STATE OF ILLINOIS )
) SS.
COUNTY OF JEFFERSON )

| | |
|---|---|
| ☐ Affirm and adopt | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☐ Reverse | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☒ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larry Harnden,

Petitioner,

**16IWCC0457**

vs.

NO: 10 WC 38188

Glister-Mary Lee,

Respondent.

DECISION AND OPINION ON REVIEW

On April 4, 2011, Respondent appealed the March 17, 2011 §19(b) Decision of Arbitrator Teague finding that Petitioner sustained accidental injuries arising out of and in the course of his employment on September 16, 2010, that Petitioner was temporarily totally disabled for a period of 15-2/7 weeks, from September 20, 2010 through January 5, 2011, at the rate of $296.67 per week under §8(b) of the WC Act, that Petitioner is entitled to $12,522.38 for necessary medical expenses under §8(a) of the Act, that Respondent is entitled to credit of $662.80 for medical benefits paid, that Respondent shall hold Petitioner harmless from credit awarded, that Respondent shall pay for the treatment recommended by Dr. Gornet, and that Respondent shall pay to Petitioner attorney's fees of $3,411.46 under §16, penalties of $6,261.06 under §19(k), and $3,210.06 under §19(l) of the Act.

Issues raised on review by Respondent were accident, causal connection, medical expenses, temporary total disability benefits, prospective medical, and penalties and fees. Oral arguments were held on November 15, 2011. On January 13, 2012, the Commission modified the §19(b) decision of the Arbitrator by decreasing the medical award from $12,522.38 to $7,653.54, and based upon the decrease in the medical award, modified the §19(k) penalties from

16IWCC0457

$6,261.06 to $3,826.77, and the §16 attorney fees from $3,411.46 to $2,437.93, and affirmed and adopted all else.

Respondent sought appeal of the Commission's January 13, 2012 19(b) Decision, and on October 10, 2012, the Circuit Court of Jefferson County confirmed the Commission's Decision. Respondent sought appeal to the Appellate Court, and on September 19, 2013, the Appellate Court (5th district) modified the Commission's award of past medical expenses by reducing the total amount awarded to $6,422.08, vacating the Commission's award of Section 19(k) penalties, modifying the Section 16 attorney fees to $906.96, and otherwise affirmed the Circuit Court's judgement, confirming the Commission's decision.

On December 17, 2014, the parties proceed to hearing with respect to permanency. On February 25, 2015 Arbitrator Lee rendered a Decision, finding that Petitioner sustained accidental injuries arising out of and in the course of his employment on September 16, 2010, that Petitioner is entitled to maintenance benefits of $296.67 per week for 35-2/7 weeks, for period of September 27, 2011 through May 31, 2012 under §8(a), that Respondent shall pay the medical expenses of $33,550.10 to Orthopedic Center of St. Louis, $42,053.70 to MFS Spine LLC, and $1,870.00 to Premier Anesthesia as provided in §8(a) and §8.2, that Respondent shall pay $1,470.00 to Petitioner for out-of-pocket expenses associated with the Aprils 26, 2012 evaluation of Vocational Counselor Steve Dolan, that Respondent shall pay Petitioner permanent total disability benefits of $445.01 per week for life, commencing June 1, 2012 as provided in §8(f) of the Act, and that Respondent shall pay to Petitioner $13,905.47 in attorneys' fees under §16, $34,763.68 in penalties under §19(k), and $10,000.00 in penalties under §19(l).

On March 27, 2015, Respondent filed §19(f) Petition. On May 11, 2015, Arbitrator Lee denied the Section 19(f) Petition.

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, permanent partial disability, vocational rehabilitation, and penalties and fees, and being advised of the facts and law, modifies the February 25, 2015 Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the award of medical expenses from $78,943.80 to $32,737.45 based upon the following: 1) The Arbitrator's award of medical expenses in the amount of $33,550.10 from Orthopedic Center of St. Louis is hereby vacated as the charges represent duplicate billing from MFS Spine LLC, and include non-compensable "interest charges" totaling $8,687.50; 2) The Arbitrator's award of medical expenses in the amount of $42,053.70 from MFS Spine LLC is modified to $29,397.45, as the amount awarded by the Arbitrator improperly included non-compensable "interest charges" totaling $12,656.25; 3) The Arbitrator's award of medical expenses in the amount of $ 1,870.00 from Premier Anesthesia is hereby affirmed; and,

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4) The Arbitrator's award of $1,470.00 to Petitioner for out-of-pocket expenses associated with the April 26, 2012 evaluation of Vocational Counselor Steve Dolan is hereby affirmed.

