her symptoms, but did no cause or aggravate her bilateral epicondylitis.

Based upon the fact that petitioner was performing a completely different job as a winder as opposed to a swedge worker, had a completely different diagnosis of bilaterally epicondylitis than her original diagnosis of carpal tunnel and cubital tunnel syndrome; the fact that she had been released by her doctor from his care on February 21, 201; the fact that Dr. Williams failed to indicate that the bilateral epicondylitis was caused by the original work accident of August 6, 2014 and the fact that Dr. Fernandez did not relate the cause of petitioner's bilateral epicondylitis to her employment, the Arbitrator finds petitioner's bilaterally epicondylitis was not the result of the work accident of August 6, 2014.

J. With the respect to the issue of medical bills incurred, the Arbitrator finds the following:

As the Arbitrator has determined petitioner's bilateral carpal tunnel and cubital tunnel syndrome where the result of the repetitive work accident of accident of August 6, 2014, awards the following bills to be paid pursuant to §8 and §8.2 with credit be given to respondent for any payment made by workers' compensation insurance and pursuant to §8 j for any payment made by respondent's health insurance carrier.

$7,642.00 Midwest Orthopedic Center (08/07/2014 to 02/17/2016)
$11,080.00 Center for Health Ambulatory Surgery Center (06/02/15 to 11/03/2015)
$6,946.00 Illinois Valley Community Hospital
$2,618.00 Associated Anesthesiologists, S.C.

No award is made for petitioner's treatment of bilateral epicondylitis diagnosed on June 22, 2016.

L. With regard to the issue of TTD, the Arbitrator finds the following:

The Arbitrator finds petitioner was temporarily totally disabled as a result of the August 6, 2014 accidental injuries from September 20, 2014 through February 21, 2016 and awards temporary total disability for this period, which is 74-2/7 weeks at the rate of $320.51 per week.

M. With regard to the issue of penalties and attorneys' fees, the Arbitrator finds the following:

Although the evidence was sufficient to support petitioner's claim for medical expenses and temporary total disability resulting from the bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome, the evidence was also sufficient to raise questions as to when petitioner's injury actually occurred, and the causal connection of the conditions to her employment, so as to justify respondent's dispute.

The evidence fails to support a causal connection between petitioner's work accident of August 6, 2014 and her recently-diagnosed bilateral epicondylitis. Accordingly, the respondent's denial to pay for treatment and disability for the newly diagnosed bilateral epicondylitis was justified.

For these reasons, the Arbitrator finds respondent's actions were reasonable under the circumstances and denies petitioner's claim for penalties and attorneys' fees.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CRISTINA AVILA,

Petitioner,

vs.

NO: 14 WC 42516

19IWCC0046

RONKEN INDUSTRIES, INC.,

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, notice, causal connection, medical expenses, temporary total disability and penalties, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that the Petitioner failed to prove her alleged September 6, 2013, repetitive trauma injury was causally connected to her work. Petitioner did seek medical care from her primary care physician on September 6, 2013 and was diagnosed with carpal tunnel syndrome. However, by her own testimony, Petitioner wasn't sure her complaints were related to her employment and no physician told her at that time that her condition was causally related to her employment. Petitioner sought minimal care between September 6, 2013 and January 15, 2014, and of the three physicians from whom Petitioner sought treatment regarding her initial diagnosis, EMG and nerve conduction study and one orthopedic visit, none causally related her complaints of carpal tunnel syndrome to her work duties. Additionally, Petitioner continued to work full duty until August of 2014. Petitioner therefore failed to meet her burden to prove accident or causal connection and the claim was properly denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision of July 7, 2017, denying Petitioner's claim and dismissing the case, a copy of which is attached hereto, is affirmed and adopted with the aforementioned changes.

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

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

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

DATED: JAN 24 2019

Charles J. DeVriendt

Joshua D. Luskin

CJD/dmm
O: 112818
49

SPECIAL CONCURRENCE

I concur with the outcome reached by the majority, but I write separately as I employ a different legal analysis to arrive at my decision.

Petitioner commenced her employment with Respondent on February 22, 2005 as a "swedger." T. 13. Her duties required her to utilize both hands to manipulate a wire tab, stick solder, screwdriver, and hot iron. *Id.* She would perform her work on 650 to 800 capacitors per day. Id.

On or about September 6, 2013, she began experiencing pain and numbness in both hands requiring her to seek medical treatment. On September 6, 2013, Petitioner presented to Dr. Cote, her primary care physician complaining of pain and numbness in both hands. Petitioner provided a history of repetitive activities at work. GX1. Dr. Cote referred Petitioner to Dr. Benavides who performed an EMG on November 1, 2013 which evidenced right-sided carpal tunnel syndrome. GX2.

On January 15, 2014, Dr. Meier, an orthopedic physician evaluated Petitioner on Dr. Cote's referral. Petitioner provided a history of bilateral hand pain. Dr. Meier performed a physical examination which evidenced positive findings for the left hand and negative findings for the right despite the positive EMG. Dr. Meier noted the discrepancy memorializing "[s]he had nerve conduction studies performed by Dr. Benavidez [*sic*], which apparently revealed right carpal tunnel syndrome." GX3. Dr. Meier released Petitioner PRN and recommended splints. On July 14, 2014, Dr. Meier reevaluated Petitioner and again performed a physical examination which was positive for the Phalen's sign but negative otherwise. Dr. Meier diagnosed right-sided carpal tunnel syndrome. *Id.* At neither of these visits did Dr. Meier provided any work restrictions nor is there any indication in the medical records that Dr. Meier obtained a history from Petitioner regarding her work duties.

On August 7, 2014, Petitioner sought another opinion from Dr. Williams also on the

referral of Dr. Cote. Petitioner proved a history of bilateral hand complaints which included pain, numbness, and tingling which were months in duration on an intermittent basis. Petitioner provided a history of her work duties while employed by Respondent over the prior nine years. Dr. Williams diagnosed bilateral carpal tunnel syndrome, advised Petitioner to refrain from performing her soldering duties, and provided an off-work note stating as such. GX4.

Petitioner testified the day following her August 7, 2014 appointment, she advised her supervisor, Roman, regarding her diagnosis of carpal tunnel syndrome and Dr. Williams' belief such condition was due to her work duties performed for Respondent. T. 21. Mr. Roman Poroshyn testified on behalf of Respondent. Mr. Poroshyn testified he spoke with Petitioner in August of 2014 but could not recall whether Petitioner at that time advised him that her condition was work related. T. 61. Mr. Poroshyn testified he spoke with Petitioner in September of 2014 at which time Petitioner advised she was diagnosed with carpal tunnel syndrome and her physician believe her condition was due to her work duties. *Id.* Mr. Poroshyn stated September of 2014 was the first time he was notified by Petitioner regarding her condition and its relationship to her work duties. *Id.*

On April 10, 2015, Dr. Carroll performed a records review at the request of Respondent's attorney in matter 14 WC 37327 and provided testimony via evidence deposition on August 24, 2015. Dr. Carroll testified Petitioner suffered from bilateral carpal tunnel syndrome which was related to her work duties performed for Respondent. RXB, p.10-11. Dr. Carroll further testified Petitioner's condition manifested itself on or about August 1, 2013. *Id.* In formulating his opinion, Dr. Carroll stated he did not consider when Petitioner believe her condition to be work related testifying as follows: "No, I did not have any knowledge of when the patient thought that. I was just looking at when the symptoms appeared, looking at the records and trying to piece together that in a reasonable fashion, and looking backwards to link it to the diagnosis. But I do not have any knowledge as to when the patient may have claimed that or was advised to claim it." RXB, p. 9.

Petitioner filed two Applications for Adjustment of Claim with two different dates of accident- August 6, 2014 (14 WC 37327) and September 6, 2013 (14 WC 42516) which were consolidated and tried on September 29, 2016. Respondent was represented by separate counsel for each accident date as Respondent was covered by different insurance policies for each accident date. The Arbitrator wrote two separate decisions finding accident in both but denying the present matter based upon a lack of timely notice.

I believe the appropriate analysis relates to the manifestation date as there is no dispute Petitioner's job duties caused her condition of bilateral carpal tunnel syndrome. Both Dr. Williams, Petitioner's treating physician, and Dr. Carroll, Respondent's expert physician testified to such causal relationship. At issue is- when did such condition manifest itself, as "the date of an accidental injury in a repetitive-trauma compensation case is the date on which the injury 'manifests itself.'" *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill. 2d 524, 531, 505 N.E.2d 1026 (1987).

As the Court noted "'[m]anifests itself' means 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." *Id.* "The manifestation date is not the date on which the injury and its causal link to work became plainly apparent to a reasonable physician, but the date on which it became plainly apparent to a reasonable employee. [Citation omitted]." *Durand v. Industrial Commission*, 224, Ill. 2d 53, 72, 862 N.E.2d 918 (2006). Further, the date of manifestation is subject to a flexible standard where various factors are examined and is generally determined to be "either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities." *Id.*

In the case at hand, Petitioner initially sought treatment in September 2013. The medical records evidence she advised Dr. Cote, her primary care physician, of her repetitive activities at work, but there is no indication Dr. Cote advised Petitioner as to a causal link between such activities and her complaints of hand pain. Moreover, Petitioner testified no physician other than Dr. Williams advised her regarding the relationship between her work duties and her condition.

Additionally, Petitioner's course of treatment with Dr. Meier was perfunctory at best. More importantly, Dr. Meier upon his January 15, 2014 initial evaluation of Petitioner questioned whether Petitioner actually suffered from carpal tunnel syndrome eventually arriving at a diagnosis of right-sided carpal tunnel syndrome on July 14, 2014. At no time did Dr. Meier restrict Petitioner from working nor did he provide any indication in his medical records of a causal relationship between Petitioner's work duties and her condition.

As Petitioner testified to and the medical records evidence, the first time Petitioner became aware of a causal relationship between her work duties and her condition was on August 7, 2014- her initial evaluation by Dr. Williams. August 7, 2014 was also the first time Petitioner was restricted from working.

Certainly, Petitioner was experiencing symptoms in September of 2013 leading her to seek medical treatment, but as the Court noted in *Durand*, "'[r]equiring notice of only a *potential* disability is a useless act since it is not until the employee actually becomes disabled that the employer is adversely affected in the absence of the note of the accident.' (Emphasis in original)." *Durand v. Industrial Commission*, 224, Ill. 2d 53, 68, 862 N.E.2d 918 (2006) (quoting *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill. App. 3d 607, 611, 531 N.E.2d 174 (1988)). Further Illinois law does not recognize a reasonable physician standard, Dr. Carroll's opinion notwithstanding, it became plainly apparent to the reasonable Petitioner on August 7, 2014 that her condition, bilateral carpal tunnel syndrome was related to her work duties performed for Respondent.

Petitioner's repetitive trauma injury manifested itself on August 7, 2014 which thereby is the appropriate date of accident. See *decision in case 14 WC 37327*. Petitioner failed to prove she sustained a repetitive trauma accident manifesting on September 6, 2013, and the matter is denied.

For the reasons set forth above, I concur with the outcome reached by the majority.

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

AVILA, CHRISTINA
Employee/Petitioner

Case# **14WC042516**

14WC037327

RONKEN INDUSTRIES INC
Employer/Respondent

19IWCC0046

On 7/7/2017, 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 1.13% 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:

0365 BRIAN J McMANUS & ASSOC LTD
MICHAEL N FOLGA
30 N LASALLE ST SUITE 2126
CHICAGO, IL 60602

1680 CASSANO & ASSOCIATES
LAWRENCE J CASSANO
1240 IROQUOIS AVE SUITE 210
NAPERVILLE, IL 60563

STATE OF ILLINOIS)
) SS
COUNTY OF LA SALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) 8(a)

Christina Avila
Employee/Petitioner

v.

Ronken Industries, Inc.
Employer/Respondent

Case # 14 WC 42516
Consolidated with: 14 WC 37327

An *Application for Adjustment 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 Ory**, Arbitrator of the Commission, in the city **Ottawa**, on **September 29, 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. [ ] Is Petitioner entitled to any prospective medical care?

L. X What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance X TTD

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

N. [ ] Is Respondent due any credit?

O. [ ] Other ______

FINDINGS

On the date of accident **September 6, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$18,530.20**; the average weekly wage was **$408.06**

On the date of accident, Petitioner was **33** years of age, **married** with **3** dependent children.

Respondent does not owe for medical services.

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

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

ORDER

Petitioner failed to give timely notice of her work accident within the provisions of the Act. Therefore, petitioner's claim is denied and the case is dismissed.

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

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

Christine M. Ory
Signature of Arbitrator
IC ArbDec19(b)

July 5, 2017
Date

JUL 7 - 2017

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christina Avila	)
Petitioner,	)
vs.	) **No. 14 WC 42516**
Ronken, Industries, Inc.	) (Consolidated with 14 WC 14 WC 37327)
Respondent.	)
	)

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing under the provisions of §19b/§8a in Ottawa on September 29, 2016. The parties agree that on September 6, 2013 petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of his employment.
2. Whether timely notice of the accident was given to respondent in the time limits stated in the Act.
3. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
4. Petitioner's average weekly wage in the year pre-dating the accident.
5. Whether petitioner is entitled to payment for medical treatment.
6. Whether petitioner is due TTD.
7. Whether penalties and attorneys' fees should be imposed upon respondent.

STATEMENT OF FACTS

The parties stipulated Humana was the group insurance carrier for respondent at the time of petitioner's two claimed work accidents.

Petitioner, Christina Avila Testimony

Petitioner was hired by respondent on February 22, 2005 and worked with respondent until May 31, 2016, when she was laid off. She was hired to work on the "swedge" line. As a swedger, petitioner held a stick solder and screwdriver in her left hand and a soldering iron in her right hand. She would take a wire tab, sticks it in with the screwdriver and then push it down with the hot soldering iron.

Petitioner did this to 650 to 800 capacitors per day. She described her job as heavily repetitive use of her arms and hands. Petitioner identified Respondent's Exhibit 1 as her job description as a swedger. She agreed with the statement in one of the first sentences in Respondent's Exhibit 1 that the physical demands of her job was repetitive in nature. Petitioner worked full duty in this job until August 6, 2014; thereafter she worked light duty, if at all.

Petitioner confirmed she asked for the day off on September 6, 2013 to see her primary care doctor, Dr. Cote, due to problems with her hands going numb and in pain constant pain. Dr. Cote referred her to Dr. Benavides for an EMG of both hands. After the EMG, Dr. Cote referred her to orthopedic surgeon, Dr. Meier. She saw Dr. Meier twice; he only prescribed pain killers.

Petitioner believed she told Roman of the pain in her hands in January, 2014.

Petitioner began working light duty on August 8, 2014. She was then seeing Dr. James Williams of Peoria. Petitioner identified Respondent's Exhibit 3 as the off-work request to see Dr. Williams on August 7, 2014. Dr. Williams took petitioner off the swedge line. Respondent accommodate petitioner's restrictions until September 19, 2014.

On August 8, 2014, at 6:00 AM, petitioner told her supervisor, Roman, that she was diagnosed with carpal tunnel by Dr. Williams and that it was related to her work with respondent. On September 19, 2014 Dr. Williams placed restrictions on her of no grasping or repetitive use of her hands; respondent could not accommodate these restrictions.

From September 20, 2014 through January 17, 2015 petitioner was not able to work and did not receive workers' compensation benefits. Petitioner received workers' compensation benefits from January 18, 2015 through February 21, 2016. During that period of time, petitioner underwent four surgeries by Dr. Williams. The surgeries were to her left wrist and elbow and right wrist and elbow. Petitioner was released to return to full duty work on February 22, 2016 and worked until May 31, 2016 when she was laid off.

Petitioner has not been symptom free since she began missing work on September 20, 2014. She has pain in her both elbows and weakness in her arms and hands. She returned to Dr. Williams on June 22, 2016. He placed restrictions on her working of no heavy lifting and no repetitive work. Dr. Williams treatment included pills with a consideration for a cortisone injection if the pills did not help.

Petitioner saw Dr. John Fernandez [at respondent's request] in the summer of 2016 in regard to the recent diagnosis by Dr. Williams of lateral epicondylitis.

All the surgeries were done at the Center for Health. She received post-operative physical therapy at the Center of Rehabilitation and Aquatic Center, which is part of the YMCA in Peru.

Petitioner testified that as of September 6, 2014, she was being paid $10.56 per hour, eight hours a day, five days a week.

On cross-examination by Attorney Cassano, petitioner confirmed she had not been told by a doctor that she had carpal tunnel syndrome or that the condition was work related before august 7, 2014. Petitioner confirmed she paid for her visit to Dr. Cote on September 6, 2013. She also agreed that when she saw Dr. Benavides for the EMG on November 1, 2013 she checked the box that the reason for her visit was not work-related. She agreed she worked at her regular position until August 7, 2014. She had last seen Dr. Meier on January 15, 2014 at which time Dr. Meier advised petitioner to return if her condition did not improve.

Petitioner agreed she did not report her work injury of September 6, 2013 within 45 days. She agreed she had not reported to Roman that her hands and arms conditions were work-related until August, 2014. She agreed she brought a note from Dr. Williams on August 8, 2014 advising she needed to be taken off the swedge line. She also confirmed she was taken off the swedge line and worked light duty until September 19, 2014.

On cross-examination by Attorney Powell, petitioner agreed she advised the Hartford Claims Adjuster on October 1, 2014 that her right hand symptoms had started two years before and left hand symptoms began one year before. She confirmed she had seen Dr. Cote on

September 6, 2013 and advised Dr. Cote she performed repetitive work. Petitioner did not believe Dr. Cote had diagnosed her with carpal tunnel syndrome on September 6, 2013.

Petitioner confirmed that on December 3, 2013 Dr. Cote referred petitioner to Dr. Meier for carpal tunnel syndrome, whom she saw on January 15, 2014. Petitioner denied that she was told by Dr. Meier that she had carpal tunnel condition.

Petitioner confirmed she did not make her appointment to return to Dr. Williams until after she had been laid off on May 31, 2016. At the time of her lay-off exit interview on May 31, 2016, she confirmed she did not tell Roman of any injuries to her arms and elbows.

Roman Poroshyn Testimony

Roman Poroshyn, respondent's production manager, was called to testify by Attorney Cassano in behalf of respondent. Roman has held the position of production manager since 2012. As such, he is responsible for human resources which includes hiring and firing, scheduling production and basically operating the production floor.

Respondent's rules require injured employees to report injuries to the production manager, which would be Roman. Petitioner reported to Roman in September, 2014 that her carpal tunnel syndrome was related to her employment. In August, 2014 petitioner brought Roman a doctor's note placing petitioner on restrictions. Roman offered petitioner a job that didn't require use of industrial grade irons. In August, 2014, Roman only knew petitioner was to be on restrictions. It was not until September, 2014 that petitioner advised Roman that her condition was work-related.

On examination by Attorney Powell, Roman confirmed petitioner worked full-duty from February 22, 2016 through May 31, 2016. Petitioner had not returned to work in the swedge department; instead she was retained as an operator of a winding machine. The job as a winder required petitioner to pick up the rolls of raw material, hold them on spindles, thread them through the machine. When the machine finished the cycle, petitioner would take out the mandrel by pulling it towards herself and remover the winder.

Roman confirmed petitioner did not report any problems with her hands or elbows at the time of her exit interview when laid off on May 31, 2016.

On cross-examination, Roman confirmed petitioner performed fifty to one hundred jobs a day as winder. Roman confirmed respondent could not accommodate petitioner's increased restrictions placed upon her by Dr. Williams in September, 2014.

Roman confirmed he completed a Form 45 with the date of accident of September 6, 2013 when respondent was contacted by Selective Insurance after an Application for Adjustment of Claim was received with the date of September 6, 2013.

Dr. Mario E. Cote/Peru Medical Clinic Records (PX.1)

Petitioner reported to Dr. Cote on September 6, 2013, that she had complaints of pain and numbness in both hands and that she performed repetitive activities was work. Tinnel sign was positive bilaterally; Phalen was negative. Carpal tunnel syndrome was diagnosed. Petitioner was referred for an EMG. On December 3, 2013, petitioner was referred to IV Ortho for carpal tunnel.

(The medical bill of $75.00 for services rendered on September 6, 2013, is included in Petitioner's Exhibit 11.)

St. Margaret's Health/Dr. Benavides Records (PX.2)

On November 1, 2013, she presented to Dr. Benavides for an EMG with a three-month history of hand pain and numbness. Petitioner reported nocturnal numbness when awakening in the morning. The November 1, 2013 EMG/NCV showed only right carpal tunnel syndrome.

Dr. Peter J. Meier/Illinois Valley Orthopedics Records (PX.3)

Petitioner was seen by Dr. Peter Meier on January 15, 2014 with bilateral complaints of bilateral hand pain. She also experienced occasional numbness and tingling. Her symptoms awake her from her sleep. Her exam showed a positive Tinel's sign on the left; negative on the right. She also had positive Phelan's sign on the left; negative on the right. She was diagnosed with early bilateral carpal tunnel syndrome. He prescribed night cockup splints and Etodolac. She was to return PRN.

She followed up on June 24, 2014 and again on July 8, 2014. On July 14, 2014, petitioner saw Dr. Meier. At that visit, petitioner had positive bilateral Phelan sign and negative Tinel's sign. Diagnosis on July 14, 2014 was right carpal tunnel syndrome. An injection was offered.

(The medical bills for services rendered on January 15, 2014 and July 14, 2014 totaling $257.00 are included in Petitioner's Exhibit 11.)

Dr. James R. Williams/Midwest Orthopaedics Center Records (PX.4)

Petitioner was first seen by Dr. Williams on August 7, 2014 as a referral by Dr. Cote. She had complaints of bilateral hand; in the thumb, long and right finger. The index finger was involved only on the left. The small finger was not involved. Petitioner described her swedge job.

Petitioner had positive Tinel's and Phelan sign bilaterally. Diagnosis was carpal tunnel syndrome. Dr. Williams notes he had a discussion with petitioner as to the cause of carpal tunnel syndrome. He took petitioner off the soldering "swedge" job.

Petitioner was seen again by Dr. Williams on September 22, 2014. She reported her hand symptoms continued despite being off the sledge job. Dr. Williams injected the right wrist. She was provided additional restrictions of now working the sedge line and also to avoid repetitive gripping or grasping.

Petitioner was again seen by Dr. Williams on October 30, 2014 with the same ongoing complaints. Dr. Williams kept her on the same restrictions. Surgery was to be scheduled.

On April 14, 2015, Dr. Williams wrote that petitioner's work activities of soldering up to 800 capacitors a day contributed to her symptoms of carpal tunnel syndrome.

Petitioner underwent a left carpal tunnel release by Dr. Williams on June 2, 2015. At her follow up appointment on June 18, 2015, petitioner reported good relief from her surgery. At the July 20, 2015, petitioner advised her carpal tunnel symptoms had improved; however, her cubital tunnel symptoms were not improving with splinting.

On September 1, 2015 Dr. Williams performed left ulnar nerve decompression for the left cubital tunnel syndrome. At the September 16, 2015 follow up appointment, petitioner reported an improvement of the cubital tunnel symptoms since surgery.

At the October 22, 2015 visit, Dr. Williams focused on the carpal tunnel and cubital tunnel condition on petitioner's right side. Surgery was scheduled and carried out on November 3, 2015. The surgery was a right open carpal tunnel release and right elbow ulnar nerve decompression.

At the follow up visit on November 16, 2015, petitioner reported significant improvement since the surgery. On December 17, 2015 and January 14, 2016, Dr. Williams kept petitioner completely off work.

On February 17, 2016 Dr. Williams released petitioner to unrestricted work as of February 22, 2016. She was to return to Dr. Williams as needed.

Petitioner returned to Dr. Williams on June 22, 2016 with bilateral elbow pain. There was bilateral swelling and tenderness over the lateral epicondyle. Petitioner reported pushing and pulling at work. Dr. Williams discussed the causes of epicondylitis. Cortisone injection was discussed. An MRI was ordered. She was released to return to restricted work with no heavy lifting or continuous repetitive use of left and right arm.

The July 14, 2016 right and left elbow MRI showed lateral epicondylitis in both.

(The medical bill for the period from August 7, 2014 through January 14, 2016, totaling $7,529.00 is included in Petitioner's Exhibit 10.)

Center for Health (Ambulatory Surgery Center) Records (PX.5)

These records are of the surgeries of June 2, 2015, September 1, 2015 and November 3, 2015. The operative reports were included in Petitioner's Exhibit 4. (The total charges for the four procedures done during the three surgeries, totaling $11,080.00, where included in Petitioner's Exhibit 10.)

YMCA Center for Physical Rehabilitation and Aquatics (PX.6)

Petitioner received physical therapy from June 29, 2015 through February 20, 2016.

Dr. James Williams September 24, 2015 Deposition (PX.7)

Dr. James Williams, board certified orthopedic surgeon, with sub specialty in hand and upper extremity surgery, testified in behalf of petitioner (6).

Dr. Williams examined petitioner on August 7, 2014. Petitioner's history was that she was 33 years old, right hand dominant who had complaints of pain, numbness and tingling in both hands involving the thumb, index, long and right fingers. The numbness, tingling and pain woke her up at night. She tried wrist cock-up splints which helped at night, but not during the day. She worked nine years for respondent doing soldering. She performed this job using a rod and screwdriver in her left hand and soldering iron in her right. She did 800 capacitors in a day; one takes less than a minute. (7-8)

Dr. Williams had treated solderers in the past. He testified that soldering is extensive (sic) on one's upper extremities. (8)

Examination by Dr. Williams revealed positive Tinel's, Phalen's and median nerve compression test bilaterally; all three provocative maneuvers for carpal tunnel syndrome (9). Dr. Williams assessment was bilateral carpal tunnel syndrome (9-10). Dr. Williams restricted petitioner from soldering (10). Dr. Williams believed there was a relationship with, or at least an aggravation of, petitioner's bilateral carpal tunnel syndrome and petitioner's job as a solderer (11). Dr. Williams performed a left carpal tunnel release on June 2, 2015; he was to perform a right carpal tunnel release in the future (12-13).

Petitioner did not have signs of bilateral cubital tunnel syndrome until her visit with Dr. Williams on July 20, 2015 (14). Dr. Williams opinion of left cubital tunnel syndrome was the same as his opinion on causation as carpal tunnel syndrome (15-17). Dr. Williams performed an ulnar nerve decompression to petitioner's left elbow on September 1, 2015 (18).

On cross examination by Attorney Cassano, Dr. Williams confirmed he had no other records of petitioner's treatment before his treatment on August 7, 2014, was the EMG report of November 1, 2013 [which showed right carpal tunnel syndrome] (24).

On cross-examination by Attorney Marciniak, Dr. Williams agreed that despite the November 1, 2013, negative EMG study on the left, given petitioner's complaints of bilateral pain and numbness in both hands in September, 2013, petitioner could be indicative of bilateral carpal tunnel syndrome at that time (26-28).

On further cross by Attorney Cassano, Dr. Williams agreed there was no indication of causation [of petitioner's carpal tunnel or cubital tunnel condition to petitioner's work] prior to August 7, 2014 (28-29).

Medical Bills for Case 14 WC 37327

Petitioner claims to following bills for treatment rendered as of August 7, 3014:
$10,928.00 – Dr. James Williams (August 7, 2014 to August 25, 2016)
$11,080.00 – Center for Health Ambulatory Surgery (June 2, 2015 to November 3, 2015)
$6,946.00 – Illinois Valley Community Hospital (June 30, 2015 to February 29, 2016)
$2,618.00 – Associated Anesthesiologists, S.C. (June 2, 2015 – November 3, 2015)
$5.94 – St. Margaret Health (October 15, 2014)

Medical Bills for Case 14 WC 42516

$75.00 Dr. Mario E. Cote (September 16, 2013)
$997.00 St. Margaret Health Neurology Center
$257.00 Dr. Peter J. Meier/Illinois Valley Orthopedics (January 14, 2014 to July 14, 2014)

(RX.1 through RX.5 Pertain to 14 WC 42516)

Swedger Job Description (RX.1)

This describe the physical requirements of the job of swedger.

First Report of Injury (RX.2)

This was completed for the claimed September 6, 2013 accident, per the testimony of Roman Poroshyn, at the direction of Selective Insurance.

Petitioner's Attendance Records for 2013 and 2014 (RX.3)

It shows the date petitioner was off for various reasons including a notation for the month of October, 2014 that petitioner was off for "Plant Injury".

Petitioner's Pay Records (RX.4)

The pay information was from a check dated September 7, 2012 through September 6, 2013, showed petitioner worked a total of 1,882.42 hours and was paid a total of $19,194.16.

Respondent's Calculation of Petitioner's Average Weekly Wage (RX.5)

Respondent, utilizing the information contained in Respondent's Exhibit 4, calculated petitioner's average weekly wage was $401.84 in the year pre-dating the accident.

(RX. A through RX. C Pertain to 14 WC 37327)

Dr. Charles Carroll April 10, 2015 Report and August 24, 2015 Deposition (RX. A & RX. B)

Dr. Carroll was hired by Hartford Insurance (defending respondent in case 14 WC 37327) to perform a records review and offer an opinion on causation and manifestation date of petitioner's carpal tunnel syndrome.

Dr. Carroll testified he understood the manifestation date to mean when the symptoms become present to the point where someone might seek care or the diagnosis becomes known (RX. B, p.8). Based upon the review of the medical records, Dr. Carrol placed petitioner's manifestation date around August 1, 2013 (RX. B, pp.10-11). Dr. Carroll agreed petitioner's job as a solderer for respondent caused or, at least, aggravated her carpal tunnel condition to the point that treatment and temporary totally disability was necessary (RX. B, pp.11 & 22).

Dr. John Fernandez July 26, 2016 Exam Report (RX. C)

Dr. John Fernandez examined petitioner and reviewed certain medical records and reports relative to petitioner's care and treatment of her upper extremities, which included the June 20, 2016 visit with Dr. Williams wherein petitioner complained of bilateral elbow pain. In the June 20, 2016 record, petitioner advised she pushed and pulled at work.

Dr. Fernandez diagnosed bilateral elbow pain with possible epicondylitis or simple myofascial pain. Dr. Fernandez did not believe petitioner's work activities caused or aggravated her epicondylitis condition, but may increase her symptoms of pain or discomfort.

Dr. Fernandez believed an MRI was appropriate; and if the diagnosis of epicondylitis was confirmed, then therapy would be the appropriate treatment. Dr. Fernandez believed petitioner was restricted from work only due to her subjective complaints. Dr. Fernandez believed that from an objective standpoint, petitioner was able to perform unrestricted work.

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:

Petitioner's treating physician, Dr. James Williams, as well as Dr. Charles Carroll, who examined petitioner at the request of Hartford Insurance, confirms petitioner's employment as a solderer for respondent caused the bilateral carpal tunnel syndrome.

According to the holding in *Peoria County Bellwood Nursing Home v. Industrial Comm'n.*, 115 Ill.2d 524, 505 N.E. 2d 1026, 106 Ill. Dec. 235 (1987). the date of accident for cumulative trauma is determined by the manifestation date, which is the date in which both the fact of the injury and the casual relationship of the injury to petitioner's employment became plainly apparent.

Although petitioner testified she was not told of she had carpal tunnel condition until January, 2014, she did relate she had complaints of pain and numbness in both hands and that she did repetitive work when she first saw her doctor for these complaints on September 6, 2013. She also places the date of accident for this claim on September 6, 2013.

Accordingly, the Arbitrator finds petitioner's condition was the result of a repetitive work accident that manifested itself on September 6, 2013.

E. With respect to the issue of notice, the Arbitrator finds the following:

By her own admission, petitioner agreed she first advised her supervisor of the pain in her hands in January, 2014. At that time, and until after her August 6, 2014 claimed accident, petitioner continued to perform her usual job. Although petitioner claims that because she filed medical claims with respondent's health insurance, Humana, for treatment of her carpal tunnel condition beginning in September, 2013, respondent had constructive notice of petitioner's accident of September 6, 2013. There is no evidence that this claim was filed through respondent, but rather filed directly with Humana. Therefore, petitioner's argument of constructive notice, by submitting the medical bills with respondent's health insurance, fails.

For these reasons, the Arbitrator finds petitioner failed to provide notice of the September 6, 2013 work accident within the time limitations of the Act.

G. With respect the issue of petitioner's earnings, the Arbitrator finds the following:

According to the wages as reported in Respondent's Exhibit 4, petitioner worked a total of 1,816.42 beginning with the check dated September 21, 2012 through the check dated September 6, 2013. She earned a total of $18,530.20 for this period. Petitioner testified she worked 40 hours a week. The total number of hours of 1,816.42 divided by 40 hours means petitioner worked 45.41 weeks and earned a total of $18,530.20. Therefore, petitioner's average weekly wage in the year pre-dating the accident was $408.06

As petitioner failed to provide timely notice of the work accident, petitioner's claim for benefits is moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEROY KELLEY,

Petitioner,

vs. NO: 14 WC 26933

CARLINVILLE REHABILITATION,

Respondent.

19IWCC0047

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

Causation and Prospective Treatment

The Commission affirms the Arbitrator's determination that Petitioner's current L3-4 condition of ill-being remains causally connected to his work injury, but his L4-5 condition is not related. Like the Arbitrator, we find Dr. Gornet's assertion that L4-5 pathology is identifiable on the 2014 and 2015 scans is simply incredible, particularly given no such protrusion was observed by the radiologist, Dr. Robson, or Dr. VanFleet.

The Commission finds that while Petitioner clearly has ongoing complaints related to his accident, the two-level disc replacement recommended by Dr. Gornet is neither reasonable nor necessary. Our finding is based not only upon Dr. VanFleet's opinions but also Dr. Robson's conclusion that Petitioner's "recommended treatment is acceptance of condition with restrictions." PX1. The Commission instead finds Petitioner is entitled to reasonable and necessary prospective treatment in the form of the FCE with validity testing as prescribed by Petitioner's initial treating specialist, Dr. Robson.

Temporary Disability

The Arbitrator awarded maintenance benefits from February 14, 2017 through January 12, 2018, the hearing date. In so doing, the Arbitrator noted Dr. Robson placed Petitioner at maximum medical improvement with work restrictions pending completion of an FCE; Respondent accommodated the restrictions until February 2017, at which point it placed Petitioner on a leave of absence but refused to authorize the FCE or offer vocational rehabilitation. The Commission finds this period is better classified as Temporary Total Disability. To be clear, Dr. Robson's October 6, 2016 note states, "I feel he needs an FCE to adequately document his work capacity. Until then, he can work at a sedentary capacity with a 10 pound limit, no bending, stooping, twisting, or awkward positions...He is at the point of maximum medical improvement with the exception of restrictions." PX1 (Emphasis added). Given Dr. Robson issued a qualified maximum medical improvement finding, contingent upon completion of an FCE and determination of Petitioner's permanent physical restrictions, the Commission finds Petitioner's condition has yet to stabilize. Moreover, while we are cognizant that the "dispositive" issue when determining entitlement to TTD is whether condition has stabilized, the appellate courts have held the impact of a claimant's injuries on his employability is relevant to stabilization:

> Near the beginning of its analysis in *Interstate Scaffolding*, the supreme court states that, when a claimant seeks TTD benefits, the "dispositive inquiry is whether the claimant's condition has stabilized," *i.e.*, whether the claimant has reached [MMI]." *Interstate Scaffolding*, 236 Ill. 2d at 142. However, later in its analysis, the supreme court clarified that an injured employee is entitled to TTD benefits "if [he] is able to show that he continues to be temporarily totally disabled as a result of his work-related injury" (*id.* at 149), and that "when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury *and whether the employee is capable of returning to the work force*" ((Emphasis added.) (*id.* at 146). Moreover, the supreme court also noted that, in two prior appellate court decisions upon which it relied, "the touchstone for determining whether the claimants were entitled to TTD benefits was * * * whether the claimants' conditions had stabilized *to the extent that they were able to reenter the workforce*." (Emphasis added.) *Id.* at 148. *Holocker v. Illinois*

Workers' Compensation Commission, 2017 IL App (3d) 160363WC, ¶40, 82 N.E.3d 658.

As noted above, Dr. Robson imposed significant work restrictions. The Commission finds those restrictions severely hinder Petitioner's employability.

Respondent ceased providing accommodated duty consistent with the physician-imposed restrictions on February 13, 2017; Petitioner thereafter remained off work while under significant work restrictions. The Commission therefore finds Petitioner entitled to Temporary Total Disability benefits from February 14, 2017 through January 12, 2018, the date of hearing.

The parties stipulated Petitioner's average weekly wage was $240.98. This yields a TTD rate of $160.65, however the Commission notes this rate falls below the minimum as calculated pursuant to Section 8(b)1. *820 ILCS 305/8(b)1*. The statutory minimum benefit rate for a claimant with no dependents for Petitioner's date of accident is $220.00. Therefore, the Commission finds Petitioner entitled to TTD benefits of $220.00 per week for a period of 47 4/7 weeks, representing February 14, 2017 through January 12, 2018.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 7, 2018, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $220.00 per week for a period of 47 4/7 weeks, representing February 14, 2017 through January 12, 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 the award of maintenance benefits is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary, and causally related medical expenses incurred through October 6, 2016 for the care and treatment of Petitioner's L3-4 condition of ill-being as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for a functional capacity evaluation with validity testing, as recommended by Dr. Robson, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of 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 and notes $4,400.00 in benefits were paid by Respondent.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 5 2019

LEC/mck

O: 11/28/18

43

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

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

KELLEY, LEROY
Employee/Petitioner

Case# **14WC026933**

CARLINVILLE REHABILITATION
Employer/Respondent

19IWCC0047

On 2/7/2018, 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 1.65% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0487 SMITH MENDENHALL SELBY & COLE
DOUG MENDENHALL
PO BOX 8248
ALTON, IL 62002

2795 HENNESSY & ROACH PC
RICHARD A DAY
415 N 10TH ST SUITE 200
ST LOUIS, MO 63101

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)

LEROY KELLEY,
Employee/Petitioner

v.

CARLINVILLE REHABILITATION,
Employer/Respondent

Case # 14 WC 26933

Consolidated cases: ______

19IWCC0047

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **1/12/18**. 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 **choice of physicians**

FINDINGS

On the date of accident, **7/24/14**, 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 as it relates to his L3-L4 disc *is* causally related to the accident.
Petitioner's current condition of ill-being as it relates to his L4-L5 disc *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned $**12,530.96**; the average weekly wage was $**240.98**.

On the date of accident, Petitioner was **34** years of age, *single* with **0** dependent children.

Respondent *has or will* pay all reasonable and necessary charges for all reasonable and necessary medical services through 10/6/16.

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**4,400.00** for permanency advance, for a total credit of $**4,400.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner maintenance benefits of $220.00/week for 47-4/7 weeks, commencing 2/14/17 through 1/12/18, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services for treatment related to petitioner's L3-L4 disc through 10/6/16, 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.

Petitioner's claim for prospective medical care recommended by Dr. Gornet is denied.

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

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

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

Signature of Arbitrator

2/5/18
Date

ICArbDec19(b)

FEB 7 - 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 34 year old Certified Nursing Assistant, sustained an accidental injury to his back that arose out of and in the course of his employment by respondent on 7/24/14. Petitioner's duties consisted primarily of assisting patients with activities of daily life. Petitioner was injured when he and another employee were lifting a patient out of a bed. Petitioner felt a pop in his back. Petitioner initially treated at Midwest Occupational Health Associates (MOHA) on 7/25/14, where he complained of low back pain, without numbness, pain or tingling down his lower extremities. Petitioner continued treatment for his back including physical therapy. Petitioner began treating with Dr. Robson on 8/27/14. At that time he had low back pain with numbness in the left leg when standing for extended periods of time. Petitioner underwent additional physical therapy for his pain and low back syndrome. Petitioner also treated with Dr. Boutwell who provided some injections. Petitioner then underwent an MRI that showed a small disc protrusion central to the left at L3-L4 and mild posterior disc bulging at L5-S1. On 1/14/15 Dr. Robson recommended an L3-L4 lumbar microdiscectomy that was denied by the respondent after petitioner was examined by Dr. Van Fleet, and Dr. Van Fleet was of the opinion that petitioner had axial back pain and was not in need of any further treatment.

This matter first came before the Commission pursuant to a Motion for 19(b) hearing on 8/26/15. At that time the issues in dispute were causal connection, medical, and prospective medical expenses. Arbitrator Gallagher found petitioner's current condition of ill-being as it relates to his low back was causally related to the injury he sustained on 7/24/14; that all medical treatment provided petitioner was reasonable and necessary; and that petitioner was entitled to the prospective medical treatment, including but not limited to, the microdiscectomy recommended by Dr. Robson. Arbitrator Gallagher's Decision was filed on 10/5/15. No appeal was taken of Arbitrator Gallagher's Decision.

Post decision, petitioner returned to Dr. Robson on 12/16/15. His complaints were low back pain and radiating left leg pain. Dr. Robson performed a repeat MRI that day that showed a left central disc protrusion at L3-L4 with an annular tear and a high intensity zone lesion, and mild degenerative disc disease at L4-L5 and L5-S1, resulting in low grade neural foraminal compromise, that was very similar to appearance to the MRI of 12/3/14. Dr. Robson noted that petitioner had no change in his symptoms despite conservative treatment. He again recommended a left L3-L4 microdiscectomy.

On 1/4/16 petitioner underwent a left L3-L4 lumbar microdiscectomy performed by Dr. Robson. Petitioner's post operative diagnosis was herniated disc on the left at L3-L4. Petitioner followed-up post-operatively with Dr. Robson. This treatment included a course of physical therapy at Apex Physical

Therapy. On 2/6/16 petitioner reported that his left leg pain had improved, but he had considerable lower back pain and cramping in his calves. On 3/16/16 petitioner complained of a backache without radicular symptoms. On 4/13/16 petitioner complained of persistent low back pain and noted therapy was not helping. Dr. Robson noted no significant improvement over the past few weeks, and wanted a repeat MRI. On 4/20/16 petitioner complained of low back and radiating pain into the left leg. Dr. Robson noted that the MRI was stopped mid procedure due petitioner being in pain. From what was performed Dr. Robson noted that it showed minimal protrusion at L3-L4 on the left side. However, without contrast it was impossible to tell scar versus protrusion. Significant motion artifact was noted, and there was a high intensity lesion right by the facet joint at L3-L4 on the left, which Dr. Robson thought may be representative of a synovial cyst. Dr. Robson saw no recurrent herniated disc or discitis, or abnormalities. Dr. Robson placed petitioner on Gabapentin. Petitioner called on 4/28/16 to tell Dr. Robson that it was not helping his lower extremity numbness or tingling.

Petitioner continued to treat with Dr. Robson monthly. On 5/4/16 petitioner was still complaining of low back and left leg pain. Dr. Robson recommended a FCE to evaluate and determine restrictions in order to map out petitioner's future. On 5/10/16 Dr. Robson noted that respondent denied the request for petitioner's FCE, and indicated that they would be sending him for a 2nd opinion.

On 6/17/16 petitioner underwent a Section 12 examination performed by Dr. Timothy Van Fleet at the request of the respondent. Petitioner had been examined by Dr. Van Fleet twice before the initial 19(b) hearing on 8/26/15. Petitioner reported that he had undergone surgery and received no relief of his symptoms which he described as back pain and numbness into the left leg. Dr. Van Fleet noted that petitioner underwent a followup MRI on 4/20/16, which was compared to images from 12/16/15, and showed interval operative changes on the left at L3-L4 with mild diffuse disc bulging without evidence of recurrent disc herniation or canal compromise; a small area of postoperative change, or a residual annular tear or fissure along the left posterior margin of the L3-L4 disc; and no new lumbar disc herniation or canal compromise. Petitioner reported that he had been to the emergency room several days ago for severe spasms across his back. He also reviewed notes from Dr. Robson.

Following his record review and physical examination, Dr. Van Fleet diagnosed lumbar degenerative disc disease and nonspecific low back pain, and now a failed back syndrome, that was not related to the back injury due to the fact that he had initially opined that surgery was not indicated nor, would likely help. He opined that "failed back syndrome" was not a work related diagnosis. Dr. Van Fleet was of the opinion that petitioner had preexisting conditions affecting or prolonging his condition

that include lumbar degenerative disc disease and symptom magnification. He opined that petitioner does not need any further treatment. Dr. Van Fleet opined that all treatment after 5/27/15 was not reasonable, necessary, or related to the injury. Dr. Van Fleet noted that petitioner failed to see any benefit as it pertains to his microdiscectomy operation and continues to have a great deal of pain in the back and down into the lower extremity. Dr. Van Fleet did not feel that the results of an FCE would be a valid conclusion. Dr. Van Fleet was of the opinion that petitioner's treatment had been compromised by the fact that he had undergone a surgical procedure for his axial back pain in the form of a lumbar discectomy operation. He was of the opinion that the surgery would not have been anticipated to have a good result, and that is what happened. He did not recommended an FCE. Dr. Van Fleet opined that petitioner was certainly at MMI as it pertains to his lumbar operation.

On 7/13/16 Dr. Van Fleet drafted an addendum report regarding a current work status for petitioner. Dr. Van Fleet noted that his recommendations regarding petitioner's work status would not be as a result of his work injury, but as a result of persistent pain following his failed back syndrome, and that is not related to his work injury.

On 10/6/16 petitioner returned to Dr. Robson after an MRI with contrast was performed. Petitioner complained of low back pain and intermittent left leg pain, better than what he had before surgery. Dr. Robson reviewed the MRI and assessed mild facet hypertrophy and spinal stenosis at L3-L4. Also noted on the MRI was a new right paracentral posterior protrusion at L4-L5 associated with compression of the right lateral recess and apparent impingement upon the traversing nerves on the right side. Dr. Robson again recommended an FCE. Until that was performed he indicated that petitioner could work in a sedentary capacity with a 10 pound limit, with no bending, stooping, twisting, or awkward positions. Dr. Robson placed petitioner at MMI.

On 11/30/16 petitioner presented to the emergency room at Jersey Community Hospital after his left leg did not move when he was going down the stairs and he fell. Bruising and swelling were noted to the left posterior forearm. He reported problems with his left leg going numb since his surgery on 1/4/16. He denied any other injuries than to his left forearm.

On 12/13/16 Dr. Van Fleet drafted a letter after reviewing the MRI of 10/6/16. He was of opinion that there were postsurgical changes on the left side at L3-L4 which demonstrated no evidence of any focal neurologic compression; some postoperative fibrosis in the area of the left side, which was consistent with postoperative changes; and right sided L4-L5 protrusion, which seems to narrow the lateral recess on the right side ever so slightly and seemed to create a bit of stenosis on the right side at

the L4-L5 level and appeared to be new and was not noted on the 4/20/16 study. Dr. Van Fleet was of the opinion that the L4-L5 paracentral posterior disc protrusion appeared to be new and is not related to the work injury on 7/24/14. He recommended no further treatment. He was of the opinion that petitioner is at MMI.

On 2/10/17 petitioner presented to Dr. Matthew Gornet, at The Orthopedic Center of St. Louis for a spinal examination. Petitioner's main complaint was central low back pain to the left buttock, left hip and intermittent tingling down his left leg with weakness of his left leg. Petitioner provided a history of his accident and treatment to date. Petitioner noted that his symptoms remained constant and worse with bending, lifting, prolonged sitting or standing, and better with a change in position. Petitioner only reported left leg pain, no right leg pain. Dr. Gornet reviewed x-rays dated 2/10/17, CT scan dated 7/24/14, MRI dated 12/3/14, MRI dated 12/16/15, and an MRI dated 10/6/16. Dr. Gornet noted that the MRIs of 12/3/14 and 12/16/15 were of moderate to poor quality. Dr. Gornet noted that the MRI of 12/3/14 revealed an obvious central left annular tear with a small disc protrusion on the left at L3-L4, and some mild disc changes at L4-L5 and L5-S1. He noted that the MRI of 12/16/15 revealed a large central annular tear at L3-L4 to the left, which correlated with his symptoms, and a central disc protrusion at L4-L5, again consistent with the previous scans. Dr. Gornet noted that the MRI of 10/6/16 was of a much better quality and continued to show a central left annular tear. He also noted that it showed a laminotomy defect at the L3-L4 level and a central right herniation at L4-L5. No significant foraminal narrowing was noted.

Dr. Gornet believed petitioner's treatment to date was reasonable. Dr. Gornet was of the opinion that petitioner's injury was more than a simple herniation at L3-L4. He believed there was a clear violation of his annulus with a large acute appearing annular tear, which correlates best with his symptoms. He was of the opinion that this could account for his symptoms being not perfectly dermatomal from the beginning. Dr. Gornet was of the opinion that petitioner's persistent symptoms would indicate persistent discogenic or post-discectomy low back pain, and he required further workup to determine where his pain emanates from, L3-L4, or from L3-L4 and L4-L5, or even L5-S1. He noted that petitioner had pathology at L4-L5 from the very beginning that was seen on the MRI on 12/3/14. Dr. Gornet recommended an MRI spectroscopy of his lumbar spine. If it showed positive characteristics beyond L3-L4 consideration should be given to a CT discogram of L4-L5 and L5-S1. He disagreed with Dr. Van Fleet that petitioner could work full duty. Dr. Gornet placed petitioner on light duty with a 10 pound limit, no repetitive bending or lifting, and alternating between sitting and standing as needed.

Respondent did not accommodate petitioner's restrictions and on 2/11/17 petitioner was approved for a 90 day Personal Leave of Absence since he was not eligible for FMLA.

Petitioner returned to Dr. Gornet on 4/20/17. His main complaint was central low back pain, particularly around the left buttock and hip, and intermittent left leg pain and weakness. Dr. Gornet was of the opinion that petitioner's L4-L5 disc has progressed since the 12/3/14 films and as of 4/20/17 showed a central disc herniation/annular tear, more to the right. He was also of the opinion that the L5-S1 showed a central mild protrusion. In comparing the MRI's Dr. Gornet was of the opinion that there had been some mild progression at L4-L5 particularly on the right; that L3-L4 remained the same; and that L5-S1 remained the same. Dr. Gornet recommended additional testing.

On 5/13/17 petitioner's Personal Leave of Absence was extended for an additional 90 days.

On 5/17/17 petitioner underwent a discogram at L3-L4, L4-L5, and L5-S1 with facet blocks on the left. The impression was non-provocative disc at L5-S1, and provocative discs at L3-L4 and L4-L5. Dr. Gornet was of the opinion that the annular tears at L3-L4 and L4-L5 were symptomatic.

On 5/17/17 petitioner also underwent a CT of the Lumbar Spine Post Discogram. The impression was annular tears at L3-L4, L4-L5 and L5-S1 with disc protrusions at each of these levels with resulting central stenosis at L3-L4 and L4-L5, and diffuse foraminal narrowing.

On 6/26/17 petitioner followed-up with Dr. Gornet. Dr. Gornet recommended disc replacements at L3-L4 and L4-L5. Dr. Gornet did not think he could make petitioner perfect given his overall status, but did believe he could substantially help him. Dr. Gornet asked petitioner to decrease his smoking to about 1/2 a pack per day. Petitioner indicated that he wanted the procedure.

On 8/12/17 petitioner's Personal Leave of Absence was extended for an additional 90 days.

On 9/11/17 petitioner returned to Dr. Gornet, still awaiting approval of the recommended disc replacement. Dr. Gornet noted that he was continuing to seek approval. He continued petitioner on light duty restrictions.

On 10/31/17 the evidence deposition of Dr. Gornet, an orthopedic surgeon, was taken on behalf of petitioner. Dr. Gornet opined that the MRI dated 12/3/14 showed a large annular tear at the L3-L4 disc, that represents a significant structural injury to L3-L4 that was significantly greater and more visually obvious. Dr. Gornet was of the opinion that by removing part of the L3-L4 disc that was structurally injured, it made that structure weaker. He was also of the opinion that the L4-L5 problem was never

treated and because of that petitioner has had continued problems. Dr. Gornet opined that petitioner did not have optimal results from surgery because all present pathology was not treated. Dr. Gornet was of the opinion that the MRIs after 12/3/14 showed progression of the problems at L3-L4 and L4-L5. He opined that petitioner's symptoms are coming from the L3-L4 and L4-L5 discs. Dr. Gornert opined that after the recommended disc replacements petitioner has the chance of improving substantially, and returning to work in some capacity, potentially even the heavy duty job he had with respondent. He believed petitioner would improve from where he is now.

Dr. Gornet opined that petitioner sustained a disc injury in his lumbar spine at L3-L4 and L4-L5 as a result of the injury in July of 2014, and that the medical treatment he provided was reasonable and necessary. Dr. Gornet was of the opinion that petitioner has had structural problems present from the very beginning and as long as they are untreated, petitioner will continue with significant pain which will not resolve and will progressively get worse. He opined that Dr. Robson's surgery did not rectify this problem, and therefore, petitioner's original work related injury still remains in effect.

On cross examination, Dr. Gornet noted that petitioner was referred to him by his attorney. He stated that he did not review the initial records of MOHA or Jerseyville Community Hospital. Dr. Gornet was of the opinion that just because petitioner's injection at L4-L5 was not therapeutic, does not mean there was not a problem there. Dr. Gornet noted that the MRI of 12/3/14 revealed an obvious central annular tear with a small disc protrusion left at L3-L4 and the radiologist mentioned some mild disc changes at L4-L5 and L5-S1. Dr. Gornet believed the degeneration at L4-L5 and L5-S1 was minimal. Dr. Gornet believed that with a structural injury, the treater is looking for something that the radiologist is not really versed in because he does not treat patients. Dr. Gornet stated that he was looking for a change in the contour of the annulus, and any change in that contour could indicate a disc injury. He was of the opinion that the contour changes at L4-L5 and L5-S1 were small changes at that time, and L4-L5 became significant. He opined that on 12/3/14 the MRI showed a subtle suggestion of an annular tear at L4-L5. He based this on a little white line at the back of the disc. Dr. Gornet agreed that the radiologist made no suggestion of an annular tear at L4-L5 on either 12/3/14 or 12/15/16. Dr. Gornet was of the opinion that cutting into the annulus and removing any disc will have the effect of reducing disc material and decompressing the nerve root, but that does not address the structural issue. Dr. Gornet noted that the radiologist noted tears on the 12/16/15 and 10/6/16 MRIs that had not changed and were stable, but that petitioner had structural problems in the spine in that the disc itself is acidic and the continued acid or disk proteins leaking out of the tear will easily cause nerve irritation in a nondermatomal pattern, without

direct nerve compression. Dr. Gornet agreed that the MRI of 10/6/16 showed a new right paracentral posterior disc protrusion which compressed the right lateral recess and impinged upon the conversing nerves on the right side, and that the herniation was a new finding, which he viewed as progression. Dr. Gornet was of the opinion that if this was causing symptoms they would be on the right.

Dr. Gornet was of the opinion that the reason for the disc replacement was that petitioner had structural problems present at the very beginning of L3-L4 and L4-L5, and the L4-L5 problems had progressed on subsequent scans, and the only way to treat a structural problem and not overload the adjacent segments is with disc replacement. Dr. Gornet agreed that there was no disc herniation at L4-L5 seen on the MRI of 12/3/14 and 12/16/15.

On redirect examination Dr. Gornet was of the opinion that he would not treat just L3-L4 because petitioner would have a horrible outcome. He was of the opinion that L4-L5 has to be treated or petitioner should not have any surgery. He stated that he would have to fix both levels.

On recross, Dr. Gornet agreed that petitioner's radicular complaints have always been on the left side, with none on the right. However, he believed petitioner's structural back pain comes from both levels.

On 11/22/17 the evidence deposition of Dr. VanFleet, an orthopedic surgeon, was taken on behalf of the respondent. Dr. Van Fleet opined that he did not feel the surgery by Dr. Robson would be beneficial, and when he saw petitioner on 6/17/16 and petitioner still had complaints, that suggested to him the he probably did not need the operation to begin with. Dr. Van Fleet was of the opinion that petitioner is not a candidate for a disk replacement at L3-L4 and L4-L5. Dr. Van Fleet does not recommend this treatment because he does not feel it would help him. Dr. Van Fleet was of the opinion that disc replacements are proposed for people with persistent back complaints, and not for people with radicular symptoms or people with instability. Dr. Van Fleet was of the opinion that this recommended surgery would not help with any of petitioner's complaints. Dr. Van Fleet could not see how Dr. Gornet could diagnosis a structural disk injury when the MRI demonstrates changes consistent with degeneration. He was further of the opinion that without a pre and post injury MRI for comparison purposes, there would be no way to say that there is a structural disc injury. Dr. Van Fleet was of the opinion that petitioner had no evidence of instability on x-rays, no instability within the facet joints, and no signs of instability around the segment. He was of the opinion that Dr. Gornet was talking about a microscopic type of thing, but without a true biopsy of the disc space before and after the injury, he did not know how he could come up with that. Dr. Van Fleet was of the opinion, after looking at the same

parasagittal image as Dr. Gornet with respect to L4-L5, that the appearance of L4-L5 appeared to be normal disc signal intensity, or normal disc space height, and really a paucity of findings on the MRI study as it pertains to the L4-L5.

Dr. Van Fleet was of the opinion that the findings on the October 2016 MRI, as it relates to the L3-L4 disc, were stable from the December 2015 MRI, which was pre-surgery. He was of the opinion that the MRI further showed that there had not been any progression of the degeneration within the annulus of the L3-L4 disc space. Dr. Van Fleet was of the opinion that if the disc was undergoing degeneration, then so too would the facet joints posteriorly also undergo degeneration, however, in petitioner's case they were stable on the MRI at L3-L4. With respect to L4-L5, Dr. Van Fleet was of the opinion that there was a paracentral disc protrusion at L4-L5 off to the right, and as a result, he would expect petitioner to have more right-sided complaints associated with this type of condition. However, he noted that petitioner had no right sided complaints.