Furthermore, the Commission finds Respondent's non-payment of benefits was neither unreasonable nor vexatious, but instead based upon a reasonable basis and good faith dispute. Accordingly, the Commission vacates the Arbitrator's award of $34,763.68 in §19(k) penalties, $10,000.00 in §19(l) penalties, and $13,905.47 in §16 attorney fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March February 25, 2015, as modified herein, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $32,737.45 for medical expenses under§8(a) of the Act, subject to the Medical Fee Schedule under §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of medical expenses in the amount of $33,550.10 from Orthopedic Center of St. Louis is hereby vacated as the charges represent duplicate medical expenses from MFS Spine LLC, and include non-compensable "interest charges" totaling $8,687.50;

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner maintenance benefits in the sum of $296.67 per week for a period of 35-2/7 weeks, from September 27, 2011 through May 31, 2012 under §8(a).

IT IS FURTHER ORDERED BY THE COMMISSION that commencing June 1, 2012, Respondent pay to Petitioner the sum of $445.01 per week for life under §8(f) of the Act for the reason that the injuries sustained caused the total permanent disability of Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of $34,763.68 in §19(k) penalties, $10,000.00 in §19(l) penalties, and $13,905.47 in §16 attorney fees is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $20,799.21 for temporary total disability benefits paid under §8(b) of the Act.

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

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

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

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: JUL 7 - 2016
KWL/kmt
O-05/16/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

| | |
|---|---|
| ☒ Affirm and adopt | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☐ Reverse | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

**16IWCC0458**

Maire Mulroe,
Petitioner,
vs.

NO: 09 WC 50076

Resurrection Health Care,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 28, 2015, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $72,000.00. 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: JUL 7 - 2016
KWL/vf
O-5/10/16
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0458

**MULROE, MAIRE**
Employee/Petitioner

Case# **09WC050076**

**RESURRECTION HEALTH CARE**
Employer/Respondent

On 10/28/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0146 CRONIN & PETERS
JOHN CRONIN
221 N LASALLE ST SUITE 1454
CHICAGO, IL 60601

2965 KEEFE CAMPBELL BIERY & ASSOC
PANKHURI K PARTI
118 N CLINTON ST 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)

☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 16IWCC0458

MARIE MULROE
Employee/Petitioner

v.

RESURRECTION HEALTH CARE
Employer/Respondent

Case # 09 WC 50076

Consolidated cases: ____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO**, on **AUGUST 13, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0458

## FINDINGS

On **AUGUST 2, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$29,120.00**; the average weekly wage was **$560.00.**

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

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

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

## ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$373.33/week** for **10-5/7th weeks**, commencing **4/22/10** through **7/6/10**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of **$51,983.60**, as provided in Sections 8(a) and 8.2 of the Act. Ax1, Px1. Respondent shall be given a credit for medical benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of **$336.00/week** for **50 weeks**, because the injuries sustained caused the **10%** loss of the man 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

10-27-2015
Date

OCT 28 2015

## FINDINGS OF FACT

Marie Mulroe ("Petitioner") testified that on 8/2/09, she worked Our Lady of the Resurrection's emergency room as an ER technician and paramedic on behalf of Resurrection Health Care ("Respondent"). Her duties included blood draws, transporting patients, lifting and moving and helping with anything that doctors and nurses needed done. Lifting included moving a patient from a wheelchair to bed or bed to bed. She stated she did a lot of lifting and moving of patients.

It is undisputed between the parties that on 8/2/09, Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent. Ax1. Specifically, Petitioner's unrebutted testimony was that on that date, she attempted to secure an O2 mask on a patient, the patient became combative and started to fight. Petitioner's left arm got crushed between the railing on the bed and the patient. She said the patient rolled over onto her left arm. As the patient came toward her, she tried to pull away and felt a pain and pop. She noted that the front part of her arm was caught in the railing but that her whole arm was involved. She stated she felt immediate pain. She initially felt pain in her left elbow because the elbow was slammed against the railing. She filed a report that night and signed it on either 8/2 or 8/3. Respondent's first report of injury indicated that a patient twisted an elbow and that Petitioner complained of pain in the elbow.

Petitioner testified that prior to this accident, she had two prior left shoulder surgeries on 12/2/05 (labral tear) and 9/6/06 (adhesive capsulitis), performed by Dr. Preston Wolin, following problems from rowing in high school and college. Petitioner last saw Dr. Wolin in December 2006. She testified her left arm felt completely fine from the last time she saw Dr. Wolin and that she had no treatment between December 2006 and 8/2/09.

Petitioner received emergency room treatment that same night. Px2. She had an x-ray of the elbow done and she explained discomfort, numbness and tingling she was experiencing. Records show chief complaint as left elbow and forearm injury after working with a combative patient and being pinned against the side rail. On cross, she testified she did not mention shoulder pain because she not have any at that time but she did mention the pop she heard in her shoulder. Over the next several days, Petitioner noticed numbness and tingling in her left arm. This sensation went down to her fourth and fifth digits. She also noticed pain in her left shoulder and noted the shoulder was unstable. Petitioner testified that the numbness and tingling subsided but the pain and instability she felt in her left shoulder continued. Petitioner continued working with these symptoms. She testified that she had shoulder surgery before and wanted to avoid another surgery. She later made an appointment with Dr. Wolin.

On 8/25/09, while driving to work, Petitioner was rear ended by a car driving approximately 30 miles per hour. She said she was belted and her arms were on the steering wheel. She noticed numbness and tingling but said her pain returned to her post-accident baseline of left arm instability and pain.

On 9/16/09, Petitioner saw Dr. Wolin. Px3. On the patient information sheet she was asked whether her injury was related to work and/or auto accident. she testified on both direct and cross that she put down that she did not know what caused her injury because she wanted the doctor to make that determination. The medical note documented an injury whereby Petitioner's arm became caught between a combative patient and railing. Her arm twisted and popped. She complained of pain in the arm and numbness and tingling into the 4th and 5th digits. Numbness and tingling resolved but pain the arm continued. Petitioner's motor vehicle accident, increased pain and return to baseline were noted. her primary complaint was shoulder pain, instability and weakness. The doctor assessed recurring left shoulder instability. The doctor returned Petitioner to light duty

work of no overhead repetitive use of the left arm, no lifting patients and max lift of 5 pounds. On 10/5/09, left shoulder arthrogram showed minimally increased signal within the distal supraspinatus tendon compatible with mild tendinopathy, normal AC joint, no evidence of labral tear or detachment

On 10/13/09, Petitioner followed up with Dr. Wolin. She continued to complain of pain and giving way of the shoulder. She was tender to palpation over the AC joint and the anterior glenohumeral joint. The doctor assessed "instability left shoulder due to work injury previously mentioned." On 10/20/09, Petitioner began therapy at the referral of Dr. Wolin with Athletico. Px6. Therapists documented that Petitioner's left arm became locked and twisted while struggling with a patient. She felt her arm pop out and back in. She reported it was popping out at random times. She was noted to be functioning independently prior to the injury. Range of motion produced pain. left upper extremity strength was 3+ out of 5 with discomfort. Petitioner was positive on Sulcus testing. The therapist believed Petitioner may have re-aggravated her nerves thus the reason for numbness and tingling but that due to extreme amounts of laxity, surgery may be indicated. The therapist believed therapy was medically necessary to improve muscle strength to help control the stability in the shoulder although stability with the capsular structure was compromised. Therapies continued and Petitioner reported increased and worsening shoulder pain. Px6.

On 11/11/09, Athletico therapists reported to Dr. Wolin that Petitioner continued with high amounts of discomfort despite being placed on Lyrica, which only helped eliminate tingling. Px6. Range of motion testing on the left produced pain, Sulcus testing was positive and Petitioner continued to report numbness and tingling in the 4th and 5th digits. Prognosis was determined to be poor and therapy was continued. Petitioner was eventually discharged from therapy. On 11/17/09, Petitioner continued with the feeling of instability. Numbness was helped with Lyrica. Px3. Left shoulder arthroscopy with open capsular shift with possible allograft was prescribed. On 11/19/09, Dr. Wolin's office sent a document to claim adjuster Jane Dyukova seeking authorizing and payment for Petitioner's left shoulder surgery. On 11/24/09, a phone log documented a call to Betsy Weever, adjuster. No authorization was given at that time, noting that she had just received the claim and was still investigating.

On 12/16/09, Petitioner was evaluated by Dr. Jay Levin at the request of Respondent. Rx3. The doctor found Petitioner's condition of ill-being related to the work injury. Two month later, on 2/12/10, Dr. Levin noted that he initially concluded that based on the information and assuming its accuracy, he found a causal connection between Petitioner's accident and her left shoulder condition. He stated he later found additional records, including a medical record from Dr. Wolin dated 9/16/09. Dr. Levin noted that Dr. Wolin's record mentioned a twisting injury to the left arm and that discomfort of the left shoulder resolved after 30 minutes and further that Petitioner's motor vehicle accident resulted in left shoulder pain, paresthesias into the neck. He noted Dr. Wolin's conclusion that left shoulder pain was not likely completely resolved. Dr. Levin stated that this supported the fact that "her initial injury as described to me that occurred on 8/2/09, had resolved within 30 minutes of that occurrence and that her persistent discomfort and need for Dr. Wolin's recommendations on 11/17/09 were related to the motor vehicle accident..."