Dr. Van Fleet was of the opinion that petitioner is not a surgical candidate because he had degenerative changes at L3-L4 and L5-S1, and a disc protrusion at L4-L5, and patients with these findings always do poorly with a fusion or a disc replacement. Dr. Van Fleet further stated that petitioner has facet joint changes at the L3-L4 level consistent with degeneration, and therefore is not a good candidate for a lumbar disc replacement because he has back pain and you don't know if the back pain is coming from the facet joint, both, or neither.

Dr. Van Fleet was of the opinion that since petitioner has failed back syndrome, an FCE would be of some help to him if the study is found to be a valid study and it is done in the setting that would be a valid means of applying the FCE testing.

On cross examination Dr. Van Fleet was of the opinion that petitioner's current condition was related to his post surgical treatment and his surgery. He was further of the opinion that the surgery did further petitioner's symptoms. Dr. Van Fleet was of the opinion that although petitioner had back pain prior to the surgery, he did not have radiating leg pain, but rather had leg numbness, and a microdiscectomy would not address back pain or leg numbness, but rather would address radiculopathy, which petitioner did not have. Dr. Van Fleet was of the opinion that smokers in general have a higher failure rate with many operations, and smoking is a contraindication in the terms of the healing of the soft tissues in the terms of the outcomes of the procedure that has been proposed. Dr. Van Fleet was of the opinion that even if petitioner had the disc replacement Dr. Gornet recommended, he could not remove

the scar tissue around the nerve root, and there would be continued motion through that segment which would cause petitioner problems around that nerve root.

On redirect examination Dr. Van Fleet was of the opinion that just because L3-L4 and L4-L5 were provocative for pain on the discogram that does not mean that surgery is going to alleviate that pain. Dr. Van Fleet noted that multilevel disc replacements are not an FDA approved procedure.

On recross examination Dr. Van Fleet was of the opinion that the annular tears seen on the 12/3/14 MRI were not addressed by the microdiscectomy and would not be addressed with a disc replacement either.

Petitioner was referred by respondent to MOHA for treatment. Additionally, petitioner treated at the Jersey Community Hospital emergency room 7/24/14, 7/26/14, 1/25/15,1/29/16, 6/15/16, 11/30/16 and 5/26/17. Petitioner was also seen by his primary care physician, who referred him to Dr. Robson. Following his surgery by Dr. Robson, petitioner eventually sought treatment from Dr. Gornet, on the referral of his attorney.

Petitioner testified that his symptoms got a little better after the first surgery, but now he hurts all the time. He testified that he has pain in his low back. He stated that the pain stays in his low back with occasional shooting pain down his left leg, but then stated that most of his leg pain is really numbness. Petitioner testified that he is able to perform his activities of daily living. Petitioner testified that he has trouble standing for 6-8 hours, and needs to sit a lot. Petitioner testified that he has tried to reduce smoking. He testified that while he was undergoing follow-up treatment after surgery he was smoking 1-2 packs a day and was encouraged to stop. Petitioner testified that he does not smoke as much now because he cannot afford it, and wants to quit. He stated that he knows smoking is not good for his back.

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

Petitioner is alleging his current condition of ill-being as it relates to his lumbar spine is causally related to the injury he sustained on 7/24/14. Petitioner had previously tried this case pursuant to Section 19(b) of the Act. The arbitrator found causal connection, awarded medical through the trial date, and found the petitioner was entitled to prospective medical treatment, including but not limited to, the microdiscectomy recommended by Dr. Robson. No appeal was taken of the Arbitrator's Decision.

Following the hearing petitioner underwent a left L3-L4 microdisectmy performed by Dr. Robson on 1/4/16. His post-operative diagnosis was left herniated disc at L3-L4. Petitioner initially had relief of his left leg pain, but still had considerable low back pain and cramping in his calves. By 3/16/16

petitioner was still complaining of low back pain, and was again complaining of radiating pain into the left leg, which at trial he described as numbness.

Petitioner's MRI of 12/16/15 showed left central disc protrusion at L3-L4 with an annular tear and a high intensity zone lesion, and mild degenerative disc disease at L4-L5, and L5-S1, resulting in low grade neural foraminal compromise, that was very similar to the appearance of the MRI on 12/3/14.

When petitioner's condition did not improve Dr. Robson recommended a repeat MRI that was stopped mid procedure due to petitioner being in pain. From what Dr. Robson could read it showed minimal protrusion at L3-L4 on the left side, but without contrast he was not sure if this was scar versus protrusion. Also noted was a high intensity lesion right by the facet joint at L3-L4 on the left, that may have been representative of a synovial cyst. Dr. Robson noted no recurrent herniated disc or discitis, or abnormalities.

Dr. Van Fleet noted that petitioner had no relief of his symptoms, which is what he had said would happen. When he compared the 12/16/15 and 4/20/16 MRIs he noted that they showed interval operative changes on the left at L3-L4 with mild diffuse disc bulging without evidence of recurrent disc herniation or canal compromise, a small area of postoperative change or a residual annular tear or fissure along the posterior margin of the L3-L4 disc, and no new lumbar disc herniation or canal compromise. The Arbitrator finds it significant that both Dr. Robson and Dr. Van Fleet had essentially the same readings of these MRIs, as did the radiologist. Dr. Van Fleet diagnosed "failed back syndrome" not related to the injury, since he had opined that the surgery was not indicated. Dr. Van Fleet noted that petitioner failed to see any benefit as it pertains to his microdiscectomy operation and continues to have a great deal of pain in the back and down into the lower extremity. He believed petitioner should not have undergone surgery for his axial back pain.

On 10/6/16 when petitioner still had not improved, Dr. Robson ordered yet another MRI of the lumbar spine. At that time petitioner reported that his low back pain and intermittent left leg pain was better than what he had before surgery. Dr. Robson reviewed the MRI of 10/6/16 and assessed mild facet hypertrophy and spinal stenosis at L3-L4. In addition to these findings was a new finding, a right paracentral posterior protrusion at L4-L5 associated with compression of the right lateral recess and apparent impingement upon the traversing nerves on the right side.

On 11/30/16 petitioner presented to the emergency room after his left leg did not move when he was going down the stairs and he fell. He reported problems with his left leg going numb since his surgery on 1/4/16. He denied any injuries other than bruising and swelling to his left posterior arm.

Dr. Van Fleet reviewed the MRI of 10/6/16 and was of the opinion that it showed postsurgical changes on the left side at L3-L4 which demonstrated no evidence of any focal neurologic compression, some postoperative fibrosis in the area of the left side which was consistent with postoperative changes, and a new right sided L4-L5 protrusion that seemed to narrow the lateral recess on the right side ever so slightly, and seemed to create bit of stenosis on the right side at L4-L5. Dr. Van Fleet agreed with Dr. Robson, and the radiologist, and noted that the findings at L4-L5 were new and had not been noted on the prior studies. He opined that this finding was not related to the work injury on 7/24/14.

After both Dr. Robson and Dr. Van Fleet were both of the opinion that the right sided L4-L5 protrusion was a new finding, petitioner's attorney sent him to see Dr. Gornet. Petitioner saw Dr. Gornet on 2/10/17 and was still complaining of low back pain with intermittent tingling down his left leg with weakness of his left leg. Petitioner reported that his symptoms had remained constant and worse with different position changes. Dr. Gornet believed the MRIs were of moderate to poor quality. Dr. Gornet agreed with Dr. Robson and Dr. Van Fleet that the MRI on 12/3/14 only showed mild changes at L4-L5. However, in contrast to opinions of Dr. Robson and Dr. VanFleet, Dr. Gornet believed the MRI of 12/16/15 showed a large central annular tear a L3-L4 to the left, and a central disc protrusion at L4-L5. Neither Dr. Van Fleet, Dr. Robson, nor the radiologist, were of the opinion that the MRI of 12/16/15 showed a central disc protrusion at L4-L5. Dr. Gornet felt the MRI of 10/6/16 was of a much better quality and was of the opinion it showed a central left annular tear at L3-L4, a laminotomy defect at L3-L4, and a central right herniation at L4-L5.

Dr. Gornet believed petitioner's injury on 7/24/14 was more than a simple herniation at L3-L4. He believed there was a clear violation of the annulus with a large acute appearing annular tear, which could account for his symptoms not being perfectly dermatomal from the beginning. He was also of the opinion, in direct contrast to Dr. Robson, Dr. Van Fleet, and the radiologist, that petitioner had pathology at L4-L5 from the very beginning that was seen on the MRI on 12/3/14.

Petitioner's low back and left leg symptoms continued and Dr. Gornet was of the opinion that petitioner's L4-L5 disc had progressed since the 12/4/14, and as of 4/20/17 showed a central disc herniation/annular tear, more to the right. He believed L3-L4 had remained the same.

Dr. Gornet had petitioner undergo a discogram. He noted provocative discs at L3-L4 and L4-L5, that were symptomatic. Based on these findings Dr. Gornet recommended disc replacements at L3-L4 and L4-L5 and causally related them to the injury on 7/24/14.

Dr. Gornet was of the opinion that by removing part of the L3-L4 disc in surgery, that made the structure weaker. He was also of the opinion that the L4-L5 problem as never treated and because of that petitioner has had continued problems. The arbitrator finds it significant that neither Dr. Robson, Dr. Van Fleet were of the opinion that petitioner had continued problems at L4-L5 before the MRI on 10/6/16. Additionally, both noted that the disc at L4-L5 that was noted on the MRI on 10/6/16 was to the right, and the arbitrator finds it significant that petitioner has no complaints of any right sided symptoms. Dr. Gornet was of the opinion that petitioner had structural problems present from the beginning that were untreated, and because of that petitioner had continued pain that got progressively worse. He was further of the opinion that Dr. Robson's surgery did not rectify this problem, and therefore, petitioner's injury still remained in effect. Dr. Gornet was of the opinion that the MRI of 12/3/14 showed a subtle suggestion of an annular tear at L4-L5. However, neither Dr. Robson, Dr. Van Fleet, nor the radiologist noted any such findings. Dr. Gornet viewed the new finding on 10/6/16 as it relates to the L4-L5 were new findings, but he viewed them as a progression of the original injury, even after admitting that there was no disc herniation at L4-L5 seen on the MRIs of 12/3/14 or 12/16/15.

Dr. Gornet was of the opinion that only treating L3-L4 would result in a horrible outcome, so he believed L4-L5 had to be treated, or no surgery should be performed. Dr. Gornet agreed that although the new finding was to the right of L4-L5, petitioner has never had radicular complaints on the right. Despite this belief, he was still of the opinion that petitioner's structural back pain comes from both levels.

Dr. Van Fleet reiterated his opinion that the original surgery should never have been performed, because petitioner still has the same complaints. He was also of the opinion that petitioner is not a candidate for a disk replacement at L3-L4 and L4-L5, because he did not believe it would help him. Dr. Van Fleet opined that disc replacement are proposed for people with persistent back complaints, and not for people with radicular symptoms or people with instability. Dr. Van Fleet was of the opinion that without a pre and post injury MRI for comparison, there would be no way to say that there is a structural disc injury, but noted that there was no evidence of instability noted on the x-rays in the facets joints or around the segment. Dr. Van Fleet was also of the opinion that the MRI of 10/6/16 showed there had not been any progression of the degeneration within the annulus of the L3-L4 disc space, because if there had been the facet joints posteriorly would undergo degeneration, and on that exam there were stable. With

respect to the new L4-L5 paracentral disc protrusion off to the right, Dr. Van Fleet was of the opinion that if there was any effect, he would expect petitioner to have more right sided complaints associated with this finding. However, petitioner has not right sided complaints. Dr. Van Fleet was also of the opinion that people with degenerative changes at L3-L4 and L5-S1, and a disc protrusion at L4-L5, always do poorly with a fusion or disc replacement. He noted that since petitioner has facet joint changes at the L3-L4 level consistent with degeneration, he would not be a good candidate for a lumbar disc replacement because he has back pain, and you do not know if the back pain is coming from the facet joint, both, or neither.

Dr. Van Fleet was of the opinion that even if Dr. Gornet performed the disc replacement he could not remove the scar tissue around the nerve root, and there would be continued motion through that segment which would cause petitioner problems around that nerve. He was further of the opinion that just because L3-L4 and L4-L5 were provocative for pain on the discogram, that does not mean that surgery would alleviate that pain. Lastly, he was of the opinion that the annular tears seen on the 12/3/14 MRI were not addressed by the microdiscectomy and would not be addressed with a disc replacement either.

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of Dr. Van Fleet more persuasive that Dr. Gornet. The arbitrator finds Dr. Van Fleet's opinions more consistent with the findings of both Dr. Robson and the radiologist, as they relate to the MRI's and therefore to the causal connection between petitioner's current condition of ill-being as it relates to his low back. The arbitrator gives no weight to the opinions of Dr. Gornet that the problems petitioner currently has at L4-L5 were present on 12/4/14 and progressed over time to what they were on 10/6/16. The arbitrator bases this finding on the fact that Dr. Robson, Dr. Van Fleet, and the radiologist agree that the findings at L4-L5 on 10/6/16 were new and not a progression of what showed on the prior MRIs.

Based on the fact that the arbitrator had authorized the left L3-L4 lumbar microdiscectomy performed by Dr. Robson on 1/4/16 in his Arbitrator Decision issued 10/5/15; that petitioner's condition did not significantly improve following this surgery; that petitioner was diagnosed with failed back syndrome by Dr. Van Fleet; and that petitioner has continued with low back pain and radiculopathy on the left, the arbitrator finds the petitioner's current condition of ill-being as it relates to petitioner's L3-L4 disc causally related to the injury he sustained on 7/24/14. Given that the arbitrator finds the new MRI findings as of 10/6/16 at L4-L5 not causally related to the injury on 7/24/14, based on the credible opinions of Dr. Van Fleet, Dr. Robson, and the radiologist, the arbitrator finds the petitioner's current

condition of ill-being as it relates to his L4-L5 disc is not causally related to the injury on 7/24/14. The arbitrator finds the new disc protrusion at L4-L5 on 10/6/16 was a new finding unrelated to the mild disc disease at L4-L5 that was seen on the 12/3/14, 12/16/15, and 4/20/16 MRIs.

J. WERE 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 petitioner's current condition of ill-being as it relates to his L3-L4 disc causally related to the injury he sustained on 7/24/14, the arbitrator finds the treatment petitioner received for his L3-L4 disc through 10/6/16, the date Dr. Robson placed him at maximum medical improvement with respect to his 3-L4 disc, was reasonable and necessary to cure or relieve petitioner from the effects of the injury he sustained on 7/24/14. Given that the treatment provided by Dr. Gornet focused primarily on the petitioner's L4-L5 disc, and the arbitrator has found the current condition of ill-being as it relates to petitioner's L4-L5 disc is not causally related to the injury petitioner sustained on 7/24/14, the arbitrator finds the treatment petitioner received from Dr. Gornet from 2/10/17 through 9/11/17 was not reasonable or necessary to cure or relieve petitioner from the effects of his injury on 7/24/14.

Respondent shall pay all reasonable and necessary medical services related to petitioner's L3-L4 disc through 10/6/16, 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. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

Having found the opinions of Dr. Robson and Dr. Van Fleet more persuasive than those of Dr. Gornet, the arbitrator finds the surgery recommended by Dr. Gornet is not reasonable or necessary to cure or relieve petitioner from the effects of his injury on 7/24/14. The arbitrator bases this opinion not only on the opinions of Dr. Robson, but also those of Dr. Van Fleet, who the arbitrator found to be more persuasive than Dr. Gornet.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner is alleging that he is entitled to temporary total disability benefits from 2/14/17 through 1/12/18. The arbitrator adopts the findings of Dr. Robson who placed petitioner at maximum medical improvement on 10/6/16 and released him from his care with restrictions of working in a sedentary capacity with a 10 pound limit, with no bending, stooping, twisting, or awkward positions, until an FCE

was performed. Respondent accommodated these restrictions until 2/13/17. After that they placed petitioner on a Leave of Absence, and refused to authorize the FCE recommended by Dr. Robson.

As a result, the arbitrator finds the petitioner is not entitled to temporary total disability benefits for this period, but instead is entitled to maintenance benefits for the period 2/14/17 through 1/12/18 based on the fact that that Dr. Robson placed petitioner at MMI for his L3-L4 disc on 10/6/16; that Dr. Robson released petitioner to work with permanent light duty restrictions on 10/6/16 until an FCE was performed; that respondent did not accommodate petitioner's light duty restrictions after 2/13/17; and respondent has yet to authorize the FCE or offer petitioner any vocational rehabilitation.

Based on the above, the arbitrator finds the petitioner is entitled to maintenance benefits pursuant to Section 8(a) of the Act from 2/14/17 through 1/12/18, a period of 47-4/7 weeks.

O. DID THE PETITIONER EXCEED HIS CHOICE OF PHYSICIANS?

Respondent claims petitioner exceeded his choice of physicians. Respondent claims that Dr. Gornet was petitioner's third choice of physicians. Respondent claims that petitioner's first choice was his treatment at MOHA, where he was referred by the emergency room doctor at Jersey Community Hospital following his work injury. They next claim Dr. Robson was his second choice of physicians, and Dr. Gornet was his third choice of physicians, both referrals from his attorney. Respondent claims although petitioner was referred to MOHA by the emergency room doctor, the fact that he continued to treat at MOHA converted the referral from the emergency room to a choice of physician by petitioner.

The arbitrator finds this argument is without merit. The arbitrator finds the petitioner began treating at MOHA on the referral of the emergency doctor, and petitioner was seen at the emergency room at the direction of the employer. Therefore, since emergency room visits are not considered a choice of physician by the claimant, and the emergency room is the one that referred petitioner to MOHA, the arbitrator finds MOHA is within the chain of referrals from the emergency room and not a physician choice selected by the petitioner, regardless of the period petitioner treated there. The arbitrator finds respondent's argument that petitioner's continued treatment with MOHA converted MOHA from a referral to a choice of physician without merit given the fact that no matter how long he treated at MOHA the reason he was there at all was on a direct referral from the emergency room physician.

Given that the arbitrator does not find MOHA petitioner's first choice of physician, but does find both Dr. Robson and Dr. Gornet petitioner's first and second choice of physicians, the arbitrator finds the petitioner did not exceed his choice of physicians.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Geraldine Jackson, as Executor of the Estate of James Jackson and widow of James Jackson,

19IWCC0048

Petitioner,

NO: 08 WC 9203 & 14 WC 21043

v.

Monterey Coal Company,

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 evidentiary ruling on Petitioner's Motion to Consolidate Evidence only while preserving all other issues to be considered by the Commission at a later date, and being advised of the facts and law, reverses the Decisions of the Arbitrator only as to the evidentiary issue as stated below.

Findings of Fact and Conclusions of Law

1. Prior to his death on May 19, 2014, Petitioner worked for 37 years in the coal mines for Respondent. Petitioner filed an Application for Adjustment of Claim on February 28, 2008, alleging shortness of breath and exercise intolerance due to coal mine dust inhalation. He provided the accident date as December 31, 2007. Petitioner's surviving spouse, Geraldine Jackson, later filed a separate Application for Adjustment of Claim on June 20, 2014, alleging Petitioner's May 19, 2014 death was causally related to his employment.

2. The matters were consolidated and proceeded to hearing on February 22, 2017. Both Petitioner and Respondent entered two sets of exhibits that corresponded with two separate exhibit lists, one for 08 WC 9203 and one for 14 WC 21043. Ms. Jackson testified, and the Arbitrator closed proofs at that time.

3. On April 5, 2017, the parties came before the Arbitrator again on Petitioner's Motion to Consolidate Evidence. The Arbitrator reopened proofs for the limited purpose of having time to consider Petitioner's motion. The parties next appeared on May 25, 2017, at which time the Arbitrator denied Petitioner's motion.

4. On July 9, 2017, the Arbitrator issued two separate Decisions denying benefits. Petitioner filed a timely Petition for Review. One of the issues Petitioner raised on review was whether his Motion to Consolidate Evidence was properly denied.

5. The oral arguments regarding Petitioner's Motion to Consolidate Evidence appear to have occurred off the record. Nevertheless, based on the arguments presented in the parties' briefs, the Commission understands that the issue centers around whether Dr. Suhail Istanbouly's deposition should be considered in both 08 WC 9203 and 14 WC 21043. At hearing, Petitioner entered Dr. Istanbouly's deposition on his second exhibit list for 14 WC 21043. Petitioner's subsequent Motion to Consolidate Evidence asked for Dr. Istanbouly's deposition to also be considered as evidence in 08 WC 9203.

Following a careful review of the record, the Commission respectfully finds the Arbitrator erred in denying Petitioner's Motion to Consolidate Evidence and finding Dr. Istanbouly's deposition could only be considered in 14 WC 21043.

Even though the parties entered two separate sets of exhibits at hearing and the Arbitrator issued two separate Decisions, it does not change the fact that Petitioner's claims were properly consolidated at hearing. There is significant overlap between the two claims as both concern whether Petitioner developed progressive coal workers' pneumoconiosis over time. As such, many records are relevant to both claims.

Because the parties consolidated the claims and proceeded with one hearing, there is no reason why exhibits entered at hearing cannot be considered in both cases, regardless of whether the parties had two exhibit sets. Therefore, Petitioner's Motion to Consolidate Evidence should have been granted.

As such, the Commission reverses the Decisions of the Arbitrator as to the evidentiary ruling on Petitioner's Motion to Consolidate Evidence alone. The parties will present all other issues to the Commission for review at a later date to be determined by the Commission with proper notice being provided to both parties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decisions of the Arbitrator dated July 13, 2017 are hereby reversed as to the above stated evidentiary ruling alone.

IT IS FURTHER ORDERED BY THE COMMISSION that all remaining issues marked on Petitioner's Petition for Review are preserved for oral argument by the parties on a later date to be determined by the Commission.

DATED: JAN 25 2019

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/met
o: 12/6/18
46

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

Linda Hendricks,
Petitioner,

19IWCC0049

vs.

NO: 10 WC 18861

Illinois Dept. 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 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 June 11, 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: JAN 25 2019
d1/10/19
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0049

HENDRICKS, LINDA
Employee/Petitioner

Case# **10WC018861**

ILLINOIS DEPT OF HUMAN SERVICES
Employer/Respondent

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:

1804 RONALDSON & KUCHLER
MARK KUCHLER
19 S LASALLE ST SUITE 1402
CHICAGO, IL 60603

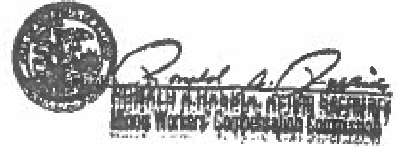
6096 ASSISTANT ATTORNEY GENERAL
JOHN M CATALANO JR
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

JUN 11 2018



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

Linda Hendricks
Employee/Petitioner

v.

Illinois Department of Human Services
Employer/Respondent

Case # **10 WC 18861**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank J. Soto**, Arbitrator of the Commission, in the City of **Chicago**, County of **Cook**, on **April 13, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

Findings

On **February 18, 2010**, Respondent-Employer *was* operating under and subject to the provisions of the Act.

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

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-Employer.

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

In the year preceding the injury, Petitioner earned $57,609.24; the average weekly wage was $1,107.87.

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

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

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

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

Respondent is not entitled to a credit under Section 8(j) of the Act.

Order

Respondent shall pay to Petitioner the sum of $644.72 per week for a period of **13.16** weeks as provided in Sections 8(e) and Sections 8(d)(2) of the Act because the injuries sustained caused **1.25%** loss of use of a **left arm**, pursuant to Section **8(e)** of the Act, and **2%** loss of use of a person **as a whole**, pursuant to Section **8(d)(2)** of the Act.

Respondent shall pay Petitioner compensation that has accrued from February 18, 2010 through April 13, 2018 and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

6/11/2018
Date

JUN 1 1 2018

PROCEDURAL HISTORY

This matter was tried before Arbitrator Frank Soto on April 13, 2018. The disputed issues involve whether Petitioner, on February 18, 2010, sustained an accidental injury that arose out of and in the course of her employment, whether Petitioner's current condition of ill-being is causally connected to her injury and the nature and extend of Petitioner's injury. The Parties stipulated that Petitioner's earnings in the year preceding the injury were $57,609.24 and her average weekly wage was $1,107.87, pursuant to Section 10 of the Act. (Arb. Ex. #1).

FINDINGS OF FACT

Linda Hendricks (hereinafter referred to as "Petitioner") has been employed with Ludeman Developmental Center (hereinafter referred to as "Respondent") for 17 years. Petitioner is employed as a mental health technician and her job duties include lifting, feeding, dressing and taking care of patients with mental and physical conditions. Petitioner testified that on occasion she needs to deal with patients who become violent.

Petitioner testified that she was injured, at work, on February 18, 2010, when she was struck by a chair thrown by a patient. Petitioner testified that she used her body to block the chair from striking other patients. After being struck by the chair, the Petitioner's left arm was sore, swollen and red. Petitioner reported the incident to her supervisor and completed a written incident or accident report.

On the day of the incident, Petitioner sought medical treatment from Dr. Imlach of Advocate Medical Group. Petitioner reported to Dr. Imlach that she was struck in the left forearm by a chair. Petitioner complained of left forearm pain. Petitioner underwent x-rays, which were negative for a fracture. Petitioner was diagnosed with a arm contusion and issued work restrictions of no lifting more than 10 pounds with the left arm. (PX 1).

The following day, on February 19, 2010. Petitioner saw Dr. Payne of Advocate Medical Group. At that visit, Petitioner was complaining of low back pain in addition to her left arm pain. Petitioner reported her pain level as 8 out of 10. On February 22, 2010, Petitioner returned to Dr. Imlach who noted slight tenderness and minimal swelling. Dr. Imlach noted that Petitioner's condition was improving. Petitioner's work restrictions were extended. (PX 1).

On March 1, 2010, Petitioner returned to Dr. Payne. At that visit, Petitioner reported that her pain level was 5 out of 10. Dr. Payne noted that Petitioner's arm contusion and lumbar strain

pain was improving. Dr. Payne proscribed muscle relaxants and issued work restrictions of no lifting more than 5 pounds and no bending, stooping or twisting. Petitioner continued treating at Advocate Health Care until March 16, 2010. At that time, Petitioner reported that her arm pain had resolved. Petitioner was released from care without restrictions. (PX 1).

Petitioner testified that after being discharged from care, she continued to experiencing problems and continues to take Aleve for pain. Petitioner testified that she had problems lifting patients and helping them use the bathroom. Petitioner's arm continues to hurt performing tasks such as lifting her grandchildren. Petitioner testified that her low back gives her problems when she has to lift things at work and at home. Petitioner testified that she experiences low back pain when it is cold and after walking. Petitioner testified that she has not received any additional medical treatment after being released from care on March 16, 2010.

The Arbitrator found the testimony of the Petitioner to be credible.

CONCLUSION OF LAW

The Arbitrator adopts the above Findings of Fact in support of the following Conclusions of Law set forth below.

To obtain compensation under the Act, a claimant bears the burden of showing by a preponderance of the evidence, he suffered a disabling injury which arose out of, and in the course of his employment. *Baggett v. Industrial Commission*, 201, Ill 2d. 187, 266 Ill. Dec. 836, 775 N.E. 2d 908 (2002). 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 to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. vs. Industrial Commission*, 129 Ill. 2d, 52, 133 Ill. Dec. 454, 541 N. E. 2d. 665 (1989). Accidental injury need not be the sole causative factor, not even the primary causative factor, as long as it was a causative factor in resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Commission*, 37, Ill. 2d. 123, 227 N.E. 2d. 65 (1967).

WITH RESPECT TO ISSUE (C) DID PETITIONER SUSTAIN AN ACCIDENTIAL INJURY THAT AROSE OUT OF AND IN THE COURSE OF EMPLOYMENT BY RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Petitioner presented sufficient, credible evidence that Petitioner's arm and lower back injury arose out of and during the course of work employment by Respondent.

Petitioner's unrebutted testimony, supported by the medical records, provides sufficient evidence that Petitioner was injured on February 18, 2010 after being struck by a chair on her left side thrown by a patient. Dr. Imlach's medical records, from the date of the accident, state that Petitioner suffered an arm contusion after being hit by a chair. The following day, Petitioner received treatment for back pain. her lower back. The Arbitrator finds that Petitioner's testimony affirmed that Petitioner twisted her body while she blocked the chair with her arm. Based upon the above, the Arbitrator finds that Petitioner's injuries did arise out of and in the course of her employment for Petitioner.

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

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that Petitioner's current condition of ill-being is causally related to her work accident of February 18, 2010, as set forth more fully below.

The Arbitrator finds that Petitioner presented sufficient, credible evidence that her current condition is causally related to the work injury. Petitioner presented on the date of the accident to Dr. Imlach and reported arm pain. Dr. Imlach's examination of Petitioner's arm revealed redness and swelling. On the day after the accident, Petitioner reported lower back pain. These records demonstrate that Petitioner was injured while blocking a chair with her left arm. Moreover, Petitioner testified that she had never suffered an injury to her arm or back prior to February 18, 2010. This testimony is consistent with and corroborated by the medical records submitted into evidence, which fail to show any preexisting condition or prior injury.

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

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

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined

and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:
- (i) The reported level of impairment;
- (ii) The occupation of the injured employee;
- (iii) The age of the employee at the time of injury;
- (iv) The employee's future earning capacity; and
- (v) Evidence of disability corroborated by medical records.

With regards to paragraph (i) of Section 8.1(b) of the Act. No AMA rating was offered into evidence. The Arbitrator, therefore, gives no weight to this factor.

With regards to paragraph (ii) of Section 8.1(b) of the Act. Petitioner was employed as a mental health technician. Petitioner's job duties include lifting patients and interacting and restraining patients with mental conditions. Petitioner's injury occurred after being struck by a chair. Petitioner continues to work in the same environment and, therefore, is exposed to the same or similar risks. Petitioner testified that she still experiences low back pain while lifting things at work. The Arbitrator gives this factor some weight to this factor.

With regards to paragraph (iii) of Section 8.1 (b) of the Act. Petitioner was 57 years old at the time of her injury. The ability to recover from injuries of tends to be more difficult from those individuals who just entering the work force or in the middle of the work life. Petitioner testified that she continues to experience low back and arm pain performing her work duties and performing some tasks of daily living which Petitioner continues to take over-the-counter pain relief medicine. The Arbitrator gives this factor some weight.

With regards to paragraph (iv) of the Act. Petitioner did not proffer any evidence involving her future earing capacity. Therefore, the Arbitrator gives this factor no weight.

With regards to paragraph (v) of the Act. Petitioner testified that she continues to suffer from low back and left arm pain. Petitioner takes over-the-counter medicine. The nature of the complaints contained in Petitioner's medical records are consistent with the areas of her body which she continues to experience pain. The medical records indicate that Petitioner's pain levels improved during treatment. Petitioner was released from care, without restrictions, within three (3) months of the injury. Petitioner testified that her pain levels did improve but that she continues

to experience residual pain which she did not experience before her injury. The Arbitrator gives this factor greater weight.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that the Petitioner sustained permanent partial disability to the extent of 1.25% loss of use of a left arm or 3.16 weeks, pursuant to Section 8(e) of the Act, and 2% loss of use of a person as a whole or 10 weeks, pursuant to Section 8(d)(2) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Terry Huber,
Petitioner,

19IWCC0050

vs. NO: 16 WC 21038

Illinois State University,
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 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 17, 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: JAN 25 2019
d1/10/19
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0050

HUBER, TERRI
Employee/Petitioner

Case# **16WC021038**

ILLINOIS STATE UNIVERSITY
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:

0293 KATZ FRIEDMAN EAGLE ET AL
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

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

JUL 17 2018

19IWCC0050

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

TERRI HUBER
Employee/Petitioner

v.

ILLINOIS STATE UNIVERSITY
Employer/Respondent

Case # 16 WC 21038

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. [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 _____

19IWCC0050

FINDINGS

On **March 15, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$32,058.00**; the average weekly wage was **$616.50**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$13,915.97** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$13,915.97**.

Respondent is entitled to a credit of $ amounts paid under it's group plan, if any under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of **$286.15**, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$369.90**/week for **37.625** weeks, because the injuries sustained caused the **17.5%** loss of the left leg, as provided in Section 8(e)(12) 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 12, 2018
Date

JUL 1 7 2018

Terri Huber v. Illinois State University 16 WC 21038

ARBITRATOR'S FINDINGS OF FACT

Petitioner Terri Huber testified that she works as a custodian for Respondent Illinois State University. She has been employed in this position for approximately three and a half years prior to her injury on March 16, 2016. She is employed full time and works five days per week from Monday through Friday. She testified that on March 16, 2016 she was vacuuming under a table when she twisted her left knee and felt immediate pain in her left knee. She further testified that she was referred for medical treatment to an Occupational Medicine Clinic and went through a course of physical therapy which only helped a little. An MRI was performed on her knee and she was then referred to an orthopedic surgeon, Dr. Joseph Newcomer. After Dr. Newcomer examined her, he recommended arthroscopic surgery.

The records of McLean County Orthopedics show that Petitioner initially saw Dr. Joseph Newcomer on May 23, 2016 and reported a twisting type injury to her knee while she was sweeping at work on 3/16/16. She described her symptoms of catching in her knee and some feelings of instability. Dr. Newcomer reviewed her MRI and concluded that it showed a "fairly significant" medial meniscus tear and minimal chondromalacia change. He also performed an exam which he felt was consistent with meniscal pathology. He recommended arthroscopic surgery. (Px#1, p.24).

Pursuant to Section 12 of the Act, Respondent had Petitioner examined by Dr. David Anderson of Orthopedics of Illinois on June 9, 2016. Dr. Anderson noted that Petitioner complained of pain over the anterior and the anteriomedial aspect of her left knee that was worse with activities. She also reported swelling and a feeling as if her knee would hyperextend. Dr. Anderson reviewed the MRI from May 18, 2016 and concluded that it was consistent with a small tear in the medial meniscus and also a medial bony contusion of the patella. Dr. Anderson concluded that Petitioner's symptoms were the result of her injury. He explained that the injury either caused or aggravated a pre-existing medial meniscus tear and caused or aggravated patellofemoral pain. He felt it was more likely that the patellofemoral compartment was causing the majority of her symptoms. He felt that either a cortisone injection or arthroscopy were reasonable options, though he commented that arthroscopy was usually less successful in treating patellofemoral symptoms. (Rx#2).

Dr. Newcomer performed surgery on June 30, 2016. The operative report shows Dr. Newcomer observed and debrided both a complex tear in the medial meniscus and a small radial tear in the posterior horn of the lateral meniscus. He also performed an abrasion chondroplasty on the underside of the patella. (Px#1, p.12).

After surgery, Petitioner was unable to get her prescriptions approved when she went to her pharmacy. She therefore contacted the Injured Worker Pharmacy ("IWP") to fill her prescriptions from Dr. Newcomer. (Px#3).

On August 8, 2016, Petitioner returned to see Dr. Newcomer and continued to have soreness and swelling in her knee, especially when on stairs. On exam, Dr. Newcomer found her to have tenderness of the medial patellar facet and medial joint line, crepitus, pain with extension and a positive McMurray's test. He recommended she undergo viscosupplementation and sought authorization for this procedure. (Px#2, p.18). Petitioner underwent post-operative physical therapy where it was noted

she reported constant pain and burning over the medial knee near the patella. (Px#2, p.63). Dr. Newcomer performed a series of five viscosupplementation injections between September 28, 2016 and October 27. 2016. (Px#2, pp. 6-15).

When Petitioner saw Dr. Newcomer on November 26, 2016, and the doctor noted that she continues to have a sharp, "stabby" pain with weight-bearing activity, particularly while maneuvering stairs. Dr. Newcomer recommended she look into oral nutraceutical and continue home exercise and using ice on her knee as needed. He released her from his care. (Px#2, pp.3-4).

Petitioner testified that at the present time her left knee frequently aches and she will have burning pain over and around her kneecap with activity. If she walks for a quarter mile she will develop burning pain. She used to walk on a trail two miles long for recreation and after a half mile she would begin to limp although she was able to finish the walk. She sometimes notices stabbing pain when she over taxes her knee, such as when she chases her grandchildren. Putting direct pressure on her kneecap causes severe pain in the kneecap. She has difficulty climbing stairs and therefore will always take an elevator. She stopped playing baseball because the running, starting, and stopping cause too much pain in her knee.

Petitioner acknowledged that she was able to return to her job as a custodian and works her normal shift. At work, vacuuming puts strain on her knee and causes pain. Petitioner has difficulty picking things off the floor because she cannot squat down. She leans over to her right to pick things off the floor. Her knee will ache as she performs her duties. Sometimes she has no choice but to crawl on the floor to pick up trash and this is very painful. She takes Tylenol three times per week because of the aching pain in her knee. During the summer months she must strip and wax the floors and using the machines causes burning pain in her knee.

The Arbitrator makes the following findings for the disputed issues:

1. With regard to the issue of medical expense, Respondent shall pay to the Petitioner the sum of $286.15 for the prescriptions that Petitioner filled with the "IWP" pharmacy. Respondent acknowledged liability for these charges.

2. With regard to the issue of the nature and extent of the disability, Section 8.1(b) of the Workers' Compensation Act provides that the level of permanent partial disability shall be based upon the following five factors:

(i) the reported level of impairment pursuant to the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment;"

(ii) the occupation of the injured employee;

(iii) the age of the employee at the time of the injury;

(iv) (iv) the employee's future earning capacity; and

(v) (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.

In this case, neither party submitted a report containing an impairment rating, so this factor cannot be included in the analysis.

Petitioner's occupation is a custodian which the Arbitrator acknowledges requires a good deal of physical exertion which places stress on Petitioner's injured knee and produces pain. This factor indicates a higher degree of permanent partial disability.

Petitioner was 56 years of age on the date of accident. As an older individual, her work life will be relatively short. She will not have to endure the adverse effects of her injuries for as long as someone who is younger. This factor indicates a lower degree of permanent partial disability.

There was no evidence showing an expected wage loss resulting from the injury. This factor indicates a lower degree of permanent partial disability.

The medical records from Dr. Newcomer and the report from Dr. Anderson indicate that Petitioner's injury resulted in tears of her medial and lateral menisci and also produced her patellofemoral symptoms. She underwent arthroscopic repairs of the tears as well as an abrasion chondroplasty of her patella, and five subsequent viscosupplementation injections. These corroborate her testimony regarding her ongoing symptoms that she chronic aching in her knee which rises to the level of burning pain with any significant physical activity.

The extent and nature of her post surgery treatment show that she sustained a rather serious injury to the left knee. Despite regular physical therapy for over two months, she was found to have tightness in the adductor and ongoing symptoms at her final therapy visit on September 26, 2016. When she was last examined by Dr. Newcomer on November 28, 2016, over five months from surgery, she was found with crepitus with knee extension and tenderness of the medial patellar facet and medial joint line. (PX 3) This factor weighs heavily in favor of a higher degree of permanent partial disability.

Based upon these five factors, the Arbitrator concludes that the Petitioner has sustained a loss of 17.5% of her left leg, or a period of 37.625 weeks under Section 8(e)(12) of the Workers' Compensation Act. Respondent shall therefore pay to the Petitioner the sum of $369.90/week for 37.625 weeks.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Travis Ruffino,
Petitioner,

vs. NO. 17 WC 22376

19IWCC0051

State of Illinois,
Liquor Control Commission.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, prospective medical treatment, 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 February 5, 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, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case

DATED: JAN 25 2019

Joshua D. Luskin

o-11/28/18
jdl-wj
68

Charles J. DeVriendt

SPECIAL CONCURRING OPINION

I concur with the result reached by the majority. I write separately as I utilize a different legal analysis in arriving at my decision. The majority in adopting the decision of the arbitrator finds Petitioner's injury arose out of and in the course of his employment based upon a traveling employee theory of recovery specifically the street risk doctrine. As Petitioner was neither traveling nor on the street when his injury occurred, I find such analysis inapplicable.

"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. [citations omitted]. 'In the course of employment' refers to the time, place and circumstances surrounding the injury." *Sisbro Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). "Arising out of" speaks to risk- is the risk encountered by the employee a risk incidental to the employment as not all injures suffered while at work are compensable. See *e.g. Brady v. Louis Ruffolo & Sons Construction Company*, 143 Ill. 2d 542, 552, 578 N.E.2d 921 (1991) ("This court has previously declined to adopt the positional risk doctrine, believing that the doctrine would not be consistent with the requirements expressed by the legislature in the Act"). "To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro* at 203.

19IWCC0051

Petitioner is employed by Respondent as a liquor control special agent. T. 11. His work duties require him to travel to different locations in order to conduct inspections for compliance with the Liquor Control Act. T. 12-13. As part of the inspection process, Petitioner is required to search the premises which includes attics, basements, or any area where an alleged violation might occur. T. 13. Further, Petitioner is required to climb stairs every day as part of his job duties. *Id.* While performing an inspection, Petitioner slipped on stairs injuring his shoulder. T.16.

"An injury is received in the course of employment where it occurs within a period of employment, at a place where the worker may reasonably be in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto. [Citation omitted]." *Scheffler Greenhouses, Inc. v. Industrial Commission*, 66 Ill. 2d 361, 367, 362 N.E.2d 325 (1977). Petitioner was in the course of his employment when his injury occurred as he was at a place he was expected to be and performing his duties.

"There are three types of risks to which employees may be exposed: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics. [citations omitted]." *Adcock v. Illinois Workers' Compensation Commission*, 2015 IL App (2d) 130884WC, ¶ 31. Further, an injury which results from a neutral risk requires the employee to show he was exposed to the risk to a greater degree than the general public. *Springfield Urban League v. Illinois Workers' Compensation Commission*, 2013 IL App (4th) 120219WC, ¶ 27. Such showing of an increased risk may be proved by "either qualitative (i.e., when some aspect of the employment contributes to the risk) or quantitative (such as when the employee is exposed to the risk more frequently than the members of the general public by virtue of his employment). [citation omitted]." *Adcock*, 2015 IL App (2d) 130884WC, ¶ 32.

"By itself, the act of walking up a staircase does not expose an employee to a risk greater than that faced by the general public. [Citations omitted]." *Baldwin v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 472, 478, 949 N.E.2d 1151 (2011). Petitioner was exposed to a neutral risk when walking on the stairs, but he was exposed to such risk more frequently than the general public. Petitioner's job duties required him to enter unfamiliar buildings and perform inspections which required him to traverse stairs on a more frequent basis than the general public. As, such Petitioner's injury arose out of his employment.

For the reasons set for above, I concur with the decision reached by the majority.

L. Elizabeth Coppoletti

Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

RUFFINO, TRAVIS
Employee/Petitioner

Case# **17WC022376**

ST OF IL/LIQUOR CONTROL COMM
Employer/Respondent

19IWCC0051

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:

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

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
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

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

FEB 5 - 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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

TRAVIS RUFFINO
Employee/Petitioner

Case # 17 WC 22376

v.

Consolidated cases: _____

STATE OF ILLINOIS / LIQUOR CONTROL COMM.
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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Herrin**, on **September 7, 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] 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, **June 30, 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 **$64,632.00**; the average weekly wage was **$1,242.92**.

On the date of accident, Petitioner was **44** years of age, *single* with **2** dependent children.

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

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

Respondent is entitled to a credit for any awarded medical expenses paid by Respondent pursuant to Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$828.61 per week** for **9-6/7 weeks**, commencing **July 1, 2017 through September 7, 2017**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary causally related 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 for any awarded 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.

The Arbitrator declines to award prospective medical treatment based on the fact that the Petitioner's medical records in evidence do not reflect any current specific treatment recommendations.

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

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

Paul V. Cellini

Signature of Arbitrator

January 31, 2018

Date

FEB 5 - 2018

STATEMENT OF FACTS

The Petitioner worked for Respondent as a Liquor Control Special Agent 1. On 6/30/17, he was performing a compliance field inspection at The Cellar, which involved searching for Liquor Control Act violations, such as bootlegging, gambling, unsanitary alcohol and beer taps, fabricated invoices, etc. This inspection can involve looking anywhere on the premises, attic to basement, and this includes climbing stairs on a daily basis.

The Petitioner had been escorted to an upper level by the CEO of the tasting room, Mr. Wells. On the way back down the stairs, Mr. Wells was behind him, and after a few stairs the Petitioner testified he turned around to answer a question from Mr. Wells and fell down the remaining 7 to 8 stairs. He testified that their discussion at that time involved where books and records needed to be kept.

Petitioner testified the stairway was dimly lit, the stairs were carpeted with no tread or track-type materials, and that he was carrying his ticket/citation book with him at the time. To his recall, there was no hand rail.

The accident report submitted into evidence by Respondent is detailed and consistent with Petitioner's testimony. (Rx1). A witness report of Mr. Wells states that the Petitioner was about 3 stairs ahead of him going down when Petitioner "took a misstep & fell, when he fell he landed on his right elbow first then slid on his back down the last 4 or 5 steps." (Rx3).

The Petitioner was taken by ambulance to Carbondale Memorial Hospital. The ambulance report indicates the Petitioner had fallen down approximately 7 stairs and landed on his right shoulder, with complaints of low back and head pain as well. There was deformity and swelling in the right shoulder. The Petitioner did not believe he lost consciousness. (Px3).

At the hospital, Petitioner reported right shoulder pain and pain to the middle lower back with numbness, as well as head and neck injuries. Petitioner reported a prior lumbar surgery. Right shoulder x-ray showed no acute fractures or dislocation. CT scans of the head and chest indicated no acute traumatic abnormalities. A lumbar CT scan noted post-operative disc replacements at L4/5 and L5/S1 and no acute fractures. Cervical CT showed no acute fracture or listhesis, but a prior cervical fusion was noted between C3 and C6 along with multi-level degeneration. There was no evidence of fusion hardware complication. The diagnoses made by the ER doctor were non-specific, and medication was prescribed. (Px4).

Petitioner next sought treatment with his family physician on 7/5/17, and saw Dr. Reyes' assistant, Angie Eubanks. He reported posterior right shoulder pain that started with the fall down the stairs, as well as low back pain that radiated to the right leg and foot. He was diagnosed with shoulder and low back pain. Noting the Petitioner wanted to see Dr. Gornet in lieu of Dr. Davis in Herrin, IL, that's where he was referred. (Px5).

Petitioner initially saw Petitioner Dr. Gornet's associate, Dr. Mall, on 7/10/17 for his right shoulder. The report states: "The owner of the facility began calling him to ask him a question, and he slipped and fell down about seven stairs", landing on his right arm and lower back. Dr. Mall noted he had previously operated on the Petitioner's left shoulder for a rotator cuff tear, and the Petitioner reported his right shoulder pain was similar to what he'd felt previously with the left shoulder. Physical examination of the lumbar spine was positive for pain to palpation, and Petitioner's right shoulder demonstrated significant weakness with rotator cuff strength testing. Petitioner also had pain to palpation over the AC joint and biceps tendon of his right shoulder, and pain with cross-body adduction and range of motion. Right shoulder x-rays showed no significant pathology. Dr. Mall diagnosed a possible right rotator cuff tear and/or SLAP tear, which he causally related to the 6/30/17 fall. He noted that Petitioner could not recall if he fell onto his shoulder or elbow first, and that: "Obviously, this would have some importance based on the pathology seen on the MRI. However, with his inability to accurately describe which of these two body parts landed first, it may be difficult to make this determination." He recommended an MRI arthrogram of the right shoulder along with restricted work duties, and referred Petitioner to Dr. Gornet for the low back. (Px6).

A "New Patient Questionnaire" Petitioner completed for Dr. Mall noted he was "walking down the stairs and slipped and fell on about the third stair, falling down about seven stairs. I landed on my right arm initially and tumbled down the remaining stairs." The Petitioner noted prior left shoulder, neck and back surgeries with Dr. Mall and Dr. Gornet. (Rx5; Px6).

Petitioner saw Dr. Gornet on 7/10/17 as well, reporting increasing neck, shoulder, and low back pain following the fall. Dr. Gornet noted that the imaging studies showed increasing structural changes at L2/3 and L3/4, above his previous disc replacements, and MRIs of the neck and low back were recommended. Dr. Gornet noted that there may be artifact issues with the films due to the prior neck and low back surgeries, but he wanted to do the least invasive test before attempting a possible CT myelogram. (Px7).

The 7/13/17 right shoulder MRI arthrogram reportedly showed: 1) focal high grade partial thickness bursal surface tear involving the anterior third of the distal supraspinatus tendon insertion in a back ground of tendinopathy; 2) a shallow partial thickness bursal surface tear in the posterior supraspinatus; 3) infraspinatus insertional tendinopathy without tendon tear; and, 4) no discrete labral tear. There was no contrast leakage that would indicate evidence of a full thickness rotator cuff tear. (Px8).

Lumbar MRI was also completed on 7/13/17, and the report indicated hardware artifact from the prior surgery, making evaluation of L4/5 and L5/S1 difficult. Above those levels, degenerative disc changes were noted from L1 to L4 with disc bulging and foraminal stenosis at each level, most prominent at L3/4. There was no evidence of central canal stenosis. (Px8).

Petitioner returned to both Dr. Mall and Dr. Gornet on 7/13/17. On exam, Dr. Mall noted continued significant weakness with rotator cuff testing and tenderness over the AC joint and biceps tendon within the bicipital groove. His review of the MRI showed no evidence of a full-thickness rotator cuff tear, or even a high-grade partial-thickness tear, but there was some intrasubstance degeneration of the rotator cuff tendon. He saw no SLAP tear. Dr. Mall recommended injections into the AC joint and subacromial space followed by physical therapy. While he felt the Petitioner would need time for pain to resolve before being released, the shoulder looked good structurally. Petitioner remained on work restrictions. (Px6).

With Dr. Gornet on 7/13/17, Petitioner reported increasing low back pain and bilateral symptoms into the buttocks and legs. The prior history of anterior decompression and disc replacements at L4/5 and L5/S1, and cervical disc

replacements at C3/4 and C6/7 was noted. In comparing the 7/13/17 lumbar MRI to a pre-accident, post-surgical lumbar MRI from July 2010, Dr. Gornet noted no change in the disc replacements at L4/5 or L5/S1, but opined that there was an increasing disc pathology at L2/3 in particular, including central herniations and subtle annular tears. In the cervical spine, however, he compared films from July 2010, 11/12/15 and 7/13/17 [Arbitrator's Note: the report from a 7/13/17 cervical MRI was not located in the medical evidence in the record], noting an "obvious impaction of the disc replacement up into C3 and this correlates with his increasing trapezial pain." Though there was no dislodgement of the C6/7 disc, there was an indication that he had subsided at that level compared to previous films. Dr. Gornet prescribed Meloxicam and Cyclobenzaprine, placed Petitioner off work through 9/14/17, and stated: "The disc replacement used at C3/4 is fairly robust and this may improve over time, but my general suspicion is the pain in his right trapezius is consistent with both a shoulder process as well as his subsidence." He recommended treated the low back conservatively, and opined that Petitioner's current symptom levels, need to be off work, medications and treatment are causally related to the recent work injury. (Px7).

Petitioner returned to Dr. Mall on 8/10/17 with no improvement in his right shoulder symptoms, noting therapy had not been approved by workers' compensation. Dr. Mall diagnosed a partial thickness rotator cuff tear, biceps tendonitis, and AC joint sprain, opining that proper treatment should include injection and therapy. Work restrictions were issued, and Petitioner planned to pursue treatment for the time being via his general health insurance. (Px6). On 8/17/17, Dr. Mall performed a right biceps tendon injection. (Px9). At the last visit with Dr. Mall prior to hearing on 8/30/17, the Petitioner reported significant anterior relief with the shoulder injection, but that this only lasted for two weeks, and that it provided no relief of his posterolateral shoulder complaints. Dr. Mall noted that Petitioner's physical examination continued to show rotator cuff weakness and pain to palpation over the biceps tendon. He recommended and administered a second injection into Petitioner's right shoulder subacromial space. (Px6). Petitioner testified that he and Dr. Mall discussed surgery if the second injection failed, though this is not indicated in Dr. Mall's report.

The Petitioner testified that he developed severe pain to the right shoulder, neck and low back areas due to the accident, but that the shoulder is his main problem. He agreed he has had prior workers' compensation claims, but none involved the right shoulder. He reviewed the accident report he completed for Respondent, agreeing it is accurate and that he tried to be truthful and honest. The Petitioner testified that he hasn't received any temporary total disability benefits to date.

On cross examination, the Petitioner reiterated that he was in a conversation with Mr. Wells, who was behind him, when he fell. He estimated that the stairs were two to two and a half feet wide, and that the carpet was "slick", though he did not notice any defects. He testified he had not used the stairs at The Cellar before 6/30/17. He went one time up the stairs that day, and he got hurt on the way back down. He was carrying a boxed clipboard that he regularly carried with him.

The Petitioner acknowledged that he previously worked for the Illinois Department of Corrections for a year or so between stints with the Respondent. He testified he has had prior workers' compensation claims, including for the neck and back treated by Dr. Gornet, but not for the right shoulder. He agreed he did not indicate neck pain in the intake form completed for Dr. Mall, and forgot to indicate he had prior right carpal tunnel surgery. He agreed that the form accurately states what he indicated, and testified that he informed Dr. Mall of exactly how he fell, including the turning around to talk, holding the clipboard, etc. He reiterated the reason he fell was because he was distracted answering Mr. Wells' question while on the stairs.

Mr. Wells testified that he met with the Petitioner on 6/30/17 at his establishment. After they did their business reviewing invoices in the upstairs office, the Petitioner walked ahead of him as they went back down the steps. He testified that

they were having casual conversation, but did not recall exactly what was being discussed. He testified that the stairs are "pretty standard", with carpet in the center and approximately 3" of wood on each side. He testified there is an overhead chandelier type light. He knew of no defects on the stairs such as tears or rips. He saw Petitioner fall, but testified that he didn't know the cause of the fall. He agreed that they only went up and down the stairs once that day. Mr. Wells agreed he completed a witness statement regarding the fall, and testified he had no reason to dispute what he wrote in his witness statement. On cross examination, Mr. Wells testified it was fair to say that the Petitioner turned around to speak to him. There is no tread trim on the stairs, just the carpet.

The Respondent submitted a prior decision of the Commission regarding a workers' compensation claim of the Petitioner while employed at the Pinckneyville Correctional Center on 4/19/10. (Rx6).

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 sustained accidental injuries arising out of and in the course of his employment on 6/30/17.

In the Arbitrator's view, it's clear that the Petitioner was a travelling employee at the time he fell down the stairs on 6/30/17. His job involves travelling to various venues that serve alcohol to ensure compliance with the Illinois Liquor Control Act. The test for determining whether an injury to a traveling employee arose out of and in the course of his employment is the reasonableness of the conduct in which he was engaged and whether the conduct might normally be anticipated or foreseen by the employer. *Cox v. Illinois Workers' Comp. Comm'n*, 406 Ill. App. 3d 541, 941 N.E.2d 961 (2010). Under such an analysis, a traveling employee may be compensated for an injury as long as the injury was sustained while he was engaged in an activity which was both reasonable and foreseeable.

Petitioner's history of the injury is credible, consistently documented throughout the record, and corroborated by the testimony of Mr. Wells. He was participating in an inspection in the course of his job when he slipped and fell down stairs. Petitioner testified that he regularly climbed stairs in the course of his inspections in order to properly search premises. Petitioner was clearly engaged in a reasonable and foreseeable activity at the time he slipped and fell on the steps. This supports the Arbitrator's finding that the Petitioner was in the course of his employment when he fell. The next question is whether the injury arose out of the employment.

In this case, the Petitioner testified that the lighting above the stairs was dim. He testified that he was holding his clipboard in his hands when he fell, and that there were no hand rails. He testified that he was looking back and talking to Mr. Wells in response to a question when he fell. While Mr. Wells testified that there was a chandelier-type lighting above the stairs, he did not testify as to the level of light it produced. He also did not testify as to whether or not there is a handrail available when using the stairs. While he testified that he did not recall what he and the Petitioner were talking about at the time, he acknowledged that they were talking while on the stairs. Taking all this evidence together, the Arbitrator finds that the greater weight of the evidence indicates the Petitioner was exposed to an increased risk of injury due to his employment when he fell down the stairs on 6/30/17.

In support of this Decision, the Arbitrator cites the following case law: *Potenzo v. Illinois Workers' Comp. Comm'n*, 378 Ill.App.3d 113, 317 Ill.Dec. 355, 881 N.E.2d 523 (2007); *Nee v. Illinois Workers' Comp. Comm'n*, 28 N.E.3d 961, 390 Ill.Dec.308 (2015).

Based upon the noted findings, the Arbitrator concludes that Petitioner, as a traveling employee, was engaged in a reasonable and foreseeable activity at the time of his injury, and was exposed to a greater risk of injury as a result of his employment and employment duties. He therefore has met his burden in establishing that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on 6/30/17.

The Arbitrator acknowledges that the Petitioner's credibility was called into question to some degree in his prior case, 10 WC 016511 (Rx6). The Respondent notes that the Petitioner's account of his fall differs in Respondent's Exhibits 1, 2, and 5, along with his own medical records and exhibits. The Arbitrator believes that the initial accident report (Rx1) and the intake form and initial report of Dr. Mall (Px6) provide contemporaneous support for the Petitioner's testimony regarding what occurred on 6/30/17 and how he fell.

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

The Respondent indicated on the record that if the issue of accident were found in the Petitioner's favor, there was no dispute that the Petitioner's claimed injuries are causally related to that accident. As such, the Arbitrator finds that the Petitioner's condition of ill-being is causally related to the 6/30/17 accident.

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 parties have stipulated that the Respondent is entitled to credit for any awarded medical expenses that were paid by Respondent prior to hearing, and that any outstanding awarded medical expenses may be paid by Respondent directly to the providers.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

While the Petitioner testified that Dr. Mall indicated a surgical recommendation, this is not indicated in the medical records that were submitted into evidence. As noted, the Arbitrator finds the Petitioner's condition to be causally related to the 6/30/17 accident. However, the last report of Dr. Mall in evidence notes that an injection was provided, and there was no other specific treatment recommendation indicated. Based on this, the Arbitrator cannot award any specific prospective medical treatment.

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:

The Petitioner claims entitlement to TTD from 7/1/17 through the 9/7/17 date of hearing. This is consistent with the Arbitrator's findings with regard to accident and causation, as well as the records of Dr. Mall and Dr. Gornet. The Arbitrator finds that the Petitioner was temporarily and totally disabled from 7/1/17 through 9/7/17.

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

Heriberto Mares Gonzalez,

Petitioner,

vs. No. 12 WC 30522

Salvation Army,

19IWCC0052

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the parties herein and proper notice given, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical care, temporary disability, penalties and attorney fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 12, 2016, is hereby affirmed and adopted.

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

DATED: JAN 28 2019
o-12/20/2018
SM/sk
44

Stephen Mathis

David L. Gore

Deborah Simpson

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

MARES, HERIBERTO GONZALEZ
Employee/Petitioner

Case# **12WC030522**

12WC004403

SALVATION ARMY
Employer/Respondent

19IWCC0052

On 5/12/2016, 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 0.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4963 NEWLAND & NEWLAND LLP
GARY A NEWLAND
121 S WILKE RD SUITE 301
ARLINGTON HTS, IL 60005

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT DELANEY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

HERIBERTO MARES GONZALEZ
Employee/Petitioner

v.

SALVATION ARMY
Employer/Respondent

Case # 12 WC 30522

Consolidated cases: 12 WC 4403

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago, IL**, on **February 16, 2016 and April 18, 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. [x] What was the date of the accident?

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [x] Should penalties or fees be imposed upon Respondent?

N. [x] Is Respondent due any credit?

O. [ ] Other ______

19IWCC0052

Heriberto Mares v. Salvation Army
12 WC 4403 and 12 WC 30522 (consolidated)

Arbitrator's Findings Relative to 12 WC 30522

Petitioner claims one work accident but filed two Applications through two different attorneys. In the instant case, 12 WC 30522, he alleged the accident occurred on January 9, 2012. For the reasons set forth in the decision in 12 WC 4403, the Arbitrator finds that the accident occurred on January 11, 2012 and that it was compensable.

The Arbitrator awards no benefits in 12 WC 30522. See the decision in 12 WC 4403 for the Arbitrator's findings of fact, conclusions of law and award.

STATE OF ILLINOIS	)		
	) SS.		
COUNTY OF COOK	)		

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Heriberto Mares,

Petitioner,

19IWCC0053

vs.

No. 12 WC 04403

The Salvation Army,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the parties herein and proper notice given, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical care, temporary disability, penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission does not believe an award of penalties and attorney fees is appropriate. Respondent has disputed this claim and questioned Petitioner's credibility from the outset. On review, Respondent explains: "[T]here were reasons to dispute the accident from the beginning. No witnesses confirmed the accident and, in fact, the Petitioner did not call any co-worker to testify. No written accident report was described. The Petitioner was unable to even identify the date of injury weeks afterward. He hired two different attorneys and related two separate dates of accident. It also must be noted that it was discovered while investigating the claim that the Respondent learned that the Petitioner had been using another person's Social Security Number and had none of his own. *** The Respondent also discovered an Accident Report suggesting a

person of the same name, address and Social Security identification injured his back with another employer in 2006." The Commission finds that Respondent had valid reasons to dispute accident and question Petitioner's credibility.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 12, 2016, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $239.21 per week for a period of 115 3/7 weeks, from January 20, 2012 through July 22, 2014, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the related medical bills in evidence pursuant to §§8(a) and 8.2 of the Act, but not the costs of non-emergency transportation.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of penalties and attorney fees is vacated.

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.

19IWCC0053

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.

JAN 28 2019

DATED:
o-12/20/2018
SM/sk
44

Stephen Mathis

David L. Gore

Deborah Simpson

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

MARES, HERIBERTO
Employee/Petitioner

Case# 12WC004403

12WC030522

THE SALVATION ARMY
Employer/Respondent

19IWCC0053

On 5/12/2016, 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 0.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4963 NEWLAND & NEWLAND LLP
GARY A NEWLAND
121 S WILKE RD SUITE 301
ARLINGTON HTS, IL 60005

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT DELANEY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK

19IWCC0053

- [ ] 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)

HERIBERTO MARES,
Employee/Petitioner

Case # 12 WC 04403

v.

Consolidated cases: 12 WC 30522

THE SALVATION ARMY,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **MOLLY MASON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **February 16, 2016, and April 18, 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. X Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

For the reasons set forth in the attached decision, the Arbitrator finds that the date of accident was January 11, 2012. The Arbitrator amends the date of accident alleged in the Application in 12 WC 4403 from January 12, 2012 to January 11, 2012 to conform to the proofs.

On the date of accident, 1/11/2012, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $12,438.92; the average weekly wage was $239.21. THESE FIGURES ARE BASED ON THE PARTIES' POST-ARBITRATION WRITTEN STIPULATION.

On the date of accident, Petitioner was **28** years of age, **married** with **2** dependent children.

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

Respondent shall be given a credit of $28,903.36 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $ **28,903.36**. Arb Exh 1.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**239.21**/week for 115 3/7 weeks, commencing 01/20/12 through 7/22/14, as provided in Section 8(b) of the Act, with Respondent receiving credit for the $28,903.36 in benefits it paid prior to arbitration. As noted in the attached decision, the Arbitrator finds that Petitioner's condition stabilized as of July 22, 2014, the date on which Dr. Bello expressed agreement with Dr. Shapiro's finding of maximum medical improvement.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $531.29 to Concentra, $27,160.12 to Pro Clinics, $2,840.34 to Herron Medical Center, $1,801.46 to Lake Shore Open MRI, $3,589.41 to Delaware Place MRI, $8,530.00 to Alivio PT & Chiro, $112,855.08 to Lake Shore Surgery Center, $330.00 to Dr. Malek and $234.77 to Illinois Bone and Joint, as provided in Section 8(a) of the Act, subject to the medical fee schedule and with credit for any prior payments by Respondent. The Arbitrator declines to award the non-emergency transportation and taxi expenses charged by some of the foregoing providers, for the reasons set forth in the attached decision. The Arbitrator also awards the Injured Workers Pharmacy charges itemized in PX 34, with Respondent receiving credit for the payments reflected both in that document and in RX 11.

Penalties and Fees

For the reasons set forth in the attached decision, the Arbitrator finds that Respondent acted in an objectively unreasonable manner, under all of the existing circumstances, in delaying the first payment of temporary total disability benefits to March 5, 2013. RX 10. Respondent shall pay to Petitioner attorney fees of **$2,808.90**, as provided in Section 16 of the Act, penalties of **$7,022.26**, as provided in Section 19(k) of the Act; and penalties of **$10,000.00**, the statutory maximum, as provided in Section 19(l) of the Act.

In no instance shall this award be a bar to a 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

Date 5/12/16

ICArbDec19(b)

MAY 12 2016

Heriberto Mares v. Salvation Army
12 WC 4403 and 12 WC 30522 (consolidated) **19IWCC0053**

Procedural History

On February 6, 2012, Petitioner filed an Application for Adjustment of Claim numbered 12 WC 4403 alleging a work accident of January 12, 2012. On September 4, 2012, via his current counsel, Petitioner filed a second Application for Adjustment of Claim numbered 12 WC 30522, alleging a work-related back injury of January 9, 2012. The cases were subsequently consolidated.

At the hearing, Petitioner testified to only one accident. He was able to pinpoint the week in which this accident occurred but was uncertain about the exact date.

Summary of Disputed Issues

The disputed issues include accident, notice, causal connection, medical, temporary total disability/maintenance and penalties/fees. The Request for Hearing form (Arb Exh 1) does not list prospective care as an issue before the Arbitrator.

Stipulations Reached On April 18, 2016

At the continued hearing, held on April 18, 2016, the parties stipulated to the following: 1) Petitioner deactivated his Facebook page after the initial hearing of February 16, 2016 and reactivated it on April 18, 2016; and 2) with the potential exception of the third functional capacity evaluation, conducted in August 2013, for which Petitioner is not seeking payment, Petitioner did not exceed the choices of physicians/referrals afforded by Section 8(a) of the Act.

Post-Arbitration Stipulation as to Earnings and AWW

At the initial hearing, the parties agreed to earnings of $15,560.00 and an average weekly wage of $299.23. Arb Exh 1. After proofs were closed, they submitted a written stipulation agreeing to earnings of $12,438.92 and an average weekly wage of $239.21. [See April 27, 2016 stipulation attached to Request for Hearing.]

Arbitrator's Findings of Fact

Petitioner testified through an interpreter. He described his English skills as poor.

Petitioner testified he was born on April 14, 1983. He grew up in Mexico. He attended high school there but did not graduate. He worked in his father's office, answering telephones. He spoke in Spanish at this job.

Petitioner testified he left Mexico in 2001. His jobs in the United States have included working for his father, helping a person at a Chicago radio station and working at Respondent. He denied working for anyone after he stopped working at Respondent.

Petitioner denied having any low back problems before his January 2012 work accident. The accident occurred at a Respondent store at some point during the week before Monday, January 16, 2012. He and a co-worker were carrying bags of compressed clothing and piling these bags on top of one another. At the time of the accident, he was lifting one of the bags in the back part of the store. He reported the accident to his shift supervisor within 5 to 10 minutes of the accident. At some point after the accident, a female general manager sent him to Concentra for treatment.

The Concentra records (PX 1) identify "Amy Sahba" as Respondent's contact person. The records reflect that Petitioner saw Dr. Lambos on January 16, 2012. The doctor's note states that Petitioner reported injuring his back on January 11, 2012 while "carrying big packages in the back area" at Respondent's store in Arlington Heights. The note also sets forth another, somewhat more detailed history: "lifted 200-lb. object with co-worker 3 times when he felt some pain sides of low back – has lifted on previous occasions same weight w/out prob." The doctor noted that Petitioner denied falling or striking his back.

Dr. Lambos described Petitioner as taking medication for diabetes. He described Petitioner's past surgical history as negative. On examination, he noted some tenderness bilaterally to the low to middle lumbar musculature, "diffusely w/o assoc findings." He described straight leg raising as negative bilaterally. He described Petitioner's gait as normal and indicated Petitioner was able to walk on his heels and toes. He prescribed Flexeril, to be used only at home and as needed, and Ibuprofen. He released Petitioner to light duty with no lifting, pushing or pulling over 10 pounds, limited bending/twisting, no climbing, kneeling or squatting and no prolonged walking or standing. He directed Petitioner to start physical therapy and return to him later that week.

Dr. Lambos indicated he discussed the foregoing "with night manager." He described Petitioner as having a "fairly good understanding of English" and noted Petitioner's wife translated all of his directions as well. PX 1.

Petitioner underwent a physical therapy evaluation at Concentra the following day, January 17, 2012. The evaluating therapist noted that Petitioner reported injuring his back at 6 PM on January 11, 2012, while "lifting a box of clothes." He noted that Petitioner's duties at Respondent involved carrying furniture and boxes of clothes and that Petitioner denied any history of low back injuries or impairments. On examination, he noted limited forward flexion, extension and rotation. PX 1.

Petitioner returned to Concentra on January 19, 2012 and saw a different physician, Dr. Debra Nelson. The doctor noted that Petitioner rated his back pain at 7/10 and described this pain as worsening. She also noted that Petitioner had attended one therapy session. She

indicated Petitioner was performing light duty but a separate handwritten note states: "no LD at work." On examination, she noted a right lateral shift, bilateral spasms, negative straight leg raising bilaterally in the seated position, with the maneuver producing back pain but no sciatic pain. She also noted normal strength, markedly decreased flexion and extension, tenderness from L1 through L5 bilaterally, a normal gait and negative Waddell's testing. She diagnosed a lumbosacral strain. She prescribed Hydrocodone and continue therapy. She directed Petitioner to stay off work on January 20 and to resume light duty on January 21 with no mopping, no lifting over 10 pounds, no pushing or pulling over 20 pounds, no bending and sitting 50% of the time. She directed Petitioner to return in one week or sooner if he had problems. PX 1.

The Concentra records reflect Petitioner was scheduled to return on January 23rd for therapy and January 26th for a follow-up visit. There is no indication Petitioner returned on either of those dates. PX 1, 2.

Petitioner testified he went to Concentra twice and then began treating elsewhere.

Records in PX 11 reflect Petitioner saw Dr. Barnabas at Alivio Physical Therapy and Chiropractic [hereafter "Alivio"] on January 24, 2012. The doctor's note of that date sets forth a very detailed history of Petitioner's employment, accident and subsequent treatment at Concentra. The history reflects that Petitioner reported having worked at a Respondent thrift store for one year, cashiering, performing maintenance and loading clothes. The history also reflects that, at about 5:30 or 6:00 PM on January 12, 2012, Petitioner and a co-worker named Javier were lifting and moving packages of clothes weighing 250 pounds. Petitioner reported that, when he and Javier moved the third package, he "felt a pain in his lower back causing the package to almost fall."

Dr. Barnabas described Petitioner's past medical history as positive for diabetes. He noted that Petitioner complained of 6-7/10 pain going down the back into both legs, left worse than right. On initial examination, he noted tenderness over the left SI joint and L4-L5, a markedly reduced range of lumbar spine motion, 5/5 strength except for the left toe, which was 4/5, intact sensation and positive straight leg raising and sciatic tension sign on the left.

Dr. Barnabas provided Petitioner with a back brace. He prescribed therapy and a lumbar spine MRI. He took Petitioner off work for one week and directed him to avoid driving and continue taking the medication prescribed at Concentra. PX 11.

On January 26, 2012, Petitioner underwent MRIs of both the thoracic and lumbar spine at Delaware Place MRI. Dr. Shafaie interpreted the thoracic spine MRI as showing multi-level spondylotic changes without any evidence of significant disc protrusion, stenosis or cord compression. He interpreted the lumbar spine MRI as showing a mild disc bulge with no significant stenosis at L4-L5, a 5.3 mm central disc protrusion at L5-S1, with no displacement of the S1 nerve root, facet arthritis of the lower lumbar spine and no acute fracture or significant spondylolisthesis. PX 11.

Petitioner saw a chiropractor, Dr. Bermudez, at Alivio on January 27, 2012. The doctor noted a complaint of 6/10 back pain radiating to the mid back and bilateral gluteal maximus. He also noted that the MRI results were not yet available. He conducted therapy consisting of electrical stimulation, hot packs, massage, mobilization and various exercises. PX 11.

On February 1, 2012, Dr. Bermudez noted persistent low back pain radiating into the buttocks. He also noted a complaint of occasional bilateral leg numbness. He reviewed the MRI results and conducted therapy, using the same modalities described in the preceding paragraph. He indicated that Petitioner would be undergoing pain management. PX 11.

Petitioner saw Dr. Bermudez again on February 3 and 6, 2012, with the doctor noting persistent pain and performing the same therapy. PX 11.

On February 16, 2012, Petitioner saw Dr. Abdellatif at ProClinics. The doctor's note of that date reflects a referral from Dr. Bermudez. The note sets forth a consistent history of the work accident, with Petitioner indicating he experienced a sudden onset of low back pain while lifting a third 250-pound bin with a co-worker. The doctor noted that Petitioner complained of low back pain radiating to both legs, causing tingling and numbness. He also indicated that Petitioner reported a "minimal response to physical therapy and meds." On examination, he noted abnormal reflexes at the ankle bilaterally and multiple trigger points in the cervical and thoracic spine and at S1 bilaterally.

Dr. Abdellatif diagnosed lumbar radiculopathy, lumbar facet SI syndrome and myofacial pain of the thoracic spine. He recommended a lower extremity EMG and a thoracic spine MRI. [There is no indication he reviewed the MRIs performed on January 26, 2012.] He directed Petitioner to "continue physical therapy and meds." PX 3.

Petitioner continued undergoing therapy with Drs. Bermudez and Barnabas thereafter, with these providers consistently documenting 6/10 to 7/10 pain levels through late June 2012. PX 11.

On March 1, 2012, Dr. Abdellatif saw Petitioner again and noted persistent symptoms. On March 2, 2012, he administered an epidural steroid injection and facet blocks at Lake Shore Surgery Center. PX 3.

On March 8, 2012, Dr. Abdellatif noted that Petitioner reported "no relief" from the injection and blocks and complained of falling at the surgery center secondary to bilateral leg weakness. The doctor noted complaints relative to the right hand and right leg. PX 3.

On March 15, 2012, Petitioner underwent another lumbar spine MRI at Dr. Abdellatif's direction. Dr. Kuritza interpreted this MRI as showing a 3-4 mm broad-based posterior disc protrusion/herniation at L4-L5, with no associated stenosis, and a 6-7 mm central posterior subligamentous herniation at L5-S1 "with an extruded nucleus pulposus indenting the ventral

surface of the thecal sac with central stenosis and mild bilateral neuroforaminal narrowing." PX 3.

Petitioner also saw Dr. Abdellatif on March 15, 2012. The note of that date reflects that Petitioner was there for the MRI results and "would like to know why he has bilateral leg weakness." PX 3.

Dr. Abdellatif administered another injection, additional facet blocks and trigger point injections at Lake Shore Surgery Center on March 16, 2012. PX 3.

On March 22, 2012, Dr. Abdellatif noted that Petitioner was "now able to walk and sleep longer" but reported falling again at the surgery center when his legs gave out on him as he tried to get out of bed. PX 3.

On April 2, 2012, Dr. Abdellatif preformed radiofrequency ablation and a third epidural injection. PX 3.

On April 4, 2012, Dr. Barnabas re-evaluated Petitioner and noted that none of the original treatment goals, i.e., decreased pain, increased strength and range of motion and return to light duty, had been met. PX 11.

On April 19, 2012, Dr. Abdellatif noted 30% improvement. He recommended a lumbar CT discogram, another injection and continued medication and therapy. PX 3.

On April 23, 2012, Dr. Abdellatif performed an injection and a four-level discogram. He described the discogram as "concordant with L4-L4, L5-S1 levels discogenic pain." He recommended percutaneous disc decompression at those levels. He directed Petitioner to continue the therapy and medications. PX 3. Dr. Kuritza interpreted the post-discogram lumbar spine CT scan as showing no significant pathology at L2-L3 or L3-L4, a 3-4 mm broad-based protrusion/herniation at L4-L5, with mild spinal stenosis and a 4-5 mm central disc herniation at L5-S1 with central stenosis and mild bilateral neuroforaminal narrowing, greater on the right. PX 3.

On April 27 and May 17, 2012, Dr. Abdellatif noted persistent complaints of constant low back pain radiating to both legs and bilateral leg weakness. PX 3.

On May 21, 2012, Dr. Abdellatif performed a percutaneous discectomy at L4-L5 and L5-S1, another epidural injection and additional trigger point injections. PX 3.

On June 21, 2012, Dr. Bermudez noted persistent lower back pain, rated 6/10. He referred Petitioner to Dr. Salehi for a surgical consultation. PX 11.

There is no evidence indicating Petitioner saw Dr. Salehi.

On June 28, 2012, Dr. Abdellatif noted that Petitioner complained of severe low back pain radiating to both legs and an inability to stand for long periods. He noted that Petitioner planned to see a surgeon. He recommended work conditioning and a functional capacity evaluation. PX 3.

Petitioner saw Dr. Malek on August 3, 2012. The doctor's CV (PX 15) reflects he underwent fellowship training in spine surgery and is board certified in neurosurgery and independent medical examination.

Dr. Malek's note of August 3, 2012 reflects a referral from Dr. Hassan [Abdellatif]. The note sets forth a detailed history of the work accident, with the doctor indicating Petitioner reported his injury to his supervisor the same day, "went to work on Friday with pain" and spoke with his manager, "Amy Sava," the following Monday, with the manager then sending him to Concentra. Dr. Malek also noted that, "in 4 days the pain started progressing down the lower extremities with tingling, numbness and weakness all the way down." He indicated that Petitioner denied any history of previous serious injury or neck or back surgery. He stated that Petitioner "did work after being at Concentra but that is only because the pain was off." He noted that Petitioner failed to respond to the injections administered by Dr. Abdellatif. He reviewed the March 15, 2012 lumbar spine MRI report and noted that Petitioner had undergone a CT discogram.

Dr. Malek described Petitioner as walking with a cane. He noted 7/7 negative Waddell's signs. He indicated that straight leg raising produced back pain.

Dr. Malek diagnosed a resolved lumbar sprain/strain and lumbar radiculopathy. He prescribed bilateral lower extremity EMG/NCV testing. He told Petitioner he wanted to obtain the MRI film and the discogram report before making any surgical recommendation. He directed Petitioner to remain off work and return to him after the EMG. PX 3, 16.

There is no evidence indicating Petitioner returned to Dr. Malek thereafter.

On September 6, 2012, Dr. Abdellatif noted that Petitioner remained symptomatic and was seeking a surgical consultation. He recommended work conditioning and a functional capacity evaluation. He directed Petitioner to remain off work and return in four weeks. PX 3.

On October 16, 2012, Petitioner underwent a functional capacity evaluation at United Rehab Providers. Ahmed Mohamed, PT, DPT performed this evaluation. In his report, Mohamed described Petitioner as putting forth full and consistent effort. He found that Petitioner's job fell into the medium physical demand category and that Petitioner was capable of performing 68.2% of the physical demands of his job. He indicated that "the return to work test items [Petitioner] was unable to achieve . . . include occasional pulling, occasional pushing, walking and total standing." He noted that, during part of the walking test, Petitioner used an assistive device and exhibited a right antalgic gait pattern. PX 3, 24.

On November 1, 2012, Dr. Abdellatif noted that Petitioner remained symptomatic and was pursuing a surgical consultation "pending approval." He recommended work conditioning and released Petitioner to "return to work according to FCE results." PX 3.

On February 21, 2013, Dr. Abdellatif noted that Petitioner remained symptomatic and was still awaiting approval of a surgical consultation. He found Petitioner to be at maximum medical improvement and instructed him to follow up as needed. PX 3.

Petitioner testified he then began a course of treatment with Dr. Shapiro at Illinois Bone and Joint. He testified it was Respondent who referred him to this physician.

Petitioner first saw Dr. Shapiro on March 21, 2013. The note of that date reflects a referral from Petitioner's current counsel. The history reflects that Petitioner lifted something heavy at work on January 12, 2012 and fell. The history also reflects that Petitioner last worked on January 18, 2012.

Dr. Shapiro noted that Petitioner complained of 8-9/10 low back pain radiating to both thighs, left worse than right. He also noted that Petitioner reported undergoing some injections which did not help. He described Petitioner as walking with a cane. On examination, he noted "severe back pain with attempted straight leg raising bilaterally." He reviewed films and reports concerning a lumbar spine MRI and CT discogram.

Dr. Shapiro described Petitioner as "significantly limited by his level of pain" and deriving ineffective relief from various conservative measures. With Petitioner's uncle acting as a translator, Dr. Shapiro recommended a two-level fusion to address L4-L5 and L5-S1. He indicated Petitioner expressed a desire to discuss the proposed surgery with his attorney and family members. PX 20.

Dr. Shapiro wrote to Petitioner's current counsel on March 21, 2013 and addressed causation as follows: "[Petitioner's] history, physical exam and imaging studies document a permanent aggravation of a pre-existing asymptomatic degenerative condition of L4-L5 and L5-S1." PX 20.

Petitioner returned to Dr. Shapiro on May 7, 2013. The doctor noted that Petitioner remained symptomatic and was still walking with a cane. Through a translator, he again recommended a two-level fusion. He indicated he anticipated Petitioner would reach maximum medical improvement nine months following this surgery. PX 20.

On August 12, 2013, Petitioner underwent a pre-operative evaluation, with a nurse practitioner noting that he reported taking Melformin for his diabetes and significantly cutting back on his cigarette smoking during the previous two years. PX 22.

Dr. Shapiro operated on Petitioner at Evanston Hospital on August 14, 2013. Petitioner was started on Morphine and Norco postoperatively. On August 15, 2013, Petitioner saw Dr.

Boatwright in consultation for diabetes management, with the doctor noting elevated blood sugar levels postoperatively. On August 16, 2013, Petitioner underwent an occupational therapy evaluation, while using a rolling walker. The therapist indicated it would not be safe to discharge Petitioner since he was in pain and reported living in a 3-story apartment with no elevator. She recommended gait training. On August 17, 2013, Petitioner underwent a lumbar spine CT scan due to persistent post-operative leg pain. The scan demonstrated post-operative changes. The radiologist described the hardware as intact but indicated one screw had a "partially extra pedicular course" and another screw had "its tip extending just lateral to the lateral margin of the L5 vertebral body on the right." The radiologist also noted a non-specific soft tissue density in the inferior aspects of L4-L5 and L5-S1. He could not exclude recurrent right L4-L5 and L5-S1 foraminal disc protrusions. PX 22.

At the first post-operative visit, on August 21, 2013, Dr. Shapiro met with Petitioner, Petitioner's father and uncle and Norma Slimmer, RN, a medical case manager. He noted that Petitioner reported checking his sugar levels at home. He also noted that Petitioner complained of persistent back discomfort and moderate discomfort in both anterior thighs. He removed the surgical staples and noted negative straight leg raising bilaterally. He obtained lumbar spine X-rays, which showed excellent position of the fusion implants. He ordered a repeat lumbar spine MRI. On preliminary reading of the MRI film, he saw no evidence of an epidural hematoma. He prescribed Lyrica and Oxycontin, in addition to the Norco, and directed Petitioner, via Petitioner's uncle, to stay off work and remain in touch with his office. He indicated he provided "all appropriate paperwork" to Petitioner and Ms. Slimmer. PX 20.

The repeat lumbar spine MRI report of August 21, 2013 reads as follows: "post-operative findings with attempted fusion L4 through S1. There is suggestion of central and right paramedian protrusion at the L5-S1 level but without significant mass effect. This may also represent fibrosis, follow-up study with gadolinium would be helpful in this differential." PX 20.

At the next post-operative visit, on September 5, 2013, Dr. Shapiro met with Petitioner and some of his family members. He noted that Petitioner had originally been scheduled to return one week earlier. He noted that Petitioner complained of persistent low back pain and intermittent leg pain, worse on the right. He also noted that Petitioner "has the perception that he has weakness in the right leg."

Dr. Shapiro described Petitioner as using a walker to ambulate. On examination, he noted well-healed incisions and negative straight leg raising bilaterally. He obtained various lumbar spine X-rays and interpreted the films as showing no changes in the position of the surgical hardware.

Dr. Shapiro assessed Petitioner as having a "persistent high level of pain in the lumbar spine with intermittent pain in both legs following lumbar fusion." He recommended another MRI, to be performed with and without contrast. He prescribed Zanaflex. He attributed Petitioner's ongoing symptoms to the "relatively large" size of the procedure and to his "poorly controlled diabetes," which he felt was slowing Petitioner's recovery. He indicated he was

reluctant to prescribe any steroids due to this condition. He referred Petitioner to pain management. PX 20.

Petitioner went to Evanston Hospital's Emergency Room on September 6, 2013, complaining of persistent post-operative right leg pain and four days of numbness below the knee to the ankle. An orthopedic resident noted that Petitioner's pre-operative leg pain was worse in the left leg but that now he seemed to have greater problems with his right leg. She described her examination as "limited by effort." Petitioner was admitted to the hospital and underwent an MRI and CT scan to check the surgical hardware. Petitioner was discharged on September 7, 2013, with Dr. Shapiro indicating the MRI did not show an epidural hematoma and the CT was still pending. PX 20.

On September 24, 2013, Dr. Shapiro met with Petitioner, a family member, a translator and Norma Slimmer, RN, a medical case manager. He indicated that Petitioner was still experiencing low back and left leg pain as well as right leg numbness. He also indicated that the post-fusion CT and MRI scans showed "appropriately placed hardware and the absence of any infection, hematoma or fluid collection." He described Petitioner as relying on a walker. He recommended that Petitioner stay off work, start therapy and see Dr. Bello for pain management. PX 20.

Petitioner underwent an initial physical therapy evaluation at Accelerated Rehabilitation on September 25, 2013. The evaluating therapist, Phillip Gonzalez, PT, MPT [hereafter "Gonzalez"], recorded a consistent history of the work accident and noted complaints of "pain with all positions that does not vary with activity" and numbness and weakness in the left leg. He described Petitioner as using a rolling walker to ambulate. He stated that Petitioner's reports of "high and unvaried pain . . . could be a limitation to physical therapy." He described Petitioner's rehabilitation potential as fair.

On October 4, 2013, Dr. Shapiro's nurse contacted Petitioner for an update. She noted that Petitioner had attended five therapy sessions to date and stated he felt worse after each session. Dr. Shapiro placed therapy on hold and scheduled Petitioner to see Dr. Bello for pain management. PX 20.

Petitioner first saw Dr. Bello on October 15, 2013. The doctor recorded a history of the work injury and subsequent two-level fusion. He indicated that the fusion "resolved much of [Petitioner's] symptoms" but did not resolve his low back pain. He noted Petitioner was still relying on a walker. On examination, he noted significant tenderness around the incision site with significant paraspinal spasms and negative straight leg raising. He diagnosed "postlaminectomy syndrome, likely multi-factorial." He continued the Norco and increased the OxyContin and Lyrica. He indicated he discussed his findings with a medical case manager. PX 20.

On October 29, 2013, Dr. Shapiro described Petitioner as "slow to change positions during the examination" and requiring "motivation in order to give full motor effort." He

recommended that Petitioner transition from a walker to a four-pronged cane. He also recommended that Petitioner consider an epidural injection and restart therapy after returning to Dr. Bello. PX 20.

On December 16, 2013, Kim Stewart of Chesterfield Services sent Acclerated Rehabilitation an E-mail authorizing a six-week course of physical therapy. PX 25.

In a therapy progress note dated December 15, 2013, Gonzalez noted he had last seen Petitioner on October 2, 2013. He indicated that therapy had been stopped at that time due to Petitioner's pain symptoms. He described Petitioner as demonstrating "positive Waddell's signs for symptom magnification and unreliable pain reports without clinical objective findings." PX 20, pp. 307-308 of 342. PX 25.

On December 26, 2013, a different therapist, Snehal Patel, PT, MPT [hereafter "Patel"], noted that Petitioner complained of increased pain and was still "heavily guarded" during passive stretching and walking. PX 25.

On December 30, 2013, Dr. Bello administered an epidural steroid injection. PX 20.

On January 7, 2014, Patel described Petitioner as reporting minimal change from the injection. He noted that Petitioner walked with a hunched over gait and continued to use a quad cane. PX 25.

On January 9, 2014, Gonzalez noted that Petitioner described the injection as "having no effect." Gonzalez described Petitioner as demonstrating "atrophy deficits secondary to self-limiting behaviors." PX 25.

On January 13, 2014, Gonzalez issued a physical therapy report indicating that Petitioner demonstrated 4/5 positive Waddell's signs "for symptom magnification and unreliable pain reports without clinical objective findings." He also indicated Petitioner scored 90% on the Oswestry Low Back Questionnaire, suggesting Petitioner was either bedbound or exaggerating his complaints. PX 25.

On January 15, 2014, Dr. Shapiro noted that Petitioner denied improvement secondary to the epidural steroid injection. He also noted that Petitioner was still using OxyContin, Norco and Lyrica. He indicated he reviewed physical therapy notes "where there was some concern about Waddell signs." He described Petitioner as continuing to rely on a four-pronged cane. He prescribed a lumbar spine CT scan and directed Petitioner to continue attending therapy and seeing Dr. Bello. PX 20.

Respondent offered into evidence a Millennium Laboratories medication screening report dated February 26, 2014 reflecting "inconsistent results" in that the screening was negative for a reported medication, Oxycontin. RX 8.

On February 28, 2014, Dr. Bello's nurse noted the inconsistent toxicology screening results and indicated that the doctor had ordered a functional capacity evaluation. PX 20.

In a therapy discharge summary dated March 7, 2014, Gonzalez noted that Petitioner had not participated in therapy since January 27, 2014 and that therapy had been placed on hold "per patient" on January 30th. Gonzalez also noted that Petitioner had last been evaluated on January 10, 2014 "with inconsistent pain limiting factors and questionable performance in physical therapy." PX 25.

At Respondent's request, Petitioner submitted to a Section 12 examination by Dr. Hsu on April 7, 2014. The doctor's letterhead reflects he is affiliated with the department of orthopedic surgery at Northwestern University.

Dr. Hsu indicated he reviewed records from Concentra, Alivio, Herron Medical Center, Dr. Shapiro, Accelerated Rehabilitation and Dr. Bello in connection with his examination.

Dr. Hsu indicated that Petitioner reported deriving no relief from the fusion or post-operative injections. He also indicated that Petitioner described his low back and leg symptoms as the same as they were before the fusion.

Dr. Hsu described Petitioner as appearing to be in no acute distress but flexing forward when he initially walked into the examination room. On range of motion testing, he noted 40 degrees of flexion, 20 degrees of extension and 20 degrees of lateral rotation to the left and right. He described straight leg raising as negative in the sitting and supine positions. He noted "positive Waddell signs with axial compression, supersensitivity, hip rotation and distraction 4/4." He also noted 4+/5 strength in both legs in all muscle groups.

Dr. Hsu indicated he reviewed the lumbar spine MRI of March 15, 2012 and the lumbar spine CT scan of January 27, 2014. He described the MRI as showing severe degenerative disc disease at L4-S1 with evidence of Modic changes at L4-L5. He interpreted the CT scan as showing excellent positioning of the cages and screws, "incomplete bony healing across the L4-L5 and L5-S1 disc spaces," interval bony consolidation and "no evidence of screw loosening or adjacent segment degeneration."

Dr. Hsu diagnosed lumbar spondylosis at L4-S1, following a two-level fusion, lumbar pseudo-arthrosis and myofascial pain syndrome. He did not believe that Petitioner's current pain stemmed from the pseudo-arthrosis shown on the CT scan since that scan was performed only six months after the fusion. He did not believe the scan showed any gross instability at the level of the surgery.

Dr. Hsu opined that the medical treatment to date "has been reasonable and necessary." He viewed Petitioner as experiencing a less than ideal recovery from this treatment. He noted that individuals of Petitioner's age who have his diagnosis "do not tend to have quick and painless recoveries." He did not believe that any pre-existing co-morbid

condition contributed to Petitioner's post-operative course. He opined that the positive Waddell's signs "suggest a psychosocial component to [Petitioner's] low back pain."

Dr. Hsu found Petitioner to be at maximum medical improvement for the work injury. With respect to the myofascial pain syndrome, which he did not link to the work injury, he recommended epidural injections and physical therapy. He also indicated Petitioner might be a candidate for a revision fusion but not in the immediate future. He stated that there was still time for further healing within one year of the fusion. He viewed Petitioner as a good candidate for a functional capacity evaluation. He stated that, if this evaluation was valid, he would recommend restrictions, but if it was invalid, he would find Petitioner capable of full duty. RX 1.

Respondent offered into evidence a Millennium Laboratories medication screening report dated May 8, 2014 that showed inconsistent results in that Hydrocodone, Norhydrocodone and Hydromorphone were detected "but could not be matched to any of the reported prescriptions." RX 9.

On June 23, 2014, Petitioner underwent a second functional capacity evaluation at Accelerated Rehabilitation Centers. A registration form in PX 25 reflects that Chesterfield Services authorized the evaluation. The report describes Dr. Shapiro as the referring physician. The evaluator was Phillip Gonzalez, the same individual who had administered therapy to Petitioner postoperatively. Gonzalez concluded that Petitioner demonstrated consistent effort through only 57.9% of the evaluation. He found this suggestive of "significant observational and evidence-based contradictions resulting in consistency of effort discrepancies, self-limiting behaviors and/or sub-maximal effort." He concluded that the overall results of the evaluation did not truly or accurately represent Petitioner's physical capabilities. He described Petitioner's pain reporting as 95% unreliable. He stated that Petitioner demonstrated the ability to perform 35.6% of the physical demands of his store clerk job and that he needed to be able to function at a medium physical demand level in order to be able to perform that job. He indicated that a formal job description was available. [Such a description, describing a "thrift store clerk" job at the Salvation Army, appears in PX 25. The physical demand section reflects that the employee is required to stand, use hands, walk frequently, reach with arms and hands, stoop, kneel, crouch, regularly lift and/or move up to 10 pounds, frequently lift and/or move up to 25 pounds and occasionally lift and/or move up to 50 pounds.]

Petitioner returned to Dr. Shapiro on July 10, 2014. In his note of that date, the doctor indicated that Petitioner was accompanied by his father and the medical case manager, Norma Slimmer. The doctor also indicated that he reviewed the results of the June 23, 2014 functional capacity evaluation with Petitioner "in detail." He recommended that Petitioner be placed at maximum medical improvement "from a non-operative standpoint" and he gave Petitioner a note indicating he could lift up to 10 pounds. He again recommended an anterior and posterior reconstruction "to revise the L4-S1 fusion that has gone on to non-union." He noted that Petitioner was still seeing Dr. Bello and continuing to use Fentanyl patches and Lyrica. He also noted that Petitioner "does not feel that he is getting any better and that his pain level is 7/10

most times." He described Petitioner as limping and using a 4-pronged cane. He noted 4/5 strength in the right leg and described Petitioner as "extremely limited in his ability to change positions." In an addendum, also dated July 10, 2014, he indicated that Petitioner's "chief complaint remains severe low back pain as well as radiating pain in his left leg and numbness in his right leg." He indicated Petitioner could return to him on an "as needed" basis. RX 12.

On July 22, 2014, Dr. Bello noted that Petitioner was still experiencing fairly significant pain as well as nausea secondary to use of Duragesic patches. He discontinued the patches and started Petitioner on Exalgo. He also indicated Petitioner "did seek a second opinion who suggested hold off on any surgery at this time in favor of progressive physical therapy." [No such opinion is in evidence.] He described urine testing as "negative for opiates." He discussed Petitioner's case with Dr. Shapiro and expressed agreement with Dr. Shapiro's finding of maximum medical improvement. PX 20.

Respondent discontinued the payment of temporary total disability benefits on July 31, 2014. RX 10.

Petitioner underwent a third functional capacity evaluation at Athletico on August 19, 2014. The report describes Dr. Shapiro as the physician recommending this evaluation. The evaluator, Jacquelyn Hendrix, described Petitioner as putting forth "near full levels of physical effort." She indicated the findings suggested the presence of "minor inconsistency to the reliability and accuracy of [Petitioner's] reports of pain and disability." Specifically, she indicated that, based on his responses to the Oswestry Low Back Disability Questionnaire and Lower Extremity Functional Scale, Petitioner would be rated "crippled" and "bedbound/exaggerating symptoms." She also noted 5/7 positive Waddell's signs.

Hendrix found Petitioner to be performing at a sedentary physical demand level. She relied on the "stock clerk" description in the Dictionary of Occupational Titles as well as Petitioner's description of his former duties in concluding that Petitioner did not meet the demands of the job he performed at Respondent. She rated that job as heavy. She described Petitioner as walking with a small based quad cane and failing to meet the job demands for "carrying, standing, climbing, balancing, stooping, crouching, squatting or twisting/spinal rotation." She noted that Petitioner attributed the cane usage to balance issues and "did demonstrate difficulties when performing dynamic balancing activities where stand-by assistance and occasional contact guard was required to prevent a loss of balance." PX 28.

On August 21, 2014, Petitioner's counsel sent a letter to Respondent's counsel enclosing the August 19, 2014 functional capacity evaluation and asking Respondent to provide either sedentary duty or reinstatement of weekly benefits retroactive to July 31, 2014. PX 39, Exh. 2.

Surveillance video obtained on September 26 and October 1, 2014 shows Petitioner walking short distances while using a cane. RX 6, 7(a).

At Respondent's request, Dr. Hsu re-examined Petitioner on October 1, 2014. In his report of that date, Dr. Hsu indicated he reviewed toxicology screen reports and the June and August 2014 functional capacity evaluations in connection with his re-examination. Dr. Hsu opined that the toxicology screen reports, which were negative for the hydromorphone that had been prescribed for Petitioner, made him "suspicious whether [Petitioner] is using the drugs prescribed to him."

On re-examination, Dr. Hsu noted negative straight leg raising in the seated and supine positions and 3/4 positive Waddell's signs. He described Petitioner's gait as "methodical with a flexed forward posture."

Dr. Hsu diagnosed lumbar spondylosis at L4 to S1, status post-fusion, lumbar pseudoarthrosis and myofascial pain syndrome.

Dr. Hsu indicated that nothing about the August 2014 functional capacity evaluation prompted him to change any of his previous opinions, commenting as follows:

> "Although there is a second [sic] FCE which demonstrates valid effort, it is much more likely than not that the first report from Accelerated Rehabilitation Center is much more reflective of his overall condition and effort. I base these opinions on my previous interactions, my examination of [Petitioner] and the documentation."

He reiterated that Petitioner should resume full duty. RX 2.

On November 10, 2014, Petitioner's counsel sent a letter to Respondent's counsel citing the June and August 2014 functional capacity evaluations and requesting that Respondent provide vocational rehabilitation services. PX 39, Exhibit 3.

On November 11, 2014, Dr. Bello noted complaints of nausea and vomiting secondary to Exalgo. He discontinued that medication and started Petitioner on Nucynta. PX 20.

On December 15, 2014, Dr. Bello noted complaints of nausea and vomiting secondary to Nucynta. He decreased the Nucynta dosage to 100 mg twice daily. PX 20.

On January 16, 2015, Dr. Bello noted that Petitioner denied nausea and was "actually doing well on the lower dose of Nucynta." He also noted that Petitioner was still using a cane but that his gait was "actually significantly improved overall." PX 20.

On February 25, 2015, Edward Pagella, M.S., CRC, a certified vocational rehabilitation counselor (PX 29), met with Petitioner, with a translator sitting in. Pagella indicated that Petitioner used a four-prong cane to walk and described himself as speaking and understanding very little English.

In his report of March 17, 2015, Pagella indicated he reviewed records from Drs. Shapiro, Bello and Hsu along with the last two functional capacity evaluations and the Dictionary of Occupational Titles.

Pagella noted that Petitioner reported taking Nucynta for his pain. He also noted that Petitioner described this medication as making him "drowsy, dizzy and nauseated."

Pagella indicated that Petitioner stated he is "always in pain" and reported experiencing a lot of pain during the functional capacity evaluations. He noted that Petitioner also reported limited sitting tolerance. He described Petitioner as standing up about 20 minutes into the meeting.

Pagella noted that Petitioner reported growing up in Mexico and coming to the United States in approximately 2003. He also noted that Petitioner described himself as separated, having two children and residing with his father in Palatine. He indicated that Petitioner is not a citizen or legal resident of the United States.

Pagella opined that, based on the last functional capacity evaluation and Dr. Shapiro's non-union diagnosis and 10-pound lifting restriction, Petitioner would not be able to resume his former job with Respondent. Pagella further opined that Petitioner would thus be relegated to unskilled occupations at a sedentary level and that he would have an "almost impossible take [sic] of obtaining work" based on his lack of transferable skills, work history, education and lack of English skills. He stated that prospective employers would see Petitioner as a liability rather than an asset and would not realistically hire him once they learned his fusion was not healed and he might require more surgery. He further stated that Petitioner would face the same difficulty securing work in his native Mexico. Citing that country's National Commission, he indicated that the current minimum wage in Mexico is equivalent to $4.19 to $5.18 U.S. dollars per day. He stated that, in Mexico, jobs Petitioner might be able to perform would include hand packer, hand sorter or assembler. PX 30.

On April 17, 2015, Dr. Bello decreased Petitioner's Nucynta dosage to 50 mg twice daily secondary to a complaint of nausea. He added Celebrex to the medication regimen. PX 20.

On May 18, 2015, Dr. Bello noted an increase in Petitioner's pain secondary to the lowered Nucynta dosage. He increased the Nucynta "back to 100 mg extended release twice daily", continued the Celebrex and ordered urine toxicology testing. PX 20.

Surveillance video obtained on the evening of June 2, 2015 showed Petitioner parking and getting out of a vehicle and walking across a lot toward his residence. The investigator conducting the surveillance indicated Petitioner "appeared to move in a slightly slowed manner with the use of a four pronged cane he carried in his right hand." RX 7(c).

Surveillance video obtained on June 10, 11 and 16, 2015 showed Petitioner walking with a cane, getting into a vehicle and conversing with another individual. RX 6, 7(c).

On June 19, 2015, Dr. Bello described Petitioner's urine toxicology testing as "consistent with therapy." He continued the Nucynta and Celebrex and found Petitioner to be at maximum medical improvement. PX 20.

Petitioner returned to Dr. Bello on July 20, August 21 and September 21, 2015. At each of these visits, the doctor noted that Petitioner rated his pain at 7/10 and used a cane to ambulate. On July 20, 2015, the doctor added Zofran to Petitioner's pain medication regimen due to a complaint of nausea. On August 21, 2015, he noted some improvement secondary to the Zofran. PX 20.

On November 20, 2015, Petitioner returned to Dr. Bello, with the doctor noting no change in his symptoms. The doctor continued the Nucynta and Zofran. PX 20.

On December 21, 2015, Dr. Bello noted that Petitioner was now complaining of increased stiffness and pain due to weather changes. He started Petitioner on a Medrol Dosepak and continued the other medications. PX 20.

On January 15, 2016, Petitioner filed a Section 19(b) petition and a detailed Section 8(a) petition and petition for penalties and fees, with various attachments. PX 39.

On January 21, 2016, Dr. Bello noted that Petitioner had discontinued the Medrol Dosepak secondary to significant vomiting. He described Petitioner's symptoms as stable, again noting a 7/10 pain rating. He continued the other medication. PX 20.

On January 25, 2016, Dr. Bello issued a "Statement of Medical Necessity" indicating he disagreed with the utilization review determination. The doctor further indicated he had been treating Petitioner for chronic pain since October 13, 2013. He described Petitioner as "consistent with his medications and [receiving] urine toxicology monitoring without issues." He attributed the chronic pain to "surgery which did not resolve [Petitioner's] symptoms." He stated he foresaw Petitioner on chronic pain medications "with the hope to taper them to the lowest most effective doses." PX 31.

On February 16, 2016, Petitioner filed an amended Section 19(b) petition and an amended Section 8(a) petition and petition for penalties and fees, with various attachments, including a detailed list of claimed medical and prescription expenses. PX 39.

Petitioner testified he is depressed because his life changed following the surgery. He has seen Dr. Torres for his depression. His primary care physician referred him to Dr. Torres after the surgery. PX 35, 36. He is unable to sleep and cannot engage in the same activities he engaged in before the accident. Dr. Shapiro discussed a revision surgery with him but he was afraid to undergo this, in part because the doctor told him there is a risk he might not be able to have more children. He wants to deal with his depression before giving any further consideration to more surgery.

Petitioner acknowledged receiving temporary total disability benefits for a while. Respondent did not offer to accommodate the permanent lifting restriction that Dr. Shapiro imposed. He would have returned to Respondent if an accommodation had been offered. He has not worked in any capacity since the last date on which he worked for Respondent. Respondent has not offered any vocational counseling or training. He has never prepared a resume on his own.

Under cross-examination, Petitioner testified he worked for an employee of a Chicago radio station called "La Ley."

Petitioner testified he was working with a co-worker named "Javier" at the time of the accident. He could not recall Javier's last name. He provided notice of the accident to Braulio Farias. [He identified this individual as a supervisor on the Request for Hearing form. Arb Exh 1.]

Petitioner had no recollection of which physician sent him to the functional capacity evaluation at Accelerated Rehabilitation or the subsequent evaluation. He could not recall whether Dr. Shapiro imposed permanent restrictions after the evaluation at Accelerated Rehabilitation.

Petitioner testified that people associated with "Medical Legal" sent him to Dr. Malek.

Petitioner acknowledged the United States government has not issued a Social Security card to him. When Respondent hired him, he provided a Social Security number ending in 5438. He invented that number. He completed written forms when he applied to Respondent. He cannot recall when he started working for Respondent. He met with Amy during the application and hiring process. Respondent did not hire him on the first date he went to Respondent. He cannot recall how he transmitted the Social Security number to Respondent. He found his original attorney via "Medical Legal." He cannot recall what forms he signed at that point. He does not recall the exact date of his accident but he knows the accident occurred during the week preceding Monday, January 16th.

Petitioner testified he is currently restricted to lifting items that weigh less than 10 pounds. He follows this restriction.

Petitioner did not recall undergoing a functional capacity evaluation in 2012. Nor did he recall being released to work following that evaluation.

Petitioner reiterated that his jobs in the United States have consisted of working for a radio station employee, working for his father and working for Respondent. He denied working full-time as a deli clerk at a Fresh Market store. He denied injuring his lower back in January 2006 while carrying a bag of garbage.

Petitioner attributed the results of the May 2013 functional capacity evaluation to a lack of clear instructions. He could not recall whether he explained this to Dr. Shapiro.

Petitioner testified he is taking medication prescribed by Drs. Shapiro and Bello. He uses all of the medication he receives. He has periodically undergone drug screenings. No one has told him that some of the results of these screenings do not match with his prescribed medication.

Petitioner denied being aware of the surveillance while the surveillance was underway. He would sometimes see people near the entrance to his house but he did not know who these people were.

Petitioner initially denied using any aliases. He then admitted that people at the radio station used to call him "Heri M. Beltran." He uses the name "Heri Mazzizo" when he posts on social media.

Petitioner admitted creating an entity known as "Mazzizo Productions." He created this before he began working for Respondent. "Mazzizo Productions" is "just a hobby," not a job. It involves music. He has a recording studio in his home. The recording studio is equipped with a clarinet, keyboards and a saxophone. If asked, he will arrange music for a friend. In the past, before he worked for Respondent, he would travel to musical shows under the name "Mazzizo Productions." He received money for doing this. He does not do that now. Since the accident, he has not traveled to Miami or Phoenix. When asked about his February 20, 2013 Facebook post, which indicated he was at the Miami airport, he indicated he did not recall this post. A friend, who works for him as a designer, designed a logo for him on a "friend to friend" basis. The friend was not his employee.

On redirect, Petitioner testified he did not walk around with a scale when he worked for Respondent. From watching television, he is aware that security personnel work at airports. He has never flown on a plane.

Jennifer Cunningham, an Internet researcher employed by Litigation Solutions, testified on behalf of Respondent. Cunningham testified she has worked for Litigation Solutions for 3 ½ years. She is not a licensed private investigator. She conducted two searches, in September 2014 and March 2015. She limited the first search, time-wise, to information from January 11, 2012 forward. She relied on background information, including Petitioner's name and date of birth, three aliases, injury date and phone number, in doing her research. None of the aliases was "Heri Beltran" or "Heriberto Mares." Most of the information she found was on Facebook and You Tube. She cannot disable a user's privacy settings. Everything she found is available to the public. On Facebook, Petitioner identified himself as "Heri M. Beltran (Mazzizo)" and "Heri Beltran." The images in her reports (RX 5A and 5B) are from Petitioner's Facebook site. That site contains many photographs. In a Facebook post dated February 20, 2013, Petitioner indicated he was checking in from the airport in Miami. She had no way to verify Petitioner's actual location as of that post. In another post, Petitioner indicated he was in Phoenix. Some

posts referenced "M Productions" and indicated Petitioner was promoting or helping promote musical performances. Posted photographs dated January 1, 2013 show a stage with big screens and speakers. Two photographs show Petitioner in a surgical gown. There are some references to Petitioner being in pain and seeing doctors.

Under cross-examination, Cunningham acknowledged there is no way to know when the posted photographs were actually taken. She found no information indicating Petitioner was charging for any services. She found no pictures showing Petitioner lifting anything. If someone had Petitioner's password, that person could post something on Petitioner's Facebook page. One of Petitioner's posts relates to him returning to college. It could be that someone other than Petitioner posted this. Many of the posts are in Spanish. She does not speak Spanish.

On redirect, Cunningham testified that the post relating to the setting up of a show states "here doing the set up." Her reports contain maybe fifty images of Petitioner. None of those images show Petitioner with a cane.

Under re-cross, Cunningham acknowledged that none of the images show Petitioner in the process of walking.

At a continued hearing held on April 18, 2016, Petitioner called **Lizet Astorga.** Astorga testified Petitioner has been her boyfriend for five years and five months. She knew Petitioner before his work accident. At that point, they would see one another from Friday through Sunday. In 2015, they began seeing one another five days a week. Petitioner now attends school near where she lives.

Astorga testified that, before the work accident, she and Petitioner frequently went out dancing. Since the accident, they have not resumed that activity. After Petitioner underwent surgery, in 2013, she assisted him with various activities, including bathing and toileting. Petitioner was not able to do much. Before the surgery, she did not have to provide this assistance. Now she sometimes helps Petitioner by taking out the garbage or picking something up off the floor.

Astorga described Petitioner as "very vain" before the accident. Petitioner liked to dress up, go out to dance and listen to music and go to work. Since the accident, Petitioner has to be told what to do. Petitioner is "kind of loafing" and does not want to go out or engage in any activities.

Astorga testified that Petitioner has not lost interest in things that interested him before the accident. Petitioner wants to resume working. He has started school. He is studying English and taking courses to obtain his GED.

Under cross-examination, Astorga testified that Petitioner attends school from 6 to 9:30 PM, Monday through Thursday, and from 9:30 AM to 3:00 PM on Saturday. She does not go to

school with Petitioner. She is appearing at the hearing voluntarily, at Petitioner's request. She would like not only to assist Petitioner but tell the truth. She accompanied Petitioner to the Commission at the time of the first hearing but she did not sit inside the hearing room on that date. After that hearing, she and Petitioner talked about Petitioner's testimony but she does not recall what was said.

In addition to the exhibits previously summarized, Respondent offered into evidence print-outs of the payments it has made to date. RX 10 reflects that Respondent paid a total of $28,903.36 in temporary total disability benefits, covering the period January 19, 2012 through July 31, 2014. The first such payment, totaling $13,612.20, was made on March 5, 2013. That payment covered the period January 19, 2012 through March 15, 2013. RX 11 shows various payments totaling $155,144.83. Many of these payments were made to certain of Petitioner's medical and prescription providers. Others were made to Respondent's examiner, Hsu Group, LLC, and medical case managers, Genex Services, Inc. The last date of payment shown on RX 11 is February 15, 2016.

Respondent also offered into evidence a utilization review report dated October 5, 2015. The report is addressed to Dr. Bello and is authored by Dr. Rana, an Illinois physician with board certification in anesthesiology and pain medicine. In this report, Dr. Rana recommended non-certification of three medications prescribed by Dr. Bello in August and September 2015: Nycynta ER 100 mg #60, Celecoxib 200 mg #60 (+ 4 refills) and Ondansetron HCL 4 mg #90 (+ 3 refills). Dr. Rana indicated Nycynta ER should be non-certified because, per ODG guidelines, it is recommended as second line therapy for patients who develop intolerable adverse effects with first line opioids and, based on the available records, "there is no prior documentation of trial and failure of first line opioid therapy." Dr. Rana indicated that Celecoxib should be non-certified because it is a non-steroidal anti-inflammatory intended for short term use and the records showed Petitioner had been taking this medication since April 2015 with no change in his pain ratings. Dr. Rana indicated that Ondansetron should be non-certified because it is an anti-nausea medication intended for acute use and "ODG does not support the use of this medication for nausea caused by chronic opioid use." The report reflects that a telephone conference with Dr. Bello could not be scheduled because the doctor had no time on September 30th or October 1st to complete a peer to peer discussion. RX 4.

Arbitrator's Credibility Assessment

Petitioner's accident- and notice-related testimony was detailed and credible. Also credible was Petitioner's denial of any pre-accident lower back problems. It appears, based on the parties' stipulation as to earnings, that Petitioner worked for Respondent for some period before the accident and none of his records mention any pre-existing back injuries or treatment.

Much attention has been directed to the issue of the legitimacy of Petitioner's reported symptoms. The initial providers at Concentra, Respondent's selected facility, did not note any positive Waddell's signs. Nor did Dr. Malek. In April 2014, Dr. Hsu, Respondent's examiner,

noted positive Waddell's and concluded that Petitioner's pain had a "psychosocial element." Petitioner's first functional capacity evaluation (performed in 2012, about ten months prior to his surgery) was valid. Phillip Gonzalez, a therapist who had already formed a negative impression of Petitioner, performed a second evaluation in June 2014, about ten months after the surgery. Gonzalez noted self-limiting and described 95% of Petitioner's pain complaints as invalid. He found Petitioner capable of returning to his job at Respondent. It appears he relied on a formal job description that did not indicate Petitioner had to lift the type of heavy item he said he was lifting when his injury occurred. The individual who performed the third evaluation, on August 19, 2014, described Petitioner as putting forth "near full" effort but also noted 5/7 positive Waddell's signs. She found Petitioner capable of performing only at a sedentary duty level. She indicated she did not have access to a formal job description. Instead, she relied on Petitioner's description of his job along with the Dictionary of Occupational Titles. Like Gonzalez, she indicated that Petitioner's responses to Oswestry Low Back Disability Questionnaire placed him in a "crippled" category.

At the hearing, Petitioner attributed the results of the second evaluation to miscommunication. He testified that the evaluator spoke only "Spanglish" and that he followed directions as well as he could. He indicated a translator was present during the last evaluation, although this is not documented anywhere in the evaluation report.

The Arbitrator views all three of the functional capacity evaluations as flawed. The first was performed prior to a major lumbar spine surgery that resulted in a non-union, with the prescribing physician (Dr. Abdellatif) noting, incongruously, that Petitioner was at maximum medical improvement but still seeking a surgical consultation. The second was performed by an individual who had already formed a negative impression of Petitioner and who, according to Petitioner, really did not speak Spanish. Moreover, this individual relied on a job description that does not mesh with the evidence as to the very heavy lifting Petitioner sometimes performed. The third was performed by an individual who did not have access to any formal job description.