On 2/19/10, Petitioner followed up with Dr. Wolin, who noted continued episodes of instability. Assessment was traumatic instability of the left shoulder due to work injury previously documented. On 3/29/10, Dr. Wolin authored a letter disagreeing with Dr. Levin's revised conclusions, stating that his medical record documented that numbness and tingling had resolved 30 minutes after the work accident but that pain persisted. Dr. Wolin also wrote that Petitioner's motor vehicle accident resulted in temporary increase in pain and that her shoulder returned to baseline immediately prior to her auto accident. He opined that the auto accident, while it may have temporarily increases symptoms, was not the cause of her instability.

On 4/22/10, Petitioner underwent and Dr. Wolin performed a left shoulder arthroscopic capsulorrhaphy. Tear of the glenoid labrum was identified. Petitioner underwent usual post-operative care. Numbness and tingling problems were noted for which Lyrica was prescribed. Symptoms eventually abated. Petitioner underwent an injection to the left shoulder in August 2010.

Petitioner was off work from the date of surgery on 4/22/10 until she obtained a new job on 7/7/10. Ax1. During that time, on 6/7/10, Dr. Wolin released Petitioner to light duty but Respondent informed Petitioner there was no light duty. On 11/11/10, Petitioner was discharged from therapy by Athletico. She reported no pain to palpation, range of motion was nearly full and testing was negative. Therapists did note Petitioner lacked some minor external rotation and some strength. On 11/19/10, Petitioner was discharged by Dr. Wolin and was told she will continue to require some treatment for her left shoulder. In March 2011, Petitioner returned to Dr. Wolin, who noted some lack of range of motion with some pain when moved past range in the anterior shoulder. The doctor noted that most likely Petitioner will require intermittent medications, injections and physical therapy.

In April 2015, Petitioner was hired as a paramedic by Chicago Fire Department. She underwent a physical exam by the Fire Dept. Petitioner continues to have restricted movement of her left arm. She has external rotation to approximately 45 percent and can only lift her left arm to approximately 80 degrees. She continues to have neurodeficits around the surgical incision.

On 6/22/11, Dr. Preston testified via evidence deposition. Px4. The doctor gave testimony regarding his medical opinions and conclusions regarding the Petitioner in this case. He initially last saw Petitioner on 12/12/06, at which time she had full range of motion, stability and good muscle strength of the left shoulder. After her work accident, he saw her and she complained in part of numbness and tingling which had resolved y after 30 minutes however the pain from her shoulder persisted. He also said she commented she began noticing the sensation of instability, which he defined as a feeling that the shoulder is going to come out of the joint. The doctor further noted that Petitioner related her recent motor vehicle accident where she noticed discomfort in her arm and shoulder but that her pain had returned to baseline 3 to 4 days later. After exam the doctor ordered an MRI arthrogram which showed a glenoid labrum tear. The doctor opined that it was consistent with the symptoms that she had been complaining to the doctor about the day of her visit shortly following the work accident. The doctor also opined that the findings on the MRI that he interpreted were in fact consistent with her description of her work injury occurring in August 2009. Dr. Wolin noted that he reviewed both of Dr. Levin's reports. He interpreted the Levin reports as essentially saying that Petitioner's had symptoms referable to her left shoulder as a result of her work injury and was doing well up until her motor vehicle accident and that therefore her current condition of the left shoulder was not related to the work injury but rather was related to the motor vehicle accident. Px4.

Dr. Wolin noted his disagreement with Dr. Levin's conclusion primarily based on the fact that Dr. Wolin's interpretation of his visit with the Petitioner following the work accident was that only the numbness and tingling in her upper extremity had resolved after 30 minutes but that the pain never went away and further following her motor vehicle accident there was only a temporary increase in pain having returned to baseline. The doctor stated that he eventually went on to operate on the Petitioner and that his findings intraoperatively were consistent with her description of her injury occurring 8/2/09. Specifically the doctor opined that being pinned between the patient and the railing, Petitioner was forced into abduction and external rotation. This resulted in an application of torque which produces a situation in which one can have an anterior instability of the shoulder, i.e. the shoulder can come out of the joint. The doctor also stated that this type of injury could

cause the instability she previously described. In addressing the motor vehicle accident, Dr. Wolin opined that been rear ended by a motor vehicle would not be consistent with the type of injury it would be significantly less likely to result in abduction external rotation type injury. Px4.