The three evaluations are consistent to the extent that each evaluator found Petitioner unable to perform certain aspects of a store clerk job, although each evaluator seemed to have a different impression of what such a job entailed.

The Arbitrator has considered the foregoing along with the testimony of Cunningham, the various Facebook posts and photographs (which, for the most part, show Petitioner posing for "selfies" in what appears to be a residence) and the testimony of Petitioner's girlfriend. The Arbitrator has also considered the video surveillance, which consistently shows Petitioner relying on a cane. The Arbitrator does not agree with Dr. Hsu's opinions as to causation and work capacity but does agree that there may be a psychological element to Petitioner's overall presentation. Petitioner has a legitimate physical condition, i.e., a non-union following a fusion, and appears to have some degree of depression, but the Arbitrator has some concerns about his passivity. Even his girlfriend seemed to question his motivation. The Arbitrator also has some doubts about Petitioner's testimony that he is currently attempting to obtain a GED.

Neither Petitioner nor his girlfriend identified the school Petitioner is purportedly attending. On social media, Petitioner expressed happiness about "returning to college" and indicated he studied communication and political science at Robert Morris University in Pittsburgh, referencing the "class of 2002." RX 5b. To the Arbitrator's knowledge, it is not possible to attend college without a high school degree or GED. The Arbitrator also has some doubts about the extent of Petitioner's participation in the music industry. Petitioner admitted having a recording studio in his residence. He also acknowledged arranging music for friends. He described his musical endeavors as merely a "hobby" but the Arbitrator has some questions about this. This is not, however, to suggest that Petitioner has been exceeding his restrictions or working, in the traditional sense. The Arbitrator merely believes that Petitioner may, on some occasions, derive occasional income from music-related activities.

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident arising out of and in the course of his employment?

The Arbitrator finds that Petitioner sustained an accident in January 2012 arising out of and in the course of his employment. The Arbitrator further finds, based on the Concentra records, that this accident occurred on the evening of January 11, 2012.

In finding in Petitioner's favor on the issue of accident, the Arbitrator relies in part on Petitioner's credible testimony concerning his lifting duties and the mechanism of his injury. Petitioner indicated he was with a co-worker at the time of the accident. He was able to identify that co-worker by name. No one refuted Petitioner's testimony that one of his job duties was to lift and stack bags or packs of clothing. The Arbitrator also relies on the consistent histories set forth in the various treatment records. All of those histories reflect Petitioner experienced an abrupt onset of low back pain while lifting a heavy bag or pack of clothes at one of Respondent's stores. The slight variance as to the accident date does not trouble the Arbitrator since several days passed before Respondent sent Petitioner to Concentra. What is important to the Arbitrator is that Petitioner was performing a job task on Respondent's premises during a regular workday when the injury occurred.

Did Petitioner provide Respondent with timely notice of his accident?

The Arbitrator finds that Petitioner provided Respondent with timely notice of his January 11, 2012 accident. In so finding, the Arbitrator relies primarily on Petitioner's credible testimony that, very shortly after the accident, he notified his immediate supervisor, Braulio, of the accident. Petitioner described the accident as occurring around 6 PM. The Concentra records of January 16, 2012 reflect that Dr. Lambos communicated his findings to Respondent's "night manager." Petitioner testified a female general manager sent him to Concentra and the Concentra records show that "Amy Sahba" authorized the treatment. PX 1. Finally, Petitioner filed his first Application on February 6, 2012, within the 45-day notice period.

Did Petitioner establish a causal connection between his work accident and his current claimed condition of ill-being?

The Arbitrator finds that Petitioner established a causal connection between the work accident and the need for the two-level lumbar fusion that Dr. Shapiro performed in August 2013. In so finding, the Arbitrator relies in part on Petitioner's credible denial of any pre-accident back problems. The Arbitrator also relies on the chain of events, with the Concentra and other early treatment records describing an abrupt onset of symptoms following the accident. The Arbitrator further relies on Dr. Shapiro's opinion that the accident permanently aggravated an underlying degenerative condition. PX 20. As noted previously, Dr. Shapiro was a physician of Respondent's selection. The Arbitrator further finds that Petitioner established causation as to the non-union that was diagnosed postoperatively and as to the need for the revision surgery recommended by both Drs. Shapiro and Hsu. Petitioner declined to undergo that revision surgery in 2014, based on his understanding of the potential risks. At the hearing, Petitioner again expressed significant reservations about having another operation.

Finally, the Arbitrator finds that Petitioner established causation as to the permanent 10-pound lifting restriction that Dr. Shapiro imposed on July 10, 2014. In his note of that date, the doctor made it clear he was imposing this restriction (and again recommending revision surgery) despite the inconsistent results of the June 23, 2014 functional capacity evaluation. In other words, he took Petitioner at his word concerning his pain level. The Arbitrator finds this compelling, in light of Petitioner's testimony that it was Respondent who chose Dr. Shapiro. Respondent did not offer any evidence contradicting this testimony.

Is Petitioner entitled to temporary total disability?

Petitioner proceeded pursuant to Section 19(b). He did not place permanency at issue. Arb Exh 1. He claims weekly benefits from January 19, 2012 through February 16, 2016 (the first date of hearing). Arb Exh 1. Respondent disputes that claim, based on its various defenses. The parties agree Respondent paid $28,903.36 in temporary total disability benefits and discontinued paying these benefits on July 31, 2014.

The Arbitrator finds that Petitioner was temporarily totally disabled from January 20, 2012 (the first date on which a physician [Dr. Nelson at Concentra] directed Petitioner to stay off work) through July 22, 2014, the date on which Dr. Bello expressed agreement with Dr. Shapiro's finding of maximum medical improvement. This is a period of 915 days or 130 5/7 weeks. The Arbitrator believes that Petitioner required ongoing pain management after July 22, 2014 but views Petitioner's condition as stabilizing as of that date. Petitioner's condition could potentially de-stabilize if he were to change his mind about the revision surgery, assuming such surgery remains an option, but it seemed to the Arbitrator that his mind is made up. He did not ask the Arbitrator to award the surgery. Nor did he offer any records indicating he had returned to Dr. Shapiro since July 2014.

The Arbitrator declines to award additional weekly benefits through the first date of hearing, as requested by Petitioner. Those benefits would be in the form of maintenance. Petitioner offered into evidence the opinion of a certified vocational rehabilitation counselor that he is not readily employable, due to various factors, but that evidence goes to permanency, which is not at issue. Petitioner is subject to a permanent 10-pound lifting restriction, per Dr. Shapiro, but did not testify to looking for work within that restriction. Petitioner did testify to recently starting school in order to obtain his GED but that testimony is in conflict with a 2013 Facebook post, which reflects he studied communication and political science at Robert Morris College as part of the "class of 2002." Dr. Torres' note of January 26, 2016 refers to Petitioner starting to take college, not GED, classes. PX 35. If Petitioner is indeed attending classes, whether they are GED- or college-level, that is a good thing, but the Arbitrator has some concerns about the accuracy of his testimony and the true level of his education.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims unpaid bills from ten medical and prescription providers. Arb Exh 1. Respondent disputes that claim, based on its various defenses. Respondent also maintains it paid a number of medical and prescription expenses. Respondent offered into evidence a print-out (RX 11) of so-called medical payments RX 11 but some of those payments were made to non-treaters, including a Section 12 examiner (The Hsu Group) and medical case managers (Genex Services, Inc.).

The Arbitrator has previously found in Petitioner's favor on the issues of accident, notice and causation. The Arbitrator has also noted that, when Dr. Hsu examined Petitioner in April 2014, on behalf of Respondent, he characterized the treatment to date as reasonable and necessary.

The Arbitrator, having reviewed the claimed bills and having compared them with the payments made by Respondent, awards Petitioner the following, subject to the fee schedule [neither party offered a fee schedule analysis into evidence]:

Concentra Medical Center
1/16/12 – 1/19/12, office visits and therapy evaluation $ 531.29

Alivio Physical Therapy & Chiropractic
1/24/12 – 6/21/12 $ 8,530.00 (PX 12)
[The Arbitrator declines to award the non-emergency transportation charges totaling $4,520.00. There is no evidence in the record supporting these charges.]

Delaware MRI
1/26/12, thoracic and lumbar spine MRIs $ 3,589.41 (PX 10)
[The Arbitrator declines to award the non-emergency transportation

charges of $250.00 delineated in PX 10. There is no evidence in the record supporting the need for such transportation.

Herron Medical Center 1/24/12 – 6/14/12	$ 2,840.34 (PX 6)
Pro Clinics (Dr. Abdellatif) 2/16/12 – 2/21/13 [The Arbitrator declines to award the non-emergency transportation charges of $300.00 for taxi service provided on February 16, 2012. There is no evidence in the record supporting the need for such transportation.]	$ 27,160.12 (PX 4)
Lake Shore Surgery Center 3/2/12 – 5/21/12 [The Arbitrator declines to award the non-emergency transportation charges dated 3/2/12, 3/16/12, 4/2/12, 4/23/12 and 5/21/12. These charges total $1,375.00 (5 x $275)]. There is no evidence in the record supporting the need for such transportation.]	$ 112,855.08 (PX 14)
Lakeshore Open MRI 4/23/12, post-discogram lumbar spine CT scan	$ 1,801.46 (PX 8)
Michel Malek, M.D. 8/3/12, consultation	$ 330.00 (PX 17)
Illinois Bone and Joint (Drs. Shapiro and Bello)	$ 234.77

The Arbitrator turns to the claimed prescription expenses from Injured Workers Pharmacy. PX 34. Petitioner maintains this facility is owed $48,530.33. This is indeed the "outstanding balance" shown on the top of the first page of PX 34 but Petitioner has provided no assistance to the Arbitrator in interpreting the various pre-allowance, net amount and "open balance" figures listed in that exhibit. Moreover, PX 34 and RX 11 reflect many payments by Respondent to Injured Workers Pharmacy between June 16, 2014 and September 19, 2015. The Arbitrator awards Petitioner the prescription charges from Injured Workers Pharmacy from May 27, 2014 through March 31, 2016, as reflected in PX 34, but with Respondent receiving credit for the payments shown on the same document. In awarding the Injured Workers' Pharmacy expenses, the Arbitrator relies on the opinions expressed by Dr. Atchison in his report of February 5, 2016. PX 33. Dr. Atchinson, a board certified physiatrist and professor at Northwestern University's Feinberg School of Medicine (PX 32-33), ably refuted the opinions that Dr. Rana expressed in the utilization review non-certification reports. He pointed out that it did not appear Dr. Rana had access to all of the records of Dr. Bello, the prescribing physician.

The Arbitrator also notes that Dr. Bello is a referral from Dr. Shapiro, a Respondent-selected provider.

Is Respondent liable for penalties and fees?

The Arbitrator initially considers the issue of whether Respondent is liable for penalties and fees based on the delay in payment of temporary total disability benefits.

The indemnity payment print-out (RX10) reflects that Respondent first paid temporary total disability benefits in this case on March 5, 2013, more than a year after the accident. As of that date, Respondent had not obtained any Section 12 examination. At the hearing, Respondent placed accident and notice in dispute but did not offer any evidence to support those defenses. The records from Concentra, a provider of Respondent's selection, significantly undermine the validity of the defenses. When Respondent eventually obtained a Section 12 examination, in April 2014, following the two-level fusion, its examiner, Dr. Hsu, reviewed records and characterized the treatment to date as reasonable and necessary. He did not attribute Petitioner's ongoing pain to the non-union but he did not question causation as to the need for the fusion. Nor did he find Petitioner capable of working in any capacity. Instead, he recommended a functional capacity evaluation.

Based on the foregoing, the Arbitrator finds that Respondent acted in an objectively unreasonable manner, under all of the existing circumstances, in delaying the initial payment of temporary total disability benefits for more than one year. It is unclear to the Arbitrator why Respondent would persist in its accident and notice defenses at the hearing since Respondent had no evidence to offer along those lines.

The Arbitrator finds Respondent liable for the statutory maximum award of Section 19(l) penalties, i.e., $10,000.00, based on the delay of more than one year in the initial payment of temporary total disability benefits. RX 10. The Arbitrator further finds Respondent liable for Section 19(k) penalties in the amount of $7,022.26 and Section 16 attorney fees in the amount of $2,809.90. The Arbitrator relies on the parties' post-arbitration earnings/wage stipulation in arriving at these figures. After the hearing, the parties agreed to an average weekly wage of $239.21. This is also the temporary total disability rate, based on the stipulation as to marital status/dependents and the applicable minimums. The period from January 20, 2012 through March 5, 2013 (the date of first payment, RX 10) represents 411 days or 58 5/7 weeks. 58 5/7 multiplied by $239.21 equals $14,044.53. 50% of $14,044.53 equals $7,022.26 and 20% of $14,044.53 equals $2,809.90.

The Arbitrator turns to the issue of whether Respondent is liable for additional Section 19(k) penalties and Section 16 attorney fees based on its failure to pay the awarded medical expenses. The Arbitrator views Respondent as having acted in an objectively unreasonable manner in having failed to pay these expenses, given Dr. Hsu's opinion that the treatment rendered prior to his examination was reasonable and necessary. However, the Arbitrator is unable to calculate 19(k) penalties and Section 16 attorney fees on the awarded expenses since

they are not reduced per the fee schedule. As noted previously, neither party offered a fee schedule into evidence.

STATE OF ILLINOIS)		
) SS.	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
COUNTY OF WILLIAMSON)	☐ 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

Laurie Chapman,

Petitioner,

vs. No. 09 WC 29095

Marion High School, 19IWCC0054

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the circuit court. The circuit court reversed the part of the Commission's decision and opinion on review dated November 30, 2017, relating to the award of wage differential benefits. The circuit court remanded the matter to the Commission "to recompute the wage differential award pursuant to Section 8(d)(1) of the Act, with directions to compute the Section 8(d)(1) wage differential amount by calculating 66 2/3 [percent] of the difference in the average amount Petitioner would be able to earn in full performance of her duties, the stipulated $68,388.00 over the period of 37 weeks ($68,388/37 weeks), and the average amount Petitioner was earning at SIU over the period of 32 weeks ($21,600.00/32 weeks)."

The Commission hereby complies with the circuit court's order and directions by calculating and entering a wage differential award as follows:

66 2/3% x ($68,388/37 – $21,600/32) = $782.21

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $782.21 per week commencing August 17, 2015 for the duration of Petitioner's disability as provided in §8(d)1 of the Act, for the reason that the injuries sustained caused Petitioner to become partially incapacitated from pursuing her usual and customary line of employment.

19IWCC0054

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

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

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

DATED: JAN 2 8 2019
o-01/10/2019
SM/sk
44

Stephen J. Mathis
Stephen Mathis

David L. Gore
David L. Gore

Deborah L. Simpson
Deborah Simpson

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

Mahogany Dixon,

Petitioner,

19IWCC0055

vs.

NO: 17WC 22491

Chicago Transit Authority,

Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

DATED: JAN 2 8 2019
SJM/sj
o-12/20/2018
44

Stephen J. Mathis

Deborah L. Simpson

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DIXON, MAHOGANY
Employee/Petitioner

Case# **17WC022491**

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

19IWCC0055

On 6/27/2018, 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 2.08% 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:

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

0515 CHICAGO TRANSIT AUTHORITY
ELIZABETH L MEYERS
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

19IWCC0055

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

MAHOGANY DIXON
Employee/Petitioner

Case # 17 WC 22491

v.

Consolidated cases: _____

CHICAGO TRANSIT AUTHORITY
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 **Frank Soto**, Arbitrator of the Commission, in the city of **Chicago**, on **4-11-18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8-2-17**, 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 **$36,757.24**; the average weekly wage was **$706.87**.

On the date of accident, Petitioner was **24** years of age, *single* with **0** dependent children.

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

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

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

ORDER

The Arbitrator finds that Petitioner proved by the preponderance of the evidence that she sustained an accidental injury that arose out of and in the course of her employment, as set forth in the Conclusions of Law attached herein.

The Arbitrator finds that Petitioner proved by the preponderance of the evidence that her current condition was causally connected to her injury of August 2, 2017. as set forth in the Conclusions of Law attached herein.

Respondent shall pay Petitioner temporary total disability benefits of $471.25/ week for 8 weeks commencing 8/3/2017 through 9/27/2017, pursuant to Section 8(b) of the Act, as set forth in the Conclusions of Law attached herein.

Respondents shall pay Petitioner reasonable and necessary medical services of $3,970.00, provided by Dr. Kelley of Integrated Behavioral Medicine, pursuant to Sections 8.2 and 8(a) of the Act and pursuant to the Illinois Medical Fee Schedule, as set forth in the Conclusions of Law attached herein.

Respondent shall pay Petitioner the sum of $424.12/ week for a period of 25 weeks as provided in Section 8(d)(2) of the Act because the injuries sustained caused a 5% loss of a man as a whole, as set forth in the Conclusions of Law attached herein.

Petitioner's claim for penalties/fees under Sections 19(k), 19(l) and 16 is hereby denied, as set forth in the Conclusions of Law attached herein.

Respondent shall pay Petitioner compensation that has accrued from August 2, 2017 through April 11, 2018 and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

6/27/2018
Date

JUN 27 2018

PROCEDURAL HISTORY

This case was tried before Arbitrator Frank Soto on April 11, 2018. The disputed issues are whether Petitioner sustained an accidental injury that arose out of and in the course of employment, whether Petitioner's current condition of ill-being is causally connected to her injury, whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits and the nature and extend of Petitioner's injuries, if any. Petitioner also filed a petition for penalties and attorney's fees pursuant to Sections 19(K), 19(l), and 16 of the Act.

FINDINGS OF FACTS

Mahogany Dixon (hereinafter referred to as "Petitioner") testified that she was employed by Chicago Transit Authority (hereinafter referred to as "Respondent") as a bus operator on August 2, 2017 and, on that date, she was 24 years old and had been working as a bus operator for two (2) years. (Tr. 8-9).

Petitioner testified that, on August 2, 2017, at 8:00 P.M., she was driving a bus on 82nd Street and Cottage Grove, when she was stopped the bus to allow people to board the bus, when a man pointed a gun at her through the front door of the bus. Petitioner testified that she ducked trying and take cover because she was scared. (Tr. 11). At that time, the passengers started to run toward the back of the bus yelling and screaming. (Tr. 11). Petitioner testified that she was scared, her heart was racing, she was freaking out and she was nervous because she did not know what to do or what was going on. (Tr. 12). Petitioner testified that once the man with the gun ran away, she closed the bus doors and continued her bus route for a couple more blocks until finishing her route. (Tr. 13).

Petitioner testified that after the incident she notified her supervisor and the police were called. Upon returning to the garage, Petitioner completed paperwork and went home. Petitioner testified that later that night, she had nightmares and flashbacks of the incident that had happened at work and of a prior incident, which occurred in August of 2010, when she was shot in the buttocks. Petitioner testified about an event which occurred at a family gathering, in August of 2010, when she was shot in the buttocks. Petitioner described hearing gun shots, running into the house and being shot. (Tr. 14). Petitioner testified that she did not go to the hospital and have the bullet removed until the wound became infected a week later. (Tr. 12-13).

The Respondent submitted into evidence, without objection, a CD with several videos from several cameras that were positioned in various locations on the bus operated by Petitioner on August 2,

2017. On one video titled "Front Door" at 19:59:33 shows a young man, in a white tee shirt, run onto the bus pushing past several passengers. As the young man, in the white tee shirt, pushes enters the bus the Petitioner is observed ducking down below and to the left of the steering wheel. On another video titled "Front-Backwards" shows the same incident. At 19:59:35 the young man, in the white tee shirt, runs onto the bus, he pushes past several passengers who were standing at the front of the bus. One of the passengers, standing at the front of the bus near Petitioner, wearing a black tee shirt, is observed looking out of the open front door toward the young man, in the white tee shirt, as he runs onto the bus. The passenger, in black tee shirt, is next observed diving onto the ground while other passengers, also located in the front of the bus, are observed hastily moving toward the back of the bus away from Petitioner. The various cameras failed to capture the image of the individual holding a gun or pointing a gun at Petitioner. (RX 1).

Petitioner testified that the following day, on August 3, 2017, she was sent to Occupational Health Centers. (Tr. 33). Petitioner said she was directed to go to Respondent's medical services. (Tr. 30). Petitioner presented herself to Dr. Sorokin, of Occupational Health Centers, who diagnosed Petitioner with work stress and referred her a psychologist. Dr. Sorokin also issued work restrictions prohibiting Petitioner from driving at work. (PX 1). Petitioner testified that was unable to work because she was not allowed to operate a bus. (Tr. 15).

On August 4, 2017, Petitioner was examined by Dr. Kelley of Integrated Behavioral Medicine. Petitioner treated with Dr. Kelley from August 4, 2017 through September 25, 2017. (Tr. 16). Petitioner testified that she reported to Dr. Kelley feeling stressed, freaking out, having nightmares, unable to sleep, having headaches, flashbacks, sweating and her heart was racing. (Tr. 17). At that initial visit, Petitioner reported that she saw a pedestrian standing outside the bus point a gun at her. Petitioner reported that she noticed the individual, who was a male, standing outside the bus, near the front door and bumper of the bus. As the passengers were boarding and exiting the bus, the male pulled out a gun and pointed it at her. Petitioner reported ducking down as passengers were screaming and running for cover. Petitioner said the guy stood there for what seemed like forever before running off. After running off, Petitioner closed the bus doors and drove away. (PX 2).

Dr. Kelley diagnosed adjustment disorder with mixed anxiety and depressed mood. Dr. Kelley noted that Petitioner denied experiencing prior similar symptoms or treatment. Dr. Kelley's records indicate that he administered the Minnesota Multiphasic Personality Inventory 2nd Restructured Form,

Trauma Symptom Inventory, 2nd Edition, Beck Depression Inventory 2nd Edition, and the Beck Anxiety Inventory. (PX 2).

Petitioner was released from care on September 25, 2017. (PX 2). Petitioner testified that she returned to work on September 28, 2017 and continues to be a bus operator. Petitioner testified that has not returned to treatment after being released by Dr. Kelley, on September 25, 2017, but that she continues to experience episodes of being very nervous and scared while operating a bus. (Tr. 19).

The Arbitrator finds the testimony of the Petitioner to be credible.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the following Conclusions of Law set forth below.

The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992). To obtain compensation under the Act, the claimant bears the burden of showing by a preponderance of the evidence, he suffered a disabling injury which arose out of, and in the course of his employment. *Baggett v. Industrial Commission*, 201, Ill 2d. 187, 266 Ill. Dec. 836, 775 N.E. 2d 908 (2002).

WITH RESPECT TO ISSUE (C) DID PETITIONER SUSTAINED AN ACCIDENT THAT AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

To be compensable under the Act, the injury complained of must arise out of and in the course of employment. *E. Baggot Co. V. Industrial Comm'n*, 290 Ill. 530, 125 N.E.254 (1919). In mental-mental cases, a claimant must be engaged in employment at the time and place of the precipitation cause of the injury and must prove that the injury occurred because of a work-related risk or because the employment placed the claimant at risk of exposure exceeding that of the general public. *Pathfinder Co. v. Industrial Comm'n*, 62 Ill.2d 556, 343 N.E.2d 913 (1976). Whether a claimant has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard, rather than a subjective standard that takes into account the claimant's occupation and training. *Diaz v. Illinois Workers; Compensation Comm'n*, 2013 IL App. (2d) 120294WC.

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the evidence that she sustained an accidental injury that arose out of and in the course of her employment on August 2, 2017, as more fully described below.

Petitioner testified that on August 2, 2017, an individual pointed a gun at her when she was operating a bus at the intersection of 82nd Street and Cottage Grove. Petitioner ducked and tried to take cover because she was scared. (Tr. 11). At that time, passenger, wearing a black tee shirt, was observed diving to the ground while other passengers were observed moving toward the back of the bus. Petitioner testified she was scared, her heart was racing, she was freaking out and she was nervous. (Tr. 12). Petitioner's testimony uncontradicted. Petitioner reported the event to her supervisor and to the police. Petitioner's testimony was collaborated by the video entered into evidence. While the video does not show the perpetrator, the video shows Petitioner and another passenger, wearing a black tee shirt, reacting to a frightening situation. (RX 1). The Arbitrator finds that Petitioner's testimony was also collaborated by the medical history provided Dr. Kelley records.

The Arbitrator finds that Petitioner was engaged in employment at the time and place of the event that cause of her injury and that the injury occurred because of a work-related risk and/or because Petitioner's employment placed her at a risk of exposure exceeding that of the general public. Petitioner, as a bus operator, must regularly drive her bus on specific routes, stop and open the bus doors, allowing individuals board or depart the bus, at specific locations, in various socially diverse neighborhoods, places bus operators at a risk of exposure exceeding that of the general public. The number of cameras placed on the bus and location of the cameras acknowledges that Petitioner, as a bus driver, is exposed to risks more than the general public.

The Arbitrator finds that the evidence supports that a gun was pointed at Petitioner which caused Petitioner to duck down out to avoid being shot. The fact that the individual pointing the gun at Petitioner was not captured by the video does not mean that Petitioner failed to suffer a sudden, severe and emotional shock. Although the individual pointing the gun was not caught on the video, Petitioner's reaction was. On the video titled "Front Door" at 19:59:52, just after the incident, shows Petitioner holding or grabbing her chest as she drives away from the location of the incident. (RX 1).

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

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that Petitioner's current condition of ill-being is causally related to her work accident of August 2, 2017, as set forth more fully below.

The Arbitrator finds that Petitioner presented sufficient, credible evidence that her current condition is causally related to the work injury. Petitioner testified after returning home, she experienced nightmares and flashbacks of the work incident and of being shot at a family gathering. (Tr. 14). The following day, Petitioner received medical treatment at Occupational Health Center, was diagnosed with mental strain related to work and referred to a psychologist. (PX 1). On August 4, 2017, Petitioner was examined by Dr. Kelley, of Integrated Behavioral Medicine. Petitioner was taken off of work and diagnosed with adjustment disorder with mixed anxiety and depressed mood. Dr. Kelley noted that Petitioner's symptoms were the result of post-traumatic stress from the August 2, 2017 work incident. (PX 2). Dr. Kelley implemented a treatment plan of cognitive-behavioral therapy to address Petitioner's symptomatology and to facilitate Petitioner coping with the event and returning returned to work. (RX 2). Petitioner's testimony was corroborated by the medical records.

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

Respondent disputed liability for the medical expenses based upon causation. As stated above, the Arbitrator finds the Petitioner's condition being causally connected to her work injury of August 2, 2017. Respondent did not proffer any evidence disputing the reasonableness or necessity of the medical treatment and bills. Therefore, the Arbitrator finds that the medical services provided by Dr. Kelley, of Integrated Behavioral Medicine, were reasonable and necessary medical treatment. Therefore, the Arbitrator finds that Respondent shall pay Petitioner the sum of $3,970.00, as detailed in PX 3, pursuant to Section 8.2 of the Act and pursuant to the Illinois Medical Fee Schedule.

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

Petitioner seeks temporary total disability benefits (TTD) from August 3, 2017 through September 27, 2017, representing eight (8) weeks. (Arb. Ex. #1). When a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized (*i.e.* whether the claimant has reached maximum medical improvement). *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n, 236 Ill. 2d 132, 142, 923 N.E.2d 266, 271, 337 Ill. Dec. 707 (2010).*

Dr. Sorokin, of the Occupational Health Centers, issued work restrictions prohibiting Petitioner from operating a bus on August 3, 2017. (PX 1). Petitioner testified that she was unable to work

because she was not allowed to operate a bus. Dr. Kelley took Petitioner off all work as of August 4, 2017 and kept Petitioner off work until releasing her from care on September 25, 2017. (PX 2). Petitioner testified that she returned to work on September 28, 2017. Respondent did not dispute the validity of the work restrictions. Respondent disputed liability claiming that Petitioner did not have an accidental injury and that her current condition of ill-being was not causally related to her work accident.

In light of the Arbitrator's findings above, the Arbitrator further finds that Petitioner is entitled to Temporary Total Disability benefits of $471.25/ week, for 8 weeks, commencing on August 3, 2017 through September 27, 2017.

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

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

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:

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

With regards to paragraph (i) of Section 8.1(b) of the Act. No AMA rating was offered into evidence. The Arbitrator, therefore, gives no weight to this factor.

With regards to paragraph (ii) of Section 8.1(b) of the Act. Petitioner was employed as a bus operator and returned to the same occupation. Petitioner continues to be exposed to the same or similar risks due to her occupation. The Arbitrator gives this factor great weight.

With regards to paragraph (iii) of Section 8.1(b) of the Act. Petitioner was 24 years old at the time of her injury. Because of her age, the Petitioner will continue to be exposed to this risk for a longer time than someone closer to the age of retirement. The Arbitrator gives this factor great weight.

With regards to paragraph (iv) of Section 8.1 (b) of the Act. Petitioner did not proffer any evidence that her future earning capacity may be compromised and, therefore, the Arbitrator gives this factor no weight.

With regards to paragraph (v) of Section 8.1 (b) of the Act. The medical records show that Petitioner was suffering from several anxiety related symptoms. Petitioner was released from treatment and returned to her prior occupation but Petitioner testified to feeling fearful for her safety and having anxiety. The Arbitrator notes that Petitioner's existing complaints were similar to the symptoms reflected in her medical records and that Petitioner was able to control her symptoms with limited treatment and return to work. The Arbitrator gives great weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that the Petitioner sustained permanent partial disability to the extent of 5% loss of use of a person as a whole or 25 weeks, pursuant to Section 8(d)(2) of the Act.

WITH REGARDS TO (O) PENALTIES, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner claims to be entitled to penalties/attorney's fees under Sections 19(k), 19(l) and 16 of the Act. Respondent submitted into evidence a video of the event and of Petitioner's reaction of the event. The video does not show that an individual pointed a gun at her. The video identified several inconsistencies regarding Petitioner's account of the incident including the length of time the gun was pointed in her direction and whether Petitioner experienced a sudden emotional shock. On video the entire incident occurred within a matter of seconds and Petitioner continue driving her route. Based upon the video and inconsistencies, the Petitioner's claim for penalties is hereby denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andre Wells,

Petitioner,

vs.

NO: 16WC12432
16WC14117

Jewel Foods,

19IWCC0056

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary disability, 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 21, 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.

19IWCC0056

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 28 2019
SJM/sj
o-12/20/2018
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WELLS, ANDRE
Employee/Petitioner

Case# **16WC012432**
16WC014117

JEWEL FOODS
Employer/Respondent

19IWCC0056

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:

1747 SEIDMAN MARGULIS & FAIRMAN LLP
NANCY J SHEPPARD
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0445 RODDY LAW LTD
PAUL A KRAUTER
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Andre Wells
Employee/Petitioner

v.

Jewel Foods
Employer/Respondent

Case # 16 WC 12432

Consolidated cases: 16 WC 14117

An *Application for Adjustment 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 **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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ______

FINDINGS

On **November 7, 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 **$37,424.00**; the average weekly wage was **$719.70**.

On the date of accident, Petitioner was **23** years of age, *single* with **0** dependent children.

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

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

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

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

ORDER

The Arbitrator's Findings of Fact, Conclusions of Law and Order are contained in the Decision for consolidated case # 16 WC 14117.

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

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

Signature of Arbitrator

6-19-2018
Date

JUN 21 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WELLS, ANDRE
Employee/Petitioner

Case# **16WC014117**

16WC012432

JEWEL FOODS
Employer/Respondent

19IWCC0056

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:

1747 SEIDMAN MARGULIS & FAIRMAN LLP
NANCY J SHEPPARD
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0445 RODDY LAW LTD
PAUL A KRAUTER
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

19IWCC0056

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

Andre Wells
Employee/Petitioner

v.

Jewel Foods
Employer/Respondent

Case # **16** WC **14117**

Consolidated cases: **16 WC 12432**

An *Application for Adjustment 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 **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. [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 **January 15, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$37,424.00**; the average weekly wage was **$719.70**.

On the date of accident, Petitioner was **23** years of age, *single* with **0** dependent children.

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

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$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 **$0.00**, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$0.00**/week for **0** weeks, as provided in Section 8(b) of the Act.

Permanent Partial Disability

Respondent shall pay Petitioner **$431.82**/week for **15** weeks, since, as a result of the accidents of **November 7, 2015** (case # 16 WC 12432) and **January 15, 2016** (case # 16 WC 14117), he has sustained a loss of use of his person as a whole to the extent of **3%** thereof, pursuant to Section 8(d)2 of the Act.

Respondent shall pay Petitioner benefits that have accrued since **March 31, 2016**, and shall pay the remainder, 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.

19IWCC0056

Signature of Arbitrator

6-19-2018
Date

ICArbDec p. 2

JUN 21 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andre Wells

v. Case # 16 WC 14117, consol. w/ 16 WC 12432

Jewel Foods

FINDINGS OF FACT

Petitioner, Andre Wells, testified that on November 7, 2015, he worked for Respondent, Jewel Foods, as an order selector. (T. 10). His job duties involved operating a forklift, selecting products and keeping his area clean. (T. 10) He had worked for Jewel Foods since June 12, 2015.

On November 7, 2015, he was in the freezer selecting a box. As he was selecting the box, he turned to take a step and put it on the pallet. When he bent down, he felt a sharp pain in his low back. He dropped to a knee for about ten seconds and placed the box on the pallet. He thought he was fine. Wells went to select another box and again felt a sharp pain. This time the pain dropped him to both knees. (T. 11) A supervisor walked by and Wells told him what had occurred. (T. 12) The pain was in Wells' low back. Wells completed an accident report.

On November 20, 2015, Wells sought care at Fit for Life clinic at Jewel. (Px #6) He testified that they do not render medical care. They provide services such as icing. (T. 13) Wells continued to work full duty. He received additional care at Fit for Life and took Aleve to reduce pain. During that time, Wells testified, he continued to have low back pain. He described it as very sharp pain with numbness that trickled down to his legs. (T. 14)

On December 18, 2015, Wells visited Jessica Herrera at Fit for Life. In her report, she recorded the following:

"Physical Assessment/Aggravating Factors/Palpation Comments: I spoke with him briefly today. He has been back for about 10 days now after being off due to illness. My concern with him is that he is still in a lot of discomfort but does not do anything about it; he states that once overtime has decreased then he is going to go to concentra. I tried explaining to him that he needs to give us an option first. He has not seen us at all for this particular concern and therefore is not improving. He believes that he will just tough it out until overtime is reduced, this is a red flag for me as he capable of working (sic)." (Px #6)

Wells went to Concentra on December 22, 2015. (Px #2) He reported that he was lifting products at work on November 20, 2015, that weighed 20 lbs. when he injured his low back. He was diagnosed with a strain and returned to work full duty.

On December 23, 2015, Wells saw his primary care physician, Dr. Pillai, at the Elmhurst Memorial Hospital. (Px #3) She recommend x-rays and physical therapy for his low back. (T. 14). Wells underwent physical therapy at Elmhurst Memorial Hospital. (Px #5)

On December 24, 2015, Wells sought treatment at Concentra/Occupational Health Centers of Illinois. He continued to work full duty. Wells started physical therapy at Elmhurst Memorial Hospital on January 4, 2016. He returned to Dr. Pillai on January 11, 2016. She recommended continued physical therapy and a back brace. (T. 16, Px #3)

On January 15, 2016, Wells testified, he had a second injury to his low back. (T. 16) Wells testified that he was working in the refrigerated side of Jewel's warehouse. He was picking up a heavy box that weighed between 70 and 85 lbs. He was bending over to place it down and felt

back pain. He testified that the back pain got worse after that incident. He continued with physical therapy at Elmhurst Memorial Hospital. He went back to Concentra on January 28, 2016. They recommended physical therapy and prescribed work restrictions that were accommodated by Jewel. (T. 17)

Wells began physical therapy with Concentra on January 28, 2016. He was assessed with a lumbar strain. (Px #2) Concentra prescribed work restrictions and physical therapy.

He attended physical therapy at Concentra and returned to them for follow-up care on February 8, 2016. Petitioner complained that he has tingling on his bilateral upper buttock. However, as has been the case all along, he did not exhibit back spasms, his neurological exam was negative, and his straight leg raising test was negative. The preliminary radiology report indicated no acute changes of the lumbar spine. The Concentra staff continued to prescribe physical therapy and work restrictions. (Px #2)

Wells returned to Concentra on February 11, 2016. He showed a functional improvement. Although he rated his bilateral low back pain at 8/10, he stated that the pain is intermittent and does not radiate. Once again, he had no back spasms, negative straight leg raising test, and a negative neurological exam. The diagnosis and treatment plan remained the same. (Px #2)

On February 23, 2016, Wells rated his low back pain at 9/10. As the Concentra physician felt that Wells was not improving, he started him on Naproxen 500 mg. and referred him to an orthopedic spine surgeon. (Px #2)

On March 11, 2016, on a referral from Concentra/Occupational Health Centers of Illinois, Wells presented for an examination by Sean Salehi, M.D., a neurosurgeon associated with U.S. Medical Group of Ill. Wells complained to Dr. Salehi of low back pain that radiates into the

bilateral buttocks. Wells also complained that with walking, he might notice that the radiating pain comes to the top of the posterior thighs. He rated his pain as a constant 8/10, but with walking, up to 9/10. Wells discontinued taking Naprosyn due to hematuria. He is currently working with restrictions. Upon examination, and with regard to the lumbar spine, Dr. Salehi noted that Wells has tenderness of the lumbosacral spine and bilateral iliac crest, and range of motion of 50° of flexion, 10° of extension, and 20° of right and left lateral flexion. However, Wells demonstrated a normal gait, negative sciatic notch tenderness bilaterally, negative lying straight leg raising test bilaterally, motor strength of 5/5 in the lower extremities bilaterally, reflexes of 1+ in the ankles and 2+ in the knees, and intact sensation in the lower extremities. Dr. Salehi diagnosed Wells with low back pain, and ordered an MRI of the lumbar spine without contrast due to his ongoing symptoms despite the passage of time and performance of physical therapy. This neurosurgeon imposed his own set of light-duty restrictions on Wells. (Px #2)

On March 31, 2016, at the request of Respondent and pursuant to Section 12 of the Act, Wells presented to orthopedic surgeon Kern Singh, M.D., of Midwest Orthopaedics at Rush. (T. 19, Rx #3) Wells complained of low back pain of 9/10, and stated that his symptoms are worsening. He also complained that his pain is increased with standing, bending forward, and lying on his stomach, and that nothing decreases his discomfort. He is able to sit, stand, and walk for 30 minutes at a time. He stated that he has had physical therapy, heat, and ice, with moderate relief. After a review of systems, Dr. Singh found Wells positive for back pain. Upon examination, Dr. Singh noted that Petitioner self-limited his lumbar spine range of motion to 5° of flexion, extension, and axial rotation. Dr. Singh performed monofilament testing of Wells' upper and lower extremities, and found the results to be symmetrical and equal without sensory loss. Moreover, Dr. Singh found no loss of strength in the upper and lower extremities, and 2+ reflexes

in the bilateral biceps, triceps, patella, and Achilles. Dr. Singh found that Wells demonstrated 5 positive Waddell Signs. Dr. Singh diagnosed Wells with a lumbar muscular strain that has resolved. He recommended that Wells return to work without restrictions. He found Wells' pain complaints to be nonobjectifiable in nature. He declared Wells to be at maximum medical improvement for his soft tissue strain. (Rx #3)

Wells stated that on April 25, 2016, he began treatment with Dr. Koutsky of Elmhurst Orthopaedics. (T. 19, Px #4) Dr. Koutsky, in the HPI section of his report, wrote that at the time of Wells' November 10, 2015 injury, he lifted product and felt a sharp pain in the middle of his lower back with some radiation into his legs. The Arbitrator notes that there are no documented complaints of radiating pain in the November 20, 2015 records. Upon examination, Dr. Koutsky found that x-rays showed moderate narrowing at L5-S1 and decreased pinprick along the dorsum and lateral border of his feet bilaterally. Although he found "mildly positive" straight leg raising test, he did not express it in degrees. Dr. Koutsky diagnosed bilateral L5-S1 radiculopathy. (Px #4) He took Wells off work, recommended physical therapy, an EMG, and a lumbar MRI. He administered bilateral paralumbar muscle trigger point injections. Dr. Koutsky's report indicates that he discussed and prescribed a TENS unit, cold therapy and an exercise kit. (Px #4) Wells testified that Dr. Koutsky provided him with a TENS unit. However, he did not recall Dr. Koutsky providing him with a cold therapy machine or an exercise kit. (T. 33) Dr. Koutsky also prescribed Tramadol. (T. 34).

Wells testified that Dr. Koutsky recommended pain medication. Wells noted that after about two weeks of using the pain medication, he found that it did not help and was actually making him feel worse. (T. 21) Dr. Koutsky next prescribed pain patches. Wells stated that they worked for about 2 ½ weeks and then irritated his skin. (T. 22) Following the patches, Dr. Koutsky

prescribed a cream medication. Wells stated that he used it once and then never used it again. (T. 22) He testified that he received no benefit from the cream. (T. 22, T. 40)

On May 25, 2016, Wells underwent an EMG/NCV. The report indicates that there was no evidence of lumbar radiculopathy. (Px #4)

A lumbar MRI was performed on May 27, 2016. The radiologist concluded that, based on such images, there was no disc disease, no herniated nucleus pulposus and no central canal or neuroforminal narrowing. (Px #4)

Dr. Koutsky called Wells on June 2, 2016 and discussed the EMG results with him. He advised Wells that there was no evidence of lumbar radiculopathy or neuropathy. In contrast to the radiologist's interpretation of the lumbar MRI, Dr. Koutsky opined that the MRI showed no "significant" degenerative change, and no evidence of any "large" herniated disk or fracture. (Px #4)

On June 2, 2016, Wells followed up with Dr. Koutsky. He recommended additional physical therapy and more medications. (T. 23) Wells testified that he told Dr. Koutsky the Tramadol was not working. However, Dr. Koutsky prescribed additional pain medication. (T. 34) Dr. Koutsky's report indicated that Wells noted significant benefit with the creams and topical patches. Dr. Koutsky also noted that Wells requested a refill on his medications and was given a prescription for Tramadol. (Px #4)

Wells underwent physical therapy at ATI from June 20, 2016 through September 8, 2016. (Px #7)

He saw Dr. Koutsky again on June 29, 2016 and medications were continued. Wells testified that he did not recall Dr. Koutsky providing him with pain medication, patches or creams

at that appointment. (T. 35-35). He told Dr. Koutsky again that the patches were not helping. (T. 38). Dr. Koutsky's report indicates that Wells noted significant benefit with the creams and topical patches. Dr. Koutsky also noted that Wells requested a refill on his medications and was given a prescription for Tramadol. (Px #4)

On July 6, 2016, Dr. Koutsky released Wells back to work full duty. He continued to undergo physical therapy at ATI. (Px #7)

He next saw Dr. Koutsky on August 4, 2016. Dr. Koutsky recommended that he complete physical therapy and start work hardening. Wells testified that he told Dr. Koutsky the creams were not working. (T. 41) Dr. Koutsky's report indicates that Wells was finding benefits with the topicals (creams). (Px #4) The report also indicates that Wells requested a refill on his medication and was given a prescription for tramadol. (Px #4)

Wells returned to Dr. Koutsky on September 8, 2016. The assessment was bilateral L5-S1 radiculopathy with low back pain. It was noted that Wells had been working full duty. He was released from care and noted to be at maximum medical treatment. (Px #4) Wells stated that he was discharged from physical therapy and work hardening on September 8, 2016. (T. 25) Since his release from care, Wells returned to Dr. Koutsky in March of 2017 for an FMLA evaluation. (T. 26)

Wells testified that between September of 2016 and March of 2017, he was in constant pain. He was icing and using Aleve or Tylenol to deal with the continued pain.

Wells testified that he has a lot of random back spasms, that he cannot stay in one position for too long, that he has limitations with sports, and that he has a problem bending down.

Wells testified that he no longer works for Jewel. He currently drives a truck for Coca-Cola as a delivery driver. (T. 29) His job with Coca-Cola requires him to drive and perform some unloading of the truck. He estimated that 10-15% of his trips required unloading. Such unloading involved putting small bottles and cases on a two-wheeled dolly. (T. 48) Wells testified that the job at Coca-Cola is nowhere as strenuous as the job with Respondent.

CONCLUSIONS OF LAW

WITH REGARD TO ISSUES "F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?" AND "L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?", THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Wells' low back condition is causally related to his work accidents of November 10, 2015 and January 15, 2016. However, he questions Petitioner's credibility. He finds that Petitioner sustained a soft tissue back strain. The Arbitrator finds Dr. Singh's findings and conclusions to be more persuasive than those of Dr. Koutsky. The Arbitrator places substantial weight on Dr. Singh's findings, particularly the 5 positive Waddell Signs, as well as the negative MRI of the lumbar spine and the negative EMG of the lower extremities. Dr. Singh found Wells' pain complaints to be nonobjectifiable in nature.

As a matter of law, the Commission is not obligated to give more weight to the opinions of the treating physician than to those of the examining physician. *Prairie Farms Dairy v. Indus. Comm'n*, 664 N.E.2d 1150, 216 Ill. Dec. 222 (5th Dist. 1996).

Pursuant to Section 8.1b of the Act, for accidental injuries that occur on or after September 1, 2011, the following criteria are to be used in the determination of permanent partial disability:

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

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

With regard to subsection (i) of §8.1b(b), the reported level of impairment pursuant to subsection (a), the Arbitrator notes that 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 Wells was employed as an order selector for Respondent. His job duties involved operating a forklift, selecting products and keeping his area clean. Following treatment for this accidental injury, Wells was released to return to work at this job. The Arbitrator therefore gives moderate weight to this factor.

With regard to subsection (iii) of §8.1b(b), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 23 years old at the time of the accident. The Arbitrator takes judicial notice that, *ceteris paribus*, Wells has a longer work life expectancy than a 33, 43, 53, or 63-year-old worker. The Arbitrator therefore gives major weight to this factor.

With regard to subsection (iv) of §8.1b(b), the employee's future earning capacity, the Arbitrator notes that no evidence was presented of a loss of future earning capacity. The Arbitrator therefore gives minor 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 the May 25, 2016 EMG study of the lower extremities was found to be negative for radiculopathy. Moreover, the radiologist's conclusion with regard to the May 27, 2016 MR images of the lumbar spine is as follows: "No disc disease. No herniated nucleus pulposus. No central canal or neuroforminal narrowing." The radiologist does not make mention of even a bulging disc. Consequently, the Arbitrator finds that Wells sustained a lumbar muscular strain. The Arbitrator therefore 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 accidents of November 7, 2015 and January 15, 2016, Petitioner, Andre Wells, has sustained a permanent loss of use of his person as a whole to the extent of 3%, pursuant to Section 8(d)2 of the Act.

WITH REGARD TO ISSUE "K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?", THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator denies Petitioner's claim for TTD. Petitioner was not taken off work until he began treatment with Dr. Koutsky on April 25, 2016. The Arbitrator finds the Dr. Koutsky's opinions in this case are not persuasive and in support thereof notes:

- Dr. Koutsky's records indicate that he prescribed a cold therapy unit and exercise kit at his first appointment on April 25, 2016. Wells testified that he was not prescribed either one.
- Dr. Koutsky's records indicate that pain medication (Tramadol) was helping Wells. However, Wells testified that after about two weeks of using the pain medication, he found that it did not help and was actually making him feel worse. He also testified that he told Dr. Koutsky the medication was not helping. Dr. Koutsky's records all indicate that the pain medication was helping Wells.
- Dr. Koutsky's records indicate that pain patches were helping Wells. However, Wells testified that the patches worked for about 2 ½ weeks and then irritated his skin. Wells testified that he told this to Dr. Koutsky. However, the records from Dr. Koutsky all indicate that the patches were helping and he continued to prescribe them.
- Dr. Koutsky's records indicate that the compound creams were helping Wells. However, Wells testified that the creams did not help and that he told this to Dr. Koutsky. The records from Dr. Koutsky all indicated the creams were helping and he continued to prescribe them.

The Arbitrator finds these discrepancies to be significant and troubling. Either Dr. Koutsky's records are inaccurate or Wells' testimony was not truthful. In either case, this gives the Arbitrator cause to question the records, opinions and recommendations of Dr. Koutsky.

The Arbitrator relies on the opinions of Dr. Singh of March 31, 2016 in finding that Wells could return to his full-duty work.

In reaching this conclusion, the Arbitrator also notes that the EMG of May 25, 2016 and MRI of May 27, 2016 were both completely normal. Those objective diagnostic tests support the opinions of Dr. Singh. Furthermore, when Dr. Singh examined Petitioner, he found that he exhibited 5 Waddell Signs.

WITH REGARD TO ISSUE "J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY?", THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator denies the Elmhurst Memorial Hospital bill in the amount of $25.00. (Px #1) It is noted in the records and Wells' own trial exhibit that this charge was for a no-show fee. That is the fault of Wells. Respondent has no responsibility for that fee.

The Arbitrator denies the bill from Elmhurst Orthopaedics in the amount of $1,253.00. (Px #1) The Arbitrator finds the treatment was not reasonable and necessary. Dr. Koutsky prescribed an unreasonable array of modalities, e.g., a cold therapy machine rather than ice packs.

The Arbitrator relies on the report of Dr. Singh of March 31, 2016 in which he found that Wells was at MMI and did not require further medical treatment.

The charges from Elmhurst Orthopaedics are all for treatment after March 31, 2016. The Arbitrator notes that both the EMG and MRI were completely negative. Furthermore, the Arbitrator finds that Dr. Koutsky's opinions are not persuasive.

Wells testified that at the first office visit on April 25, 2018, Dr. Koutsky did not prescribe him with a cold therapy machine or exercise kit. However, Dr. Koutsky's records state the

opposite. Furthermore, Dr. Koutsky's records indicate that all of the prescriptions he provided helped Wells. This included pain medications, patches, and creams. Wells testified that he told Dr. Koutsky that the pain medications did not work, the patches irritated his skin and the creams did not provide relief. The records of Dr. Koutsky and the testimony of Wells are inconsistent. Based upon this evidence, the Arbitrator denies the bills for treatment with Dr. Koutsky.

The Arbitrator denies the bills from Trisys (Coast Diagnostics), $2,732.50; Trisys (DocRX), $2,171.95; Metro Health solutions, $5,346.79; and Ally Clinical Diagnostics, $10,029.60. (Px #1) These bills total $20,280.84. The bills are for compound creams prescriptions and drug testing. The Arbitrator finds that these charges and treatment were not reasonable or necessary. The Arbitrator relies upon the reasons cited in the above paragraph concerning the bills from Elmhurst Orthopaedics. Wells testified that Dr. Koutsky never even told him about a prescription for the creams. He received the creams in the mail one day, tried it for a couple of days, and noted that it did not work. Wells testified that he told Dr. Koutsky the creams did not work. The Arbitrator further relies upon the UR reports wherein these prescriptions were denied (RX # 1, Rx #2) and the report of Dr. Singh (Rx # 3). Dr. Koutsky responded to UR. (Px #8)

The Arbitrator denies the bills from La Clinica in the amount of $7,200.00. (Px #1) The Arbitrator notes that EMG was prescribed by Dr. Koutsky. The Arbitrator has already found the treatment at Elmhurst Orthopaedics not to be reasonable or necessary; this includes Dr. Koutsky's recommendations including the EMG.

The Arbitrator denies the bill from ATI in the amount of $1,346.91. (Px #1) The Arbitrator notes that the physical therapy at ATI was prescribed by Dr. Koutsky. The Arbitrator has already found the treatment at Elmhurst Orthopaedics not to be reasonable or necessary; such treatment includes the physical therapy that Dr. Koutsky recommended.

19IWCC0056

6-19-2018

Brian T. Cronin, Arbitrator

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 PEORIA	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Nash,

Petitioner,

vs. NO: 14WC002901

Keystone Steel & Wire,

Respondent.

19IWCC0057

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, causal connection, permanent disability, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed 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.

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

DATED: JAN 2 8 2019
o-12/6/2018
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 who found that Petitioner's current condition of ill-being of his left shoulder was causally related to a work-related accident on November 14, 2013. The Arbitrator awarded Petitioner 43&2/7 weeks of temporary total disability benefits, $83,190.99 in current medical expenses, and 50 weeks of permanent partial disability benefits representing loss of 10% of the person-as-a-whole. I would have found that Petitioner did not sustain his burden of proving a work-related accident caused the current condition of ill-being and denied compensation.

Petitioner alleged an accident on November 14, 2013 while pulling a wire stump out of a machine. He had an MRI the next day, which was interpreted as showing a full-thickness tear of the supraspinatus tendon with 2.2-centimeter retraction, hypertrophic spurring and effusion of the AC joint, and subchondral cystic changes and edema within the distal clavicle and acromion. Respondent's General Foreman, Brian Stirnaman, testified that on November 11, 2013, three days prior to the alleged accident, Petitioner informed him that he could no longer work on large diameter machines because of his left shoulder.

On December 10, 2013, Dr. Merkley performed arthroscopic surgery with subacromial decompression, distal clavicle excision, and rotator cuff repair. In his deposition, Dr. Merkley testified that Petitioner "most likely had pre-existing rotator cuff tendinosis, partial tearing based on the fact that he had Type III acromion, had a history of previous rotator cuff at his contralateral shoulder, but that his injury as described *** was an aggravating factor in his pre-existing condition." On cross-examination, Dr. Merkley acknowledged that Type III acromion is associated with rotator cuff pathology, the 2.2-centimeter retraction probably did not develop the day between the accident and the MRI, that all MRI findings could have predated the accident, and his intraoperative findings could all have been non-traumatic in nature.

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Respondent's Section 12 medical examiner, Dr. Karlsson, noted that the MRI not only showed the more than 2-centimeter retraction, it also noted the fatty infiltration of the supraspinatus, which would have been present for a year or more prior to the accident, and that the type of spurring and degenerative changes shown in the MRI commonly, in and of themselves, cause rotator cuff tears. He concluded that the alleged accident neither caused nor aggravated Petitioner's left-shoulder condition. I find the causation opinions of Dr. Karlsson persuasive. In addition, Dr. Markley acknowledged that all of the pathology he found intraoperatively as well as all the pathology found in the MRI could have all been pre-existing and non-traumatic in nature.

For the reasons stated above, I would have found that Petitioner did not sustain his burden of proving the work-related accident caused the current condition of ill-being necessitating surgery and denied compensation. Therefore, I respectfully dissent from the majority opinion.

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NASH, DAVID
Employee/Petitioner

Case# **14WC002901**

KEYSTONE STEEL & WIRE
Employer/Respondent

19IWCC0057

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:

0192 CUSACK GILFILLAN & O'DAY
DANIEL P CUSACK
415 HAMILTON BLVD
PEORIA, IL 61602

0507 RUSIN & MACIOROWSKI LTD
JOHN MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David Nash
Employee/Petitioner

v.

Keystone Steel & Wire
Employer/Respondent

Case # **14** WC **2901**

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 **Peoria**, on **12/14/16**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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 **11/14/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$47,382.40**; the average weekly wage was **$911.20**.

On the date of accident, Petitioner was **54** 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 **$13,000.00** for other benefits, for a total credit of **$13,000.00**.

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 $83,190.99, as set forth in Petitioner's exhibit 6, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $31,407.92 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 $607.47/week for 43 2/7 weeks, commencing 12/2/13 through 10/1/14, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $13,000.00 for non-occupational indemnity benefits that have been paid.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of **$546.72**/week for a further period of **50** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **10% loss of use of the person as a whole.**

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

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

Michael K. Nowak, Arbitrator

11/24/17
Date

ICArbDec p. 2

DEC 1 2 2017

FINDINGS OF FACT

Petitioner, David Nash, testified that he is 57 years old, resides in Tremont, Illinois, and that he retired from Keystone Steel & Wire on October 1, 2014, after 33 years. In 1989, he transferred to the drawing room and worked as a wire drawer until he retired on October 1, 2014.

As a wire drawer, he would take steel rods and stretch them out using a machine until they reached the size needed for a particular order. As the machine stretches the wire, it feeds onto a spool or a stump. When the spool is full Petitioner would have to pull the spool out so it could then be transported by a fork truck. This was demonstrated using Petitioner's group Exhibit No. 11 which depicts the machine he worked on when the injury occurred. Petitioner testified that each time he would pull a stump, the force required would be different. Sometimes they would come out easily. Other times he would really have to tug and pull to get it moving. He stated that sometimes there were flat spots on the rail which held the stumps and required a substantial effort to get it off the flat spot and moving. Stumps loaded with the type of wire Petitioner was working with at the time of his injury weigh approximately 2,000 pounds.

Petitioner testified that on November 14, 2013, at approximately 9:00 a.m. while pulling a stump out on machine 604, he felt a pop and a sharp pain in his left shoulder. He testified that he attempted to keep working; however, the pain continued so he felt he should make a report of injury as required by Respondent. Petitioner went to first aid and spoke with the nurse, Betty, to make an injury report. Dr. Pena was available so he also examined Petitioner. At that time, Dr. Pena immediately ordered x-rays, an MRI, and gave Petitioner 800 mg of Ibuprofen and a pain killer. Petitioner testified that Dr. Pena told him that the act of pulling the stump was probably the cause of something happening to his left rotator cuff.

Petitioner had an MRI at OSF St. Francis Medical Center the next day. Upon Dr. Pena reviewing the results of the MRI, he referred Petitioner to Dr. Johnson at Midwest Orthopedic. At that time, Petitioner indicated to the nurse, Betty, that if he needed to see a doctor at Midwest Orthopedic, he would prefer to see Dr. Merkley because he had heard good things about him. Petitioner testified that he was told by Respondent's nurse at the direction of Rusty Hewitt, the workers' compensation claim administrator, that if he wanted to see Dr. Merkley, he needed to cancel the appointment with Dr. Johnson and make an appointment with Dr. Merkley on his own. Petitioner was able to get an appointment with Dr. Merkley for November 25, 2013. At that time, Dr. Merkley recommended surgery, which was scheduled for December 10, 2013.

Petitioner testified that he received correspondence dated November 27, 2013, from Mr. Hewitt, the worker' compensation claims manager for Respondent. In that letter, Mr. Hewitt said, in part, "Dr. Pena has reviewed this investigation material and has given his medical opinion that pulling a carrier in this manner with only 50 pounds of force required to move the carrier is not sufficient to cause a full thickness tear of the rotator cuff." (PX 7). Petitioner testified that Dr. Pena never mentioned anything like that to him, and as a matter of fact, told Petitioner that he did "something" to his left shoulder when he pulled the wire stump. Petitioner testified that he proceeded to have his surgery performed through his health insurance. Although the surgery helped his left shoulder problem, Dr. Merkley recommended that he not go back to that job because of the risk of future injury. The Arbitrator notes, and it will be specifically addressed below, that Dr. Pena denied ever reviewing any investigation until March 17, 2014, which was 5 ½ months after the injury.

19IWCC0057

Additionally, with regard to RX 1, a note from Mr. Stirnaman which speaks of a conversation that he had with Petitioner, Petitioner agreed that a conversation took place on the date. Petitioner credibly testified that the conversation with Mr. Stirnaman took place because Mr. Stirnaman had asked Petitioner to bid a job on a new machine. Petitioner testified that when he indicated he did not wish to bid on the new machine because of his shoulder he was referring to problems with his right shoulder, which was operated on in 2010. Petitioner testified that since his previous right shoulder surgery in 2010, he would bid off the heaver jobs with the larger wire to avoid reinjuring the right shoulder. Petitioner stated that the new machine runs heavier wire and he also reiterated that he had no problem with his left shoulder until November 14, 2013. Petitioner did testify that in 1996 he went to his primary care physician with joint pain, which turned out to be lead poisoning. Once he received treatment, the joint pain resolved.

Petitioner was asked to address his wife's physical disability because it had come up with Dr. Pena and Dr. Karlsson. Petitioner readily admits that his wife is almost a complete quadriplegic, has minimal function, and requires 24/7 care. He then went on to describe that he uses various lifts and a van equipped for her to accomplish those tasks. He indicated that he uses a patient lift to move her about the house and even to bathe her. He testified that this does not involve heavy lifting and has never caused a physical problem for him in the past. The Arbitrator notes that although both Dr. Pena and Dr. Karlsson speculated that there may be some relationship between caring for his wife and the condition of his left shoulder, they admitted that they had no idea what he did to aid his wife. The Arbitrator finds there is no credible evidence in the record to suggest Petitioner sustained any injury to his left shoulder while caring for his wife.

Ronnie McClenahan was called to testify. He testified he has worked for Respondent for 29 years as a wire drawer. He testified that he has worked on machine 604 which is pictured in RX 7, deposition exhibit no. 5, pages 1, 2, and 3. He testified that the pages 4, 5, and 6 were machine 332, which had nothing to do with this incident. Mr. McClenahan also testified that in order to get the stumps out, you must pull and jerk to get them at times. Like Petitioner, he testified that every time you pull out a stump it would require different force. He testified that the stumps on machine 604 would weigh between 1800 and 2100 pounds when loaded. Mr. McClenahan also testified that in order to initially move the stump you need to always begin by jerking it in order to get it going. Both Mr. McClenahan and Petitioner demonstrated the force by pulling on Petitioner's attorney's shoulder. The force appeared to be substantial.

Dr. Michael Merkley, a board certified orthopedic surgeon, testified by way of evidence deposition. He stated that the Petitioner gave a history that he injured his shoulder on November 14, 2013. (PX 1 page 6). Petitioner stated that he was pulling on a wire stump during his normal work duties when he felt a pop in his left shoulder with sharp pain. (PX 1, page 6). Dr. Merkley stated that Petitioner had already been to see Dr. Pena and had been placed on modified duty at work. (PX 1 page 6). Petitioner also denied any previous left shoulder problems. He did have right rotator cuff repair which was performed in 2010. (PX 1 page 6, 7). The doctor related that he had already undergone an MRI of the left shoulder which the doctor had reviewed at that first visit. His physical examination noted a painful arc and positive impingement sign. He showed tenderness at the acromioclavicular joint. His rotator cuff testing showed weakness at the supraspinatus and low grade weakness at the external rotators of the rotator cuff. (PX 1 page 7). Dr. Merkley diagnosed him with a rotator cuff tear at his left shoulder and acromioclavicular joint arthrosis at his left shoulder. (PX 1 page 8). The doctor embarked

on a course of treatment and performed surgery on December 10, 2013. (PX 1 page 8). Petitioner underwent arthroscopic decompression, excision of his distal clavicle, and arthroscopic repair of the supraspinatus portion of his rotator cuff. (PX 1 page 9).

Dr. Merkley last saw Petitioner on November 25, 2014, and placed him at maximum medical improvement. (PX 1 page 9). With regard to prognosis, the doctor felt it would be guarded because he has seen several wire drawers from Keystone who develop shoulder problems. He stated:

> …anecdotally I've had several patients who were wiredrawers who had problems. And my prognosis for his return to work is that he could – he would be at a higher risk for having further problems in the future than somebody who had a structurally, you know, untorn, not previously repaired rotator cuff. (PX 1, page 10)

With respect to causation Dr. Merkley stated:

> My opinion based on a reasonable degree of medical certainty is that Mr. Nash most likely had pre-existing cuff tendinosis, partial tearing based on the fact that he had a Type III acromion, had history of previous rotator cuff tear at his contralateral shoulder, but that his injury as described to me in November of 2013 was an aggravation of a pre-existing condition. (PX 1, page 11)

Petitioner called Rusty Hewitt to testify as an adverse witness. Mr. Hewitt testified that he is employed by CCMSI, a third party administrator, and works at the Keystone Steel & Wire plant. With regard to his November 27, 2013, correspondence directed to Mr. Nash, Mr. Hewitt testified that he spoke with either Dr. Pena or his nurse regarding the opinions stated in this letter. The letter, however, refers to only Dr. Pena. Dr. Pena testified that he did not talk with Mr. Hewitt at all about the contents of the letter or offer any other opinions. Mr. Hewitt testified that he went to take photos of the machine on November 21, 2013, with Chester Barker, the safety person for Respondent. He testified that at that time, there were no tests performed. Although he testified that he would have shown Dr. Pena the photos prior to issuing the denial letter dated November 27, 2013, Dr. Pena denied this. Mr. Hewitt testified that all of the photos he took were of machine 604. The Arbitrator finds the testimony of Petitioner and Mr. McClenahan, an employee who actually works on these machines, that only half of the photos entered into evidence were machine 604, the machine which Petitioner was working on, and half were machine 302, which is not even involved in this incident, more persuasive than the testimony of Mr. Hewitt.

Respondent called Timothy Heitzman to testify. He testified that he has been employed with Respondent for 28 years. In 2013 he worked as Petitioner's foreman. Mr. Heitzman also testified that the photos were from two different machines. Mr. Heitzman testified that Petitioner reported to him on November 14, 2013, that he felt a pain in his shoulder while removing a stump. Mr. Heitzman testified that there was a meeting held at the scene where Petitioner was injured which included himself, Dr. Pena, and Chester Barker. The meeting was held sometime before Thanksgiving 2014. The Arbitrator notes that Dr. Pena denies being at such a meeting. Mr. Heitzman testified that he filled out the Report of Injury, RX 2. He stated that he indicated on the report that there was a pre-existing condition or prior injury based on his conversation with Brian Stirnaman alone. He testified that he did not inform the union of the meeting as required by the collective

bargaining agreement (CBA). He additionally testified that he had not worked on any of these machines for 18 years.

Respondent called Brian Stirnaman to testify. He testified that he has been a general foreman for Respondent for 22 years. With regard to the conversation on November 11, 2013, for which he wrote the note, he testified that he did not remember the conversation being about bidding on a machine. The Arbitrator notes that Mr. Stirnaman later contradicted himself when he stated that they were discussing machine 357, which is a larger diameter machine, and that Petitioner then mentioned that he couldn't work on the larger diameter jobs because of his shoulder. Mr. Stirnaman testified that he didn't know anything about Petitioner's prior right shoulder injury. However, the note referred to does not mention left shoulder at the beginning of the note; it is only added later. Mr. Stirnaman testified that he used a device to measure the force required to set a stump in motion. He alleged thaqt 48-50 pounds was required to set a loaded stump in motion. There was no evidence admitted to corroborate his testimony in this regard despite the fact that according to the CBA a union representative was to be notified of any such testing. Further, He indicated that a second shift foreman was with him; however, no one was called to testify. Mr. Stirnaman admitted that he had no meter printouts or other evidence that the tests were performed. Mr. Stirnaman acknowledged that all injuries were to be investigated by safety and health department and central safety committee members per the CBA. He testified that he used the force machine several times; however, he did not know how many or what the results were from each test. He also admitted that Petitioner never verbally mentioned his left shoulder when discussing bidding on machine 357. Dr. Pena testified that he was not present when Brian Stirnaman allegedly performed force testing. Mr. Stirnaman just relayed that information to him. The Arbitrator did not find the testimony of Mr. Stirnaman persuasive.

Respondent recalled Rusty Hewitt to testify. Mr. Hewitt testified that he referred the file to Respondent's attorney in the spring of 2014, and that counsel asked for a written report from Dr. Pena, at which time Dr. Pena requested another inspection. Dr. Pena, however, said that there was only one inspection done 5 ½ months after the injury.

Dr. Homer Pena testified by way of evidence deposition for the Respondent. Dr. Pena is employed by OSF St. Francis Medical Center. He is an occupational doctor and has no current board certifications. He spends half of every week at Respondent's facility. When asked directly if he had ever talked to Rusty Hewitt about Petitioner's condition, he answed "I may have told him I didn't like what he said on the rejection notice, he's using me. That's about the only thing." (PX 10 page 37, 38). When asked again if he ever talked to Hewitt about Petitioner's condition, he said "no sir." (PX 10 page 38).

Dr. Pena testified about his initial visit with the Petitioner and notes in his reports that the Petitioner related that he felt a pop when pulling on the wire stump. Although he doesn't recall saying anything to the Petitioner about the significance of that pop, he did have it in the back of his mind. (PX 10 page 43). Dr. Pena is then asked if he wanted to make a referral to Dr. Johnson of Midwest Orthopedic to which he responded that he had no recollection of that. (PX 10 page 44). When confronted with PX 12, a hand written nurses' note, Dr. Pena then admitted he did want to refer the Petitioner to Dr. Johnson but he had forgotten that fact. (PX 10 page 44, 45). Dr. Pena also admitted that the nurse's note does reflect that Petitioner requested to see Dr. Merkley because he has heard good things about him. (PX 10 page 45). The bottom line is that Dr. Pena wanted the

Petitioner to see Dr. Johnson, but the notes accurately reflect that Rusty Hewitt, the workers' compensation administrator, told the nurse to tell Petitioner to make his own appointment. (PX 10 page 46). The doctor later testified that he wanted the Petitioner to see Dr. Johnson because his experience has been that the results are better with Dr. Johnson than Dr. Merkley. (PX 10 page 51). Dr. Pena stated that with Dr. Merkley there are delays with healing and taking longer to heal. (PX 10 page 52).

Dr. Pena admitted, however, that when he first saw Petitioner on November 14, 2013, he assessed his injury as left rotator cuff injury occurring early in his workday. (PX 10 page 48). Dr. Pena states that he assessed it as a work injury and that he never saw the Petitioner again. (PX 10 page 48). He further admits that he put the employee on restrictions of no lifting, pushing, pulling, carrying greater than 5 pounds, no activity above the left shoulder, and no repetitive movement of the left shoulder. (PX 10 page 49). Dr. Pena stated that he dictated a note to that effect on November 25, 2013. (PX 10 page 49).

Dr. Pena further stated that he did not have any conversations with anyone about the case until he got the letter or communication from Mr. Stirnaman to do an onsite visit. (PX 10 page 50). Dr. Pena was asked who he had talked to from his November 14, 2013, visit with the Petitioner up to and including March 17, 2014. He stated he had no recollection of talking to anybody at Keystone nor did he have any records indicating there had been any conversations during that period. (PX 10 page 56). All of Dr. Pena's three reports stand for the proposition that the visit to the job site took place March 17, 2014, which would have been 5 ½ months after the alleged injury and well after the surgery was performed by Dr. Merkley.

Dr. Pena testified on direct examination that he had done one report, but when shown PX 2, he admitted that there is another report and that he was incorrect on direct examination. (PX 10 page 59). He is then shown PX 3, a third report that was produced by Respondent's counsel on April 1, 2014, and he says that he has a question as to why the report starts differently and why it is typed differently. (PX 10 page 61). He firther admitted that the third report is his report, but it is not the same as the other two. (PX 10 page 61). Exhibit 3 begins "Dr. Homer Pena dictating an onsite report concerning,". (PX 10 page 65). Petitioner's No. 2 starts off saying "I was escorted to the Keystone Wire Mill". (PX 10 page 65). He then has to admit that report number 1 is similar to report number 2, but it bears different dictation and transcription dates for which he has absolutely no explanation. (PX 10 page 65). He then admits that all three reports are similar at least regarding the on-site examination date which took place March 17, 2014. (PX 10 page 68). Thus all three would have been generated over five months from the first and only time Dr. Pena saw David Nash as a result this alleged injury.

Dr. Pena was then given the November 27, 2013, denial letter that is addressed to Petitioner and signed by Rusty Hewitt. Dr. Pena testified that he did not render that opinion to Rusty Hewitt. (PX 10 page 71). The Arbitrator notes the following question:

> Q: So he's ascribing words to you in his letter of November 27, 2014, that are not your opinion?
>
> A: Those are not my words. You know, I would not concentrate on the weight. I would concentrate on the mechanism. (PX 10 page 72).

Dr. Pena is directly contradicting the letter and the testimony of Rusty Hewitt. The Arbitrator notes that he is also saying that he would not even concentrate on the weight issue, he would only concentrate on the mechanism, yet both Dr. Pena and Dr. Karlsson in their depositions find that force was a key factor in deciding that the injury was not work related. Dr. Pena also testified that after he saw the MRI and the x-ray, but before his on-site evaluation of March 17, 2014, he still believed the injury was work related. He admits he changed his opinion only after the on-site evaluation. Dr. Pena also testified that the Petitioner had to take care of his quadriplegic wife. He admits, however, that he has no idea what Petitioner did for his wife at home. (PX 10 page 80).

Dr. Troy Karlsson , who examined Petitioner pursuant to section 12 of the Act, testified by evidence deposition. With regard to the note of Brian Stirnaman dated November 26, 2013, the doctor admitted that if that conversation was not as reported by Mr. Stirnaman, then his opinions would be subject to change. (RX 7, page 38). Moreover, he admitted to relying heavily on Dr. Pena's records. Also, on cross examination the doctor admitted that he could not tell where Respondent's Exhibit 8, a purported medical record was from. (RX 7, page 40). He concludes by saying that Exhibit No. 8 did not weigh heavily in his opinions. (RX 7, page 43). Dr. Karlsson also agrees that AC joint changes with significant spurring formation predisposes one to rotator cuff tear either on a degenerative or traumatic basis. (RX 7, page 47). Dr. Karlsson performed an AMA impairment rating of Petitioner's shoulder and found a loss of 5% loss of use of the arm, or 3% loss of use of a man as a whole.

Petitioner called Penny Wight to testify as a rebuttal witness. Ms. Wight testified that she is a union representative and is on the central safety committee. She stated that per the CBA she is to be notified of all injuries via phone or email regarding scheduling a serious incident meeting with central safety. She testified that she was never notified of an injury to Petitioner. Pursuant to the collective bargaining agreement, she should have been notified of the meetings which the company allegedly held regarding this injury. She testified that she contacted Chester Barker, to ask for a copy of the report and he informed her that there wasn't any meeting.

CONCLUSIONS

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

Based on the testimony presented at hearing, the Arbitrator finds that Petitioner did sustain an accidental injury which arose out of and in the course of his work with Respondent on November 14, 2013. Both Petitioner and Ronnie McClenahan testified that pulling the stump out can sometimes be difficult and require a substantial effort. Additionally, Petitioner's treating physician opined that the pulling on the wire stump was a least a causative factor. Moreover, Dr. Pena on the day of the injury felt it was also work related. Dr. Pena changed his opinion some 5 ½ months later when he was taken to view the site. Likewise, Dr. Karlsson opined that Petitioner's injury was not caused or aggravated by his work incident. However, he relies heavily on the information provided by Mr. Stirnaman regarding the force necessary to remove the stump and Petitioner's statement that his left shoulder was bothering him prior to the accident. The Arbitrator finds neither statement reliable.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner met his burden of establishing he sustained an accident which 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 the testimony and opinions of Dr. Merkley more reliable and persuasive than those of Dr. Pena and Dr. Karlsson as the opinions of the later are, in large part based upon reliance on false information.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury he sustained on November 14, 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?

Respondent submitted medical bills totaling $83,190.99. (PX 6) Based upon the above findings and the absence of evidence to indicate the treatment provided to Petitioner was not reasonable and necessary the Arbitrator finds that the medical services that were provided to the Petitioner were reasonable and necessary in light of Petitioner's work related injury of November 14, 2013.

Respondent shall pay reasonable and necessary medical services of $83,190.99, as set forth in Petitioner's exhibit 6, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $31,407.92 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.

Issue (K): What temporary benefits are in dispute?

Respondent did not dispute the period of incapacity, but simply its liability therefore based upon the issues of accident and causation. Based upon the above findings the Arbitrator finds Petitioner is entitled to TTD benefits from December 2, 2013, through October 1, 2014.

Respondent shall pay Petitioner temporary total disability benefits of $607.47/week for 43 2/7 weeks, commencing 12/2/13 through 10/1/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $13,000.00 for non-occupational indemnity benefits that have been paid.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that Dr. Karlsson performed an AMA impairment rating of Petitioner's shoulder and found a loss of 5% loss of use of the arm, or 3% loss of use of a man as a whole. However, impairment does not equal disability. The impairment rating is part of the determination for permanent partial disability benefits, but is not the sole or main factor. The Arbitrator therefore gives *little* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes Petitioner retired from Keystone Steel & Wire on October 1, 2014, after 33 years. Dr. Merkley last saw Petitioner on November 25, 2014, and placed him at maximum medical improvement. With regard to prognosis, the doctor felt it would be guarded because of the work Petitioner had done as a wire drawer for Respondent. Specifically, the doctor stated "... my prognosis for his return to work is that he could – he would be at a higher risk for having further problems in the future than somebody who had a structurally, you know, untorn, not previously repaired rotator cuff." (PX 1, page 10) The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 54 years old at the time of his injury. 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 ongoing symptoms and limitations to which Petitioner testified are corroborated by the medical records. Petitioner underwent arthroscopic decompression, excision of his distal clavicle, and arthroscopic repair of the supraspinatus portion of his rotator cuff. The Petitioner was a credible witness in all regards. As a result of his injuries and the risk of further injury if he returned to his prior employment Petitioner retired on October 1, 2014. The Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rick L. Shelton,

Petitioner,

vs.

NO: 15WC035721

City of Springfield,

19IWCC0058

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 30, 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.

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

DATED: JAN 2 8 2019
SJM/sj
o-12/6/2018
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 who found that Petitioner's current condition of ill-being of cubital tunnel syndrome of his right elbow was causally related to an alleged work accident on April 24, 2015, when Petitioner was chopping a tree trunk. The Arbitrator awarded Petitioner 2&6/7 weeks of temporary total disability benefits and 75 weeks of permanent partial disability benefits representing loss of the use of 15% of his right arm. I would have found that Petitioner did not sustain his burden of proving an alleged work-related accident caused his current condition of ill-being and denied compensation.

Petitioner initially alleged that he sustained an injury on May 13, 2015, which was the day he first sought medical treatment at Prompt Care. The treatment note mentioned a log hitting the dorsal aspect his right hand and noted injuries to three fingers on Petitioner's right hand. Two and a half years later, on November 16, 2017, he amended his Application for Adjustment of Claim to allege an accident date of March 24, 2015. He alleged that he suffered a crushing injury to his right arm. Petitioner did not seek additional medical treatment until August 18, 2015, when he went to his primary care physician, Dr. Yap, for regular checkup. While Petitioner testified he reported a "twisting Injury" to his arm at both the initial record at Prompt Care and to Dr. Yap, neither treatment note indicated any such twisting injury and Dr. Yap made no mention of any injury to Petitioner's right hand or arm whatsoever.

The record before us raises serious questions about Petitioner's credibility. His testimony was inconsistent regarding the mechanism of injury and with the medical records. In addition, I find the opinions of Respondent's Section 12 medical examiner, Dr. Rotman more persuasive than Petitioner's treating doctor, Dr. Neumeister. Dr. Rotman testified that the mechanism of injury could not have caused Petitioner's cubital tunnel syndrome. On the other hand, Dr. Neumeister's opinion testimony was very equivocal as he testified that the mechanism of injury "could have" or "potentially caused" Petitioner's condition of ill-being. He also acknowledged that in his initial examination, Petitioner did not mention any condition related to his right elbow.

For the reasons stated above, I would have found that Petitioner did not prove that the alleged work-related accident caused his condition of ill-being of right carpal tunnel syndrome, reversed the Decision of the Arbitrator, and denied compensation. Therefore, I respectfully dissent from the majority opinion.

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHELTON, RICK L
Employee/Petitioner

Case# **15WC035721**

19IWCC0058

CITY OF SPRINGFIELD
Employer/Respondent

On 1/30/2018, 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:

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

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

RICK L. SHELTON,
Employee/Petitioner

Case # **15** WC **35721**

v.

Consolidated cases: ____

CITY OF SPRINGFIELD,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **1/11/18**. 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 **3/24/15**, 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 $**35,100.00**; the average weekly wage was $**609.60**.

On the date of accident, Petitioner was **54** 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 $**00.00** for TTD, $**00.00** for TPD, $**000.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $406.40/week for 2-6/7 weeks, commencing 2/9/16 through 2/28/16, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $365.76/week for 75 weeks, because the injuries sustained caused the 15% loss of petitioner's right arm, as provided in Section 8(e) of the Act.

Respondent shall pay reasonable and necessary medical services related to the treatment of petitioner's right hand and arm from 3/24/14 through 2/18/16, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall also reimburse petitioner for any out of pocket payments petitioner made with respect to the reasonable and necessary medical services petitioner received for his right hand and arm from 3/24/14 through 2/18/16,

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

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

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

Maureen H. Pulia

Signature of Arbitrator

1/26/18
Date

ICArbDec p. 2

JAN 3 0 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 54 year old truck driver/laborer, alleges that he sustained an accidental injury to his right arm/hand that arose out of and in the course of his employment by respondent of 3/24/15.

Petitioner testified that on 3/24/15 he was working with the Forestry Crew. His duties included trimming trees, taking down hazardous trees, cleaning up limbs, and removing hazardous limbs. Petitioner testified that on 3/24/15 he and his crew was called to a worksite at 18th and Capital. The foreman at the job site was Larry Long. Petitioner testified that when he arrived at the site there was a 45 foot tall, 70 inch diameter, oak tree that his crew had been instructed to remove. Petitioner testified that after the branches were removed, the remaining 14 foot trunk was cut down and was on the ground. Petitioner stated that the trunk was so heavy it had to be cut in half before being placed in the truck.

Petitioner testified that he was responsible for cutting the trunk in half with a 25 inch Steel chain saw. Petitioner determined the middle of the trunk and began to cut. He testified that it appeared that the trunk was completely on the ground. To cut the trunk, petitioner started at the top and moved the saw down on the other side before bringing the saw back so that it could get through the entire trunk. Petitioner used both hands to do this. Petitioner had his right hand on the trigger to operate the chain saw. Petitioner testified that when the saw is active it produces a lot of power and torques that try to pull the operator forward when he tries to pull the saw out. Petitioner testified that he had to control the downward motion of the saw.

Petitioner testified that Larry Long, his foreman, was approximately 4 feet away from him while he was sawing the trunk in half. While petitioner was cutting through the trunk he saw it was going to lunge forward. His right arm was extended and he was pulling the saw backwards while twisting his arm outward. This caused his palm to face upwards and his forearm and elbow to face downwards. Petitioner testified that once he saw the trunk was going to come towards him his right arm hit the ground and he took his finger off the chain saw trigger in order to stop the chain saw. As his did this, his arm rolled back up and the 2nd half of the trunk rolled onto the dorsal part of his right hand, taking his glove off in the process. Petitioner felt immediate numbness and tingling in the dorsal part of his right hand. Petitioner testified that Larry Long knew the trunk had hit the dorsal part of his right hand, and that he had numbness and tingling in the dorsal part of his hand.

After the injury, petitioner and his crew cleaned up the work area and went back to the shop, since it was close to lunch time. Petitioner did not report the incident on 3/24/15 because he thought it would get better. He testified that he reported it to Sean Haynes later. Petitioner testified that he did not report the incident to Brad O'Neal, the Safety Officer, until about 3 weeks later, when he was going to go to Prompt Care to get it checked out.

On 5/13/15 petitioner presented to Dr. Sharma at Springfield Clinic for right hand pain and discomfort for about 6 weeks. He reported that he works for the city and was cutting down a tree and caught his hand between tree trunks. He stated that he came in for further evaluations and recommendations. He reported that his pain was primarily affecting the ulnar side of his right hand around the 5th metacarpal at the MCP joint. He stated that using it made it feel worse. He noted that rest helps, but the pain does limit him, and impede his activities of daily living. He denied any previous fractures or dislocations of the right hand. An examination revealed some ecchymosis of the right hand. Tenderness was noted at the 5th metacarpal at the 5th metacarpophalangeal joint, without any malrotation or malalignment. Petitioner had diminished grip strength. X-rays were negative for any acute fractures or dislocations. He was diagnosed with a right hand 5th metacarpophalangeal joint sprain. Conservative treatment, activity modification, and functional progression was warranted. Petitioner was instructed to follow up after 8 weeks of conservative treatment had been completed.

After seeking treatment at Springfield Clinic petitioner filed a written report with Brad O'Neal in May 2015.

On 8/8/15 petitioner presented to his primary care physician, Dr. Yap, for follow-up of his right hand pain, numbness and stiffness. Dr. Yap referred petitioner to Dr. Trudeau for an EMG/NCV.

On 9/3/15 petitioner underwent an EMG/NCV performed by Dr. Edward Trudeau. Petitioner gave a history of cutting a log in April of 2015 when the log rolled back and impacted the top of his right hand, and resulted in numbness in that area since then. He also complained of weakness, discomfort, and pain in the dorsal surface of his right hand. The results revealed right dorsal ulnar cutaneous neuropathy, moderately severe, and, bilateral carpal tunnel syndrome. Petitioner noted on the questionnaire that his chief complaints of upper extremity pain and paresthesia, had been present for at least 5 months.

On 10/14/15 petitioner presented to Dr. Wottowa at Springfield Clinic for follow-up of a crush injury of the hand. Dr. Wottowa noted complaints of pain in petitioner's right hand, after he sustained an injury to his right hand in May of 2015, when a log rolled over the ulnar aspect of his hand. Petitioner reported pain in his hand since that time. Dr. Wottowa noted that petitioner's pain was most localized to the MCP joints of the 3rd, 4th, and 5th digits of the right hand, that radiates to the PIP joints of the associated digits. Petitioner reported that the pain was over the dorsal and palmar aspect of his right hand. He also reported some numbness in these areas. Following an examination and review of the EMG/NCV, Dr. Wottowa assessed a crush injury to the 3rd, 4th and 5th metacarpals of the right hand, related to the crush injury he described. He believed it would improve with time. He instructed petitioner to follow-up in 2 months. Dr. Wottowa recommended that petitioner soak his hand in paraffin baths a few times a day over the next few weeks.

On 10/15/15 Dr. Trudeau drafted a letter to petitioner's attorney, Gregory Sgro, and CCMSI, informing them that he received a letter on 10/1/15 indicating that the City of Springfield did not have a claim for petitioner for a date of injury of 4/20/15, and therefore, no medical benefits were going to be paid under worker's compensation. He noted that Kathy McBee told him that what likely happened was some sort of computer glitch where the date of 4/20/15 got on the computer incorrectly since there is no date of injury for the claim that was denied. He noted that petitioner told him that his injury was about 5 months prior to his visit on 9/3/15. Dr. Trudeau took this to mean that this was a rough calculation and the actual injury could have been in April of 2015, earlier, or later.

On 12/2/15 petitioner presented to Dr. Neumeister, on the referral of Dr. Yap. The reason for his visit was identified as "right hand three fingers" by petitioner. Petitioner's chief complaint was identified as right hand pain and numbness. He reported that this began while he was at work and a log rolled over the dorsal aspect of his right hand and wrist. He stated that since that time he has had numbness and tingling of the dorsal hand over the ulnar 2 digits. He also reported pain in this area with decreased grip strength on the side. Petitioner reported prominent pain in his wrist when he was working, that had not improved since the injury. An examination revealed some decreased sensation in the distribution of the dorsal branch of the ulnar nerve with numbness and tingling, and a positive Tinel's overlying the area where the dorsal branch splits off. Petitioner also demonstrated right ulnar sided wrist pain that could indicate a tear in the TFCC. Dr. Neumeister noted decreased grip strength on the right as compared to the left. Dr. Neumeister assessed an injury of the right wrist, hand, or finger, and right hand pain. He ordered an MRI of the right/wrist.

On 12/9/15 the petitioner underwent an MRI of the right hand/wrist. The findings were an older fracture through the base of the hamate with 2.8mm of distraction, with nonunion; moderate to severe osteoarthritis of the triscaphe joint with full thickness chondromalacia; sunchondral cystic changes on the proximal lunate most typical of ulna abutment; degenerative signal of the membranous portion of the TFCC without a definitive tear; and a small cyst in the styloid process.

On 1/6/16 petitioner returned to Dr. Neumeister for evaluation of ongoing numbness and tingling in the right hand. Dr. Neumeister noted that the findings on the MRI showed a potential fracture through the base of the hamate which was likely old in nature; severe arthritis of the STT joint potential for ulnar abutment syndrome with cystic changes in the proximal lunate and some degenerative changes within the TFCC; and a small cyst in the styloid process. He also noted that petitioner reported pain around the MP joint that seemed to be getting worse (4mm), and an episode of moderate swelling. An examination revealed some improved tenderness around the ulnar fovea; tenderness in the radial carpal joint that was a positive provocative

compression at the cubital tunnel with numbness that developed in the dorsal and palmar side of the ulnar nerve distribution; and pain around the MP joint that seemed to be within the joint itself. Dr. Neumeister was of the opinion that petitioner's most symptomatic problem was cubital tunnel syndrome, and likely arthritic changes to the MP joint of the long finger on the right side. He also noted some mild degenerative changes in the wrist, as well as bilateral carpal tunnel. Petitioner indicated that he wanted relief of these symptoms. Dr. Neumeister was of the opinion that petitioner was a candidate for a right cubital tunnel release, and at the same time wanted to perform a steroid injection into the right long finger MP joint to stop the inflammatory degenerative process. Petitioner agreed to the plan.

On 2/9/16 petitioner underwent a right cubital tunnel release, and a 40 mg of Kenalog injection into the long finger MCP joint. This procedure was performed by Dr. Neumeister. Petitioner's post operative diagnosis was right cubital tunnel syndrome and right long finger MCP arthritis.

On 2/18/16 petitioner last followed-up with Dr. Neumeister. Petitioner was doing very well and had good return of sensation in his ulnar sided digits. Petitioner's right long MCP joint seemed to have improved range of motion and less tenderness since the injection. Petitioner was released on an as needed basis, and was released to return to work on 2/29/16 without restrictions.

On 4/21/16 petitioner underwent a Section 12 examination performed by Dr. Michael Rotman, an orthopedic surgeon, at the request of the respondent. The injury date was noted as 5/13/15. It was noted that petitioner was cutting a stump in half when half of the stump hit the ulnar aspect of his right hand, eventually resulting in an ulnar nerve release at the right elbow which completely relieved his symptoms in his right hand. Petitioner reported no complaints of numbness or tingling, unless he does activities overhead for a while. Petitioner reported that he developed numbness over the dorsal ulnar aspect of his right hand at the time of the injury, and that it went away completely after a few days after his ulnar release surgery. Petitioner reported that the symptoms he had after the incident were not there before the incident. Petitioner denied any current trouble with the dorsal ulnar numbness and tingling. In addition to his examination, Dr. Rotman reviewed an Employee Accident Report from May 2015, records from Springfield Clinic, Dr. Trudeau, Dr. Yap and Dr. Neumeister, and the MRI of the right hand. Following an examination and record review, Dr. Rotman was of the opinion that petitioner was doing very well from his nerve release on the right. He noted that petitioner's ulnar numbness and tingling went away quickly after his ulnar nerve release on the right, suggesting that the numbness and tingling in that area may have been related to the elbow. However, he was of the opinion that there was no evidence of an elbow injury, and a direct blow to the ulnar aspect of his wrist was not going to cause a significant torque to the elbow to have caused an acute cubital tunnel. He noted that none of the

providers had a single concern at the level of the elbow, but rather the dorsal ulnar hand and the dorsal ulnar cutaneous branch of the ulnar nerve. He was of the opinion that there was no evidence of an elbow injury, or care directed to the elbow. Dr. Rotman saw no evidence of a work related injury to the right elbow. He was of the opinion that petitioner had reached MMI with regards to his wrist contusion and possible contusion of the dorsal sensory cutaneous branch of the ulnar nerve at the level of the right hand. He was further of the opinion that the nerve release at the elbow, and current tolerable symptoms from the left cubital tunnel, would not be related to the injury.

On 4/21/16 petitioner was also seen for consultative electrical diagnostics studies by Dr. Daniel Phillips to evaluate his upper extremities. Petitioner denied any right upper extremity symptoms. A repeat EMG/NCV was performed. The impression was moderate bilateral sensory motor median neuropathies across the carpal tunnels, mild to moderate demyelinative ulnar neuropathy across the left elbow that was clinically asymptomatic, and mild demyelinative ulnar motor neuropathy across the left wrist which was reasonably related to the old fracture and step off that was clinically asymptomatic. When the right ulnar motor conduction velocity across the elbow was corrected for temperature, the results were unremarkable and had resolved. Petitioner did not have symptoms in the median nerve distributions, and therefore, was found to not have carpal tunnel syndrome. Dr. Phillips noted that petitioner's dorsal ulnar cutaneous nerves were normal.

On 1/13/17 the evidence deposition of Dr. Rotman, an orthopedic hand surgeon, was taken on behalf of the respondent. Dr. Rotman testified that there was nothing in petitioner's history that he gave him that suggested to him that petitioner sustained an injury to his right elbow. Dr. Rotman found the history petitioner provided him and the other providers to be consistent. He saw no elbow injury in any history. He was of the opinion that the main problems with Dr. Trudeau's EMG/NCV seemed to be the dorsal ulnar cutaneous branch of the ulnar nerve at the wrist, which appeared to be the source of his numbness from the injury. He testified that Dr. Phillips did not find evidence of dorsal ulnar cutaneous neuropathy. Dr. Rotman opined that petitioner's carpal tunnel is not related to the injury. He was of the opinion that petitioner would have numbness in different fingers for carpal tunnel syndrome and he would have a lot of wrist swelling in the area of the carpal tunnel. He noted that petitioner had asymptomatic cubital tunnel on the left. He testified that petitioner's right side looked okay when Dr. Trudeau did his EMG/NCV, and there was no mention of cubital tunnel until it was treated later. Dr. Rotman was of the opinion that it is certainly possible that petitioner had cubital tunnel on the right, even though his nerve studies were normal. Dr. Rotman opined that the right cubital tunnel is not related to the injury because for it to be related, the treatment and the complaints would have to have been from an elbow injury. He was of the opinion that a traumatic cubital tunnel would present with elbow pain that would be documented in

the record, and all of petitioner's complaints and exams were focused about the wrist. He noted that there was no focus or concern about the right elbow for several months. He noted that there was no conservative treatment of the elbow before surgery.

On cross examination, Dr. Rotman related the neuropraxia of the dorsal ulnar cutaneous branch to the injury described. Dr. Rotman was of the opinion that petitioner sustained a wrist contusion and possible contusion of the dorsal sensory cutaneous branch of the ulnar nerve at the level of the right hand. He opined that the hamate fracture was not related to the injury, and predated it. He further opined that the injection to the right middle finger MCP joint was not related to the occurrence of a direct blow on the opposite side of the hand. He was of the opinion that this problem was felt to be arthritic. Dr. Rotman was of the opinion that a torque that hits the dorsal ulnar aspect of the right hand would not torque the right elbow at all in the direction that an acute cubital tunnel would occur. He was further of the opinion that an acute cubital tunnel would occur if petitioner had a direct blow to the inner elbow, or an elbow fracture, or a torque in the opposite direction where the elbow is going into valgus or a knock-kneed type of position of the elbow, which would stretch the ulnar nerve. Dr. Rotman opined that if the force of the tree coming down had thrown petitioner's elbow into the ground that would be a direct blow to the inner elbow that could cause an acute cubital tunnel. He stated that it would be less likely for an acute cubital injury to occur if petitioner's hand was caught under the trunk briefly and he pulled with all his might to get it out.

On 6/14/17 the evidence deposition of Dr. Neumeister, a plastic surgeon, with a certification in hand surgery, was taken on behalf of petitioner. He noted that petitioner complained of numbness and tingling in his hands, particularly in the ring and little finger on the right hand. He noted that the ulnar two digits are used for these two fingers. He testified that petitioner had symptoms on the dorsal of the back of his right hand, as well as decreased strength and pain at the dorsal wrist. Dr. Neumeister noted that petitioner did not describe the accident to him. He testified that Dr. Trudeau noted changes to the dorsal cutaneous nerve on the back of the hand that supplies sensation to the top of the ring and the little fingers, and that nerve starts a few inches north of the wrist. Dr. Neumeister noted that on 1/6/16 he noted on examination a provocative compression at the elbow that reproduced some of the symptoms petitioner was having. Dr. Neumeister noted that it was significant that after the surgery petitioner's pain in his middle finger, and the numbness and tingling in his right little and ring finger had resolved.

Dr. Neumeister opined that if the numbness and tingling in petitioner's ulnar two digits and the ulnar side of right wrist began immediately after the injury on 5/15/15, that may cause him to believe that the incident caused or contributed to his right carpal tunnel syndrome. He noted that the wrist is a little bit of distance away

from the elbow, and the injury may have been related to how he was having to hold his hand or wrist in a certain amount of elbow flexion, or when the elbow was bent and potentially stretched the nerve. He was of the opinion that petitioner had an injury to the nerve branch right at the wrist area, that resolved, but flared up at the elbow. He opined that although it was not directly traumatized, it may have been a result of the position he had to hold it in as a result of the injury, or any swelling or inflammation that may have contributed to the compression. Dr. Neumeister opined that when petitioner completed cutting through the trunk of a large tree with a chain saw, and the trunk rolled over the dorsal aspect of his right hand, twisting his hand and forearm until it pinned the back of his hand to the ground, this could be consistent with an injury to the dorsal cutaneous branch of the right ulnar nerve. He further opined that if the force of the trunk caused his forearm to twist in a clockwise direction, and out away from his body, this also could potentially cause an injury to the right ulnar nerve, and if the force of the rolling trunk also forced his elbow to strike the ground while twisted outward, that could also cause an injury to the right ulnar nerve. He opined that if petitioner pulled his right arm from a twisted, pinned position with enough strength to free his hand under a 1,000 pound log, that could also result in an injury to the right ulnar nerve. He opined that if the symptoms were not there prior to the alleged injury, and he had them subsequently, then the incident could have caused or contributed to petitioner's ulnar neuropathy.

On cross examination, Dr. Neumeister was of the opinion that petitioner' symptoms of numbness and tingling did not resolve until after the cubital tunnel was released. Dr. Neumeister noted that in his office note of 12/2/15 petitioner made no mention of his right elbow.

Petitioner offered into evidence Work Order #201411522 for the Forestry Department to remove center Oak tree, and trim 2 other Oak trees on 3/24/15 at Shannon Brooks at 1910 E. Capitol Ave., Springfield.

On 11/16/17 petitioner filed an amended Application for Adjustment of Claim amending the accident date to 3/24/15. The original date of accident was 5/13/15. Petitioner stated that this was because he received documents from respondent with this accident date on it. He stated that it was the respondent that determined the initial accident date of 5/13/15.

Petitioner testified that he has not received any temporary total disability benefits for the time he was off after his surgery. He further stated that he has not sought any treatment since being released by Dr. Neumeister on 2/18/16. Since the surgery, petitioner has not had any tingling or numbness, but his strength is less and his right arm fatigues a lot easier. He testified that it is harder to do repetitive activities, and it is uncomfortable to use power equipment, or work overhead or with his arms extended. He reported weakness with these activities. He testified that if he has to hold anything heavy for an extended period of time he uses his left hand.

Petitioner testified that when he presented to Dr. Rotman for evaluation he told him that he twisted his right arm at the time of the injury, but Dr. Rotman may not have heard it because his resident and nurses were talking while he was talking. He further testified that Dr. Rotman never asked him if twisted his arm as part of the injury, or if his elbow struck the ground.

Petitioner testified that when he first filled out paperwork for the respondent in May of 2015 he indicated that he injured three fingers on his right hand. He did not provide a specific accident date, only an injury date of sometime in May of 2015, because that is when he first sought treatment at Prompt Care.

Stephen Haynes, Supervisor of the Tear Out Crew and Concrete Crew for the Department of Public Works, was called as a witness on behalf of respondent. Haynes was in charge of the Forestry take down crew in the spring of 2015. Haynes testified that in March of 2015, or in the Spring of 2015, petitioner never reported any injury to him. Haynes testified that as the supervisor he would check on the crews twice a day, and sees them at the beginning and end of the day. Haynes testified that when he spoke with Larry Long after he received notice of this court hearing, Long told him that petitioner mentioned to him that he was hurt.

On cross examination, Haynes testified that petitioner's foreman on 3/24/15 was Larry Long, and if the foreman witnessed the accident he would report the injury to Brad O'Neal in the Safety Department and fill out the proper paperwork. He denied that there were a lot of small injuries in the jobs he supervises that are not written up . Haynes testified that the proper procedure is for the accident to be reported to O'Neal. Haynes denied he knew anything of an alleged injury on 3/24/15 within 45 days of petitioner's alleged injury. Haynes did not speak to Larry Long regarding this alleged injury until after notice of the court hearing.

Bradley O'Neal, Safety Technician for respondent's Department of Public Works, was also called as a witness on behalf of respondent. He stated that he was in this position on 3/24/15. O'Neal testified that when there is a work injury, the employee has to report it first to his supervisor, then if the supervisor is not available, the employee should come to him to complete the paperwork. He testified that he never received any report from Haynes regarding petitioner's accident.

O'Neal testified that three weeks after the accident petitioner told him he was going to go to Prompt Care for an injury, but there was no paperwork filled out, so he did not think it was a work injury. He testified that if he had been told it was a work related injury he would have had petitioner fill out the appropriate paperwork, but that was not done. O'Neal questioned why the paperwork was not filled out on the date of injury, but stated that this has happened in the past, and that this was not the first incident of paperwork not being completed

when an injury occurs. O'Neal testified that the paperwork for petitioner's injury was not completed until 10/19/15, and at that time the accident date was identified as May of 2015.

O'Neal testified that if an employee is injured on a specific day but does not want treatment, a SNOPI (Supervisor Notification of Possible Injury) Form is completed so that if the employee later needs treatment there is documentation of the injury. O'Neal testified that this was not done in petitioner's case.

O'Neal also testified that on the sign in and sign out sheet the employees fill out each day there is a question that the employees are to answer as to whether or not they sustained an injury that day. He stated that a lot of times this question is not answered, and there is talk that it may be removed from the form because some employees may not know they were injured until after the actual date of injury because they have no symptoms right away. O'Neal could not say if petitioner answered this question on his sign in/sign out form on 3/24/15.

On cross examination, O'Neal testified that when petitioner filled out paperwork he was not asked to get any witness statements. He was not sure if any witnesses were listed. O'Neal testified that Larry Long was petitioner's supervisor on 3/24/15 and he was never interviewed. He further testified that he has no reason to believe that petitioner's accident did not occur as he claims. O'Neal testified that he did have a conversation with petitioner in April of 2015 about him going to Prompt Care for treatment, and that petitioner may have told him his symptoms at that time. He also testified that there would be no reason for petitioner to check in with him as the Safety Technician and tell him he was going for treatment at Prompt Care if he was not hurt at work.

On redirect examination O'Neal testified that he did not remember the specific date of his conversation with petitioner about going for treatment, and stated that it could have been in May of 2015. O'Neal testified that petitioner stated that he was going to see a doctor, but he had no recollection of what was hurting him.

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

Petitioner alleges that he sustained an accidental injury to his right wrist/hand that arose out of and in the course of his employment by respondent on 3/24/15 when a tree trunk he was cutting rolled onto the dorsal part of his right hand. Petitioner testified that this occurred when he was cutting through a 70 inch diameter tree trunk with a chain saw and the saw lunged forward and his arm extended. As he was pulling the saw backward he twisted his right arm outward so that the palm of his hand was facing upwards, and his right forearm and elbow were downward. Petitioner testified that once he noticed the saw was going to come towards him his right arm hit the ground. Petitioner then took his finger off the chain saw trigger in order to stop the chain saw. As he did this, his arm rolled back up and the 2nd half of the trunk rolled onto the dorsal part of his right hand,

taking off his glove. Petitioner testified that he had immediate numbness and tingling in the dorsal part of his right hand.

Petitioner testified that Larry Long was approximately four feet away from him while he was cutting the trunk, and knew the trunk had hit the dorsal part of this right hand, and that he had numbness and tingling in the dorsal part of his right hand. Petitioner testified that he did not report the incident that day because he thought it would get better. He stated that he reported it to Sean Haynes later. He also testified that he reported the incident to Brad O'Neal, the Safety Officer, 3 weeks later, when he was going to go to Prompt Care to get it checked out.

Haynes testified that petitioner never told him he sustained an injury on 3/24/15. However, O'Neal testified that three weeks after the incident petitioner told him that he was going to Prompt Care for an injury. O'Neal testified that he did not know it was a work injury, and therefore no paperwork was completed. However, he also admitted that there would be no reason for petitioner to come to him regarding an injury and tell him he was going to Prompt Care unless it was a work injury. O'Neal testified that there are daily sign in and sign out sheets on which employees are to indicate if they sustained an accident. However, he admitted that the employees don't always do this, especially, if they have no pain that day. He also testified that he does not know what petitioner indicated on the daily sign in and sign out sheet on 3/24/15, because no one checked it. O'Neal testified that he had no reason to believe that the petitioner's incident did not occur as he claims, and that he had a conversation with petitioner in April of 2015 about him going to Prompt Care for treatment, and petitioner may have told him his symptoms at that time.

Additionaly, Dr. Trudeau, in a letter dated 10/15/15 to petitioner's attorney, noted that Kathy McBee told him that there must have been a computer glitch since there was no denial of any claim for petitioner with an accident date of 4/20/15.

When petitioner first presented for care at Springfield Clinic on 5/13/15 he provided a consistent history of his alleged injury and reported that it occurred about 6 weeks prior. That would place the accident date at the end of March 2015 or early April 2015. When petitioner also sought treatment from Dr. Trudeau, Dr. Wottowa, and Dr. Neumeister, he provided a consistent history of the alleged injury. Petitioner provided the same history to Dr. Rotman, who examined petitioner on behalf of respondent.

The arbitrator notes that the accident date of 5/13/15 was placed on the accident report when it was eventually completed by respondent. Petitioner noted that this was the date he first presented for care, and was the accident date the respondent was using. O'Neal testified that this paperwork was not filled out until

10/19/15, but this was not the first time paperwork for an injury was not completed at the time of the alleged injury. O'Neal testified that he was not sure if any witnesses were listed on the report, but regardless of that, he did not get any witness statements. He testified that he never spoke to Larry Long, petitioner's foreman.

Upon further investigation, the Work Order for the removal of the Oak tree by the Forestry Department, the job on which the petitioner claims he was injured, was offered into evidence by petitioner, and indicates that that job was performed on 3/24/15.

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 he sustained an accidental injury to his right arm/hand that arose out of and in the course of his employment by respondent on 3/24/15. The arbitrator finds the petitioner testimony was consistent with the credible medical records; the testimony of O'Neal supports a finding that petitioner did report an injury to him within weeks of the alleged injury, and may have also told him his symptoms at that time; and, that O'Neal had no reason to believe petitioner's alleged injury did not happen as he described. The arbitrator finds the incorrect accident date was based on petitioner's failure to report it for a few weeks; O'Neal not realizing at first that petitioner's trip to Prompt Care was for a work injury; the first paperwork not being completed by O'Neal until 10/19/15 and the accident date being identified as the first day petitioner sought treatment, rather than the day on which he was hurt; and the fact that no investigation into the accident was performed. The arbitrator also found it significant that Haynes testified that he had talked with Long and Long told him that petitioner had mentioned to him that he had gotten hurt.

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT?

Petitioner alleges that he provided testimony to both O'Neal and Haynes. However, Haynes testified that petitioner did not report the accident to him. The arbitrator finds it significant that O'Neal testified that he had a conversation with petitioner in April of 2015 about going to Prompt Care, and that petitioner may have told him about his symptoms at that time. Although O'Neal testified that he did not know petitioner had a work injury at that time, he agreed that since he was not petitioner's supervisor there would be no reason for petitioner to report any injury to him, and tell him he was going to be seen at Prompt Care, which is where respondent has their employees checked out following an injury. O'Neal also confirmed that there would be no reason for an employee to report and injury to him and tell him they were going to Prompt Care for treatment unless it was a work related injury.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner provided respondent with timely notice of the accident. The arbitrator bases this finding primarily on the testimony of O'Neal who indicated that petitioner reported an injury a few weeks after 3/24/15, and there would be no reason

for petitioner to report an injury to him and tell him he was going for treatment at Prompt Care unless it was a work related injury.

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

Petitioner alleges his current condition of ill-being as it relates to his right arm/hand is causally related to the injury he sustained on 3/24/15. Respondent claims petitioner's current condition of ill-being is not causally related to the injury on 3/24/15.

Petitioner testified that when he was trying to pull the saw back after he was being pulled forward he was twisting his right arm outward so that his palm was facing upward and his forearm and elbow were downward. He further stated that once he saw the trunk coming towards him his right arm hit the ground and he took his finger off the chain saw trigger in order to stop the saw. When he did this his right arm rolled back up and the trunk rolled onto the dorsal part of his right hand and took his glove off. Petitioner experienced immediate numbness and tingling in the dorsal part of his right hand, which he never had before.

When petitioner first sought treatment he reported that his pain was primarily affecting the ulnar side of right hand around the 5th metacarpal at the MCP joint. Tenderness was noted and petitioner had diminished grip strength. He was assessed with a right hand 5th metacarpophalangeal joint sprain. Petitioner had conservative treatment for 8 weeks.

In August of 2015 he presented to his primary care physician, Dr. Yap because he still had pain, numbness and stiffness in his right hand. Yap recommended an EMG/NCV that revealed right dorsal ulnar cutaneous neuropathy, moderately severe, and bilateral carpal tunnel syndrome.

Petitioner then presented to Dr. Wottowa with complaints of right hand pain since his injury. He also reported pain over the dorsal and palmar aspect of his hand, and numbness. Dr. Wottowa noted that petitioner's pain was localized to the MCP joints of the 3rd,4th and 5th digits of the right hand that radiates to the PIP joints of the associated digits. He related this to petitioner's crush injury. Dr. Wottowa recommended continued conservative treatment.

When continued conservative treatment provided petitioner with no relief, petitioner saw Dr. Neumeister on the referral of Dr. Yap. Petitioner's complaints continued to be right hand pain and numbness since the work injury. He reported that since the injury petitioner had numbness and tingling of the dorsal hand over the ulnar 2 digits. He also reported decreased grip strength on the right. An examination revealed decreased sensation in the distribution of the dorsal branch of the ulnar nerve with numbness and tingling and a positive Tinel's overlying the area where the dorsal branch splits off. Petitioner also demonstrated right ulnar sided wrist pain.

On 1/6/16 petitioner reported that the pain around the MP joint seemed to be getting worse, and he had moderate swelling. Dr. Neumeister noted tenderness in the radial carpal joint that was a positive provocative compression at the cubital tunnel with numbness that developed in the dorsal and palmar side of the ulnar nerve distribution. and pain with the MP joint. Dr. Neumeister believed petitioner's most symptomatic problem was his cubital tunnel syndrome, and likely arthritic changes to the MP joint in the long finger on the right side. Dr. Neumeister recommended a right cubital tunnel release and injection into the 3rd finger on the right hand. Petitioner underwent this procedure on 2/9/16. On 2/18/16 petitioner followed-up and was doing very well and had good return of sensation in his ulnar sided digits. His 3rd finger on his right hand also seemed to have improved range of motion and less tenderness. Petitioner returned to full duty work without restrictions on 2/29/16.

Opinions as to causality were offered by both Dr. Neumeister, for petitioner, and Dr. Rotman for respondent. Dr. Rotman did not examine petitioner until 2 months following his surgery and return to full duty work. Following his examination and record review, Dr. Rotman noted that petitioner was doing very well after his surgery, and had no current trouble with the dorsal numbness and tingling. He noted that petitioner's ulnar numbness and tingling went away quickly after his ulnar nerve release on the right suggesting that the numbness and tingling in that area may have been related to his elbow. However, he noted that there was no evidence of an elbow injury, and that a direct blow to the ulnar aspect of his wrist was not going to cause a significant torque to the elbow to have caused an acute cubital tunnel. For this reason he saw no evidence of a work related injury to the right elbow. He was of the opinion that petitioner had sustained a wrist contusion and possible contusion to the dorsal sensory cutaneous branch of the ulnar nerve at the level of the right hand. Dr. Rotman was also of the opinion that traumatic cubital tunnel would present with elbow pain that would have been documented, but all of petitioner's complaints and exams were focused on the wrist. Dr. Rotman also opined that the injection to the right 3rd finger MCP joint was not related to the occurrence of a direct blow on the opposite side of the hand. He believed it was arthritic. He believed that a torque that hits the dorsal ulnar aspect of the hand would not torque the elbow at all in the direction that an acute cubital tunnel would occur.

However, Dr. Rotman also opined that if the force of the tree coming down had thrown petitioner's elbow into the ground that would be a direct blow to the inner elbow that could cause an acute cubital tunnel. The arbitrator finds this significant, especially given petitioner's credible testimony that once he saw the trunk was going to come towards him his right arm hit the ground.

Dr. Neumeister noted that it was significant that after the surgery petitioner's pain in his middle finger, and the numbness and tingling in his right little and ring finger had resolved. He was of the opinion that although

the wrist is a little bit of distance away from the elbow, the injury may have been related to how petitioner was having to hold his hand or wrist in a certain amount of elbow flexion, or when the elbow was bent it potentially stretched the nerve. Dr. Neumeister was of the petitioner that petitioner had an injury to the nerve branch right at the wrist area that resolved, but flared up at the elbow. He opined that although the right elbow was not directly traumatized, it may have been traumatized as a result of the position petitioner had to hold it in as a result of the injury, or any swelling or inflammation that may have contributed to the compression. Dr. Neumeister opined that when petitioner completed cutting through the trunk of a large tree with a chain saw, and the trunk rolled over the dorsal aspect of his right hand, twisting his right hand and forearm until it pinned the back of his hand to the ground, this could be consistent with an injury to the dorsal cutaneous branch of the right ulnar nerve. He further opined that if the force of the trunk caused petitioner's forearm to twist in a clockwise direction, and out away from his body, or if the force of the rolling trunk also forced his elbow to strike the ground while twisted outward, or if petitioner pulled his right arm from a twisted, pinned position with enough strength to free his hand under a 1,000 pound log, these events could also potentially cause an injury to the right ulnar nerve. Dr. Neumeister further opined that if petitioner's symptoms were not there prior to the alleged injury, and he had them subsequent to the injury, then the injury could have caused or contributed to petitioner's ulnar neuropathy. Dr. Neumeister also found it significant that petitioner' symptoms of numbness and tingling did not resolve until after the cubital tunnel was released.

Based on the above, the arbitrator finds both Dr. Neumeister and Dr. Rotman were of the opinion that if the force of the tree coming down had thrown petitioner's elbow into the ground that would be a direct blow to the inner elbow that could cause an acute cubital tunnel. Given that petitioner provided unrebutted testimony that is what happened to his hand and arm, the arbitrator finds the petitioner's current condition of ill-being as it relates to his right hand/arm causally related to the injury petitioner sustained on 3/24/15. The arbitrator further bases this opinion on the fact that petitioner had no problems with his right hand/elbow prior to the injury on 3/24/15; that his symptoms were continual until he underwent the right cubital tunnel release and injection into the right long finger MCP joint; and that his symptoms resolved right after his right cubital tunnel release and injection into the right long finger MCP joint.

J. WERE 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 petitioner's current condition of ill-being as it relates to his right arm/hand causally related to the injury he sustained on 3/24/15 the arbitrator finds the treatment petitioner received for his right hand/arm from 3/24/15 through 2/18/16 was reasonable or necessary to cure or relieve petitioner from the effects of the injury he sustained on 3/24/15.

Based on the above, as well as the credible evidence, the arbitrator finds the respondent shall pay all reasonable and necessary medical services related to petitioner's right hand/arm from 3/24/15 through 2/18/16. Respondent shall also reimburse petitioner for any out of pocket expenses related to the reasonable and necessary medical expenses he received for his right hand/arm from 3/24/15 through 2/18/16. Respondent shall be given credit for medical benefits that have been paid, and respondent shall hold petitioner harmless from any claims by any providers of the services for which respondent is receiving this credit, as provided in Section 8(j) of the Act

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner claims he was temporarily totally disabled from 2/9/16 through 2/28/16. Respondent does not dispute this claimed period, however, they do dispute liability.