Dr. Wolin testified he last saw Petitioner in March 2011 at which time she lacked some range of motion and had some pain but otherwise her shoulder was stable. He did believe the overall strength of the shoulder was good and he opined that more likely than not she may require medications, injections or therapy. Otherwise, she was at maximum medical improvement and was encouraged to follow up as needed. In explaining his internal office procedure for taking patient history, the doctor explained that there are two histories typically taken one from his physician assistant and a second final history edited and completed and finish by Dr. Wolin himself to which there are additions or corrections made by him. Under cross-examination, the doctor admitted that he had not seen any police report or treatment record regarding the motor vehicle accident. He also stated he did not know what position the body was at the time of the accident and he did not know if Petitioner as a driver ever got slammed with her left shoulder into the side of the vehicle.

On 7/26/11, Dr. Levin testified via evidence deposition. Rx3. Dr. Levin stated that he first saw petitioner in December 2009 wherein she described work accident to her left arm after being tangled up between a patient and a bed rail. She reported that her left shoulder popped out, became dislocated but it went back in. She felt instant pain in left shoulder and left elbow. The direction of forced application by demonstration was external rotation and forward flexion. She mentioned she was involved in a motor vehicle accident. following the accident, she had regular soreness in the left shoulder with slightly increased pain "which within one week was the same pain she had prior to her auto accident." She indicated that her left shoulder the time of the motor vehicle accident was not abducted or externally rotated. The doctor did agree that petitioner should have left shoulder surgery as recommended by Dr. Wolin.

The doctor stated that he issued two separate reports because when he authored the first report finding causation, he had not reviewed or compared Dr. Wolin's September 2009 initial assessment. He later found discrepancies between Dr. Wolin's September 2009 initial assessment and Petitioner's statements to him. This was pointed out to him by Respondent's attorney and he issued a revised opinion relating Petitioner's left shoulder to the auto accident rather than the work accident. Specifically, the September 2009 intial assessment note by Wolin he reviewed apparently stated that following the work accident, Petitioner had some left shoulder discomfort that resolved 30 minutes after the work accident but that after the motor vehicle accident the left shoulder pain had returned and had not likely completely resolved. Dr. Levin opined that the cause of her current condition was the motor vehicle accident rather than the work accident. Dr. Levin also opined that the auto accident as described would be capable of causing a left shoulder injury especially given the fact that petitioner had prior left shoulder pain.

Under cross-examination, Dr. Levin stated that he had not had an opportunity to review the revised September 2009 initial assessment note by Wolin. Dr. Levin also testified and agreed that external rotation and forward flexion of the left arm in the work accident would be consistent with the type of torn labrum injury that Petitioner suffered.

## CONCLUSIONS OF LAW

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

The parties dispute causal connection between Petitioner's undisputed work accident and her left shoulder instability and torn labrum. The outcome of this disputed issue ultimately depends on which version of Dr. Wolin's September 2009 initial evaluation medical note is most consistent with other medical records and testimonial evidence and most credible in light of the other evidence. In one version, which the parties have referred to as the revised version, appears in Dr. Wolin's April 2011 certified medical records, wherein it is noted that Petitioner had a work accident to the arm and elbow and that numbness and tingling had resolved after 30 minutes. The revised version also states Petitioner was in a motor vehicle accident and that there was some increase discomfort but that it that had returned to baseline. *Id.* This baseline has been described by both Petitioner at trial and Dr. Wolin during his testimony to mean baseline injury status after the work accident but before the auto accident. This revised version indicates that it was signed by Dr. Wolin on 9/16/09 and later revised by the doctor on 10/13/09. This revised version of Dr. Wolin's medical records and opinions are certified as true, complete and accurate on 4/5/11 per the subpoena issued to Dr. Wolin's office. Px3.

The unrevised or perhaps original version of this same date of service is not included the certified medical records of Dr. Wolin but is referenced in the medical evaluation reports of Dr. Levin. Px3, Rx3. Dr. Levin's records show that in this version, Dr. Wolin stated that following the work accident, Petitioner's left shoulder discomfort resolved after 30 minutes. In this version, it states that Petitioner had a motor vehicle accident with left shoulder pain noticeable for 3-4 days, not likely completely resolved. Dr. Levin noted that Petitioner described to him that the shoulder pain had completely resolved. This version is dated as being signed by Dr. Wolin on 9/16/09. There are no co-signors and no revised dates on this. The medical note appears to be faxed on or about 9/21/09. Rx3.