Having found petitioner's current condition of ill-being as it relates to his right arm/hand causally related to the injury he sustained on 3/24/15 the arbitrator finds the petitioner was temporarily totally disabled from 2/9/16 through 2/28/16, a period of 2-6/7 weeks.

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

As a result of the injury on 3/24/15 the petitioner underwent a right cubital tunnel release and an injection to the right long finger MCP joint. Petitioner was released to full duty work without restrictions on 2/29/16.

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 truck driver/laborer at the time of the accident and was released to full unrestricted work on 2/29/16, and has worked in that capacity without incident or further medical treatment since that date. Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 54 years old at the time of the accident. Because of this and the fact that petitioner is currently working in his regular duty job without restrictions, 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 no evidence was offered with respect to petitioner's future earnings. 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 the last medical record offered into evidence was the report of Dr. Neumeister dated 2/18/16. At that time petitioner was doing very well and had good return of sensation in his ulnar sided digits. Petitioner's right long MCP joint seemed to have improved range of motion and less tenderness since injection. Petitioner was released as needed, and released to return to work on 2/29/16 without restrictions. Petitioner testified that he has not had any tingling or numbness, but his strength is decreased and his right arm fatigues a lot easier. He also reported that repetitive activities are harder; it is uncomfortable to use power equipment; and he experiences weakness when he works overhead with his arms extended. He stated that if he has to hold anything heavy for an extended period of time he uses his left hand.

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 his right arm pursuant to §8(e) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rodney Bowman,

Petitioner,

vs. NO: 17WC 15942

Otto Baum Company, 19IWCC0059

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 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 March 1, 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: JAN 28 2019
SJM/sj
O-12/6/2018
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 who found that Petitioner's current condition of ill-being of his left shoulder was causally related to a work-related accident on May 3, 2017. The Arbitrator awarded Petitioner 38&1/7 weeks or temporary total disability benefits (to the date of arbitration in this proceeding pursuant to Section 19(b)), $62,093.40 in current medical expenses, and ordered Respondent to authorize and pay for prospective treatment recommended by Dr. Merkley. I would have found that Petitioner did not sustain his burden of proving the work-related accident caused the current condition of ill-being and denied compensation.

Petitioner alleged an accident in which he fell and landed on his left shoulder. At Arbitration, Respondent disputed accident, but did not argue the issue on review. The medical records reveal that prior to the accident, Petitioner had serious issues with his left shoulder. On October 6, 2016, he reported to his rheumatologist, Dr. Couri that due to his left-shoulder condition he had difficulty performing his job as a cement worker and was probably going to apply for Social Security Disability. He made a similar statement to his successor rheumatologist, Dr. Hanna, on March 9, 2017.

Respondent's Section 12 medical examiner, Dr. Lieber testified that the MRI showed "evidence of significant preexisting abnormalities in the shoulder that had no relationship to the alleged May event and there was no evidence of an acute traumatic injury to the shoulder."

Specifically, he noted that labral tear with paralabral cyst was degenerative in nature and that the surgery performed by Dr. Merkley was related to his underlying pre-existing arthritic condition and not the alleged work accident.

In addition, in his deposition, Dr. Merkley acknowledged that much of the pathology noted in the MRI could have been degenerative in nature. Finally, Dr. Merkley testified he based his opinion that the accident caused Petitioner's condition and the need for surgery on Petitioner's reporting to him "that he had no previous problems with the shoulder prior to the fall," a premise which is clearly incorrect. Therefore, I find the opinions of Dr. Lieber more persuasive than those of Dr. Merkley.

For the reasons stated above, I would have found that Petitioner did not sustain his burden of proving the work-related accident caused the current condition of ill-being necessitating surgery 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

BOWMAN, RODNEY
Employee/Petitioner

Case# **17WC015942**

OTTO BAUM COMPANY
Employer/Respondent

19IWCC0059

On 3/1/2018, 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 1.83% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5354 STEPHEN P KELLY
ATTORNEY AT LAW LLC
2710 N KNOXVILLE AVE
PEORIA, IL 61604

1337 KNELL LAW LLC
CHARLES D KNELL
504 FAYETTE ST
PEORIA, IL 61603

19IWCC0059

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Rodney Bowman
Employee/Petitioner

v.

Otto Baum Company
Employer/Respondent

Case # 17 WC 15942

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other ___________

FINDINGS

On the date of accident, **May 3, 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.

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned **$66,560.00**; the average weekly wage was **$1,280.00**.

On the date of accident, Petitioner was **51** years of age, ***single*** with **1** dependent child.

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

Respondent shall be given a credit of **$6,826.66** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$6,826.66.**

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

Respondent shall authorize the treatment recommended by Dr. Merkley, including, but not limited to, the recommended post-operative care.

Respondent shall pay the reasonable and necessary medical services in the amount of **$62,093.40** (*i.e.*, as included in Petitioner's Exhibit 5) as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid under its group health plan under Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$853.33**/week for **38 1/7** weeks, commencing **May 8, 2017 through January 29, 2018,** as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$6,826.66** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$6,826.66.**

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

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

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

Melinda M. Rowe-Sullivan
Signature of Arbitrator

2/27/18
Date

ICArbDec19(b)

MAR 1 - 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Rodney Bowman
Employee/Petitioner

Case # 17 WC 15942

v.

Consolidated cases: N/A

Otto Baum Company
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he started in the union in 1987 as a cement mason and concrete finisher. He testified that when he first started he worked for River City Construction, where he worked for three years. He testified that he then went to Wiegand Concrete, where he finished concrete. He testified that he did a lot of city sidewalks and curbs and that it was mostly flat work. He testified that his work required him to be on his hands and knees every day and that he is required to use both upper extremities.

Petitioner testified that he was employed by Respondent on two different occasions, the most recent of which was when he began working again for Respondent in February of 2017. He testified that he did cement masonry work and that he was able to perform these activities from February of 2017 through the date of accident.

Petitioner testified that on May 3, 2017, he had an accident. He testified that on the date of accident, he was at Midland School in Lacon where two co-workers were striking off most of the time and he was setting screeds. He testified that when they were closer to the wall, he and another co-worker would strike off down the wall. He testified that his co-workers went to lunch and he went to his truck to eat. He testified that he came back in, got on his knee boards and was sliding down the wall. He testified that when he got down to the end, there was a door opening which had a header (*i.e.*, board) that was sticking up from the floor. He testified that when he stepped off his knee boards, his foot tripped and he caught the edge of the board and tripped. He testified that he had his hard hat and tools in both hands. He testified that when he fell out onto the concrete, he tried to catch himself with his left hand and felt a pop in his left shoulder.

Petitioner testified that when he fell, he noticed his shoulder was hurting badly. He testified that after it happened, he finished up what he was doing, picked up his tools and leaned his knee boards against the wall. He testified that he told the foreman on the job, Paul Wilkerson, that his left arm was killing him. He testified that his left elbow and shoulder were hurting and that he had scrapes on his arm where he fell. He testified that he said to Paul that if he did not need him, he was going to take off. He testified that it was about 1:00 pm in the afternoon and that he was not able to finish the job that day and went home.

Petitioner testified that the next day, he went to the emergency room at UnityPoint Methodist. He testified that the medical records indicating that he told them that he lost his balance were not accurate and that he tripped on the header that was sticking up. He testified that at the hospital, they took x-rays of his left shoulder and elbow. He testified that he then went to another doctor, Dr. Hoffman. He testified that

he had another attorney at that time and that he decided to go to Dr. Hoffman, which was one of the names given to him by his former attorney.

Petitioner testified that he started treating with Dr. Hoffman on May 8, 2017, at which time he ordered an MRI of his left shoulder. He testified that on May 12, 2017, he had an MRI of his left shoulder. He testified that on May 17th Dr. Hoffman referred him to an orthopedic doctor, but that he was unable to go and was told that he needed to turn it in to his own insurance. He testified that he did not go to IWIRC because he was already going to Dr. Hoffman. He testified that he believed that he saw Dr. Hoffman approximately three times in May of 2017 and that the pain in his left shoulder did not go away. He testified that it was a sharp pain and that he felt like he was being stabbed with a knife. He denied having had this kind of pain before.

Petitioner testified that he eventually saw Dr. Merkley by using his own insurance and that he saw him in August of 2017. He testified that at that time, Dr. Merkley wanted to schedule surgery but it was denied. He testified that in July of 2017, Respondent had him seen by Dr. Lieber. He denied telling Dr. Lieber that he injured his right shoulder and testified that he told him that he injured his left shoulder.

Petitioner testified that in the months of June through September of 2017, his pain never went away and his range of motion was never full. He testified that he had surgery with Dr. Merkley in November on his left shoulder and that he has been undergoing follow-up care with Dr. Merkley since the surgery. He testified that Dr. Merkley said that he could not believe how well he was doing. He testified that he has not yet been released to full duty and that Respondent has never offered him a job within his restrictions. When asked if he had ever been given a light duty job offer leading up to surgery, Petitioner testified that "Todd" texted him the day after he was hurt on May 4, 2017 that he had some caulking that he could do, but that this was the only time he was offered work.

Petitioner testified that currently, the pain that he had had before surgery was gone and that he could move his arm now up and down but was lacking quite a bit of motion out to the side. He testified that his next appointment was scheduled for February 23rd with Dr. Merkley. He denied having sustained any other accidents to his left shoulder other than the one at issue.

Petitioner testified that he received treatment for rheumatoid arthritis before the date of accident and that he first sought treatment with Dr. Couri in 2011 for rheumatoid arthritis. He testified that in 2011, he had pains in a lot of his joints including his knees, elbows, ankles, and shoulders, but that it was nothing like the pain he felt when he fell. He testified that he was given medications for his complaints, including Vicodin and Tramadol. He testified that he continued treating with Dr. Couri through the fall of 2016. He testified that he wondered whether or not he could continue to do cement work, but that he would probably never give up the trade until he could no longer walk.

Petitioner testified that in March of 2017, he came under the care of Dr. Hanna since Dr. Couri had retired. He testified that when he saw Dr. Hanna in March of 2017, he had no complaints to his shoulders at that time. He testified that from April 13, 2017 until the date of accident he did not go to the doctor for arthritis complaints, and he further denied seeing any other doctors during this timeframe for his left shoulder.

Petitioner testified that he was asking for his medical bills to be paid and that he was also asking for temporary total disability benefits for being off work since May 4, 2017.

On cross examination, Petitioner testified that he was married in July and that Respondent's Exhibits 13 and 14 were photos of him on the dance floor at his wedding. When asked if he had any difficulties dancing with his left shoulder that evening, Petitioner responded that he could not lift his arm over his head.

On cross examination, Petitioner testified that most of his medications were for pain from his arthritis.

On cross examination, Petitioner testified that he believed that a co-worker named Jared saw him at the time of the accident because he was laughing. He testified that after he fell, he got up and talked to Paul Wilkerson.

On cross examination, Petitioner testified that he has group health insurance through the union and that he believed that they had paid for his treatment. He testified that he did not know the extent that was paid by the union, and that he was still getting bills in the mail and was being turned over to collection agencies.

On redirect, Petitioner testified that he was never provided authorization for physical therapy or an injection and that he put his medical bills through his group insurance because Respondent would not pay them.

Paul Wilkerson was called as a witness by Respondent at the time of arbitration. Mr. Wilkerson testified that he is employed by Respondent and that he is a finisher foreman. He testified that he knows Petitioner and that he also worked with him previously at River City Construction. He testified that he belonged to Local 18, the same union that Petitioner belongs to.

Mr. Wilkerson testified that on the date of accident, Respondent had a job at Midland School District and that they were working on concrete floors, curbs and sidewalks. He testified that in May of 2017, they were working on pouring the high school gym floor. He testified that on the date of accident, they were striking off and finishing concrete. He testified that Petitioner worked through the lunch hour that day.

Mr. Wilkerson testified that at some point after lunch, he heard something when he was outside the building, not too far from the corner. He testified that as he was walking towards the corner, he saw Petitioner on the ground outside the building/gymnasium area. He testified that when he saw Petitioner on the ground, he remembered that his feet were close to the door and that his head was away from it. He testified that he was not sure how Petitioner was lying on the ground, but that he believed he was on his left side. He denied having seen Petitioner fall. He testified that he walked around the corner, that Petitioner was on the ground and that he asked him if he was alright. He testified that Petitioner was "working" his arm a little bit, but that they did not have a conversation about it. He testified that he did not ask Petitioner if he needed to see a doctor and that Petitioner asked if he could be the first person to go, which was fairly common.

When asked if anything that he saw on the date of accident or his interaction with Petitioner caused him to fill out an incident report, Mr. Wilkerson responded that it did not occur to him to do it and that it was not unusual for there to be bumps and scratches during the course of any given day. He testified that if he knew Petitioner was going to see a doctor, he would have filled out the accident report. He testified that he eventually filled out a report.

On cross examination, Mr. Wilkerson testified that Petitioner was able to work February through April of 2017 with no problems. He testified that he had no evidence that Petitioner could not do his work prior to the date of accident. He denied ever pulling Petitioner off the job before the date of accident.

On cross examination, Mr. Wilkerson conceded that Petitioner could he have said that his arm was bothering him and that he wanted to go home on the date of accident.

The Application for Adjustment of Claim was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The exhibit was duplicative of that as contained in Arbitrator's Exhibit 1. (PX1; AX1).

The medical records of Dr. Daniel Hoffman were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on November 7, 2017, at which time it was noted that he had pain in the left shoulder, that while at work on May 3, 2017 he was working on a slab and tripped over a board and fell two feet off the slab onto his left shoulder and that he then began to have pain in the left shoulder. It was noted that an MRI was done showing a partial thickness tear of the supraspinatus tendon and that he had been seen by Dr. Merkley, who had scheduled surgery at Proctor Hospital. Petitioner underwent a pre-operative physical and was cleared for surgery. At the time of the August 31, 2017 visit, it was noted that Petitioner was seen for a rash, was assessed with a fungal infection and was given a script for Lotrisone. At the time of the August 30, 2017 visit, it was noted that Petitioner continued to have pain in the left shoulder and was scheduled for surgery at the end of September. The assessment was noted to be that of large labral tear and left shoulder strain. It was noted that Petitioner was to remain off work and was to schedule a pre-operative visit prior to surgery. A work slip was issued on August 30, 2017, taking Petitioner off work until his recheck appointment on September 20, 2017. A work slip was issued on August 2, 2017, taking Petitioner off work until his recheck appointment on August 30, 2017. (PX2).

The records of Dr. Hoffman reflect that Petitioner was seen on August 2, 2017, at which time it was noted that he continued to have pain in the left shoulder. The assessment was noted to be that of shoulder strain and large labral tear. Petitioner was instructed to continue the medications and remain off work. At the time of the July 12, 2017 visit, it was noted that Petitioner continued to have pain in the left shoulder and was awaiting an evaluation in Chicago. The assessment was noted to be that of large labral tear and shoulder strain. Petitioner was instructed to continue the medications and remain off work. A work slip was issued on July 12, 2017, taking Petitioner off work until his recheck appointment on August 2, 2017. At the time of the May 8, 2017 visit, it was noted that Petitioner was employed by Otto Baum as a cement mason, that while at work on May 3, 2017 he was working on a slab and tripped over a board, and that he fell two feet off the slab onto his left shoulder. It was noted that Petitioner began to have pain in the left shoulder and was seen and evaluated in the Emergency Room, where x-rays indicated a possible lateral clavicle fracture at the level of the AC joint. It was noted that since the injury, Petitioner had had pain and limitation of motion of the left shoulder. The assessment was noted to be that of possible lateral clavicle fracture, shoulder strain and possible rotator cuff tear. Petitioner was instructed to be off work and to undergo an MRI of the shoulder. A work slip was issued on May 8, 2017, taking Petitioner off work until his recheck appointment on May 22, 2017. (PX2).

The records of Dr. Hoffman reflect that Petitioner was seen on May 17, 2017, at which time it was noted that he had continued pain in the left shoulder and limitation of motion. The assessment was noted to be that of shoulder strain and large labral tear. Petitioner was referred to orthopedics and was instructed to remain off work. A work slip was issued on May 17, 2017, taking Petitioner off work until his recheck appointment on May 31, 2017. At the time of the May 31, 2017 visit, it was noted that Petitioner continued to have limitation of motion and pain in the left shoulder. The assessment was noted to be that of shoulder strain and large labral tear. Petitioner was instructed to remain off work, continue the anti-inflammatory medications and await an orthopedic opinion. A work slip was issued on May 31, 2017, taking Petitioner off work until his recheck appointment on June 21, 2017. At the time of the June 21, 2017 visit, it was noted that Petitioner continued to have pain in the left shoulder as a result of the work-related injury. The assessment was noted to be that of shoulder strain and large labral tear. Petitioner was instructed to remain off work, continue the anti-inflammatory medications and await an orthopedic opinion. A work slip was issued on June 21, 2017, taking Petitioner off work until he was released by Dr. Hoffman's office. (PX2).

The Left Shoulder MRI Interpretive Report dated May 12, 2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that the MRI of the left shoulder performed at UnityPoint Health Proctor on that date was interpreted as revealing (1) partial-thickness articular and bursal surface tearing of the supraspinatus tendon; no full-thickness rotator cuff tear; (2) large labral tear predominantly involving the posterior labrum; associated parameniscal cyst extending into both the suprascapular and spinoglenoid notch, measuring approximately 3.5 cm in total length along the posterior aspect of the glenoid; this could exert mass effect on the suprascapular nerve; there is mild atrophy of the infraspinatus muscle, which could be related to that process; (3) degenerative changes at the AC joint without evidence of acute fracture of the distal clavicle; (5) mild subacromial/subdeltoid bursitis. (PX3).

The Left Shoulder and Elbow X-ray Interpretive Report dated May 4, 2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that x-rays of the left shoulder performed at UnityPoint Health Methodist on that date were interpreted as revealing suspect lateral clavicle fracture at the level of the AC joint. The records further reflect that the x-rays of the left elbow also performed at UnityPoint Health Methodist on that date were interpreted as revealing no acute bony abnormality. (PX4).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 5.

The medical records of Midwest Orthopaedic Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records reflect that Petitioner was seen on November 29, 2017, at which time it was noted that he was doing well and had typical post-operative pain. It was noted that Petitioner was still taking and needing Percocet almost daily and that he had no other complaints. The assessment was noted to be that of status post left shoulder arthroscopy with decompression, distal clavicle excision, biceps tenodesis and subscapularis repair. It was noted that Petitioner had already started therapy. The Initial Evaluation at Professional Therapy Services dated November 22, 2017 noted that Petitioner fell at work on May 3, 2017 while "trowing" a raised concrete floor along a wall, that he went to step off the new floor and tripped over a "form" and fell down off the floor that he was standing on, that he was bracing himself with an outstretched left arm and that he heard a "pop" when his had hit the hard concrete on the ground. It was noted that Petitioner was able to reach overhead into kitchen cabinets and closet shelves prior to his injury with the left shoulder without an issue and that his wife was currently assisting him with dressing and bathing tasks. It was noted that Petitioner's prior and existing conditions included fibromyalgia and rheumatoid arthritis. (PX7).

The records of Midwest Orthopaedic Center reflect that Petitioner was seen on August 16, 2017, at which time it was noted that he was working for Otto Baum when he tripped over a header and fell onto a pile of excess concrete which had hardened and that he landed on his left side. It was noted that Petitioner felt a pop at his left shoulder and that he had been off work since the injury on May 3rd. It was noted that Petitioner denied any previous problems at the shoulder, that he had no neck pain, numbness, tingling or radiation and that he had had no injections or physical therapy for the shoulder. The impression was noted to be that of (1) partial rotator cuff tear, left shoulder; (2) acromioclavicular joint arthrosis/synovitis; (3) degenerative posterior labral tear with paralabral cyst. It was noted that based on the MRI, Dr. Merkley thought that the acute injury was to the rotator cuff and that there was some subdeltoid bursal fluid, which could be consistent with acute injury. It was noted that Petitioner had elected to undergo arthroscopy with decompression, distal clavicle excision, labral debridement and possible rotator cuff repair. (PX7).

The medical records of UnityPoint Methodist were entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The records reflect that Petitioner was seen in the Emergency Room on May 4, 2017, at which time it was noted that the incident occurred yesterday, that Petitioner lost his balance about 13:30 and that the injury mechanism was a direct blow. It was noted that Petitioner came to the Emergency Room via personal transport and that there was an injury to the left elbow and left shoulder. It was noted

that the pain was moderate and that final diagnoses were that of contusion of left elbow and sprain of the left shoulder. It was noted that at 15:20 a conversation was had with Petitioner, that he was informed of radiology findings and that he indicated he had talked to his employer and requested a note for work. It was noted that Petitioner was advised to follow-up at IWIRC for notes for further work. Petitioner was discharged. (PX8).

The medical records of Dr. Hicok were entered into evidence at the time of arbitration as Petitioner's Exhibit 9. The records reflect that Petitioner was seen on June 26, 2017 for an annual wellness exam. It was noted that Petitioner recently had a fall at work and tore his rotator cuff and labrum on the left, that he was seeing someone else for this and that he had not yet been able to get with an orthopedic physician yet. At the time of the March 6, 2014 visit, Petitioner was seen for pain medication refills. The location of Petitioner's pain was noted to be that of the back, neck, knee, shoulders, wrists and hands. The assessment was noted to be that of anxiety, chronic pain syndrome and rheumatoid arthritis. A phone note dated September 27, 2013 visit, noted that Petitioner called for a refill of pain medications. At the time of the July 18, 2013 visit, Petitioner was seen for a wellness exam. It was noted that Petitioner was seeing a rheumatologist and was considering disease-modifying agents. (PX9).

The records of Dr. Hicok reflect that Petitioner was seen on October 29, 2012, at which time it was noted that his chief complaint was that of medication refills and joint pain all over. It was noted that Petitioner had pain in every joint including the back, neck, hips, knees, heels, ankles, hands, wrists and shoulders. The assessment was noted to be that of rheumatoid arthritis with some progression by stable activity and medication use. (PX9).

The transcript of the deposition of Dr. Michael Merkley dated December 8, 2017 was entered into evidence at the time of arbitration as Petitioner's Exhibit 10. Dr. Merkley testified that he is board-certified in orthopedic surgery, that his specialty is in sports medicine, that he treats individuals with shoulder problems and sport-related knee injuries and that approximately 70% of his practice is shoulder surgery. (PX10).

Dr. Merkley testified that he first saw Petitioner on August 16, 2017, that he stated that he was employed as a concrete finisher, that he indicated that he was working for Otto Baum when he tripped over a header and that he fell into a pile of excess concrete which had hardened, landing on his left side. He testified that Petitioner stated that he felt a pop at his left shoulder and that he had been off work since the injury. He testified that Petitioner denied any previous problems at the shoulder, that he did not have any neurologic symptoms and that he had had no steroid injections or therapy as initial treatment for his shoulder. He testified that Petitioner indicated that the accident occurred on May 3rd. He testified that the x-rays performed at the office showed degenerative changes at the acromioclavicular joint and that one could not see tendinous structures on an x-ray. He testified that he reviewed the MRI and that his interpretation was that there was high signal intensity signal at the distal clavicle with fluid in the joint, that there was a partial-thickness supraspinatus tear with surrounding bursal fluid which could possibly indicate some acuity and that there was a chronic-appearing degenerative posterior labral tear with paralabral cyst. (PX10).

Dr. Merkley testified that his impression was that Petitioner had a partial rotator cuff tear at the left shoulder, that he had AC joint arthrosis with active synovitis and that he had a degenerative posterior labral tear with paralabral cyst. He testified that after discussing treatment options, Petitioner elected to undergo arthroscopy at his left shoulder. He testified that on November 14, 2017, Petitioner underwent an arthroscopic subacromial decompression with distal clavicle excision, arthroscopic subscapularis repair and arthroscopic biceps tenodesis.[1] He testified that Petitioner's post-operative diagnosis was that of a tear of

[1] The Operative Report dated November 14, 2017, which was marked as Deposition Exhibit 4, noted that Petitioner underwent (1) arthroscopy with subacromial decompression, distal clavicle excision, left shoulder; (2) arthroscopic

the upper border of the subscapularis tendon left shoulder, superior labral tearing with biceps tendon subluxation, left shoulder and AC joint arthrosis of the left shoulder. He testified that the post-operative diagnosis was consistent with the complaints Petitioner provided to him when he was first seen. (PX10).

Dr. Merkley testified that at the last post-operative visit on November 29, 2017, Petitioner had typical post-operative pain, that he was still taking his narcotic pain medication and that the exam did not show anything out of the ordinary. He testified that Petitioner was to continue his physical therapy and to start weaning off the pain medication. (PX10).

Dr. Merkley testified that he believed that the medical care that he had given was reasonable and necessary to treat the diagnoses and that the surgery he recommended was needed to treat the diagnoses. He testified that he believed that the surgery he performed was related to the work injury in that Petitioner stated that he had no previous problems at the shoulder prior to the fall, that the fall caused pain and that the surgery was indicated due to pain that had persisted for six months without resolution. (PX10).

On cross examination, Dr. Merkley agreed that he relied on the MRI of May 12, 2017 in addition to the physical findings on August 16, 2017. He testified that as to the mild partial-thickness articular and bursal surface tearing of the supraspinatus tendon, he believed that this was degenerative. He agreed that there was no evidence of a full-thickness rotator cuff tear. He agreed that the infraspinatus, teres minor and subscapularis appeared within normal limits on the MRI. He testified that the moderate to advanced AC joint arthropathy was not related to the injury and that what he treated Petitioner for was the pain at the AC joint which could be related to the injury. He testified that the findings on the MRI were not related, but that the pain complaints were related to the accident. He agreed that the deformity to the distal clavicle was not related to the accident and that he did not disagree with the statement that marrow edema appeared more localized to the joint and degenerative in nature than reflective of recent trauma. (PX10).

On cross examination, Dr. Merkley agreed that there was no convincing evidence of an acute fracture of the distal clavicle based on the MRI and his examination. He testified that the statement about moderate lateral downsloping in the coronal plane of the acromion that could contribute towards impingement was not really a finding that a radiologist should be making, that radiologists should not diagnose impingement syndrome and that radiologists should diagnose that the space is narrower. He testified that Petitioner had pain in the bursa which he believed was from bursitis and not so much from classical impingement syndrome. He testified that bursitis could be the result of the accident or it could be pre-existing. He agreed that there was no evidence of a tear of the long head of the biceps tendon. (PX10).

On cross examination, Dr. Merkley testified that he thought Petitioner's labral tear was degenerative as evidenced by the presence of the paralabral cyst, which indicated chronicity. He agreed that there were certain things that one could not find on an MRI or through a clinical examination until surgery was performed. He agreed that the subscapularis repair and biceps tenodesis were found in surgery and were not revealed on the MRI, that he could not say whether they were in existence prior to May 3, 2017 and that he could not say whether or not they were caused by the accident. (PX10).

On cross examination, Dr. Merkley testified that the supraspinatus tendon where tearing was identified on the MRI was not found to be significant enough that it warranted repair. He testified that the positive findings on the examination of August 16, 2017 were the Neer and Hawkins impingement signs and the painful arc. He testified that Petitioner had tenderness at the distal clavicle and pain with active

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subscapularis repair, left shoulder; (3) acromioclavicular joint arthrosis, left shoulder by Dr. Merkley for a pre-operative diagnosis of recalcitrant left shoulder pain and post-operative diagnoses of (1) tear of the upper border of the subscapularis tendon, left shoulder; (2) superior labral tearing with biceps tendon subluxation, left shoulder; (3) acromioclavicular joint arthrosis, left shoulder.

compression testing, which was consistent with a painful AC joint. He testified that the supraspinatus strength testing was weak, but that he felt that it caused pain and the arm gave way so he felt that it was pain-related. He agreed that the degenerative posterior labral tear with paralabral cyst was not related to the accident of May 3, 2017. (PX10).

On redirect, Dr. Merkley agreed that his opinions after cross examination had not changed since direct examination and that the accident could have caused pain to the shoulder area, necessitating the surgery he performed. (PX10).

The Application for Adjustment of Claim was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The exhibit was duplicative of that as contained in both Arbitrator's Exhibit 1 and Petitioner's Exhibit 1. (RX1; AX1; PX1).

The Response to 19(b) Petition for Immediate Hearing was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The Response to Motion for Medical Authorization Pursuant to 820 ILCS 305/8(a) was entered into evidence at the time of arbitration as Respondent's Exhibit 3.

The medical records of UnityPoint Health were entered into evidence at the time of arbitration as Respondent's Exhibit 4.[2] The records were effectively duplicative of those as contained in Petitioner's Exhibit 8. (RX4; PX8).

The Letter from Petitioner's Prior Attorney dated May 10, 2017 to Respondent was entered into evidence at the time of arbitration as Respondent's Exhibit 5.

The medical records of Midwest Orthopaedic Center (pertaining to 2007 treatment) were entered into evidence at the time of arbitration as Respondent's Exhibit 6. The records pertained to treatment rendered to Petitioner in 2007 for a right distal fibula fracture after having fallen down stairs on June 10, 2007. (RX6).

The transcript of the deposition of Dr. Lawrence Lieber dated January 24, 2018 was entered into evidence at the time of arbitration as Respondent's Exhibit 7. Dr. Lieber testified that he is board-certified in orthopedic surgery. He testified that the majority of his practice is that of general orthopedics. (RX7).

Dr. Lieber testified that he performed an evaluation of Petitioner on July 17, 2017, at which time he gave a history that he had an alleged work event on May 3, 2017 while working for Otto Baum as a cement mason. He testified that Petitioner indicated that he was troweling a floor and came across a doorway, that he went to step over a board, tripped and fell, landing onto his hand and then rolled forward onto his left shoulder. He testified that Petitioner stated that he placed his hand initially on the ground for support and that as he rolled forward, he felt a pop in his shoulder. He testified that Petitioner indicated to him that there was no prior history of problems with the left shoulder. (RX7).

Dr. Lieber testified that Petitioner's subjective complaints were that of left arm pain, weakness in the shoulder but no popping, pain in the left shoulder at night and difficult with overhead activity. He testified that Petitioner also complained of a stiffness about the shoulder with swelling and also numbness in his arm down his hand. He testified that Petitioner indicated that he was a cement mason and that it required him to stand, ambulate, bend, push and pull heavy objects, perform overhead activity and lift up to 100 pounds. He testified that Petitioner indicated that his hobbies included racing cars. He testified that his review of the MRI films was that Petitioner had rotator cuff tendinitis, AC joint arthritis, degenerative labral tears with associated paralabral cyst and some subdeltoid bursitis. (RX7).

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[2] Any highlighting or markings that appear in the exhibit were not made by the Arbitrator.

Dr. Lieber testified that his diagnosis was that of status post contusion/strain of the left shoulder with underlying AC joint arthritis and rotator cuff syndrome. He testified that he felt that the MRI showed evidence of significant pre-existing abnormalities in the shoulder that had no relationship to the alleged May event and that there was no evidence on the MRI of acute traumatic injury to the shoulder. He testified that associated with the labral tear was a paralabral cyst, which was a degenerative cyst by definition that occurred over time associated with increased fluid due to the degenerative labral tearing in the first place, and that the finding was not in any way related to the alleged accident in May 2017. He testified that from an objective standpoint he felt that Petitioner could go back to work full duty but that subjectively and based on his examination, Petitioner showed significant inability to utilize the shoulder in an active manner and felt that he might require some restrictions at work consisting of lifting of 25 pounds, no use of the left upper extremity in an overhead position and minimal use of the left upper extremity. He testified that these restrictions would be based on Petitioner's subjective complaints. (RX7).

Dr. Lieber testified that he thought that Petitioner should undergo an injection with associated therapy for up to 3-4 weeks. He testified that after the conclusion of the cortisone injection and therapy, he thought that Petitioner could go back to work with no restrictions. He testified that he felt that after the recommended injection with associated four weeks of therapy, Petitioner would have reached maximum medical improvement as it related to the alleged May 2017 event. He testified that he thought that Petitioner's subjective complaints were out of proportion to the objective evidence. (RX7).

Dr. Lieber testified that the finding of severe restriction of range of motion was an objective finding, meaning that Petitioner would not move his shoulder based upon his subjective ability to prevent his shoulder from moving. He testified that based on the MRI findings and the lack of swelling, ecchymosis, deformity or atrophy of the left shoulder, the range of motion restriction was inconsistent with the MRI findings. (RX7).

Dr. Lieber testified that he authored a second report dated September 6, 2017, wherein he referenced three times the right shoulder. He testified that his reference to the right shoulder with either a typographical error or he misspoke. He testified that after reviewing Dr. Merkley's office note from August 2017, he felt that surgical intervention was not indicated and that he continued to believe that the cortisone injection along with therapy would have been of benefit to Petitioner. He testified that if Dr. Merkley did proceed with surgery, he felt that it was related to the preexisting abnormalities and had no relationship to the May 2017 event. (RX7).

On cross examination, Dr. Lieber agreed that he was provided no evidence of Petitioner having prior left shoulder problems predating May 3, 2017. He agreed that he was provided no evidence by the employer of Petitioner receiving any prior left shoulder treatment predating May 3rd. When asked whether he had any knowledge of Petitioner's work history leading up to May 3, 2017, Dr. Lieber responded that he did not other than the fact that he was a cement mason. He testified that he did not have any evidence or any knowledge of Petitioner missing any work as a cement mason prior to May 3, 2017 for left shoulder complaints. He testified that he thought that Petitioner was telling the truth about the incident and that he believed that Petitioner had the accident as described on May 3rd when he tripped over a board, landing on his left hand and rolling onto his left shoulder. (RX7).

On cross examination, Dr. Lieber agreed that he had seen in his practice that the mechanism of injury of falling onto the left hand/arm outstretched could cause injury to the shoulder area. He agreed that the type of accident that occurred had an effect on Petitioner's shoulder, which he classified as a contusion/strain. He agreed that as a result of that contusion/strain, it was his opinion that that diagnosis was related to the described work injury of May 3, 2017. (RX7).

On cross examination, Dr. Lieber agreed that he gave a recommendation regarding medical care and that the medical recommendation was related to the described work injury. He testified that he did not

know that the employer would not authorize the treatment he recommended. He testified that he did not know whether Petitioner's pain went away after the May 3, 2017 accident. He agreed that if the evidence in the case showed that Petitioner's complaints to his left shoulder never went away and that Petitioner was not allowed to get the medical treatment he recommended, the aggravation or injury that occurred to the left shoulder may not have gone away. (RX7).

On cross examination, Dr. Lieber agreed that at the time that he saw Petitioner in July of 2017, he was not at maximum medical improvement. He testified that at the time that he saw Petitioner in July, he could go to work as a cement mason with restrictions but was not able to work full duty. He agreed that if Petitioner did not receive the treatment he recommended, he could not give an opinion whether or not he was still having problems as of January 29, 2018. He agreed that if the evidence showed that Petitioner had left shoulder pain as a result of the work injury, that he was not allowed the medical care that he recommended and that he had pain to the left shoulder for a 6-month period, the pain would be chronic. (RX7).

On cross examination, Dr. Lieber agreed that he was not saying that Dr. Merkley committed malpractice by performing surgery. He agreed that if Petitioner had continuing left arm complaints leading up to the time of surgery that never went away and that he was not allowed the medical care and treatment that was recommended, he thought that the surgery performed by Dr. Merkley was reasonable and necessary. He testified that if Petitioner's pain never went away, he did not think that the surgery would be related to the work injury of May 3, 2017 based on his evaluation of the MRI and the objective evidence that he saw in July. (RX7).

On cross examination, Dr. Lieber testified that he did not perform surgery sometimes for individuals who had pain complaints. He testified that he found no evidence that the accident described to him could have aggravated the pre-existing condition. He testified that he did not have any evidence of pain complaints to Petitioner's left shoulder pre-dating May 3, 2017. He agreed that in his second report, there were three mistakes as related to the body part that was involved in the case. (RX7).

On cross examination, Dr. Lieber agreed that he saw Petitioner on one occasion. He agreed that Dr. Merkley would be in a better position to give an opinion on Petitioner's condition of ill-being after July 17, 2017 and testified that this was so because he only saw him in July 2017 and that Dr. Merkley saw him after. He testified that he did not have any criticisms of Dr. Merkley as a physician. (RX7).

The medical records of Unity Point Clinic Rheumatology were entered into evidence at the time of arbitration as Respondent's Exhibit 8. The records reflect that Petitioner was seen on March 25, 2015, at which time it was noted that he was having increased symptoms, that he was frustrated and that he had migratory joint pain. It was noted that Petitioner had some swelling in the wrists and hands. The assessment was noted to be that of inflammatory arthritis. Petitioner was recommended more aggressive therapy and was given a Kenalog injection. At the time of the November 5, 2015 visit, it was noted that Petitioner returned with continued chronic pain. It was noted that Petitioner hurt all over and that his knees, ankles, wrists, back, neck, shoulders and hands were bothering him. It was noted that Petitioner had swelling off and on in his hands, that he worked as a concrete construction worker and that it was hard work on him and that he worked outside most of the time. It was noted that Petitioner had a component of inflammatory arthritis but that Dr. Couri had not seen a lot of synovitis, that Petitioner occasionally had mild swelling in the hands and wrist and that he most likely had a component of osteoarthritis in the wrist also. It was noted that Dr. Couri wondered if Petitioner was evolving into fibromyalgia. Petitioner was recommended to undergo a sleep study and to continue his home exercise program. A Kenalog injection was given on that date. (RX8).

The records of Unity Point Clinic Rheumatology reflect that Petitioner called on August 29, 2016 and wanted to speak with Dr. Couri about disability. At the time of the October 6, 2016 visit, it was noted

that Petitioner returned with continued chronic pain. It was noted that Petitioner hurt "all over," including his peripheral joints, neck and back. It was noted that Petitioner had swelling in his hands in the morning and that they hurt quite a bit. The assessment was noted to be that of rheumatoid arthritis, continued symptoms with not much synovitis. It was noted that Petitioner had not been anxious to take Methotrexate but that Dr. Couri felt that it was the next step. It was noted that Dr. Couri believed that there was an osteoarthritic component in the hands and that he suspected in the spine and knees. It was noted that Petitioner had significant difficulty doing his work as a concrete worker and had done no other work beside that, that he felt he could not continue to do this work much longer and that he wondered about applying for disability. At the time of the November 13, 2016 visit, it was noted that Petitioner returned with continued chronic pain "all over" and that his last Kenalog injection did not help at all. It was noted that Petitioner was getting more frustrated, that he continued to have difficulty working as a cement worker and that he was probably going to apply for disability. It was noted that Petitioner was tender in his hands, wrists, knees, elbows and shoulders with some impingement of his shoulders. The assessment was noted to be that of rheumatoid arthritis. (RX8).

The records of Unity Point Clinic Rheumatology reflect that Petitioner was seen on March 9, 2017 by Dr. Hanna, who noted that he had been under the care of Dr. Couri for management of rheumatoid arthritis and osteoarthritis. It was noted that Petitioner was on chronic prescription opiate therapy with both Hydrocodone and Tramadol and that he had been non-compliant in obtaining x-rays and labs ordered by Dr. Couri in October. It was noted that Petitioner was considering applying for disability due to worsening of arthritis pain on the job and that he noted significant pain in his hands, wrists, back and knees. The assessment was noted to be that of osteoarthritis, multiple sites; osteoarthritis, hands; rheumatoid arthritis by history; low back pain, chronic prescription opiate use. It was noted that Petitioner was to plan to taper analgesic therapy as his clinical symptoms allowed and that a controlled substance agreement was signed. (RX8).

The records of Unity Point Clinic Rheumatology reflect that Petitioner was seen on August 2, 2017, at which time it was noted that he fell at work and injured his left shoulder in May and had been off work since the injury. It was noted that Petitioner was having difficulty navigating through the worker's compensation injury process and had yet to see an orthopedic specialist and that he had retained the services of an attorney. It was noted that Petitioner noted pain with limited range of motion of his left shoulder and that he also reported increased discomfort in multiple other joints. It was noted that Petitioner took Tramadol and Hydrocodone for pain management and that he admitted that he suffered withdrawal symptoms if he did not take Hydrocodone. It was noted that Petitioner noted significant pain in his hands, wrists, back and knees and that he was planning to apply for Social Security Disability. The assessment was noted to be that of osteoarthritis, multiple sites; left labral tear/supraspinatus tear subsequent to work-related injury May 2017; osteoarthritis, hands; rheumatoid arthritis by history, not on DMARD therapy; chronic prescription opiate use. (RX8).

The records of Unity Point Clinic Rheumatology reflect that Petitioner was seen on December 16, 2013, at which time it was noted that he returned with continued variable pain in his joints. It was noted that Petitioner hurt mainly in the hands and shoulders and some in the knees. The assessment was noted to be that of localized inflammatory arthritis. At the time of the July 15, 2013 visit, it was noted that Petitioner returned with continued variable pain. It was noted that his right wrist, knees and the bottom of his feet were bothering him the most and that he was tolerating the medications okay. It was noted that Petitioner continued to be somewhat frustrated about how he was doing. The assessment was noted to be that of inflammatory arthritis, increasing symptoms again. Petitioner was recommended to start Methotrexate. At the time of the March 4, 2013 visit, it was noted that Petitioner returned with continued variable pain. It was noted that the Kenalog injection helped him quite a bit for about two months, that he was having increased pain again in his hands and ankle, that his back was worse in the last 1-1½ months and that it had never bothered him like this. It was noted that Petitioner felt puffiness in his hands and that he had not had

any other definite swelling. The assessment was noted to be that of inflammatory arthritis most likely with a good anti-inflammatory result from Kenalog. Petitioner was recommended to try Methotrexate. (RX8).

The records of Unity Point Clinic Rheumatology reflect that Petitioner was seen on October 22, 2012, at which time it was noted that he returned with continued variable pain. It was noted that in general it sounded like Petitioner was hurting more, that he had continued variable pain in his heels, that he had aching migratory-wise in his arms and leg and that he did not have any definite swelling that he had noticed. It was noted that Petitioner was frustrated. The assessment was noted to be that of history of a diagnosis of rheumatoid arthritis with continued pain, probably combination muscle and joint. It was noted that Petitioner remained seronegative for RA, that Dr. Couri still did not see any definite swelling and that Petitioner was recommended to try Sulfasalazine along with a Kenalog injection. At the time of the June 21, 2012 visit, it was noted that Petitioner returned with continued variable pain. It was noted that in general, it sounded like Petitioner was hurting more and that he finally went for x-rays, but did not do the blood tests. It was noted that Petitioner hurt most at the left heel and that he denied any definite swelling in the joints, but that his hands, knees and ankles could bother him. The assessment was noted to be that of history of a diagnosis of rheumatoid arthritis with probably some increased joint pain still without any obvious swelling. It was noted that Dr. Couri did not see any obvious rheumatoid damage on the x-rays but that they still needed labs and needed to decide on treatment. (RX8).

The records of Unity Point Clinic Rheumatology reflect that Petitioner was seen on February 20, 2012, at which time it was noted that he returned with continued variable pain. It was noted that Petitioner hurt at the neck, back, hands and wrists, that he was stiff in the morning for about 3 hours and that he had not had much in the way of swelling. It was noted that Petitioner cancelled the sleep study and had not done his labs or x-rays. The assessment was noted to be that of history of rheumatoid arthritis without any real definite swelling. Petitioner was recommended a "burst" of Prednisone to see how well it worked for him to assess his anti-inflammatory response. At the time of the August 22, 2011 visit, it was noted that Petitioner was sent in consult by Dr. Hicok for an opinion on the diagnosis and treatment of possible rheumatoid arthritis. It was noted that Petitioner had pain in his back, knees, hands and neck about 6 years ago and that the question of rheumatoid arthritis was raised, apparently from blood tests. It was noted that Petitioner hurt during the day more than at night and that he hurt more at work than in the morning. It was noted that Petitioner's MCPs and PIPs could swell some in the joints and the flexors but not a lot, that his back and knees bothered him more than his hands and neck and that the hands and wrists bothered him some while working. It was noted that Petitioner had had some difficulty doing his work, that he had his own business pouring concrete, that he had a crew and that they did a lot of the physical work but that he still did some of the physical work. It was noted that Petitioner's ankles could hurt some all day, that he had a history of fractures bilaterally, that the right elbow and shoulder bothered him on and off for the past several years and that the knees could bother him some with kneeling more than standing and walking. It was noted that Petitioner was diagnosed with rheumatoid arthritis in the past but that Dr. Couri was not sure on what basis and that he needed to see new labs and hand x-rays. It was noted that Petitioner had a component of osteoarthritis in the joints. (RX8).

Various Photographs were entered into evidence at the time of arbitration as Respondent's Exhibits 9-14.

CONCLUSIONS OF LAW

With respect to disputed issue (C) pertaining to accident, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of his employment with Respondent on May 3, 2017.

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 the case at hand, the Arbitrator finds that Petitioner was performing a task incidental to his employment when his injury occurred. Petitioner testified that he tripped over a form board and it resulted in his falling on his left side and left shoulder. The Arbitrator finds that the histories of accident as described to Dr. Hoffman, Dr. Merkley and Dr. Lieber were fairly consistent with Petitioner's testimony at the time of arbitration. (PX7; PX10; RX7). Furthermore, Paul Wilkerson confirmed that Petitioner did, indeed, fall on that date, and he also noted that Petitioner was having issues with his left shoulder immediately following the accident. As the Arbitrator finds Petitioner to have been a credible witness at the time of arbitration and notes that he appeared to testify in a forthright manner, the Arbitrator finds that Petitioner met his burden of proof in establishing that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on May 3, 2017.

With respect to disputed issue (F) pertaining to causation, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident.

Having reviewed and considered the entirety of the medical evidence in the case, the Arbitrator places greater evidentiary weight upon the opinions of Petitioner's treating physician, Dr. Merkley, than those offered by the Section 12 examining physician, Dr. Lieber. The Arbitrator notes that Dr. Merkley testified that he believed that the surgery he performed was related to the work injury in that Petitioner stated that he had no previous problems at the shoulder prior to the fall, that the fall caused pain and that the surgery was indicated due to pain that had persisted for six months without resolution. (PX10). While Dr. Lieber testified that he felt that the MRI showed evidence of significant pre-existing abnormalities in the shoulder that had no relationship to the alleged May event and that there was no evidence on the MRI

of acute traumatic injury to the shoulder, Dr. Lieber also agreed on cross examination that if the evidence in the case showed that Petitioner's complaints to his left shoulder never went away and that Petitioner was not allowed to get the medical treatment he recommended, the aggravation or injury that occurred to the left shoulder may not have gone away. (RX7). While Petitioner testified that in 2011 he had pains in a lot of his joints including his knees, elbows, ankles, and shoulders, he further testified that it was nothing like the pain he felt when he fell at the time of the incident at issue. Based upon the foregoing, the Arbitrator finds that Petitioner met his burden of proving that his current condition of ill-being is causally related to the accident of May 3, 2017.

With respect to disputed issue (J) pertaining to necessary medical services, in light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's care and treatment was reasonable, necessary, and causally related to his work accident of May 3, 2017. As a result thereof, Respondent shall pay the reasonable and necessary medical services in the amount of $62,093.40 (*i.e.,* as included in Petitioner's Exhibit 5) as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid under its group health plan under Section 8(j) of the Act.

With respect to disputed issue (K) pertaining to prospective medical treatment, in light of the Arbitrator's finding as to the issue of causation, the Arbitrator finds that Respondent shall authorize the treatment recommended by Dr. Merkley, including, but not limited to, the post-operative care.

With respect to disputed issue (L) pertaining to temporary total disability benefits, the Arbitrator notes that Petitioner seeks temporary total disability benefits from May 4, 2017 through January 29, 2018. (AX1).

"[T]o prove temporary total disability, the employee must demonstrate not only that he did not work, but also that he was unable to work." *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 256, 899 N.E.2d 365, 378, 326 Ill. Dec. 148 (2008). The Arbitrator finds that Petitioner has demonstrated that he did not work and was unable to work for the timeframe of May 8, 2017 through January 29, 2018, but that he has failed to demonstrate that he did not work and was unable to work during the timeframe of May 4, 2017 through May 7, 2017.

In so concluding, the Arbitrator notes at the outset that no work slips were entered into evidence at the time of arbitration from Dr. Merkley, but there were work slips from Dr. Hoffman covering the timeframe of May 8, 2017 through September 20, 2017. (PX2). The Arbitrator notes that Dr. Lieber testified that as of the time of the IME on July 17, 2017, he recommended that, subjectively and based on his examination, Petitioner showed significant inability to utilize the shoulder in an active manner and felt that he might require some restrictions at work consisting of lifting of 25 pounds, no use of the left upper extremity in an overhead position and minimal use of the left upper extremity. (RX7).

At the time of arbitration, Petitioner testified that he was asking for temporary total disability benefits for being off work since May 4, 2017, that he has not yet been released to full duty and that Respondent has never offered him a job within his restrictions, but the medical records of UnityPoint Methodist only indicated that Petitioner was advised to follow-up at IWIRC for notes for further work. (PX8). That said, the Arbitrator finds that Petitioner has failed to demonstrate that he did not work and was unable to work during the timeframe of May 4, 2017 through May 7, 2017.

In summary, the Arbitrator finds that Petitioner has demonstrated that he did not work and was unable to work for the timeframe of May 8, 2017 through January 29, 2018, but that he has failed to demonstrate that he did not work and was unable to work during the timeframe of May 4, 2017 through May 7, 2017. As a result of the foregoing, the Arbitrator finds that Respondent shall pay temporary total disability benefits for a period of 38 1/7 weeks, commencing May 8, 2017 through January 29, 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 PEORIA	)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify: Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JERMALL PETTIES,

Petitioner,

19IWCC0060

vs.

NO: 16 WC 586

KEYSTONE STEEL & WIRE,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact and Conclusions of Law

1. Petitioner was employed as a machine operator in Respondent's fence department. On December 1, 2015, during his first day of training on a V-mesh machine, Petitioner felt a sharp pain shoot through his left lower back as he was using a sledgehammer to knock a wrapper off a fence.

2. Petitioner presented to Dr. David Braun at OSF St. Francis Medical Center on the accident date. Dr. Braun diagnosed Petitioner with a lumbar strain and took Petitioner off work.

   On December 3, 2015, Petitioner was seen by Dr. Homer Pena, also of OSF St. Francis Medical Center. Dr. Pena diagnosed Petitioner with a left-sided lumbar strain causing a shift. While under the care of Dr. Braun and Dr. Pena, Petitioner treated with medication, work restrictions, and physical therapy from December 7, 2015 to December 18, 2015.

   On December 29, 2015, Petitioner reported his back was feeling better, and Dr. Pena found

the strain and shift had resolved. Dr. Pena discharged Petitioner, returned him to full duty work, and advised him to continue medication during his first week back at work.

Petitioner testified Respondent accommodated the light duty restrictions provided by OSF St. Francis Medical Center and paid him temporary total disability for his time off work.

3. Petitioner made no attempt to return to work after Dr. Pena released him. Instead, Petitioner's attorney referred him to Dr. Blair Rhode of Orland Park Orthopedics. He first began treating with Lori Welke, Dr. Rhode's physician's assistant ("PA").

   Petitioner presented to Orland Park Orthopedics for the first time on January 5, 2016. PA Welke took Petitioner off work and recommended physical therapy and medication.

   On January 29, 2016, a lumbar spine MRI yielded normal results. On February 1, 2016, PA Welke opined that Petitioner's symptoms were likely isolated to a severe lumbar strain and kept him off work.

4. On February 15, 2016, Dr. Julie Wehner performed an independent medical examination. Dr. Wehner found Petitioner had negative straight leg raising, a normal neurological examination, and no radiographic findings to support his pain. Dr. Wehner diagnosed Petitioner with a lumbar strain but placed him at maximum medical improvement. She agreed with Dr. Pena's finding that Petitioner was capable of full duty work as of January 3, 2016. Dr. Wehner also gave Petitioner a 0% AMA impairment rating, stating she found no clinical or radiographic findings to support his subjective pain complaints.

5. Petitioner thereafter attended physical therapy from February 16, 2016 to April 28, 2016. During this period, on February 24, 2016, Dr. Rhode found Petitioner's MRI did not demonstrate a structural pathology causing right-sided foraminal stenosis and believed his symptoms were isolated to a severe lumbar strain. Petitioner was kept off work.

6. On March 16, 2016, Dr. Wehner provided an addendum to her independent medical examination report. She indicated she had reviewed the January 29, 2016 MRI and it was normal. Dr. Wehner reiterated that there were no clinical or radiological findings.

7. On March 31, 2016, Petitioner presented to Prairie Spine and Pain for the first time and saw Derek Morrow, physician's assistant to Dr. Richard Kube. Petitioner was referred to Dr. Kube by Dr. Rhode's office. In addition to low back pain, Petitioner then complained of right leg pain, numbness, and tingling in the right calf. PA Morrow noted Petitioner did not have any leg pain until a couple weeks to months after his accident.

   Lumbar spine X-rays showed no acute fractures or deformities and a well-maintained spinal curvature. PA Morrow interpreted the earlier MRI to show a touch of formal stenosis but no specific lumbar spine neurocompressive lesions. On April 28, 2016, PA Morrow stated he was not sure what to make of Petitioner's leg sensations because the MRI did not show any neurocompressive lesion that made sense for leg pain.

8. Petitioner thereafter attended work conditioning from May 2, 2016 to June 14, 2016. On May 18, 2016, Dr. Rhode noted improvement and placed Petitioner on modified light duty with a 20-pound lifting and carrying restriction.

9. On May 31, 2016, a functional capacity evaluation placed Petitioner's capabilities within the medium category. Based on Petitioner's self-provided job description, the evaluator found Petitioner incapable of working an eight-hour day in his usual, customary occupation because he could only stand for 50 minutes. The evaluator stated Petitioner would need the option of taking brief seated breaks while working at the medium demand level.

   On June 21, 2016, Dr. Kube placed Petitioner at maximum medical improvement with permanent restrictions consistent with the functional capacity evaluation. Petitioner was told to return as needed. Petitioner testified he advised Respondent of his permanent restrictions shortly thereafter and was told the restrictions could not be accommodated.

   On June 29, 2016, Dr. Rhode also placed Petitioner at maximum medical improvement with permanent light-medium duty restrictions, including a 35-pound lifting and carrying restriction. Dr. Rhode told Petitioner to follow up as needed.

10. On July 7, 2016, Dr. Rhode provided Petitioner with a 3% AMA impairment rating. He noted mild loss of flexion but no loss of strength nor significant atrophy.

11. Petitioner returned to Orland Park Orthopedics complaining of worsening pain on July 14, 2016. PA Welke noted Petitioner remained at maximum medical improvement but prescribed medication. She maintained Petitioner's permanent restrictions. On the same day, Petitioner filed a demand for vocational rehabilitation.

12. On July 20, 2016, Dr. Wehner penned an addendum, which emphasized Petitioner had normal MRI findings, negative straight leg rising, and no defect in reflexes or motor strength. Dr. Wehner believed there was a lack of objective findings, both clinical and radiographic, to substantiate any subjective complaints. As such, she believed Petitioner's functional capacity evaluation lacked an objective basis for providing permanent restrictions. Dr. Wehner further opined that the treatment provided by Dr. Rhode and Dr. Kube was unsupported by objective findings and medical standards, and as such, was not medically necessary nor reasonable. She stated that a lumbar strain with a normal MRI would not require work hardening nor permanent restrictions in a 28-year-old male. She instead believed Petitioner was capable of full duty work as of January 3, 2016.

    Dr. Wehner also provided a 0% AMA impairment rating. She stated Petitioner had a Class 0 impairment because there were no objective clinical examination findings, only intermittent complaints of nonspecific leg pain, and symptom magnification.

13. On September 8, 2016, Dr. Kube reviewed Dr. Wehner's report and responded that it was known through literature that people could have continued unresolved complaints from a sprain or strain. He believed Petitioner's effort at the functional capacity evaluation was valid and it was therefore appropriate to restrict Petitioner's activity accordingly.

14. The parties deposed Dr. Wehner on September 9, 2016. Dr. Wehner testified there were no clinical findings that would objectively corroborate Petitioner's left flank subjective complaints. She also noted Petitioner had no nerve compression or spine abnormality that would cause leg weakness.

    Dr. Wehner testified Petitioner had inconsistent reports of intermittent alternating leg pain that was not present the first month post-accident. She noted the OSF St. Francis Medical Center records specifically stated Petitioner did not have leg pain. She testified the first time there was mention of radiating pain was on February 24, 2016, and that involved Petitioner's right side. Dr. Wehner believed Petitioner had no radiculopathy because there was no consistency in his leg pain, as it was not there for several months, then it was on the right side, and then it was on the left side with no radiographic correlation.

    Dr. Wehner further opined that Petitioner's functional capacity evaluation was not a true reflection of his abilities as it was based on subjective complaints. Dr. Wehner believed that because Petitioner was a 28-year-old with a normal MRI and clinical findings, there was no reason he could not perform the functional capacity evaluation activities. Dr. Wehner further testified that work hardening is never medically necessary for a routine sprain nor for people with sedentary activities.

    Moreover, in support of her 0% AMA impairment rating, Dr. Wehner testified that subjective complaints without objective findings or significant clinical abnormalities fall in Class 0. She testified that because Petitioner's subjective pain complaints do not fit with his normal MRI, they cannot be used to justify an impairment rating.