The Arbitrator has carefully reviewed all available medical evidence and opinions and concludes that Petitioner has proven by a preponderance of the credible evidence that her current condition of ill-being with respect to her left shoulder is causally related to her undisputed work accident of 8/2/09. In support thereof, the Arbitrator relies on and adopts the medical opinion of Dr. Wolin finding causal connection and relies on the revised version of Dr. Wolin's 9/16/09 medical note, which was revised on 10/13/09.

In so relying on Dr. Wolin's causal connection opinions, the Arbitrator find that Dr. Wolin's revised medical note is credible and consistent with both Petitioner's testimony regarding what she related to Dr. Wolin at her initial evaluation and is also consistent with Dr. Wolin's ultimate opinions appearing elsewhere in the arbitration record. Regarding Petitioner's testimony, she testified she sustained left arm injury after becoming tangled between a patient and a bed rail. She stated the incident involved her entire arm, that she felt a pop in the shoulder and a pain in the elbow from her elbow hitting and pulled her arm out. Petitioner's testimony is consistent with Dr. Wolin's medical record that she sustained a twisting injury to her arm and shoulder and that her numbness and tingling went away after about 30 minutes. In declining to adopt Dr. Levin's finding that Petitioner's 'injury' had resolved after 30 minutes, the Arbitrator notes that the date of injury's time is approximately 11pm. Rx1. Emergency room records state that initial intake began at 11:45pm, which would be outside the 30 minutes Dr. Levin believes Petitioner's injury to have resolved. To the extent anything resolved, it likely was Petitioner's numbness and tingling or elbow injury as supported by Petitioner's testimony and the emergency room records and Dr. Wolin's revised 9/16/09 note stating that the numbness and tingling resolved.

In addition, the Arbitrator also finds that Dr. Wolin's revised medical note that Petitioner's left shoulder condition is causally related to her work accident is consistent with Dr. Wolin's ultimate opinion finding causation elsewhere in the record. First, Dr. Wolin testified that he would have revised the 9/16/09 medical note with his own opinions as the original version likely contained the medical notes of his physician assistant. He credibly testified he essentially has the last say in what those opinions are. The record shows he amended his physician assistant's history to conform to Dr. Wolin's understanding of the history of injury on 10/13/09. Records also show that on the same date Dr. Wolin revised the 9/16/09 note, he actually saw Petitioner in follow up. In the 10/13/09 medical note, Dr. Wolin assessed "instability of left shoulder *due to work injury previously mentioned.*" (emphasis added). In the Arbitrator's view, the 10/13/09 note is evidence that Dr. Wolin all along believed Petitioner's left shoulder to be causally related to the work accident and all along had the understanding that in fact Petitioner's left shoulder pain or instability returned to baseline, which was the baseline pain caused by the work accident. That Dr. Wolin did not revise the 9/16/09 note until 10/13/09 tells the Arbitrator that he did so only at that time because that was Petitioner's next follow up. Thus, at the time the unrevised version of the 9/16/09 note was faxed as evidenced in Rx3, it had not yet been revised. Dr. Wolin's opinions again are consistent in the 11/17/09 follow up wherein it is written that Petitioner's left shoulder instability was due to her work injury previously documented.

Then, on 11/19/09, Dr. Wolin's office sent a document to claim adjuster Jane Dyukova seeking authorizing and payment for Petitioner's left shoulder surgery. On 11/24/09, a phone log documented a call to Betsy Weever, adjuster. No authorization was given at that time, noting that she had just received the claim and was still investigating. In the Arbitrator's view, Dr. Wolin's actions and conduct in seeking approval for surgery indicates to the Arbitrator that Dr. Wolin in fact believed all along that Petitioner's work accident caused her left shoulder instability and tear. Finally, the fact that the revised version of the 9/16/09 medical note appears in the certified medical records of Dr. Wolin as true and accurate confirms the Arbitrator's conclusion on this issue.

In addition to Dr. Wolin's consistent opinions finding causation, the doctor's opinion on causation is supported by the medical evidence. First, Petitioner and Dr. Wolin noted that Petitioner was without left shoulder pain or instability prior to her work accident. while she had problems in the past for her left shoulder, Dr. Wolin's records and his testimony confirm she was otherwise stable. Second, both Drs. Wolin and Levin testified that Petitioner's mechanism of injury at work was consistent with the type of injury she sustained. Dr. Wolin testified it was supported by the findings on arthrogram and intraoperatively. Third, Petitioner and Dr. Wolin credibly testified that the auto accident did nothing more than temporarily increase Petitioner's pain but that it returned to baseline, which was the pain in the left shoulder from the work accident. petitioner's left shoulder did not pop during the auto accident the way it did during the work accident. While Dr. Wolin did acknowledge that he did not review anything specific with regards to the auto accident, the Arbitrator notes that neither did Dr. Levin. Thus, without any definitive explanation that the auto accident significantly exacerbated, accelerated or contributed to Petitioner's left shoulder injury so as to be considered an intervening injury, the Arbitrator is unwilling to conclude same. For the foregoing reasons, the Arbitrator finds Petitioner's current condition of ill-being with respect to the left shoulder is causally related to her work accident.

***ISSUE (K) What temporary benefits are in dispute?***

Petitioner claims a period of disability from 4/22/10 through 7/6/10, representing the 10-5/7$^{th}$ weeks she was off of work recovering from her work related left shoulder surgery. Ax1. Respondent agrees to the period of disability but disputes that it is responsible for payment of TTD benefits for this period of time. The

Arbitrator finds that Petitioner was temporarily and totally disabled as a result of her work related left shoulder injury and subsequent surgery. Respondent shall pay Petitioner temporary total disability benefits of **$373.33/week** for **10-5/7th weeks**, commencing **4/22/10** through **7/6/10**, as provided in Section 8(b) of the Act.

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

Having found in favor of Petitioner on the issue of causal connection, the Arbitrator finds that medical services provided to Petitioner were both reasonable and necessary and further that Respondent has not yet paid all appropriate charges for such reasonable and necessary medical services. The evidence showed that Petitioner suffered from left shoulder instability and labral tear as a result of the work accident. This was confirmed on arthrogram and intraoperatively. Dr. Wolin opined these injuries were consistent with and the result of the work accident. Both Drs. Wolin and Levin opined, irrespective of causation, that Petitioner's surgery was medically indicated. Respondent shall pay reasonable and necessary medical services of **$51,983.60**, as provided in Sections 8(a) and 8.2 of the Act. Ax1, Px1. Respondent shall be given a credit for medical benefits that have been paid.

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

The evidence shows Petitioner last treated for her work related left shoulder injury in March 2011 at which time she was released to full duty work and placed at maximum medical improvement. Petitioner underwent an arthroscopic capsulorrhaphy to the left shoulder following failed conservative care. This surgery revealed that Petitioner suffered a tear of the glenoral labrum lying from the 6 o'clock position inferiorly to the 10 o'clock position superiorly. Three bio-absorable cork screws were placed to repair the tear. Petitioner underwent usual post-operative therapy and rehabilitation. Dr. Wolin noted that she lacked some range of motion and had some pain but otherwise her shoulder was stable. He did believe the overall strength of the shoulder was good and he opined that more likely than not she may require medications, injections or therapy.

Petitioner testified that she is now working as a paramedic for the City of Chicago and continues to experience limitations with her left arm. At the hearing, Petitioner complained of neurodeficits around her surgical incisions and demonstrated external rotation to approximately 45% and was able to lift her left arm to approximately 80°. She also has numbness and tingling in her 4th and 5th digits. She takes over the counter medication for pains and has not been back to Dr. Wolin since. She testified her shoulder is more stable due to titanium screws being put in place. Respondent shall pay Petitioner permanent partial disability benefits of **$336.00/week** for **50 weeks**, because the injuries sustained caused the **10%** loss of the man as a whole, as provided in **Section 8(d)(2)** of the Act.

ARBITRATOR SIGNATURE

10-27-15
DATE

STATE OF ILLINOIS )
) SS.
COUNTY OF WINNEBAGO )

| | |
|---|---|
| ☐ Affirm and adopt | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☒ Reverse | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID VERNETTI,

Petitioner,

vs.

**16IWCC0459**

NO: 13 WC 36545

VERIZON WIRELESS,

Respondent.

DECISION AND OPINION ON REVIEW

Respondent appeals the August 17, 2015 19(b) Decision of Arbitrator Andros finding that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on March 15, 2013, that Petitioner's current condition of ill-being is causally related to his accidental injuries, that Respondent shall pay Petitioner temporary total disability benefits of $666.67 for 85-6/7 weeks for the period of October 22, 2013 through June 15, 2015, as provided in Section 8(b), and that that Respondent shall authorize and pay for the prospective psychiatric counseling and medication management until Petitioner reaches a state of maximum medical improvement pursuant to Section 8(a) and 8.2 of the Act.