15. The parties then deposed Dr. Kube on September 15, 2016. Dr. Kube testified it was not unusual for an individual to have problems associated with a sprain for five to six months post-accident. Dr. Kube admitted it was somewhat true that Petitioner was restricted to sedentary duty based upon subjective complaints, as there were no compressive lesions nor explanation for leg complaints. However, Dr. Kube testified he limited Petitioner's activity at his first visit because Petitioner was having muscle spasms and it was his practice to prevent additional damage as a patient goes through physical therapy. He testified Petitioner then began work conditioning and was taken off work to prevent overtraining.

16. On September 24, 2016, a lumbar motion analysis X-ray found no radiographic evidence of listhesis nor instability at any level, a PI-LL equal to -8 degrees, and no other motion anomalies at any other imaged levels.

    On October 5, 2016, Petitioner returned to Dr. Rhode, who again told Petitioner he was at maximum medical improvement and could follow up as needed.

    On October 6, 2016, Petitioner's doctor at Prairie Spine and Pain noted the vertebral motion analysis had shown no instability despite some abnormal motion at L5-S1. Petitioner was again told he remained at maximum medical improvement and discharged. The doctor indicated he was not providing Petitioner with any more prescription medication.

However, on October 17, 2016, PA Welke prescribed more pain medication. She also noted Petitioner remained at maximum medical improvement and could return as needed.

17. On October 26, 2016, Dr. Wehner penned another addendum, opining that the lumbar motion analysis had no medical significance and was a nonstandard test that added to treatment cost without providing any benefit. Dr. Wehner stated there was no expectation of instability based on the normal MRI; and therefore, there was no medical reason why the test was ordered. As such, she considered the test to be not medically necessary.

18. On five more occasions from October 31, 2016 to February 27, 2017, Petitioner sought treatment from either PA Welke or Dr. Rhode. Both continually noted that Petitioner remained at maximum medical improvement and recommended home exercises.

    At Petitioner's last treatment visit on February 27, 2017, PA Welke recommended weaning Petitioner off pain medication. Petitioner was again listed at maximum medical improvement with permanent restrictions and told to return only as needed.

19. At the time of hearing, Petitioner testified he has trouble sitting and standing for long periods. He is no longer involved in outdoor recreational activities, including the YMCA basketball league he participated in pre-accident. Petitioner further noted difficulty lifting, stating he cannot lift a couch nor pick up his two young kids for long periods. Petitioner testified he takes pain medication daily but did not name the medication. Petitioner had no pre-accident lower back or leg problems.

20. Petitioner was unemployed at the time of hearing and had not worked since leaving his machine operator position. Petitioner did not know the exact date he was released by Respondent.

    Petitioner could not recall what his job was immediately before he started working for Respondent on November 3, 2014. However, Petitioner testified he previously worked in sales, as a forklift operator, and as a subcontractor for a scaffolding business.

    Petitioner's Exhibit 17 consisted of job search forms filled out by Petitioner, indicating he applied to 98 jobs. The forms do not list dates to show when he applied to these jobs and do not list the date or result of any follow up contact, except for two positions where Petitioner wrote "possible interview." Many positions Petitioner indicated he applied to appear to be somewhat physical jobs, including but not limited to, janitorial, housekeeping, construction, security officer, loading, packing, stocking, and material handling positions. Other positions appear to be more sedentary, including but not limited to, office clerk, cashier, and data entry.

    Petitioner could not recall the dates he contacted potential employers but testified he did job searches every week. He was only contacted back by one potential employer, Stanley Steamer. Petitioner never had an in-person interview.

Medical Expenses

Following a careful review of the entire record, the Commission finds Petitioner's lumbar strain was causally related to his December 1, 2015 accident, but his leg complaints were not. The Commission further finds Petitioner achieved maximum medical improvement for the lumbar strain as of June 29, 2016 and denies medical treatment after said date.

Petitioner was immediately diagnosed by Dr. Braun with a lumbar strain on the accident date. He proceeded to treat with pain medication, physical therapy, and restrictions. After a month of treatment, during which Petitioner had no radicular complaints and reported improving symptoms, Dr. Pena returned Petitioner to full duty and discharged him on December 29, 2015.

Petitioner made no attempt to return to work after being released. Petitioner testified the medication, physical therapy, and restrictions had not helped him at that point. However, the treatment records show Petitioner had been reporting steady improvement to his doctors.

After his discharge from Dr. Pena's care, Petitioner continued treating from January 5, 2016 to February 27, 2017 with PA Welke, Dr. Rhode, and Dr. Kube. All care provided was conservative, including medication, physical therapy, work conditioning, home exercises, and restrictions.

The Commission notes that during this year of continued treatment, there were minimal to no objective findings. In terms of radiographic findings, a January 29, 2016 MRI yielded normal results. On February 24, 2016, Dr. Rhode found the MRI did not show a structural pathology causing right-sided foraminal stenosis. PA Morrow and Dr. Kube also found the MRI showed no specific neurocompressive lesions. A March 31, 2016 lumbar spine X-ray thereafter showed no acute deformities and a well-maintained spinal curvature. Finally, the September 24, 2016 lumbar motion analysis demonstrated no radiographic evidence of listhesis or instability, a PI-LL equal to -8 degrees, and no other motion anomalies. In short, the Commission finds no radiographic evidence demonstrating significant objective findings.

In terms of clinical examination, the most significant objective finding was PA Morrow's observation of muscle spasms on March 31, 2016. However, the Commission notes that Petitioner did not complain of ongoing muscle spasms at hearing and the treatment records suggest it was a symptom that had resolved, as Petitioner did not continue to report spasms to his treating doctors.

To further evaluate causation, the Commission must consider what weight to give Dr. Wehner's reports. After careful consideration of all records, the Commission finds Dr. Kube's opinions to be more persuasive than Dr. Wehner's opinions. Dr. Kube's belief that even sprains can sometimes result in residual problems is more reasonable, and therefore more persuasive, than Dr. Wehner's hardline stance that such a sprain can never reasonably require work hardening or restrictions. Such hardline stances make Dr. Wehner's opinions appear unrealistic, given sprains come in all degrees of severity and people have different degrees of pain tolerances.

Despite her hardline stances on sprains, Dr. Wehner's opinion that Petitioner's leg complaints were not caused by the accident is supported by all treatment records. Dr. Wehner

correctly categorized the leg complaints as sporadic and highlighted that the OSF St. Francis Medical Center records did not show a single complaint of radiating leg pain. Petitioner did not report radiating pain until February 24, 2016, and at that time, it was his right leg. As the radiculopathy complaints were inconsistent and did not appear for several months post-accident, Dr. Wehner found no radiculopathy.

Dr. Wehner's opinion on the leg pain is supported by the records of both Dr. Rhode and Dr. Kube. Specifically, on February 24, 2016, Dr. Rhode found Petitioner's MRI did not support his complaints of right-sided radiculopathy. Shortly thereafter, on March 31, 2016, PA Morrow noted that Petitioner did not have any leg pain until a couple weeks to months post-accident. PA Morrow then stated on April 28, 2016 that Petitioner's leg complaints did not make sense as his MRI did not show any neurocompressive lesions.

As all consulted doctors, including the independent medical examination doctor and treating doctors, do not believe Petitioner's leg complaints make sense based on objective findings, the Commission finds Petitioner failed to prove his sporadic leg pain and radiculopathy complaints are causally related to the December 1, 2015 accident.

However, in terms of the lumbar sprain, all the consulted doctors agree it occurred as a result of the work accident, but they differ as to when Petitioner reached maximum medical improvement. Dr. Wehner agreed with Dr. Pena that Petitioner achieved maximum medical improvement as of December 29, 2015, whereas Dr. Kube and Dr. Rhode placed Petitioner at maximum medical improvement after his functional capacity evaluation on June 21, 2016 and June 29, 2016 respectfully.

Although Dr. Wehner attacked the validity of the functional capacity evaluation, the treating doctors believed Petitioner put forth a valid effort. Dr. Wehner took another hardline stance by stating there was no reason a 28-year-old with a normal MRI and clinical findings could not perform all functional activities. However, there is no hard evidence that Petitioner lacked credibility when reporting his subjective pain to the functional capacity evaluation examiner.

In consideration of the entire record, Petitioner's subjective complaints at the time of hearing were not corroborated by objective findings. Instead, the Commission finds the record establishes that Petitioner was at maximum medical improvement for his lumbar sprain when Dr. Kube and Dr. Rhode placed him at it in June 21, 2016 and June 29, 2016 respectfully. These maximum medical improvement dates are supported by Dr. Kube's testimony that it was not usual for an individual to have problems associated with a sprain for five to six months post-injury.

In all treatment records after these June 2016 dates, treating doctors just reiterated that Petitioner remained at maximum medical improvement with permanent restrictions and offered little to no new treatment. As such, Petitioner's multiple trips back to his doctors after he was discharged from their care in June 2016 were unreasonable and unnecessary.

The Commission recognizes that even though Dr. Pena first placed him at maximum medical improvement on December 29, 2015, Petitioner had a right to seek a second opinion if he felt ongoing pain. Dr. Rhode was his second choice of provider, as OSF St. Francis Medical Center

with Dr. Braun and Dr. Pena as his first. Although there were minimal to no objective findings after Dr. Pena's discharge, the record shows Petitioner did subsequently have some muscle spasms, restricted motion, and residual pain complaints. However, after both treating doctors agreed Petitioner was at maximum medical improvement in June 2016, there were no subsequent objective findings that would justify the reasonable necessity of continued treatment.

In conclusion, the Commission finds Petitioner's leg pain is unrelated to his accident. However, in terms of the lumbar sprain, as Petitioner was released at maximum medical improvement from Dr. Kube and Dr. Rhode on June 21, 2016 and June 29, 2016 respectfully, the Commission finds Petitioner is entitled to payment of medical expenses up to June 29, 2016. After this date, treating doctors consistently told Petitioner he remained stagnant at maximum medical improvement and could follow up only as needed. There were no significant objective findings beyond his maximum medical improvement dates. As such, the Commission finds all treatment provided after Petitioner's release from care at maximum medical improvement on June 29, 2016 was not medically reasonable and necessary, and therefore, denies treatment after said date.

Temporary Total Disability

The Commission finds Petitioner proved entitlement to temporary total disability benefits up to June 21, 2016 but failed to thereafter prove entitlement to maintenance.

Petitioner was immediately taken off work on the accident date by Dr. Braun and kept off work or on light duty until Dr. Pena's release to full duty on December 29, 2015. His effective return to full duty date was January 4, 2016.

Petitioner testified during that period, Respondent accommodated the light duty restrictions and paid him temporary total disability benefits for the time he was off work. As such, Respondent is entitled to a credit for temporary total disability and salary paid up until Dr. Pena's release.

However, Petitioner made no attempt to go back to work after being released by Dr. Pena. Instead, he presented to his second provider, Orland Park Orthopedics on January 5, 2016. He was then kept off work until PA Morrow switched him to sedentary duty on March 31, 2016.

Petitioner remained on sedentary or light duty until his May 31, 2016 functional capacity evaluation put him at the medium demand level. Petitioner was then placed at maximum medical improvement with permanent light-medium duty restrictions pursuant to the functional capacity evaluation by Dr. Kube on June 21, 2016.

The Commission notes that the surveillance videos entered by Respondent at hearing fail to show Petitioner blatantly operating outside of his restrictions. Respondent's Exhibit 4 shows Petitioner carrying a small child a short distance from a car to a house. However, as the distance Petitioner carried the small child was extremely short, it is not a clear indicator of Petitioner's actual pain tolerances. Moreover, Petitioner testified that the child was approximately 20 pounds, which is not an egregious weight.

As Petitioner has shown entitlement to temporary total disability benefits up to June 21, 2016, the Commission must next consider maintenance. Petitioner testified he contacted Respondent shortly after receiving his permanent restrictions and was told by a nurse at Keystone Medical that Respondent could not accommodate them. It is notable that Petitioner's supervisor, Tim Heaton, testified that he was never contacted about Petitioner coming back to work in June 2016. However, Mr. Heaton admittedly did not work in Respondent's medical department.

In evaluating Petitioner's job search efforts, the Commission notes the job search forms submitted in Petitioner's Exhibit 17 fail to show when Petitioner applied to any potential jobs. As such, it is not clear whether Petitioner went weeks or months in between applying to jobs, nor is it clear if or when he followed up with any jobs.

Also, many of the potential jobs listed seem to involve some physical labor possibly outside of Petitioner's restrictions, including janitorial, loading, packing, stocking, and material handling positions. As Petitioner's Exhibit 17 fails to give any timeframe as to when these jobs were sought and lists several physical labor jobs, the Commission finds Petitioner failed to meet his burden of establishing a diligent job search.

It is notable that on June 14, 2016, Petitioner did file a demand for vocational rehabilitation. However, there was no evidence in the record as to whether the parties subsequently appeared before the Arbitrator on Petitioner's motion. There was also no evidence concerning why vocational rehabilitation was not subsequently initiated. As such, it is not clear to the Commission whether Petitioner or Respondent impeded any vocational rehabilitation efforts.

As Petitioner did not establish a diligent job search, the Commission finds Petitioner failed to prove entitlement to maintenance beginning June 21, 2016.

Permanent Partial Disability

Following a careful review of the record, the Commission respectfully disagrees with the Arbitrator's award of 10% MAW based on the §8.1(b) statutory factors. As previously addressed, the record does not support a finding that Petitioner's leg complaints were causally related to the accident. Thus, in only considering Petitioner's lumbar strain, there were very little findings of objective deficits on radiographs and clinical examination. Petitioner has not treated since February 27, 2017, at which time PA Welke recommended weaning him off pain medication.

Petitioner testified his physical symptoms at hearing were similar to his symptoms when the accident first happened. However, Petitioner had reported improvement several times throughout his treatment records and there continues to be a lack of substantial objective findings.

The Commission notes that both Dr. Rhode and Dr. Wehner offered AMA impairment ratings. Dr. Rhode found Petitioner suffered a 3% whole person impairment, noting mild loss of flexion with no loss of strength nor significant atrophy. Dr. Wehner provided a 0% AMA impairment rating, citing there was no objective findings on clinical examination, intermittent complaints of nonspecific leg pain, and symptom modification. Although the Commission has already found Dr. Wehner's opinion to be less persuasive, it notes that neither of the two competing

impairment ratings are high enough to justify an award of 10% MAW. The lack of significant objective findings also lends support to the lower impairment ratings.

The Commission further notes that there was no testimony regarding how the accident specifically affected Petitioner's future earning capacity. Although Petitioner was unemployed at hearing, he did not claim a wage differential and failed to present a diligent job search. Additionally, none of the jobs listed in Petitioner's Exhibit 17 show any potential salaries.

Although Petitioner has permanent restrictions, he treated only conservatively, did not conduct a diligent job search to establish the effect of his restrictions, and has low AMA impairment ratings. Moreover, without significant objective findings, Petitioner's restrictions were based on subjective pain complaints only. As such, the Commission finds an award of 3.5% MAW to be appropriate based on the §8.1(b) statutory factors. The Commission modifies the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $418.03 per week for a period of 17.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 3.5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $464.47 per week for 29 weeks, commencing December 2, 2015 through June 21, 2016, as provided by §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that maintenance benefits after June 21, 2016 are hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses from December 1, 2015 to June 29, 2016 as provided in §8(a) and §8.2 of the Act pursuant to the applicable medical fee schedule, and all medical expenses after June 29, 2016 are hereby denied.

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

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

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 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: JAN 2 8 2019

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/met
o: 12/6/18
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0060

PETTIES, JERMALL
Employee/Petitioner

Case# **16WC000586**

KEYSTONE STEEL & WIRE
Employer/Respondent

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:

1824 STRONG LAW OFFICES
TODD A STRONG
3100 N KNOXVILLE AVE
PEORIA, IL 61603

0507 RUSIN & MACIOROWSKI LTD
JOHN MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

19IWCC0060

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

Jermall Petties
Employee/Petitioner

v.

Keystone Steel & Wire
Employer/Respondent

Case # **16** WC **0586**

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 **Peoria**, on **3/21/17**. 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 **12/1/15**, 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 **$36,228.92**; the average weekly wage was **$696.71**.

On the date of accident, Petitioner was **28** 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 $**2,786.82** for TTD, $**0** for TPD, $**0** for maintenance, and $**8,450.00** for other benefits, for a total credit of $**11,236.82**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of **$46,312.43**, as set forth in PX 16, 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 **$464.47**/week for **30 1/7** weeks, commencing **12/2/15** through **6/29/15**, 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 **$418.03**/week for **50** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **10% loss of the person as a whole.**

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

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

Michael K. Nowak, Arbitrator

12/5/17
Date

ICArbDec p. 2

DEC 12 2017

FINDINGS OF FACT

Petitioner testified that in December of 2015 he was employed at Keystone Steel & Wire Company. His job title at Keystone was that of a machine operator. Petitioner testified that on December 1, 2015, he was being trained on a new machine called the v-mesh. Petitioner testified that this was his 2nd day working on the v-mesh machine. Petitioner testified that he would place a wrapper on a beam shaped piece of metal that would be placed into the machine. Fencing is then rolled around the wrapper covered beam. Once this procedure is complete, and the fence roll is around the wrapper, a sledge hammer was used to knock clamps off the fence so the wrapper could be removed. Petitioner testified that while he was pulling the wrapper from the fence, he felt a sharp pain in his left lower back. Immediately after the accident he notified his foreman Tim Heaton. Accident and notice are undisputed in this case.

Petitioner testified that at the request of Tim Heaton, he was transported to the Keystone Plant Medical Center. At that time the Petitioner saw Dr. Braun. (PX 3) Dr. Braun noted a consistent history indicating that Petitioner was currently on day 2 of training on a new machine, that he was bent forward and hitting a clamp out of the roll of fence with a sledge hammer, and then pulling the clamp out of the rest of the way once it was loosened. He straightened his back and felt some immediate pain in his lower back bilaterally left worse than right. At that time the Petitioner was diagnosed with a lumbar strain by Dr. Braun, was deemed unfit to work, and was to follow up with Dr. Pena on December 3, 2015.

Petitioner testified that on the day of the accident he also filled out an incident report. (PX 2) The incident report is consistent with Petitioner's description of the injury.

Petitioner followed up with Dr. Pena on December 3, 2015. Dr. Pena noted a consistent history of a work-related accident. Dr. Pena noted that Petitioner was lifting a wrapper which was approximately 50 pounds in weight, 6 feet in length and 2 feet wide. It is also noted in Dr. Pena's medical records that Petitioner described that he was in the forward flexed position when he felt left sided low back pain. Dr. Pena diagnosed the Petitioner with left sided lumbar strain causing a shift. Dr. Pena recommended that the Petitioner undergo physical therapy and kept him off work. Petitioner next saw Dr. Pena on December 10, 2015. At that time Dr. Pena noted that the Petitioner was still having trouble straightening up his back and was still experiencing pain in his low back. Dr. Pena also diagnosed the Petitioner with left sided lumbar strain with shift and recommended that the Petitioner remain off work and continue physical therapy. Petitioner next saw Dr. Pena on December 15, 2015. At that time Dr. Pena felt that Petitioner was able to work some light duty or sedentary duty if available. Dr. Pena recommended that the Petitioner continue physical therapy. Petitioner last saw Dr. Pena on December 29, 2015 at which time Dr. Pena released the Petitioner full duty and declared him to be at a point of maximum medical improvement. Petitioner testified that when he saw Dr. Pena the last time, he was still experiencing the pain in his low back. Petitioner testified that after being released, the employer refused to authorize any further treatment.

Petitioner testified that once he was released by Dr. Pena, he did not have a primary care doctor and Respondent was not authorizing any treatment. Petitioner testified that he sought treatment with Dr. Rhode because he would see him without pre-authorization. On January 5, 2016, Petitioner presented to Dr. Rhode's office. (PX 7) At that time the Petitioner saw Dr. Rhode's physician assistant, Lori Welke. The history taken by

Ms. Welke indicates that the Petitioner was training on a new machine on December 1, 2015. He was making a roll of deer fencing and having to knock the steel beam out of the middle with a mallet and then pull it out. This was taking him about 15 minutes squatting and pulling by himself when he felt a tear or pull in his left lower back. He had immediate pain and reported it. Ms. Welke noted this to be an acute episode with no prior history of back pain. It is also noted that the pain was not radiating. Ms. Welke noted and the Petitioner testified that the therapy he underwent at OSF Occupational Health was briefly helping but the doctors at OSF Occupational Health indicated to the Petitioner that he does not need any additional treatment and is fine to go back to work. After taking a history from the Petitioner Ms. Welke proceeded with physical examination and after physical examination diagnosed the Petitioner with possible L4-L5 herniated disc. Ms. Welke recommended that Petitioner undergo an MRI.

On January 29, 2016, Petitioner underwent an MRI of his low back which read to be normal.

Petitioner followed up with Ms. Welke on February 1, 2016. At this time the Petitioner was diagnosed with a severe lumbar strain and recommended to continue physical therapy. Petitioner first saw Dr. Rhode on February 24, 2016 at which time Dr. Rhode diagnosed the patient with severe lumbar strain and indicated that the patient continues to complain of right sided S-1 radiculopathy. Dr. Rhode referred the Petitioner to Dr. Kube's office.

Petitioner presented to Dr. Richard Kube's office on March 31, 2016. (PX 10) At that time Petitioner saw Dr. Kube's physician assistant, Dereck Morrow. Mr. Morrow noted a history from Petitioner and indicated that the Petitioner is experiencing pain in his low back since December of 2015. Mr. Morrow noted that Petitioner was training on a new piece of equipment and that he was pulling fence which required the Petitioner to break the fence loose. Mr. Morrow noted that Petitioner was bending over as he was lifting and pulling. He felt pain in his low back specifically the left low back. Mr. Morrow also noted that initially Petitioner did not experience any leg pain, but a couple of weeks to a month later he started noticing right leg pain and also had an episode of bilateral symptoms including numbness into the back of his lower extremities. Mr. Morrow, after reviewing the MRI, noted that the MRI reflects that the Petitioner has a slight high intensity zone at L4-L5 in the posterior central aspect of the disc. He also thought that there might also be a touch foraminal stenosis at this level. Mr. Morrow recommended that Petitioner undergo physical therapy. He also noted that it is very obvious on examination that the Petitioner has muscle spasms and strain type issues going on in his lumbar spine. Mr. Morrow opined that the Petitioner could work at sedentary duty only.

Petitioner started physical therapy at Dr. Kube's office on February 11, 2016.

Petitioner next followed up with Dr. Rhode on March 23, 2016 at which time the doctor recommended that Petitioner follow up with Dr. Kube for a potential epidural injection, and placed him on light duty. After this visit with Dr. Rhode, Petitioner continued with physical therapy.

Petitioner next saw Mr. Morrow on April 28, 2016. It was recommended that Petitioner move forward with a work conditioning program and a Functional Capacity Evaluation.

On the recommendation of Dr. Morrow, Petitioner started work conditioning on May 2, 2016 and continued until May 26, 2016. After work conditioning Petitioner underwent a Functional Capacity Evaluation at Azer Clinic on May 31, 2016.

The Functional Capacity Evaluation demonstrated that the Petitioner is able to sit for 30 minutes, stand for 50 minutes, lift 30 pounds from waist to shoulder, 40 pounds from floor to waist and 30 pounds from floor to shoulder on an occasional basis. (PX 11)

After the Functional Capacity Evaluation the Petitioner followed up with Dr. Kube on June 21, 2016. Dr. Kube reviewed the Functional Capacity Evaluation and indicated that the Functional Capacity Evaluation reflects an accurate indication of what the Petitioner can and cannot do safely. Based on the results of the Functional Capacity Evaluation, Dr.Kube declared the patient to be at a point of maximum medical improvement and provided the Petitioner with work restrictions consistent with the results of Functional Capacity Evaluation.

On June 29, 2016, Dr. Rhode discharged the Petitioner with permanent restrictions of light - medium duty that consisted of maximum lift of 35 pounds and frequent lift of 20 pounds.

Petitioner continued to follow up with Dr. Rhode's office for pain management. He last presented to Dr. Rhode's office on February 27, 2017.

After being released by Dr. Kube, Petitioner was seen in his office on two more occasions. On September 8, 2016, Petitioner saw Dr. Kube himself. Dr. Kube noted that literature supports the proposition that people can have continued complaints and symptoms from a sprain or strain type of injury. Dr. Kube further opined that Petitioner had a number of objective findings which would substantiate his performance during the Functional Capacity Evaluation, which would be consistent with a valid effort. Dr. Kube also recommended that Petitioner undergo a motion analysis, a new technology available to look at the motion segments of the lumbar spine. Petitioner underwent this testing with Dr. Kube and next followed up with Dr. Kube on October 6, 2016. On October 6, 2016 Dr. Kube indicated that the vertebral motion analysis demonstrated some abnormal motion at L5-S1 level. Dr. Kube again discharged Petitioner with restrictions consistent with the Functional Capacity Evaluation.

Petitioner was examined by Dr. Julie Wehner on February 15, 2016 pursuant to section 16 of the Act. Dr. Wehner was of the opinion that as a result of the work accident Petitioner sustained a lumbar strain. She opined that work hardening was unnecessary as a lumbar strain does not require work hardening. She was also of the opinion that the Petitioner's permanent restrictions were not needed and that there were a lack of objective findings to substantiate Petitioner's permanent work restrictions. Dr. Wehner also conducted a subsequent records review as a result of which she generated a report. Her opinions were unchanged. Further, she agreed with Dr. Pena's opinion that Petitioner could perform work starting January 3, 2016.

The deposition of Dr. Kube was entered into evidence. (PX 13) Dr. Kube testified that his assessment was that the Petitioner was experiencing a spasming type of issue with his back. He further testified that Petitioner's results in the tests used to determine a patient's cooperation demonstrated 100% cooperation in the Functional Capacity Evaluation, which would be consistent with putting forward a maximum effort. Dr. Kube

testified that during Petitioner's Functional Capacity Evaluation, Petitioner demonstrated an ability to lift as much as 40 pounds floor to waist, 40 pounds waist to shoulder and 50 pounds pushing and pulling. Dr. Kube testified that, based on the Functional Capacity Evaluation, he felt it appropriate to place the Petitioner on permanent restrictions. Id., at 18-19. Dr. Kube testified that Petitioner suffered from a significant sprain/strain type injury, that he did not improve, and still had residual problems. Id., at 21. Dr. Kube testified that there are many individuals who will get complete resolution after a sprain or strain, but there is also a significant number who will continue to have some degree of pain. Some will have a little bit of waxing and waning patterns, and some will continue with a residual baseline pain. Id. Dr. Kube testified that the history of accident, fairly contemporaneous onset of back pain, and the mechanism of injury fit someone who strained their back during a lifting maneuver. Id., at 21-22. Dr. Richard Kube testified that the treatment that the Petitioner received was reasonable and necessary and the permanent restrictions are causally related to the accident. Dr. Kube indicated that Petitioner exhibited spasms and there is no way that one can feign a knot, lump, or muscle spasm in the back. Id., at 38. Dr. Kube also opined that with a younger person, such as Petitioner, who is put into a work conditioning program, increases his work capabilities and provides a better chance for him to return to gainful employment. Id., at 37

Dr. Wehner was also deposed her deposition was introduced into evidence. (RX 1) Dr. Wehner testified that she has no reason to dispute the history and the mechanism of the injury that the Petitioner was involved in. Id., at 31. Dr. Wehner also admitted that she is aware of no medical records which document any prior back pain or treatment for Petitioner. Dr. Wehner testified consistent with her opinions as stated above. She also indicated that she issued an addendum report. (RX 2) In her addendum report, Dr. Wehner reviewed Dr. Kube's medical records dated September 14, 2016 and opined that Dr. Kube's assessment and recommendation for motion analysis was not reasonable.

Petitioner testified that when he was released to light duty by Dr. Pena and Dr. Braun, he was told that Respondent had no light duty or sedentary duty available for him. Petitioner testified that he was paid TTD benefits until approximately December 29, 2015. The Arbitrator notes that the Respondent claims that the Petitioner was paid TTD benefits until January 2, 2016. Petitioner testified that when he was off work by order of Dr. Rhode, and when he was on modified duty restrictions by Dr. Kube and Dr. Rhode he would take his work restrictions to Keystone Medical as instructed. It was his understanding that Keystone did not have any work available for him, and none was offered. Petitioner testified that once he received permanent restrictions by Dr. Kube he also took those restrictions to Keystone Medical and he was notified that there is no job available for him within his restrictions. Petitioner testified that he received no payment from Respondent from the first time that he saw Dr. Rhode's office on January 5, 2016 through the date of trial. Petitioner testified that he looked for jobs after being released and while receiving treatment with Dr. Rhode and Dr. Kube. Petitioner introduced his job search forms which were entered into evidence. (PX 17)

Tim Heaton, Petitioner's foreman, testified at trial. Mr. Heaton testified that he is not aware of any work status forms that the Petitioner brought to his attention. Mr. Heaton admitted, however that when someone has restrictions, they are to be taken this to Keystone Medical, and not to him. Mr. Heaton testified that he did take the Petitioner to Keystone Medical on the day of the accident. He further confirmed that Petitioner was on his 2nd day of training at a v-mesh machine when the accident occurred.

Respondent introduced surveillance video of Petitioner into evidence. (RX 4 – 10) The Arbitrator notes that nothing in the videos appeared to indicate that the Petitioner exceeded his restrictions. There was video showing Petitioner carrying a package of bottled water, but it did not appear to be a 24 bottle case of water. The video also showed, and Petitioner admitted, that from time to time Petitioner has lifted and carried his son who was born in January 2014. Petitioner testified that his child is small in size, which appeared consistent with the Arbitrator's observation.

Petitioner testified that currently he is unemployed. Petitioner also testified that he still has problems with his lower back. Petitioner testified that he still experiences pain and has trouble standing, lifting, and walking. Petitioner testified that he is unable to engage in the recreational activities that he was able to prior to this accident.

CONCLUSIONS

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

Petitioner testified credibly at the time of the arbitration. The Arbitrator notes that all of the medical records introduced at the time of the arbitration provided a consistent history and mechanism of injury. The Arbitrator finds the testimony and opinions of Dr. Kube and Dr. Rhode more persuasive than those of Dr. Wehner and Dr. Pena in this case.

Dr. Wehner issued a blanket denial on causation and stated that no sprain can require permanent restrictions or work conditioning. Dr. Kube, on the other hand, explained that some strains can be severe in nature that can cause residual pain and complaints. Further, Dr. Kube documented objective findings, including spasms, that Petitioner was experiencing as a result of the accident.

Based upon the foregoing and the record taken as a whole., the Arbitrator finds that Petitioner has met his burden of establishing that his current condition of ill-being, including his permanent restrictions, to be causally related to the accident of December 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?

Petitioner offered medical expenses totaling $46,312.43. (PX 16) Based upon the above findings and conclusions, the Arbitrator finds the treatment corresponding to these expenses was reasonable and necessary.

Respondent shall pay reasonable and necessary medical services of $46,312.43, as set forth in PX 16, 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.

Issue (K): What temporary benefits are in dispute?

Petitioner claims entitlement to TTD benefits from December 1, 2015 through June 16, 2016 and maintenance benefits from June 17, 2016 through the date of hearing, March 21, 2017. Respondent agrees that Petitioner was entitled to benefits from December 2, 2015 through January 3, 2016.

It is undisputed that Petitioner sustained a work related back injury on December 1, 2015. Petitioner was initially treated by Respondent's medical personnel. He was initially authorized off work as of the day of injury and given a course of physical therapy. On December 29, 2015, Dr. Pena noted that Petitioner's strain had resolved and released him to return to regular duty work without restriction effective January 4, 2016. At this point Respondent terminated all benefits under the Act.

Once Petitioner was discharged by Dr. Pena he sought treatment with Dr. Rhode. On January 5, 2016, Petitioner presented to Dr. Rhode's office. He was eventually referred to Dr. Kube as well. Petitioner remained under temporary work restrictions by Dr. Rhode and/or Dr. Kube until June 29, 2016 when Dr. Rhode placed permanent restrictions of Petitioner consistent with an FCE. (Petitioner had been given permanent restrictions by Dr. Kube a few days before). Respondent did not offer restricted duty within his restrictions.

Petitioner testified that he commenced a self-directed job search after having been given permanent restrictions. Petitioner's job search log indicates 98 job contacts between June 29, 2016 and March 21, 2017, an approximate nine-month period.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner is entitled to TTD benefits from December 2, 2015 through June 29, 2016, the date he reached MMI and was given permanent restrictions per Dr. Rhode.

Based upon a review of Petitioner's job search log which reflects approximately 11 contacts per month the Arbitrator concludes Petitioner's self-directed job search was insufficient to entitle him to maintenance benefits. Maintenance benefits are, therefore denied.

Respondent shall pay Petitioner temporary total disability benefits of $464.47/week for 30 1/7 weeks, commencing 12/2/15 through 6/29/15, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $2,786.82 for TTD, and $8,450.00 for non-occupational benefits paid, for a total credit of $11,236.82.

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

The Arbitrator notes that Petitioner waived his right to consideration of an award under section 8(d)1 of the Act.

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 two physicians offered impairment ratings in this case. Dr. Wehner opined that Petitioner had a zero-impairment rating. Dr. Rhode also performed an impairment rating and calculated the total person impairment rating at 3%. The Arbitrator therefore gives *some* weight to this factor.

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 working as a machine operator for Respondent. Petitioner testified that based on his restrictions, he could not return to work at Keystone. Petitioner testified that his job as a machine operator at Keystone required him to lift between 40-100 pounds. Petitioner testified that the employer never accommodated his restrictions. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 28 years of age on the date of accident. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that although there is no direct evidence of reduced earning capacity in this case, Petitioner's permanent restrictions will likely impair his earning capacity. The Arbitrator therefore gives *some* 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 was diagnosed with a severe strain/sprain of his low back from which he continues to experience symptoms. Both Dr. Rhode and Dr. Kube placed permanent restrictions on this Petitioner. The Arbitrator notes that medical records document that Petitioner continued to experience problems with his low back as of the date of the hearing. Further, Dr. Rhode opined that the Petitioner will require oral medication and possible future physical therapy as a result of this accident. The Arbitrator therefore gives *Some* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of the person as a whole pursuant to §8(d)2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nellisa Roebuck,
Petitioner,

vs. NO: 15 WC 30713

Ford Motor Company,
Respondent.

19IWCC0061

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, 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 facts involved in this claim were well laid out in the Decision of the Arbitrator, and the Commission adopts the findings of fact as delineated in the decision. The Commission further concurs with the Arbitrator that the claimant's head contusion was causally related to the workplace accident, but that none of her other diagnoses were so related. The Commission notes that the claimant did not treat for the head contusion after February 2015; at an appointment with her doctor on March 20, 2015, there was a discussion of a workplace knee injury but no discussion of the head contusion. The Commission observes, as did the Arbitrator, that an addendum report was prepared by Dr. Tinfang in December 2016, in which Dr. Tinfang noted complaints of dizziness, blurred vision, and headaches post-concussion. However, she was not diagnosed with a concussion either at the original treatment date or at the March 2015 appointment, and therefore, the Commission, as did the Arbitrator, assigns minimal weight to the addendum report generally and does not rely on the diagnoses contained therein. The Commission finds no credible diagnosis of a concussion or post-concussion syndrome and finds the claimant attained MMI by February 15, 2015.

19IWCC0061

Regarding the nature and extent of the injury, the Arbitrator properly delineated and examined the five factors set forth in Section 8.1(b) of the Act, including providing no assignment of weight to the first factor (AMA impairment rating) given that no such rating was introduced as evidence. The Commission does interpret the evidence somewhat differently than did the Arbitrator in some respects, however.

First, with regard to the employee's future earnings capacity, the Commission notes that not merely has the claimant provided no indication of a future impairment of earnings, the claimant missed no time from work as a result of this accident and only followed up from the initial treatment on one occasion. The Commission thus assigns some weight to this factor, as it specifically indicates that the claimant did not have persistent problems from this incident.

Second, and more significantly, the Commission notes and concurs with the Arbitrator that the claimant's trial testimony of her current symptoms was overstated and unreliable as juxtaposed with the medical records provided. The Commission likewise puts greater weight on the medical records generally and this factor specifically regarding permanent disability.

The petitioner suffered a minor head contusion, not a concussion, and demonstrated no acute abnormalities on CT scan or at her follow-up appointment, and the assertions of persistent symptoms of blurred vision and headaches are not reliable or credible. The Commission finds that, given the minor injuries sustained and lack of credible persistent symptoms or pathology, that the claimant has demonstrated permanent partial disability only to the extent of 1% loss to the person pursuant to Section 8(d)2, and modifies the Arbitrator's award accordingly. All other findings and awards of the Arbitrator, including the 8(j) credit, are affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $266.75 per week for a period of 5 weeks, as provided in §8(d)2 of the Act, as the injuries sustained caused the loss of use of a person as a whole to the extent of 1%.

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 is entitled to a credit of $958.10 under Section 8(j) of the Act.

19IWCC0061

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,500.00 The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 9 2019

o-01/16/19
jdl/ac

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Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROEBUCK, NELLISA
Employee/Petitioner

Case# **15WC030713**

FORD MOTOR COMPANY
Employer/Respondent

19IWCC0061

On 9/12/2017, 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 1.14% 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:

1315 DWORKIN AND MACIARIELLO
JONATHAN WILLIAMS
134 N LASALLE ST SUITE 650
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
JAMES FLANNERY
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Nellisa Roebuck
Employee/Petitioner

v.

Ford Motor Company
Employer/Respondent

Case # 15 WC 30713

Consolidated cases: N/A

19IWCC0061

An *Application for Adjustment 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, ILLINOIS**, on **6/15/17**. 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. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **2/14/15**, 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 **$19,116.94**; the average weekly wage was **$444.58**.

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*** 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 **$958.10** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$266.75/week** for **15 weeks**, because the injuries sustained caused the **3%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent is entitled to a credit of **$958.10** under Section 8(j) of the Act.

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

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

Signature of Arbitrator

9-11-2017
Date

SEP 12 2017

BACKGROUND

Nellisa Roebuck ("Petitioner") alleged injuries arising out of and in the course of her employment with Ford Motor Company ("Respondent") on February 14, 2015. Ax1. On June 15, 2017, by agreement of the parties, an arbitration hearing was held on the following disputed issues: causal connection nature and extent of the injury. Ax1-2. Further, by agreement of the parties and upon order of the Arbitrator, Petitioner's claim was severed from 15 WC 21032 for the purposes of trial, which remains pending and undetermined. The following is a recitation of the facts adduced at trial for 15 WC 30713.

FINDINGS OF FACT

As of February 14, 2015, Nellisa Roebuck ("Petitioner") was an employee of Ford Motor Company ("Respondent") for three years. Petitioner testified that she was an assembly line worker, whose job duties required the inspection of cars on the line and placing the necessary identification stickers on the cars. On February 14, 2015, Petitioner stated that a "lift gate" tool fell and hit her in the head. Petitioner testified that she fell to the ground and experienced loss of vision and dizziness. Petitioner then testified that she was taken to see her supervisor, whom she waited for to report her injury who never arrived, and then to Ford's onsite occupational health facility. There, Petitioner was examined by Sadie Miller, R.N. (Px1). The record from the occupational health facility notes a history of the accident provided by Petitioner that is virtually identical to the history that she provided in her testimony. (Px1). In her clinical observation, the onsite nurse noted that Petitioner complained of headache, dizziness, blurred vision, and a significant sensitivity to light. (Px1). Furthermore, Petitioner had a swollen forehead that was tender to touch. (Px1). Petitioner was ultimately diagnosed with a forehead contusion, including a bruise and/or hematoma. (Px1). Based on this examination, Petitioner was sent to Ingalls Memorial Hospital for further examination. (Px1).

On February 15, 2015, Petitioner presented to Ingalls Memorial Hospital. (Px2). Petitioner stated that she was hit in the head by a machine at work and complained of headaches, dizziness, blurred vision, and photophobia. (Px2). Petitioner underwent a CT scan that did not reveal any intracranial hemorrhaging or other acute findings. (Px2). Petitioner was diagnosed with an "injury of head" and discharged home with a referral to her primary care physician, Dr. Tinfang. (Px2). Upon her discharge, Petitioner testified that she returned to work per policy, and sat in the occupational health facility because she did not feel well enough to return back to work.

On March 20, 2015, Petitioner presented to her primary care physician, Dr. Tinfang. (Px3). While Petitioner was not treated for a head injury at that time, Dr. Tinfang later entered an addendum noting that Petitioner suffered a head injury at work from which she complained of "headache, blurred vision and dizziness post-concussion." (Px3). Petitioner's prior medical records showed she may have complained of headaches as recent as 2014 with Dr. Tinfang.

Petitioner testified that she continues to experience headaches, that her balance is off and that she still has blurred vision. She further stated that she sometimes falls, that she constantly drops stuff and her blurred vision regularly affects daily life. Petitioner stated she takes Tylenol regaruly for headaches.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner has met her burden of proof by a preponderance of the credible evidence that the injury to her head is casually related to the accident at work.

Here, Petitioner was an employee of Respondent, and testified that she was an assembly line worker. Petitioner further testified that she was placing stickers on a car when a lift gate tool fell and hit her on the head. Petitioner was immediately treated at Respondent's onsite occupational health facility, and was then sent to Ingalls Memorial Hospital for further testing. Petitioner's medical records and testimony indicate that she immediately complained of headaches, dizziness, and blurred vision, and she continues to complain of similar symptoms through the date of trial. Petitioner further testified that she had not experienced the aforementioned symptoms prior to the date of injury, and could not recall the few treatments with Dr. Tinfang prior to the date of injury in which she complained of headaches. Under a chain of event theory, the Arbitrator concludes that Petitioner suffered a contusion to the head as a result of undisputed work accident and that such contusion is causally related to that work accident.

The Arbitrator notes that on March 20, 2015, Petitioner presented to Dr. Tinfang where she was diagnosed with hypertension, overactive bladder, tobacco abuse, depression, back pain and knee pain. At that time her chief complaint was knee pain and depression. The Arbitrator finds that none of the aforementioned conditions are causally related to her February 14, 2015 work accident as none of the aforementioned conditions or symptoms appear anywhere in the initial treatment records. The addendum from Dr. Tinfang notes Petitioner was sent to Ingalls after being hit on the head from a lift gate, and she complained of headaches, blurred vision, and dizziness post-concussion. No other notes are included from the March 20, 2015 visit. (Px3). The medical record from March 20, 2015 in Respondent's exhibits via subpoena, do not include the addendum from December 28, 2016. (Rx3 at 198 - 213). The Arbitrator declines to adopt Dr. Tinfang's addendum to his medical chart noting a concussion or headaches because Petitioner herself admitted she could not recall her treatment with Dr. Tinfang and there is no reliable explanation given why Dr. Tinfang would amend a medical chart which failed to mention any work injury. Even if the Arbitrator adopted Dr. Tinfang's addendum, Petitioner's diagnosis per the available medical record was and remains a head contusion. Also of note, the Arbitrator does not find Petitioner's prior complaints in 2014 of headaches sufficient enough to break any causal connection between her injuries and her work accident.

Accordingly, the Arbitrator concludes that Petitioner's condition as it relates to her head contusion is causally related to her undisputed work accident.

Issue (L) What is the nature and extent of the Petitioner's injury?

The Arbitrator incorporates for foregoing findings of fact and conclusions of law as though fully set forth herein. The record shows that Petitioner's head contusion reached maximum medical improvement on 2/15/15, the date in which she last treated with Ingalls.

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 an assembly line worker at the time of the accident and that she in fact returned to her same position. The Arbitrator notes that there appears to be no formal medical note

releasing Petitioner to return to work in her same pre-injury capacity. Petitioner testified she was able to return to her position and that 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 48 years old at the time of the accident. The Arbitrator acknowledges that Petitioner has potentially a longer work life expectancy and superimposed on her injuries, she may suffer the effects of those injuries longer as compared to a worker with a shorter work life expectancy remaining. On the other than, Petitioner's stated diagnosis was a contusion for which she has not treated for in sometime. Because of foregoing, 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 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 notes that Petitioner was diagnosed with a head contusion. Petitioner's medical records showed she complained of dizziness, blurred vision and headaches. Petitioner last treated for this work injury on 2/15/15. Petitioner's trial testimony regarding how she feels today are not corroborated by the available medical record and the Arbitrator finds her testimony in this regard to be overstated and unreliable. The Arbitrator finds the medical records from Ford and Ingalls to be most reliable. Based on the foregoing, the Arbitrator therefore gives the greatest weight to this factor.

The Arbitrator rejects Petitioner's contention that she suffered or suffers from post-concussive syndrome as such diagnosis is not noted anywhere in the medical record and where no reasonable inference for such a diagnosis exists based upon the available medical record. Pet the medical record, Petitioner suffered a closed head injury or concussion. Petitioner's CT scan was entirely negative for any acute abnormalities and Petitioner ceased any related medical treatment after her visit to Ingalls hospital. Based on the foregoing relevant factors, along with the record as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **3%** loss of man as a whole pursuant to §8(d)(2) of the Act.

ISSUE (N) Is Respondent due any credit?

The Arbitrator incorporates for foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, the parties failed to indicate whether they agreed that Respondent was entitled to an 8(j) credit. Ax1. Nevertheless, the Arbitrator finds and concludes because there was no dispute as to Petitioner's medical treatment and because no contrary evidence was submitted by Petitioner, Respondent shall be entitled to a credit under Section 8(j) in the amount of **$958.10** for payments made to Ingalls. Ax1, Rx5.

Signature of Arbitrator

9-11-2017
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

April Jacobs,

Petitioner,

vs. NO: 13 WC 4650

City of Chicago,

19IWCC0062

Respondent.

DECISION AND OPINION ON REVIEW

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

Pursuant to Section 8.1b of the Act, the Commission weighs the following five factors accordingly (*820 ILCS 305/8.1b(b)* (West 2014); *Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC, ¶ 52, 56 N.E.3d 1101):

Section 8.1b(b)(i) – level of impairment

Neither party obtained an impairment rating; as such, the Commission assigns no weight to this factor.

Section 8.1b(b)(ii) – occupation of the injured employee

At the time of the March 30, 2012 accident, Petitioner was employed as a construction laborer, a heavy physically demanding position. The Commission agrees with the Arbitrator that a heavy physically demanding position tends to place significant stress on the body causing it to

become more susceptible for future injuries. The Commission finds this weighs in favor of an increased permanence.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 38 years-old on the date of accident. The Commission observes Petitioner has a greater work life expectancy which will require her to manage the effects of her injury for a greater period of time. The Commission finds this weighs in favor of an increased permanence.

Section 8.1b(b)(iv) – employee's future earning capacity

Petitioner returned to work in the same position and earning the same or more than prior to the injury. There is no evidence that her future earning capacity was adversely impacted as a result of her injury. The Commission finds this weighs in favor of a decreased permanence.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

According to the medical records, Dr. Diadula of MercyWorks initially diagnosed Petitioner with right shoulder strain, right upper back strain, and neck sprain/strain. She was prescribed medication and physical therapy and was placed on limited duty. She was subsequently prescribed work conditioning. While attending work conditioning, Petitioner experienced a gradual onset of left neck and left shoulder pain. PX1, PX2.

On June 7, 2012, Petitioner sought treatment with Dr. Fardon. A cervical MRI was performed which evidenced some very minor degenerative changes within normal limits for Petitioner's age. Dr. Fardon prescribed physical therapy as well as medication. Petitioner continued to complain of left-sided lateral to anterior neck sub-clavicular and anterior arm pain. On August 22, 2012, a brachial plexus MRI was performed which was unremarkable. On September 11, 2012, an EMG was performed which evidenced medial cord of the brachial plexus dysfunction, but no evidence of radiculopathy or peripheral neuropathy. Dr. Fardon opined the EMG was concordant with her clinical symptoms. Dr. Fardon diagnosed a traction injury to the brachial plexus on the left-side and opined no surgery was needed. Dr. Fardon continued work restrictions. Petitioner underwent physical therapy and work conditioning but continued to complain of the same symptoms. On January 8, 2013, Dr. Fardon examined Petitioner, was unable to determine a specific diagnosis for Petitioner, and increased her work restrictions to 30 pounds. PX3.

On January 29, 2013, Dr. Levin evaluated Petitioner on request of Respondent pursuant to Section 12 of the Act. Dr. Levin opined Petitioner suffered from subjective complaints of pain with a clinical evaluation within normal limits. Dr. Levin released Petitioner to return to work full duty and placed Petitioner at maximum medical improvement with no further treatment indicated. RX1.

On June 4, 2015, Petitioner presented for her final evaluation with Dr. Fardon and reported significant improvement with a desire to return to work full duty. On June 11, 2015, Petitioner returned to work at her full duty capacity. PX3.

Petitioner testified she continued to work as a construction laborer and stated: "I know I'm not going to be a hundred percent, but I think I'm great to do the job." T. 25-26. Petitioner has sought no additional treatment for her neck and/or shoulders since her return to work. T. 31. The Commission finds this weighs in favor of a decreased permanence.

Based on the above factors and the record in its entirety, the Commission finds Petitioner sustained a 5% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's July 3, 2018 decision is modified for the reasons stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable, necessary and related medical expenses identified as outstanding pursuant to the exhibits for treatment prior to January 29, 2013 pursuant to §8(a) of the Act, subject to the Medical Fee Schedule pursuant to §8.2 of the Act. Respondent shall receive credit for all medical benefits that have been paid and Respondent shall hold Petitioner harmless for any claims as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $695.78 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability of the person as a whole to the extent of 5%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. The Commission notes Respondent paid $41,839.65 in temporary total disability benefits for the period from April 3, 2012 through January 28, 2013.

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

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There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 29 2019
LEC/maw
o12/19/18
43

L. Elizabeth Coppoletti

Joshua D. Luskin

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JACOBS, APRIL
Employee/Petitioner

Case# **13WC004650**

CITY OF CHICAGO
Employer/Respondent

19IWCC0062

On 7/3/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0154 KROL BONGIORNO & GIVEN LTD
RANDALL W SLADEK
120 N LASALLE ST SUITE 1150
CHICAGO, IL 60602-3506

0010 CITY OF CHICAGO DEPT OF LAW
D TAYLOR CHITTICK
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

April Jacobs
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 13 WC 4650

Consolidated cases: n/a

19IWCC0062

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Soto**, Arbitrator of the Commission, in the city of **Chicago**, on **4/16/18**. 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] 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 **3/30/12**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$73,216.00**; the average weekly wage was **$1,408.00**.

On the date of accident, Petitioner was **38** 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 **$41,839.65** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$41,839.65**.

ORDER

The Arbitrator finds that Respondent **shall pay medical expenses**, identified as outstanding pursuant to the exhibits, for treatment prior occurring **prior to 1/29/2013**, pursuant to Section 8(a) and 8.2 of the Act, and subject to the fee schedule. Respondent shall be given a credit for all medical benefits that have been paid and Respondent shall also hold Petitioner harmless for any claims by any providers for services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent is **not liable for medical treatment** received **after 1/29/2013**, as set forth in the Conclusions of Law attached herein.

Respondent is **not liable for TTD** benefits **after 1/29/13**, as set forth in the Conclusions of Law attached herein.

Respondent shall pay Petitioner the sum of $695.78/week for a period of **35 weeks** as provided in Section **8(d)(2)** of the act because the injuries sustained caused a **7%** loss of a **man as a whole**, as set forth in the Conclusions of Law attached herein.

Respondent's claim for a credit involving ordinary disability benefits is moot and need not be addressed, as set forth in the Conclusions of Law attached herein.

Respondent shall pay Petitioner compensation that has accrued from March 30, 2012 through April 4, 2018 and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

7/2/2018
Date

JUL 3 - 2018

PROCEDURAL HISTORY

This matter was tried before Arbitrator Frank Soto on April 16, 2018. The disputed issues are whether Petitioner's condition of ill-being is causally connected to her injury, whether Respondent is liable for unpaid medical expenses, whether Petitioner is entitled to TTD benefits from April 3, 2012 through June 11, 2015. Respondent denies liability for TTD benefits after January 29, 2013. Nature and extend of Petitioner's injury and whether Respondent is entitled to a credit for ordinary disability payments pursuant to Section 8(j) of the Act is also at issue.

FINDINGS OF FACT

On March 30, 1012, April Jacobs (hereinafter referred to as "Petitioner") testified that she was working for the City of Chicago (hereinafter referred to as "Respondent") as a construction labor when she injured her back and left and right shoulders holding a heavy pipe. At the time of her injury, Petitioner was 38 years old. Petitioner testified that the injury occurred on a Friday but she reported the accident the following Monday. After reporting the accident, Petitioner was treated at Mercyworks.

On April 2, 2012, Petitioner presented herself at Mercyworks and reported right shoulder and right upper back pain. The upper back pain was in the perithoracic area just medial to the right scapula. Petitioner reported her pain level as 4 out of 10. Petitioner reported being injured while holding up a valve, with a pipe, that was hooked up to a machine. When the machine released the pipe, the valve rolled over injuring her right shoulder and right upper back. (PX 1).

The examination found tenderness in the right scapula and in the area just medial to the scapula and in the deltoid. Petitioner had full abduction, forward elevation and internal rotation. There was no swelling in the shoulder's noted. The right shoulder x-ray was negative. Mercyworks diagnosed a strain of the right shoulder and right upper back. Petitioner was proscribed Skelazin and told to return in three days. (PX 1).

On April 5, 2012, Petitioner returned to Mercyworks. Petitioner reported pain in the right shoulder and right upper back near the right shoulder and scapula. Petitioner reported her pain level as 4 out of 10. Petitioner was proscribed physical therapy. On April 20, 2012, Petitioner returned to Mercyworks complaining of right shoulder and right upper back pain in the

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parathoracic areas medical to the right scapula. Petitioner also complained of pain in her elbows. Petitioner reported her pain level as 2 out of 10. Petitioner was proscribed Skelazin, Medrol dosepak and additional physical therapy. (PX 1).

On May 4, 2012, Petitioner returned to Mercyworks complaining of some right shoulder pain and right upper back, in the shoulder blade area, pain. Petitioner reported her pain level as 2 out of 10. Work condition was proscribed. (PX 1).

On May 16, 2012, Petitioner returned to Mercyworks complaining of stiffness in the trapezii, tenderness in the right scapula and in the area between the shoulder blades and the trapezii. Petitioner was taken out of work conditioning and, on May 21, 2012, she was referred to Dr. Heller. (PX 1).

On May 22, 2012, Petitioner went to the emergency room at Mercy Hospital complaining of left shoulder pain. Petitioner reported recently returning to work and her condition was worsening. Petitioner reported "crook, crawling feeling" on the left side of her neck since starting physical therapy a right shoulder sprain. Petitioner said the left shoulder pain onset was gradual over the past three weeks. Petitioner said she was unable to complete therapy because of the left side pain. The examination showed normal range of motion in the back and extremities with no swelling. Petitioner's motor strength was normal. Petitioner was released and given materials regarding a muscle strain and told to follow up with Dr. Heller and to schedule an MRI. (PX 2).

On June 7, 2012, Petitioner presented herself to Dr. Fardon of Midwest Orthopadedics at Rush. Petitioner reported that she was injured while holding a heavy pipe to steady the position of a pipe on uneven ground which strained the back of her neck and upper dorsal area. Petitioner complained of right parascapular and trapezius pain. The examination found Petitioner's upper extremities to be symmetrical with no muscle atrophy or weakness and with no clear sensory pattern for her symptoms. Dr. Fardon noted that Petitioner had nonspecific discomfort with overhead extension efforts and he diagnosed a cervical sprain and ordered an MRI. (PX 3).

After undergoing the MRI, Petitioner returned to Dr. Fardon, on June 20, 2012, Petitioner returned to Dr. Fardon who noted that each time Petitioner attempts, at work conditioning, to

return her to a point where she could go back to work she gets worse. Dr. Fardon reviewed the MRI which showed no significant abnormalities and very minor degenerate changes. Dr. Fardon recommend returning to physical therapy. (PX 3).

On July 11, 2012, Petitioner returned to Dr. Fardon complaining of increased pain in the right trapezius. Dr. Fardon noted that Petitioner had not returned to therapy. Dr.Fardon issued work restrictions of no lifting more than 25 pounds and no bending or stooping more than 6 times per hour and no overhead work. Dr. Fardon renewed his recommendation for physical therapy. (PX 3).

On August 1, 2012, Petitioner returned to Dr. Fardon reported she was making progress in therapy. Petitioner complained of left side of her neck pain in the supraclavicular fossa area and left trapezius pain. The examination found no neurological dysfunction, no Hoffmann's sign and no inverted brachioradialis response. Dr. Fardon recommended additional therapy. (PX 3).

On August 22, 2012, Petitioner returned to Dr. Fardon reporting that when she tries to increase her activities (lifting) the pain increases in the left side of the neck. Dr. Fardon noted that the location of the pain was in an odd location. The pain was down the supraclavicular fossa and up along the lateral side of the neck. The examination found no neurologic symptoms, no dysfunction in the arms and Petitioner's neck had full range of motion. Dr. Fardon ordered a brachial plexus MRI. Petitioner underwent the MRI which was unremarkable with no evidence of a focal finding or mass or lymphadenopathy in the supra left clavicular brachial plexus region. (PX 3).

On September 5, 2012, Petitioner returned to Dr. Fardon complaining of left-sided lateral anterior neck subclavicular and anterior arm pain. Dr. Fardon noted the pain was not associated with any specific activities or positions. Dr. Fardon also noted the pain was initially on the right side but continues to persist on the left side. Dr. Fardon ordered an EMG. (PX 3).

After undergoing the EMG, Petitioner returned to Dr. Fardon on September 20, 2012. Dr. Fardon's examination showed no radiating pain in the arms or legs, no neurologic deficit in her left arm and no pain with activities assisted motion in her shoulder. Petitioner reported pain in her neck with movements of the neck on the left. Dr. Fardon reviewed the EMG which

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showed no evidence of radiculopathy, no evidence of peripheral neuropathy but did show nerve conduction evidence of medial cord of the brachial plexus dysfunction. Dr. Faron wrote in his records, *"I think her electrodiagnostic observation is concordant with her clinical syndrome and that the best diagnosis is that she has had a traction injury to the brachial plexus on the left side."* Dr. Fardon opined that Petitioner's prognosis was good and no invasive treatment was needed. Dr. Fardon opined that Petitioner should not return to her heavy-duty work and that she should do light duty work. Dr. Fardon proscribed gabapentin and additional physical therapy. (PX3).

On November 1, 2012, Petitioner returned to Dr. Fardon. Petitioner reported that she was applying for a new job. Dr. Fardon noted that Petitioner did not need epidural steroid injections and issued work restrictions of no lifting more than 20 pounds occasionally. Dr. Fardon proscribed additional physical therapy and told Petitioner to return only as needed. (PX 3).

On January 8, 2013, Petitioner returned to Dr. Fardon. Petitioner reported that her symptoms were the same or slightly better. Dr. Fardon examined Petitioner and found that she had full range of motion, her upper extremity reflexes were symmetrical and there was no Hoffmann's sign and no inverted brachioradialis response. In his records, Dr. Fardon wrote, that he was uncertain of Petitioner's diagnoses and he modified her restrictions to no lifting over 30 pounds and no overhead work. (PX 3).

On January 29, 2013, Petitioner was examined by Dr. Mark Levin, pursuant to Section 12 of the Act. Petitioner reported minimal pain on the right side. Petitioner complained of numbness and tingling on the left side of her head to her left trapezius. Petitioner's orthopedic examination was normal. Dr. Levin found that Petitioner did not have any true objective pathology and he further found that Petitioner's subjective complaints did not fit any objective residual orthopedic pathology. Dr. Levin opined that Petitioner was at maximum medical improvement, she did not need any additional medical treatment and she could return to work full duty. (RX 1). Petitioner's TTD benefits were terminated as of January 23, 2013.

On April 11, 2013, Petitioner retuned to Dr. Fardon reporting discomfort in the supraclavicular area on the left side and along the left side of the neck. Dr. Fardon said Petitioner could work but not heavy lifting. Dr. Fardon ordered an EMG and MRI.

After undergoing an EMG and MRI, Petitioner returned to Dr. Fardon, on June 25, 2013. Dr. Fardon said the EMG showed a very slight slowing of the sensory conduction of the ulnar distribution without any localizing lesion and there was no evidence of a brachial plexus abnormality. Dr. Fardon advised Petitioner to return to work and resume normal life activities in spite of her residual pain. Dr. Fardon proscribed work conditioning. (PX 3).

On August 6, 2013, Petitioner returned to Dr. Fardon reporting that work conditioning exacerbated her condition. Petitioner complained of left supraclavicular area pain. Dr. Fardon recommended continuing with work conditioning. On October 10, 2013, Petitioner returned to Dr. Fardon with the same complaints. Dr. Fardon examined Petitioner and noted that he was unable to locate any mass or tenderness in the supraclavicular fossa area. Dr. Fardon opined that Petitioner may have a minor brachial plexus injury. Dr. Fardon stated he did not believe Portioner was being well served by not working. (PX 3).

On January 8, 2014, Petitioner underwent a functional capacity examination which showed that Petitioner could work at a medium level physical demand level. On April 25, 2014, Dr. Fardon ordered a repeat of a MRI of the brachial plexus area. Petitioner underwent the MRI on May 1, 2014. The MRI was unremarkable with no evidence of a mass or other abnormally to account for Petitioner's symptoms. (PX 3).

On May 22, 2014, Petitioner returned to Dr.Fardon who indicated that the MRI did not show anything suggestive of any residual brachial plexus injury. Dr. Fardon found that Petitioner was at maximum medical improvement and there was nothing further to do. Dr. Fardon released Petitioner to sedentary or certain forms of medium work. (PX 3).

On June 4, 2015, Petitioner retuned to Dr. Fardon reporting only minimal pain. Dr. Fardon recommended work conditioning and, if not approved, Dr. Fardon said Petitioner could return to work full duty. (PX 3).

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Petitioner testified that she returned to work as a construction labor on June 4, 2015 and she has been able to perform her job duties. Petitioner testified that she is not at 100% and that she has to work differently. Petitioner also testified that she has not sought any medical treatment after being released from Dr. Fardon on June 4, 2015.

CONCLUSION OF LAW

The Arbitrator adopts the above Findings of Fact in support of the following Conclusions of Law set forth below.

To obtain compensation under the Act, a claimant bears the burden of showing by a preponderance of the evidence, he suffered a disabling injury which arose out of, and in the course of his employment. *Baggett v. Industrial Commission*, 201, Ill 2d. 187, 266 Ill. Dec. 836, 775 N.E. 2d 908 (2002). 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 to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. vs. Industrial Commission*, 129 Ill. 2d, 52, 133 Ill. Dec. 454, 541 N. E. 2d. 665 (1989). Accidental injury need not be the sole causative factor, not even the primary causative factor, as long as it was a causative factor in resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Commission*, 37, Ill. 2d. 123, 227 N.E. 2d. 65 (1967).

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

To recover under the Act, an employee must show that there is a causal connection between the claimant's employment and the injury. In *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 797 N.E.2d 665 (2003), the Illinois Supreme Court held that "even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor." *Id.* The accident "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.* (emphasis in original).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the evidence that her current shoulder and neck condition is causally related to her work accident of March 30, 2012. Petitioner testified that she was injured at work and that she reported the injury soon after the injury. The history Petitioner provided at Mercyworks was consistent with her testimony and consistent with Dr. Fardon's medical records. The Arbitrator notes that Respondent did not proffer any witnesses or evidence disputing that Petitioner's current condition of ill-being is not causally related to her work accident of March 30, 2012.

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

Petitioner claims Respondent is liable for unpaid medical bills. Petitioner did not specify which medical bills Respondent is liable. Rather, Petitioner cites to the Petitioner's exhibits. On the Request for Hearing, Petitioner wrote "See petitioner's exhibits". (Arb. Ex. #1). Petitioner's Exhibit No. 1 does not contain any medical bills or invoices. (PX 1). Petitioner's Exhibit No. 2 does not contain any medical bills or invoices. (PX 2). Petitioner's Exhibit No. 3 contains twenty-five (25) encounter invoices, from Midwest Orthopaedics at Rush, dated August 19, 2015, with various charges and dates of services. None of the encounter invoices indicate that an amount is due from either the insurance company or patient. (PX 3). Petitioner's Exhibit No. 4 contains three (3) patient statements from ATI Physical Therapy, dated November 20, 2013, with various charges. (PX 4). Petitioner's Exhibit No. 5 contains eight (8) Health Insurance Claim Forms, from Midwest Orthopaedics at Rush, for dates of service of 10/10/13, 12/10/13, 01/08/14, 02/25/14, 04/25/14, 05/01/14, 05/22/2014 and 06/04/15. (PX 4). Respondent submitted into evidence an Itemization of benefits paid by Respondent to ATI, Midwest Orthopaedics and Mercy Hospital. (RX 2).

A claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, treat, relieve or cure the effects of the claimant's injury. *F&B Manufacturing Co.*, 325 Ill.App.3d 527, 534 (2001). That Petitioner failed to prove that Respondent is liable for medical expenses after January 29, 2013,

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the date of Dr. Levin's report. As such, the Arbitrator finds that treatment after January 29, 2013, was not causally related to the accident and not needed to diagnose, treat, relieve or cure Petitioner from the effects of her injury and, as such, the Respondent is not liable for treatment after January 29, 2013. However, the Respondent did not dispute liability for medical treatment prior to January 29, 2013. As such, the Arbitrator finds that Respondent is liable for medical treatment, identified in Petitioner's exhibits, occurring prior to January 29, 2013 was treatment that was reasonable and necessary to diagnose, treat, relieve or cure Petitioner from the effects of her injury. As such, Respondent shall pay for medical treatment, identified in Petitioner's exhibits, provided prior to January 29, 2013 pursuant to Section 8(a) and 8.2 of the Act, and subject to the fee schedule. Respondent shall be given a credit for all medical benefits that have been paid and Respondent shall also hold Petitioner harmless for any claims by any providers for services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act, as set forth more fully below.

On January 29, 2013, Dr. Mark Levin found Petitioner to be at maximum medical improvement and he opined that Petitioner did not need further medical treatment. Dr. Levin found Petitioner's orthopedic examination to be normal. Dr. Levin opined that Petitioner's subjective complaints did not fit any objective residual orthopedic pathology. (RX 1).

The Arbitrator finds the opinions of Dr. Levin to be persuasive. The Arbitrator further finds that Dr. Fardon's medical records supports Dr. Levin's opinions. Dr. Fardon's January 8, 2013, examination found that Petitioner had full range of motion, symmetrical upper extremities, and there was no Hoffmann's sign and no inverted brachioradialis response. On that date, Dr. Fardon said he was uncertain as to Petitioner's diagnoses. (PX 3). After Dr. Levin's examination of January 29, 2013, Dr. Fardon ordered additional MRIs and EMGs, which found no abnormalities. The subsequent MRIs and EMGs found no evidence of any brachial plexus abnormalities. At no time, were Petitioner's subjective complaints validated by an objective neurological test. Petitioner's initial symptoms involved the right shoulder and right scapula area. Petitioner's symptoms changed to her left side. Dr. Fardon, on January 8, 2013, was, uncertain of Petitioner's diagnoses.

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Petitioner returned to full duty work on June 4, 2015 without undergoing any additional medical treatment other than physical therapy, which she failed to complete. Petitioner testified that upon returning to work, she could perform all of her job duties. After returning to full duty, Petitioner did not need to return to treatment. The Arbitrator finds that returning to full duty without needing to return to treatment further supports Dr. Levin's opinions of January 29, 2013.

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:

Once a claimant has reached MMI, an injury has become permanent and he is no longer eligible for TTD benefits. *Nascote Industries v. Industrial Comm'n,* 353 Ill. App. 3d. 1067, 1072 (5th Dist. 2004) (*citing Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill.2d 107, 118 (1990)). To be entitled to receive TTD, the claimant must also show not only that he or she did not work but also that he or she was unable to work. *Interstate Scaffolding, Inc. v. The Illinois Workers' Compensation Commission,* 236 Ill.2d 132, 923 N.E.2d 266, 337 Ill. Dec. 707 (2010).

Petitioner claims she is entitled to TTD benefits from April 3, 2012 through June 11, 2015. Respondent paid $41,839.65 in TTD benefits and disputes liability for TTD benefits after January 29, 2013, the date of Dr. Levin's report. (Arb. Ex. #).

The Arbitrator finds that Petitioner failed to prove by the preponderance of the evidence that she is entitled to TTD benefits after January 29, 2013 as set forth more fully below.

The Arbitrator found the opinions of Dr. Levin to be persuasive and that Petitioner was at maximum medical improvement as of January 29, 2013. Dr. Levin found that Petitioner's subjective complaints did not correspond to any objective findings and Petitioner was capable for returning to work full duty as a Construction Laborer. Petitioner's course of treatment after Dr. Levin's examination consisted of sporadic and infrequent appointments with Dr. Fardon, who said, on June 25, 2013, approximately two years prior to Petitioner returned to work, "*I have advised her that I think she needs to get back to work and get back with normal life activities in spite of the residual pain that she may experience.*" On October 10, 2013, Dr. Fardon wrote in his records "*I do not think she is being well serviced by continued absence from any work.*" Dr. Levin opined that Petitioner was capable to return to full duty on January 29, 2013. Without undergoing any significant medical treatment and while reporting the same or similar

complaints, Petitioner returned to full duty work on June 4, 2015. Petitioner testified that she was able to perform her job duties and that she did not seek any additional medical treatment after returning to work. Additionally, Dr. Fardon eventually authorized Petitioner to return to work full duty without restrictions and Petitioner was able to perform her duties. The Arbitrator finds that Petitioner's ability to return to work supports Dr. Levin's opinions. As such, Petitioner's claim for TTD benefits after January 29, 2013 is herby denied.

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

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

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:
   - (i) The reported level of impairment;
   - (ii) The occupation of the injured employee;
   - (iii) The age of the employee at the time of injury;
   - (iv) The employee's future earning capacity; and
   - (v) Evidence of disability corroborated by medical records.

With regards to paragraph (i) of Section 8.1(b) of the Act. No AMA rating was offered into evidence. The Arbitrator, therefore, gives no weight to this factor.

With regards to paragraph (ii) of Section 8.1(b) of the Act. Petitioner was employed as a construction labor. A construction laborer is a heavy physical demand position. The Arbitrator notes that heavy physical demand positions tend to place significant stress on the body causing the body to breakdown or become more susceptible for future injuries. The Arbitrator gives this factor great weight.

With regards to paragraph (iii) of Section 8.1 (b) of the Act. Petitioner was 38 years of age on the date of the accident and as such the Petitioner will be in the work force being exposed to heavy physical demanding work for a long time. Petitioner will be required to continue working for many years with the effects of this injury. Petitioner testified that she is not at 100% and she changed the way she works because of the effects of this injury. The Arbitrator gives this factor great weight.

With regards to paragraph (iv) of Section 8.1(b) of the Act. Petitioner returned to work in the same position and earning the same or more money than prior to the injury. Petitioner did not proffer any evidence that her future earning capacity was compromised or adversely impacted as a result of her injury. The Arbitrator gives this factor some weight.

With regards to paragraph (v) of Section 8.1 (b) of the Act. The treating medical records in this case corroborate Petitioner's neck and shoulder injury; however, the records of treatment after January 29, 2013, showed sporadic and infrequent treatment. Petitioner was able to return to full duty work, without the needing additional medical treatment, supports Dr. Levin's opinion regarding MMI and that Petitioner's subjective complaints did not fit with any objective residual orthopedic pathology. Dr. Levin's opinion was consistent with Dr. Fardon's medical records which also documented Petitioner's residual pain complaints. The Arbitrator gives this factor great weight.

Based upon the above factor, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 7% loss of a person as a whole or 35 weeks, pursuant to Section 8(d)(2) of the Act.

WITH RESPECT TO ISSUE (N) WHETHER PETITIONER IS ENTITLED TO A CREDIT FOR ORDINARY DISABILITY PAYMENTS, THE ARBITRATOR FINDS AS FOLLOWS:

In light of the Arbitrator's finding regarding Respondent's liability for TTD benefits after January 29, 2013, the issue of whether or not Respondent is entitled to a credit for ordinary disability benefits received by Petitioner is moot and need not be addressed.

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

Edwin Cadiz,

Petitioner,

vs. NO: 15 WC 32886

UPS

Respondent.

19IWCC0063

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 July 18, 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: JAN 29 2019
o012419
DLG/mw
045

David L. Gore

Stephen Mathis

Deborah Simpson

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

CADIZ, EDWIN
Employee/Petitioner

Case# **15WC032886**

UPS
Employer/Respondent

19IWCC0063

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:

0222 GOLDBERG WEISMAN & CAIRO LTD
JAMES BABCOCK
ONE E WACKER DR 39TH FL
CHICAGO, IL 60601

5880 ASA LAW GROUP
KATE EXO
1301 W 22ND ST SUITE 201
OAK BROOK, IL 60523

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

EDWIN CADIZ
Employee/Petitioner

v.

UPS
Employer/Respondent

Case # **15** WC **32886**

Consolidated cases: **None**

19IWCC0063

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **ARBITRATOR MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO**, on **May 11, 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 3, 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 **$17,711.89**; the average weekly wage was **$376.55**.

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

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

Respondent shall be given a credit of **$7,734.51** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$7,734.51**. Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits at the statutory minimal rate of **$253.00** per week for the periods from **09/04/15** through **03/06/17** and from **07/17/17** through **05/11/18**, representing **121-2/7th** weeks. Respondent is entitled to a credit for payments previously made in the sum of **$7,734.51**.

Respondent shall pay the reasonable and necessary medical services in the gross amount of **$644,966.64**, subject to liability parameters under *Perez* for spousal payments made by BCBS in the amount of **$175,338.94** and further subject to Sections 8(a) and 8.2 of the Act. Respondent shall be entitled to a credit for Liberty Mutual payments made. Respondent's request for 8(j) credit is ***denied*** as Respondent is not entitled for payments made by Petitioner's spouse's group health carrier.

Respondent shall authorize and approve the follow up visits with Drs. Rinella and Rhode.

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

7-18-18
Date

JUL 1 8 2018

FINDINGS OF FACT

Petitioner, Edwin Cadiz, age 54 and married, was employed as a part-time forklift driver by Respondent UPS. Petitioner had operated fork lifts for 20-25 years and began working with Respondent in 2014 at the South Holland Freight hub which has approximately 217 docks, dispersing freight from trailer to trailer. (T. p. 7-9)

On the morning of September 3, 2015, Petitioner was operating a forklift capable of carrying a maximum weight of between 2,500 to 3,000 pounds with the lift weighting between 3,500 to 4,000 pounds. The lift was equipped with a seatbelt but was not equipped with any other restraints such as a shoulder harness. The docks are located outside and trucks back trailers to the dock on a pavement with a downward slope toward the dock. The dock itself is four to five feet above the pavement. (T. p. 9-10, 16)

Petitioner's lift approached a trailer with a skid about chest high and six feet wide through the dock door. As the forks and front wheels reached the trailer at two miles per hour, the truck took off very quickly and without warning. As a result, the forks of the 3,500 to 4,000-pound lift went straight down to the pit four to five feet below. Petitioner's hands were on the steering wheel when the truck took off. The weight of the lift being operated was on the back end. The lift struck the sloped pavement five to six times. The first impact with the pavement was the front left fork which was described as very brutal. The second impact was with the right rear and then the lift rocked back to the left, to the right and then back to the left again. Petitioner described attempting to brace himself, but the impacts were so violent that he was unable to prevent his body from being shaken to the left and right. (T. p. 11-16)

When the lift came to a rest, Petitioner notices a lot of pain in his lower back, shoulder and neck and attempted to grab the top rack to take the pressure off of his back until an ambulance arrived and transported Petitioner to Ingalls Hospital. (T. p 16-17). There, Petitioner complained of low back pain due to fall. Px1. Petitioner gave a history that he was driving a forklift when the trailer pulled away and he fell out of the forklift onto the ground.

Ingalls Memorial Hospital performed x-rays and CT scans to the left hip, head, back and neck and discharged Petitioner with a diagnostic impression of closed head injury, cervical strain and lumbar strain with instructions to follow up with a doctor within 24-48 hours and prescribed Flexeril and anti-inflammatories.

Petitioner sought additional medical treatment on September 4, 2017 at Orland Park Orthopaedics/Blair Rhode, M.D. (Pet. Ex. 2) Dr. Rhode's exam found lumbar paraspinous muscle pain with palpation with pain upon forward flexion. The neck exam found pain upon palpation and limited active range of motion. Petitioner was taken off of work for two weeks to reassess and consider physical therapy and/or an MRI.

On September 18, 2015 Petitioner reported continued pain in the low back and neck with pain radiating down his right lateral thigh. An MRI was prescribed, and Petitioner remained off duty with a prescriptions for Norco, Flexeril and Mobic. On September 30, 2015, the back pain continued to be reported as radiating down the right lateral thigh. The MRI was interpreted as L5-S1 bilateral foraminal stenosis with the right being greater than the left. Because the low pain was more radicular than axial, Dr. Rhode recommended Petitioner remain off duty and that Petitioner undergo an epidural. The November 13, 2015 chart note indicates approval for the epidural and been withheld pending additional conservative treatment. Dr. Rhode prescribed remaining off duty, NSAIDS, rest and physical therapy. The follow up on December 11, 2015 found continued positive bilateral straight leg raising and the low back and right lateral thigh pain was reported as increasing with sitting.

Again, an epidural was prescribed with Petitioner to remain off of work with medications prescribed in the form of Norco, Flexeril & Mobic.

On December 22, 2015 Dr. Rhode performed the first of three lumbar epidural steroid injections for in the right side L5/S1 at South Chicago Surgical Solutions. Petitioner reported on January 6, 2016 as responding well to the first ESI and requested a return to work light duty despite continued neurological symptoms into the right leg with paraspinous muscle pain on palpation and a positive straight leg raising exam. Petitioner testified at the hearing that he wanted to try light duty to see if he could hopefully get better and get back to full duty. He worked a half day, two-and-a-half to three hours walking around the warehouse picking up bills from each trailer but by the time he completed half of the warehouse he said he was in a lot of pain in both his lower back and his right leg. (T. p22)

Physical therapy for a diagnosis of lumbar radiculopathy was performed at ATI from November 17, 2015 through January 4, 2016. Px8. Upon discharge, Petitioner continued to endorse low back pain, left greater than right. Interim utilization review non-certified the therapies as recommended by Dr. Rhode based upon non-improvement, exceeding ODG recommendations and that Petitioner should continue via home exercise.

On January 13, 2016, Dr. Rhode reported that Petitioner did not tolerate the return to light duty on Tuesday, January 12, 2016. Examination found paraspinous muscle pain on palpation, positive straight leg raise, and forward flexion to the knees was with pain. Petitioner was reported to have radicular symptoms down the right leg. Flexeril, Mobic & Norco continued to be prescribed, Petitioner was to remain off duty and a second epidural was prescribed due to the positive response to the first.

On January 19, 2016, the second transforaminal lumbar epidural steroid injection was performed on the right side L5/S1 at South Chicago Surgical Solutions by Dr. Rhode. On February 8, 2016, Petitioner reported little or no relief. Examination found paraspinous muscle pain on palpation, positive straight leg raising with range of motion forward flexion to the knees with pain. The radicular symptoms continued down the right leg. The Flexeril, Mobic & Norco were continued, Petitioner was to remain off duty. He was referred to a back specialist and prescribed a third epidural steroid injection which was performed on February 23, 2016.

Little or no relief was reported upon follow up on March 09, 2016 following the third ESI. Dr. Rhode reported paraspinous muscle pain on palpation, positive straight leg raising examination, forward flexion to the knees with pain and extension to 20 degrees with pain. Flexeril, Mobic & Norco. Remain Off Duty. Referral was made to a back specialist, Anthony Rinella, M.D. Petitioner was to remain off duty and continue with the prescribed Flexeril, Mobic and Norco.

Anthony Rinella, M.D. an adult and pediatric spine surgeon with Illinois Spine and Scoliosis Center first examined Petitioner on March 25, 2016. (Pet. Ex. 3 & 5) At that time, Petitioner rated his pain as a 6/10 and 11/10 on a 10 –point visual analog scale. On examination, Petitioner's forward flexion was limited to 30 degrees secondary to pain, with numbness along the lateral aspect of his right leg extending over his shin. Dr. Rinella interpreted the CT scan of 09/03/2015 and the MRI of 09/23/2015 as demonstrating severe degenerative disc disease with bilateral foraminal stenosis at L5-S1 and central stenosis at L4-L5 and L5-S1. Surgery was prescribed in the form of an L5-S1 fusion with L4-L5 laminectomy. Based upon the symptoms and the mechanism of the injury Dr. Rinella noted on November 11, 2016 that it was very clear that Petitioner became symptomatic from pre-existing L5-S1 foraminal stenosis during the work-related fall of the forklift.

On March 26, 2016 Petitioner attended a section 12 exam with Timothy Payne, M.D. after which all benefits were discontinued.

Petitioner was reevaluated by Dr. Rinella on April 07, 2016, June 08, 2016 and July 27, 2016. Petitioner remained either unchanged or with very similar symptoms with low back pain radiating into his right thigh and calf, rating his pain an 8/10 on a 10-point visual analog scale despite taking Norco, Soma and Flexeril. Numbness was noted in the S1 more so than the L5 distribution on the right side.

Petitioner remained off duty and continued with Orland Park Orthopaedics on April 27, 2016, June 6, 2016 and June 08, 2016. On April 27, 2016 Dr. Rhode noted that the low back radicular symptoms continued down the right leg in the form of lateral thigh to lateral calf physiological to the S1 dermatome. He also noted that the lack of atrophy was not a factor and that the low back injury was secondary to the fall on the forklift.

Dr. Rinella performed two surgeries upon Petitioner while an inpatient at Silver Cross Hospital during the period from July 11, 2016 through July 15, 2016. (Pet. Ex. 3 & 4)
On July 11, 2016 an L4-S1 posterior spinal instrumentation, L4-S1 posterolateral fusion, transforaminal lumbar fusion, placement of PEEK interbody cage, local spinal autograft, spinal allograft, fluoroscopic imaging, and L4-L5 laminectomy was performed. (Pet. Ex. 4 p. 134-135)

On post-surgical day one, it was noted that Petitioner had an increase in the right posterior thigh symptoms and numbness. Dr. Rinella diagnosed a right S1 more so than L5 radiculopathy. A CT scan demonstrated bone graft in the lateral recess of L5-S1. As a result, a revision L4-S1 laminectomy was performed with partial fascetectomy and foraminotomy L4-L5-S1. (Pet. Ex. 4 p. 133)

Following the surgeries, Petitioner was placed as an inpatient with Silver Cross Rehabilitation. (Pet. Ex. 4 p 623-1147)

After discharge, Dr. Rinella reported slow but consistent improvements. On July 27, 2016 Orland Park Orthopaedics reported improvement with right leg symptoms while Petitioner continued to use a walker for assistance. On August 24, 2016 Dr. Rinella noted that the right foot numbness had decreased. Physical therapy was undertaken as Petitioner continued post-surgical visits with Dr. Rinella & Orland Park Orthopaedics and remained off duty. On December 28, 2016, Dr. Rinella recommended a return to light duty work with a 15-pound restriction and no repetitive bending or twisting. On December 30, 2016, Orland Park Orthopaedics recommended sedentary work. On January 25, 2017 Dr. Rinella noted pain complaints of 5/10 but on exam noted slightly diminished sensation in the right S1 and L5 distribution. On March 1, 2017, Dr. Rinella released Petitioner to return to work full duty.

Petitioner testified that he attempted to return to work full duty operating a forklift on March 6, 2017. (T. p 30). He testified that he drove a forklift for about a week when the pain returned. On May 22, 2017, Petitioner reported to Orland Park Orthopaedics that his back was getting harder and harder to work with and that he essentially becomes bedridden after a day at work with increasing pain radiating into the buttocks. He continued to work with restrictions as prescribed by the treating physicians through July 16, 2017. (T. p. 33)

On June 22, 2017, Dr. Rinella noted the pain had increased to 8/10 after returning to work and that Petitioner was complaining of right thigh symptoms extended into the buttocks while taking anti-inflammatories and Lidocaine ointment. Exam found tenderness at the LS junction with forward flexion limited to 45 degrees due to pain. A CT performed was interpreted by Dr. Rinella on July 26, 2017. He found bilateral screws at L4

and L5 and only a left-side screw at S1 which was loose with views suggesting motion of the cage. Due to the loosening of the S1 screw, a revision procedure was prescribed. From September 19, 2017 through September 25, 2017 Petitioner was an inpatient at Silver Cross Hospital and underwent the revision surgery, his third back surgery overall, which included removal of rods and screws, placement of a new right S1 pedicle screw, replacement of the left S1 screw, an L5-S1 posterolateral fusion.

Petitioner has remained off duty under the care of this treating physicians since this third surgery through the date of hearing.

On December 21, 2017, Dr. Rinella noted slow improvement following L4-S1 revision fusion. Px6. Physical therapy has been undertaken at ATI from January 08, 2018 through February 16, 2018. (Pet. Ex. 9) On February 23, 2018, Petitioner saw Dr. Rhode for follow up of low back and neck pain. He was to remain off work and continue follow up for spine surgery. Px7. On March 09, 2018, Dr. Rinella had noted concern to monitor the S1 blade that may have partially dislodged per x-ray. Px6. Petitioner was to continue core exercise program and follow up. On March 23, 2018, Petitioner again returned to Dr. Rhode, unchanged. He was to follow up for palliative management. Px7.

As of the date of hearing, May 11, 2018, Petitioner testified that a repeat CT was pending review by the surgeon. (T. p. 35) He testified that he hardly gets any sleep at night, that the numbness in his right leg and pain in the low back is constant, describing the pain as a 7/10 almost every day. (T. p 59) After one to two hours of sleep, Petitioner testified to waking in pain with spasms. (T. p 36) When Petitioner attempts to walk more than a block, Petitioner testified that he gets stiff and his back gets hard to the touch. Prior to the accident he would walk to the park three to four blocks from his house and play basketball with his son. (T. p.58)

Prior to this accident, Petitioner testified that he never received medical treatment for his low back or right leg, had no prior problems with his low back and right leg and had worked continuously for Respondent outside of a prior work related left leg fracture in which he denied injuring his back in any fashion. He had no difficulties operating his forklift prior to the accident and described his work ethic as hustle, hustle, hustle, rarely saying no to extra hours when asked on his Tuesday to Saturday shifts. He had no physical limitations to the numbers of hours he could work prior to the accident. (T. p 36-39, 41).

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

Petitioner was the only witness to testify at trial. Having considered all evidence, the Arbitrator finds Petitioner's testimony was credible, forthright and otherwise unrebutted. Petitioner was consistent in giving his history of accident and did appear to exaggerate the facts and circumstances thereto. Petitioner's recollection is repeated in various medical records. Petitioner was also credible in describing his course of medical treatment, his current and ongoing symptoms and his understanding of the ongoing need for additional medical treatment.

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

Based upon the evidence presented, the Arbitrator finds that there is a causal relationship between Petitioner's current condition of ill-being and the accident of September 3, 2015. There is no evidence that

Petitioner was suffering from any problems with his lower back and right leg prior to the date of accident. There is no evidence that Petitioner sustained any subsequent, intervening accidents or injuries to the affected body parts. Petitioner provided credible testimony as to the mechanism of injury, his course of care, which under a chain of events theory demonstrated a prior state of good health and an immediate change thereafter following the work accident. In this case, the Arbitrator concludes that Petitioner has proven that his work accident was a causative factor in his current condition of ill-being as it relates to his lumbar spine.

In so finding, Arbitrator relies on the opinions of Petitioner's treating physicians, Drs. Rhode and Rinella. The accident is accurately described in the histories recorded by the physicians. The Petitioner's testimony describing a 3,500 to 4,000-pound forklift falling fork first from the dock into a pit 4 to 5 feet below, and rocking font to back and side to side has been consistent through-out the record. Based upon the symptoms and the mechanism of the injury Dr. Rinella noted on November 11, 2016 that it was very clear that Petitioner became symptomatic from pre-existing L5-S1 foraminal stenosis during the work-related fall of the forklift. On April 27, 2016 Dr. Rhode noted that the low back radicular symptoms continued down the right leg in the form of lateral thigh to lateral calf physiological to the S1 dermatome. He also noted that the lack of atrophy was not a factor and that the low back injury was secondary to the fall on the forklift

The Arbitrator does not find the opinions of Respondent's Section 12 examiner, Dr. Thomas Payne persuasive. Dr. Payne acknowledged that there were no prior indications of low back symptoms and that it was possible for the accident to have aggravated the pre-existing foraminal stenosis. Dr. Payne also acknowledged that improvement was had following surgery and that Petitioner benefited from surgery. The Arbitrator finds this opinion to be equivocal and entitled to less weight compared to Petitioner's extensive treatment records and the opinions of Drs. Rinella and Rhode. Therefore, the Arbitrator finds Petitioner's current condition of ill-being as it relates to his cervical and lumbar spine related to his work accident.

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

Based upon the evidence presented, the Arbitrator finds that the bills itemized in Petitioner's Exhibit #10 are reasonable and necessary. The Arbitrator further finds that each bill contains a corresponding date of service which is found in the record. The records correlated to treatment reasonable and necessary as to Petitioner's low back condition. Accordingly, the Arbitrator awards these bills in gross and subject to the limitations discussed below.

The following bills are ***denied*** as there is no corresponding bill other than a reference made in Petitioner's summary of bills captioned "Bill Review," which appear as the first few pages of Px10: South Holland Fire, Superior Ambulance, Ingalls Memorial Hospital, Bob Rady, Inc., HC Radiology, Assoc. Radiologists, Comprehensive Pathology, Hospitalists Consul. Grp., Neuralwatch Texas, Prof. Clinical Labs, Imaging Assoc. of Indiana, Munster Radiology, Progressive Surgical, American Neuro. and St. Margaret Mercy. Px10.

In awarding the remaining bills listed below, the Arbitrator assigns little weight to Respondent's UR reports, as they fail to persuasively explain why such treatment was not reasonable or necessary. The Arbitrator places greater weight on the treatment recommendations on Petitioner's treaters, noting ODG to be guidelines only. Thus, the following bills are awarded in gross to Petitioner. The Arbitrator finds these bills reasonable,

necessary and otherwise related to Petitioner's cervical and lumbar work-related injuries and further notes that the appropriate bill appears in the record, along with a corresponding medical record.

Action PMR	$1,616.00
Allied Anest. Assoc.	$18,550.00
ATI PT x245	$6,126.28
ATI PT x364	$12,552.89
ATI PT x936	$3,777.17
BCBS Lien	$175,338.94
Comm. Hospital	$28,155.85
Franciscan Phys. Network	$2,692.50
HC Radiology	$316.00
Illinois Spine & Scoliosis	$198,471.94
Infinite Strategic	$671.43
Medical Services RIC	$414.00
Orland Park	$36,643.11
Rx Development	$10,241.94
Silver Cross	$305,060.17
South Chicago Surgical	$11,527.50
US Lab	$8,149.86

At trial, Respondent asserted an 8(j) credit noting it was "to be shown." Ax1. Petitioner disputed the claim for credit, noting that payments made by Petitioner's spousal group were not subject to such credit. *Id.* Here, workers' compensation insurance payments were made by Liberty Mutual and spousal group payments were made by BCBS. The Arbitrator is unable to award an 8(j) credit, noting that Petitioner did not have group health insurance through Respondent for which such a credit would normally be allowed and any payments made by Liberty Mutual are not credit under 8(j) but rather credit for payments made. In addition, the Arbitrator notes that the recent case of *Perez v. Ill. Workers' Comp. Comm'n*, 2018 IL App (2d) 170086WC does not change this conclusion. *Perez* is, however, relevant to the issue of what Respondent's liability is for awarded medical bills noted above.

In *Perez*, the appellate court found that an employer is only liable for the amount of medical expenses actually paid pursuant to the negotiated rate, regardless of whether the employer or its insurer negotiated the rate. In interpreting Section 8(a) only, the Perez court did not hold that spousal group payments should operate as a credit under Section 8(j) but rather only that the employer's liability should be limited to that negotiated rate. Here, payments by BCBS are reflected in some of the bills awarded above, however, the Arbitrator is unable to determine whether such payments reflect the fully negotiated rate and whether such payments are to some or all dates of service for any given provider. Similarly, payments made by Liberty Mutual are also reflected in some of the bills but again the Arbitrator is unable to determine whether such payments reflect the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or the fee schedule. Therefore, the Arbitrator awards the above bills in gross, which total **$644,966.64**, subject to liability parameters under *Perez* for spousal payments made by BCBS in the amount of **$175,338.94** and further subject to Sections 8(a) and 8.2 of the Act. Respondent shall be entitled to a credit for Liberty Mutual payments made.

ISSUE (K) 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. Petitioner testified that a follow up visit with Dr. Rinella to review the recent CT scan is pending.

Dr. Payne testified that Petitioner required further care as to his degenerative conditions but remained equivocal on causation. Having found in favor of Petitioner on the issue of causation, the Arbitrator adopts Petitioner's treating doctor's opinions and adopts the portion of Dr. Payne's opinion agreeing that Petitioner is in need of further treatment. Treatment records show that Petitioner has not yet reached maximum medical improvement for his lumbar spine condition and that he continues to experience ongoing symptoms. Thus, the Arbitrator finds that Respondent shall authorize the follow up visit with Dr. Rinella.

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. Petitioner claims that he has been temporarily totally disabled from **September 4, 2015** through **March 6, 2017** and from **July 17, 2017** through the date of hearing, **May 11, 2018**. Petitioner attempted to return to work on two occasions. The Arbitrator adopts the findings of the treating physicians together with the testimony of the Petitioner in awarding benefits for this period totaling **121-2/7th** weeks at the statutory minimum rate of **$253.00** per week. Respondent is entitled to a credit for payments previously made in the sum of **$7,734.51**.

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

Elissa Velasquez,
Petitioner,

vs. NO: 16 WC 15219

Lightology,
Respondent.

19IWCC0064

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical, 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 $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 9 2019
o012419
DLG/mw
045

David L. Gore

Stephen Mathis

Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VELASQUEZ, ELISSA
Employee/Petitioner

Case# **16WC015219**

LIGHTOLOGY
Employer/Respondent

19IWCC0064

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
LYNN TAYLOR
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

2461 NYHAN BAMBRICK KINZIE & LOWRY
JOSEPH GREGORIO
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ELISSA VELASQUEZ,
Employee/Petitioner

Case # **16 WC 15219**

v.

Consolidated cases:

LIGHTOLOGY,
Employer/Respondent

19IWCC0064

An *Application for Adjustment 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 **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. [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 **4/4/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $ **2,240.00**; the average weekly wage was $ **560.00**.

On the date of accident, Petitioner was **38** 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 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $0.

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

Order:

- Petitioner failed to establish an April 4, 2016 accident that arose out of and in the course of her employment with Respondent.
- Petitioner failed to establish that her current condition of ill-being is causally related to a compensable April 4, 2016 accident.
- Petitioner failed to establish that Respondent is liable for payment of any medical bills.
- Petitioner failed to establish that she sustained any permanent partial disability as a result of the alleged accident.

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

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

#001 Arb. George Andros — Signature of Arbitrator

6/12/18 — Date

JUN 13 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ELISSA VELASQUEZ, Petitioner, v. LIGHTOLOGY, Respondent.	Court No. 16 WC 15219

19IWCC0064

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, a then 38-year-old RGA Coordinator, alleges that she sustained injuries to her left shoulder as a result of performing her job duties on April 4, 2016. (Pet. X 1)

Testimony of Petitioner

Petitioner testified that she began working for Respondent as a RGA Coordinator on February 26, 2016. She testified that her job duties included inspecting and processing damaged goods. She testified that she was required to lift boxes from a floor onto a cart, and then from a cart to a workstation. She testified that some of the boxes weighed "anywhere from 10 to maybe 50 pounds." Petitioner testified she was required to open the boxes, inspect the goods to confirm that they were defective or damaged, and enter information into a computer. She testified that after processing the returns, she would seal the boxes and place them on a shelf, sometimes with the assistance of a ladder.

Petitioner testified that on the morning of April 4, 2016, she was performing her normal work, and was opening boxes at her workstation when she began experiencing sharp pains in her left shoulder. Petitioner testified that she attempted to "deal with it" thinking she was sore, but began experiencing more pain as she was lifting.

Petitioner testified that, around noon on April 4, 2016, she told her supervisor, Tim Davis, that she was experiencing pain in her left shoulder, and asked to leave to go to the emergency room during her lunch break. Petitioner testified that she sought treatment at Swedish Covenant Hospital later that day.

Petitioner testified that she received a light duty note, and that she texted it to Tim and her other supervisors. Petitioner testified that the following morning on April 5, 2016, she received a call from Tim and another supervisor who told her that she was terminated.

Petitioner testified that she sought treatment at All Care Family Medical on April 7, 2016, and began a course of physical therapy. She underwent a left shoulder MRI on May 16, 2016, and last saw her physician at All Care Family Medical on May 20, 2016. Petitioner testified that the last time she sought treatment for her shoulder was May 20, 2016. Petitioner testified that she first returned to work in September or October of 2016 at Aaron's Auto Glass.

On cross-examination, Petitioner was asked whether her first day working for Respondent was actually March 7, 2016. Petitioner testified that she "**did not remember**". She was asked if her payroll records showed that she first began work on May 7, 2016, whether she would disagree with that. Petitioner replied "you know what, no, because I could be wrong, but I know when I signed the letter." Regarding April 4, 2016, the alleged date of accident, **Petitioner could not remember what time she arrived at work** that morning, or whether she arrived on time, noting that it was "almost two years ago." When asked whether she told her supervisor, Tim Davis, that she hurt her arm from lifting and kissing her dog, Petitioner testified "no, my dog is not that heavy."

On cross-examination, Petitioner testified that the first time she sought treatment for her arm was at Swedish Covenant Hospital on April 4, 2016. When asked whether she indicated to Swedish Covenant that the **injury took place at home on March 14, 2016,** Petitioner testified that she could not recall. Petitioner was asked if she would take issue with the fact that page 10 of the records subpoenaed from Swedish Covenant, marked as Petitioner's Exhibit No. 4, stated that she was hurt at home on March 14, 2016. Petitioner testified "I don't know, its been so long."

Testimony of Tim Davis – Warehouse Manager

Tim Davis testified that he is the warehouse manager for Respondent, and supervised Petitioner in that capacity on April 4, 2016. He testified that he was familiar with Petitioner's job duties. He identified Respondent's Exhibit 1 as a true and accurate copy of the job description for RGA Coordinator, and that it was a true and accurate representation of Petitioner's job duties while she worked for Respondent.

He testified that Petitioner would **process between six and ten boxes a day.** He contradicted Petitioner's testimony regarding the weight of the packages, and testified that the packages weighed, **on average, around five to ten pounds, with the heaviest packages weighing approximately 15 pounds.** He testified that the extent of Petitioner's lifting activities would be placing the boxes on a dolly, transferring them to her workstation, and placing them on shelves. He testified that her job **did not** require her to work with her arms overhead or above her shoulder. He testified that Petitioner **never reported** a work injury to him, and if she did, there were policies and procedures in place for reporting and documenting workplace injuries.

He testified that **Petitioner's attendance while employed with Respondent was "horrible"** and that she would often call off work for various reasons. **He testified that the Thursday or Friday before April 4, 2016, Petitioner approached him crying stating that she had lost her dog, and was too distraught to work, so he allowed her to take the day off.**

He testified that on the following Monday, April 4, 2016, **around 8:45 or 9:00 a.m., before her shift, Petitioner approached Tim at his desk in the warehouse crying and holding her shoulder.** He testified that **Petitioner told him she hurt her arm lifting her dog over the weekend.** He testified that she asked to leave for a doctor's appointment. He testified that he responded "if you got to go, you got to go. You can't work with an arm like that." On cross-examination, Mr. Davis testified that **Petitioner did not perform any work on April 4, 2016,** because she asked to leave as soon as she arrived at work. "She just came in and told me she had to leave."

On direct examination, he testified that **on April 5, 2016, he called Petitioner to tell her that she was being let go for attendance.** He testified that **Petitioner never told him that she allegedly injured her shoulder at work,** either prior to or during that phone call.

Medical Records

The Arbitrator finds that Mr. Davis' testimony is supported by the initial medical records for treatment dates before Petitioner was terminated for poor attendance, which clearly indicate that the injury occurred at home.

The intake chart from Swedish Covenant Hospital Emergency Department, dated April 4, 2016, lists the **injury date, time and place as "3/14/16 HOME".** (PX 4, p. 10) (*Emphasis added*) Petitioner reported having left neck and **shoulder pain for three weeks and that there was no preceding injury.** (PX 4, p. 11) (*Emphasis added*) She further stated that she "saw the person covering her doctor a week and a half ago, who recommended conservative therapy." (PX 4, p. 11)

Additional records from that visit state that Petitioner had been having shoulder tightness for three weeks, and was told by her primary doctor to take over-the-counter pain medication and Ben-Gay, but had not had any relief. (PX 4, p. 17)

Further, Section 10 of the medical bill for the April 4, 2016, visit at Swedish Covenant Hospital contains a section titled **"is patient's condition related to employment?"** (PX 8, p. 3) The box next to that section is marked "no".

Petitioner began treatment with Dr. Mysliwiec at All Care Family Medical on April 7, 2016. (PX 2, p. 26) Petitioner complained of left shoulder and arm pain which she said **started in early March**. (PX 2, p. 26) (*Emphasis added*) The work status note by Dr. Mysliwiec dated April 7, 2016, **notes a date of injury of March 22, 2016**. (PX 2, p. 25) The work status note from April 29, 2016, also lists a date of injury of March 22, 2016. (PX 2, p. 14)

Petitioner underwent a left shoulder MRI on May 16, 2016. (PX 3, p. 3) The report noted a grossly intact rotator cuff without definite evidence of tears or pathology. (PX 3, p. 3)

Petitioner was reevaluated by Dr. Mysliwiec on May 20, 2016. Dr. Mysliwiec diagnosed left shoulder pain and administered a Kenalog injection. Dr. Mysliwiec directed Petitioner to follow-up after two weeks "if not better." No additional medical records were presented after that date.

Petitioner offered medical bills into evidence as Petitioner's Exhibits 5, 6, 7, and 8. Respondent objected to all bills on the basis of liability.

CONCLUSIONS OF LAW

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 as follows:

Petitioner failed to establish by a preponderance of credible evidence that she sustained an April 4, 2016, accident that arose out of and in the course of her employment.

In support of this finding, the Arbitrator notes, a claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of their claim, including proof that they suffered an accident, which arose out of and in the course of their employment. 820 ILCS 305/2 (West 2008).

The burden of proof consists of providing sufficient evidence to establish a prima facie case for entitlement to benefits consisting of "evidence on all the necessary elements to establish the underlying cause of action." *City of Chicago vs. Illinois Workers' Compensation Commission*, 373 Ill. App. 3d 1080, 1090-1091 (Ill. App. 1st Dist. 2007). An injury is sustained "in the course" of employment when it occurs during employment in the place where the worker may reasonably perform employment duties or engage in some incidental employment activities. *Baggett vs. Industrial Commission*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment if it originates from a risk connected with or incidental to the employment, so as to create a causal connection between the employment and the accidental injury. *Id.* at 194. Both elements must be present at the time of Claimant's injury in order to justify compensation. *Illinois Bell Telephone Company vs. Industrial Commission*, 131 Ill. 2d 478, 483 (1989).

In support of this finding, the Arbitrator further finds the testimony of Petitioner's supervisor, Tim Davis, to be most credible and reliable. He testified that on the Thursday or Friday before April 4, 2016, Petitioner left work early to look for her lost dog. Mr. Davis testified that on the following Monday, April 4, 2016, Petitioner presented to Respondent's place of business before her shift crying and holding her shoulder, and said she found her dog and hurt her shoulder lifting the dog over the weekend. Mr. Davis testified that Petitioner never reported any alleged work related injury to him. He further testified that Petitioner did not perform any work on April 4, 2016. The Arbitrator notes that Petitioner did not retake the stand or call a rebuttal witness following Mr. Davis' testimony.

The Arbitrator finds that Petitioner was not a credible witness. Petitioner testified that she only began experiencing pain in her shoulder when she began working on April 4, 2016, and that she did not seek any treatment for her arm before that date. However, the medical records from Swedish Covenant Hospital, which were created only a few hours after the alleged incident, are silent as to any alleged April 4, 2016, work related accident and state that Petitioner's pain began three weeks earlier without inciting injury. These records further state that she sought treatment with another doctor a week or two before, and that the injury occurred at home on March 14, 2016. The Arbitrator notes that these records were one of Petitioner's own exhibits.

When asked whether she told the doctors at Swedish Covenant Hospital that she injured her arm on March 14, 2016, Petitioner testified that she did not know and "it's been so long."

The medical bills from Swedish Covenant Hospital for the April 4, 2016, visit state that the injury was not related to employment. Further, the Arbitrator notes that the records from Petitioner's treating physicians at All Care Family Medical state that she had been having issues for three weeks prior to April 4, 2016, and list a date of injury 3/22/16.

The Arbitrator notes that none of the medical records offered by Petitioner document the sudden onset of pain that Petitioner testified that she experienced on April 4, 2016. The Arbitrator further notes that the medical records that were offered into evidence by Petitioner, particularly those from Swedish Covenant for treatment on April 4, 2016, stand in stark contrast to her testimony that she only began experiencing pain at work on the morning of April 4, 2016, and first sought treatment on that date.

The Arbitrator further notes that Petitioner failed to introduce or offer any records for the phantom "person she saw covering her primary MD" as noted in the Swedish Covenant medical records. A reasonable inference can be made that these records were not offered because they are adverse to Petitioner's claim.

For all of the above reasons, the Arbitrator finds that the Petitioner failed to establish by a preponderance of credible evidence that she sustained an April 4, 2016, accident arising out of and in the course of her employment with Respondent. Based upon this finding of no accident, the Arbitrator concludes that all other issues are moot. Compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TOM BONORIS,

Petitioner,

vs. NO: 12 WC 2002
13 WC 22352
14 WC 4841

JENNINGS CHEVROLET,

Respondent.

19IWCC0065

DECISION AND OPINION ON PETITION UNDER §8(a) OF THE ACT

This matter comes before the Commission on Petitioner's "8(a) Petition for Medical Benefits," filed on September 26, 2017. A hearing was held before Commissioner DeVriendt on January 19, 2018, in Chicago, Illinois, and a record was made.

Findings of Fact and Conclusions of Law

An arbitration hearing was held on June 13, 2017, and decisions were issued in all three cases on September 5, 2017. Neither party reviewed the decisions, which became final. The relevant inquiry before us is whether Petitioner's cervical condition of ill-being remains causally related to his work injury and whether he is entitled to prospective cervical surgery.

On April 17, 2014, Petitioner underwent a C5-6 and C6-7 microdiskectomy, osteophytectomy, allograft and plate fusion, which the Arbitrator found was causally related. Petitioner testified that, after the arbitration hearing, he started getting increased pains down his arm and the right side of his neck so he returned to his primary care physician, Dr. Revis, on July 31, 2017. Dr. Revis' record is consistent with this testimony and indicates a history of neck pain for the past month with some radiation down the arms to the hands. Dr. Revis recommended rehabilitation exercises, medication, and an MRI. *Px7.*

A cervical MRI was performed on September 8, 2017, and revealed, in part, slightly progressed degenerative disease at C7-T1 with severe right neural foraminal narrowing. *Id.* Petitioner testified that Dr. Revis recommended he see a surgeon so he returned to Dr. Bailes who had performed the cervical fusion surgery in April 2014.

On September 18, 2017, Dr. Bailes recorded Petitioner's complaints of worsening right-sided neck and shoulder pain. He noted that the MRI showed severe right-sided foraminal stenosis at C7-T1. Dr. Bailes opined, "This pain is present and follows the prior cervical pain syndrome, and represents adjacent level disease after the two level cervical discectomy and fusion." He recommended a right C7-T1 hemilaminectomy and foraminotomy. *Px7.*

Petitioner testified that his symptoms worsened and he sought a second opinion with Dr. Graf on October 27, 2017. *T.11.* Dr. Graf examined Petitioner and interpreted the MRI as showing foraminal narrowing on the right at C7-T1 with extensive disc facet and disc degenerative changes at C4-5 and C7-T1 adjacent to the fusion. Dr. Graf opined that Petitioner's pain was more likely axial in origin and related to his severe disc degeneration at C7-T1 and C4-5. He wrote that Petitioner also had significant arthrosis secondary to adjacent level degeneration from the previous fusion. Dr. Graf wrote that Petitioner asked him if this would be considered related to his initial surgery. Dr. Graf opined, "this degeneration and stenosis would be considered causally related to the initial surgery given that it is adjacent to a prior fusion and this would be considered a contributory factor in the development of adjacent level degeneration and stenosis." Dr. Graf believed Petitioner's condition would be better addressed with an adjacent level fusion at least at the C7-T1 level and possibly at the C4-5 level. *Px9.*

Neither Dr. Bailes nor Dr. Graf testified in this matter. Dr. Bailes' records were obtained in response to a subpoena and certified pursuant to Section 16 of the Act. Dr. Graf's report was not certified or obtained pursuant to a subpoena. However, Respondent did not object to the admission of Dr. Bailes' or Dr. Graf's records on foundation or hearsay grounds. Respondent only objected to the causation opinions contained therein based on the argument that they were given for the purpose of litigation. After reviewing the records, we find that although they contain causation opinions, they are admissible because they were related to Petitioner's treatment and not prepared for litigation.

Respondent offered no medical opinion to contradict the causation opinions of Dr. Bailes and Dr. Graf. Petitioner testified that he had not been sent by Respondent for a Section 12 examination. *T.13.*

We find the opinions of Dr. Bailes and Dr. Graf persuasive that Petitioner has developed adjacent level disease, which remains causally related to his work injury as sequelae of his previous cervical fusion surgery. We therefore award the medical expenses related to Petitioner's continued cervical treatment.

At the hearing, Petitioner's attorney stated that the only bill Petitioner is asking the Commission to award is the unpaid bill of Dr. Graf. Petitioner's attorney agreed that the other bills have been paid by Blue Cross/Blue Shield and Petitioner requested a hold harmless order for those payments. Petitioner's Exhibit 6 contains many bills for services prior to the arbitration hearing on June 13, 2017, so they are not properly at issue before us. However, we award the bills incurred after the arbitration hearing contained in Px6, subject to the fee schedule in Section 8.2 of the Act. The bills reflect a zero balance and, as requested by Petitioner, Respondent is entitled to a credit under Section 8(j) of the Act for those bills paid by Blue Cross/Blue Shield with Respondent holding Petitioner harmless from any claims and demands by any providers of

the benefits for which Respondent is receiving credit. We also award the $467.04 bill of Dr. Graf contained in Petitioner's Exhibit 9, subject to the fee schedule in Section 8.2 of the Act.

Petitioner testified that he would prefer to undergo the procedure recommended by Dr. Bailes because he is comfortable with Dr. Bailes, who performed the first surgery, and it is a more conservative approach than another two-level fusion, as recommended by Dr. Graf. We therefore award the prospective medical treatment as recommended by Dr. Bailes.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §8(a) is hereby granted as outlined above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $467.04 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 is entitled to a credit under §8(j) of the Act for payments made by its group insurance carrier; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for prospective surgery as recommended by Dr. Bailes under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 9 2019

Charles J. DeVriendt

Joshua D. Luskin

SE/
O: 12/19/18
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Special Concurrence

I concur with the result reached by the majority. I write separately as I do not agree with the majority's admission of Dr. Graf's hearsay opinion statements as to causation and the majority's reliance on the same in reaching its decision. I would sustain Respondent's objection and strike such statements from the record.

As the majority notes, Dr. Bailes' records (PX7) were obtained by subpoena pursuant to Section 16 of the Act. Dr. Graf's records (PX9), although not obtained by subpoena were

accepted by Respondent as true and correct. As such Respondent waived its objection based upon foundation. Respondent, albeit not clearly stated, objected to hearsay statements contained in both Dr. Bailes' and Dr. Graf's records. T. 32, 35.

As the Court noted in *RG Construction Services v. Illinois Workers' Compensation Commission*, "[t]he provisions of Section 16 at issue in this appeal assist in accomplishing that goal by easing the *foundational requirements* for the admission of a treating physician's records. *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 50, 976 N.E.2d 1 (stating the 2005 amendments to section 16 were meant 'to ease the *foundational requirements* for the admission of medical bills and records')." (Emphasis added). 2014 IL App (1st) 132137WC, ¶ 39. The amendments to Section 16 of the Act were undertaken to allow the admission of medical records to be more efficient not to shield objectionable hearsay statements.

Certainly, treating physicians' records "are likely to contain medical opinions relating to a variety of aspects in the care, treatment, and evaluation of the employee." *RG Construction Services* at ¶ 39. Such opinions are offered as part and parcel of the care and treatment of a patient. An opinion offered relating to a causal relationship between an accident and a claimant's resulting condition of ill-being is neither necessary nor relevant to the diagnosis or treatment provided by a doctor. Such statements are hearsay and do not qualify under the exception defined in the Rules of Evidence- Rule 803(4)- Statements for Medical Diagnosis or Treatment. *Illinois Rules of Evidence*- Rule 803(4) (2011).

Again, as the Court noted in *RG Construction Services*, "'under certain circumstances the probability of accuracy and trustworthiness [of a document] may serve as a substitute for cross-examination under oath.' *United Electric Coal Co. v. Industrial Commission*, 93 Ill. 2d 415, 444 N.E.2d 115, 117 (1982)." 2014 IL App (1st) 132137WC, ¶ 42. The Court went on to explain the Supreme Court's holding in *United Electric Coal Co. v. Industrial Commission*. In *United Electric Coal Co.*, the Supreme Court allowed a hearsay causation opinion into evidence despite the employer's objection to the same. The Court reasoned that the opinion testimony offered by the treating physician was, in part, based upon the opinions provided by the employer's examining expert physician. In such circumstances, the Court reasoned the opinions offered were trustworthy.

Dr. Bailes' records contains the following opinion statement: "The pain is present and follows the prior cervical pain syndrome, [*sic*] and represents adjacent level disease after the two level cervical discectomy and fusion." PX7. Such medical opinion statement was made as part of the care and treatment of Petitioner and qualifies as an exception to hearsay under Rule 803(4). *Illinois Rules of Evidence*- Rule 803(4) (2011).

Dr. Graf's records contain the following opinion statement: "The patient did ask today if this would be considered related to his initial surgery. In my opinion this degeneration and stenosis would be considered causally related to the initial surgery given that it is adjacent to a prior fusion and this would be considered a contributory factor in the development of adjacent level degeneration and stenosis." PX9. Such statement is hearsay and does not qualify as an exception under Rule 803(4) as the statement was not made for the purposes of diagnosis or treatment. The opinion was offered in direct response to a question posed by Petitioner presumably for use at hearing. Further, unlike *United Electric Coal Co. v. Industrial*

19IWCC0065

Commission, there is nothing in the record which indicates this opinion is inherently trustworthy. As such, I would sustain Respondent's objection and redact this portion of Dr. Graf's records.

This evidentiary admission, though, does not affect the outcome. Based upon Petitioner's testimony as well as the treating medical records of both Dr. Bailes and Dr. Graf, I find a causal relationship between Petitioner's initial accident(s) and subsequent medical treatment with his current need for treatment and surgery.

L. Elizabeth Coppoletti