The issues presented on review are causal connection, medical expenses, temporary total disability benefits, and prospective medical care. The Commission, after considering the entire record, reverses the Decision of the Arbitrator, finding that Petitioner failed to prove his current condition of ill-being is causally related to his March 15, 2013 work-related injury. As a result the Commission's findings herein, the Arbitrator's awards of temporary total disability benefits and prospective medical care are hereby vacated. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) Petitioner, a 34 year-old retail sales consultant, testified he began working for

Respondent on December 1, 2012, at Respondent's Belvidere store location. Petitioner testified that at work about 7:00 p.m. on March 15, 2013 three African American men came into the store, that one of the men announced a robbery, pulled a gun and waved it around the room. Petitioner testified that the robbers then made everyone go to the back of the room, and that one of the robbers was "kind of sticking the gun in the back of us" because they could not get the door to the inventory room open at first. Petitioner testified they all went into the back of the room, that everyone was forced to lay on the on the floor, but that the robbers kept Petitioner up and said they wanted Petitioner to get into the inventory room. Petitioner testified that the robbers made everyone empty out their pockets and then smashed their phones, that they made the Petitioner and the manager, Jared, open the inventory room, and that they made them fill big military like duffle bags with items from the inventory room. Petitioner testified during this time the robbers were sticking the guns in the back of their head and yelling at them to go faster. Petitioner testified that after bags were filled they helped the robbers carry them out the back of the store where a car waiting for them, and then he and Jared were locked in the bathroom with all the other people, after which the robbers left. Petitioner testified they then came out of the bathroom and he called 911 on his own phone, after which the police arrived. (T4-13).

2) Petitioner testified that the incident happened on a Friday, that he sought no treatment, that he returned to work on that Sunday, that after about 10 minutes some of Respondent's human resources people came to speak to them about the incident, and that he then had a panic attack and could not breathe. Petitioner testified that the store manager told him he could go home and come back in a couple of days, that Respondent gave him about two weeks off, that he sought no treatment, but that during that time he was anxious, had trouble sleeping, and had nightmares. (R14-16).

3) The March 18, 2013 office visit note from Rockford Health System reflects that Petitioner was seen for complaints of anxiety and insomnia after a store robbery at work the Friday prior, when he was held at gunpoint. Petitioner reported complaints of fatigue and panic attacks. Petitioner advised he had done nothing for his symptoms, gave a history of anxiety, attention deficit disorder, and heartburn, and further advised his current medications at the time of his visit included Wellbutrin and Nexium. Petitioner's physical exam was noted to be within normal limits, with normal mood, affect, behavior, and thought content. Petitioner was diagnosed with anxiety, prescribed Klonopin, and advised on counseling. (RX9).

4) Petitioner testified that he did not return to work at that location, that he did not feel safe at that store, and that he asked for and was given a transfer to another store. Petitioner testified that he began working at Respondent's Rockford store, that he had problems doing his job there due to panic attacks he had when he saw African Americans or people wearing hoodies come into the store, and that he would often hide in back of the store because of those fears. (T16-18).

5) Petitioner testified that he began using drugs and alcohol "pretty quickly" over the two week period he was off, that the alcohol numbed it, that he started to drink a lot and was unable to go to work because he was drunk or tired, and that he then started to use cocaine for energy to go to work and stay up long hours and drink because he

was in so much pain and did not know what to do. Petitioner testified that "because of the stuff that I was going through, I turned to drinking and using drugs a lot." Petitioner testified that he did not have any medical treatment during that time, and that he requested time off to seek the treatment, but was not permitted to because of his work schedule. Petitioner testified that in the past he was a social drinker and an occasional marijuana user with his friends, but that those things did not affect his life. (T18-19).

6) Petitioner testified that on July 10, 2013 he was seen at Rosecrance for troubles with drugs and alcohol, and that he then followed up at Rosecrance on July 19, 2013, at which time he discussed the work incident. Petitioner testified that Rosecrance offered classes from 9:00 a.m. until 12:00 p.m. each day, but that his store manager would not let him have the time off to go. (T19-22).

7) The July 10, 2013, Placement Assessment and Recommendation records from Rosecrance reflect Petitioner contacted the facility over the phone to seek "treatment due to his use of drugs and alcohol," and that he is a binge drinker and binge user of cocaine. Petitioner further reported that this had been an issue for him for "one year." Petitioner gave a history that as a result of this problem he had no shows for work, family discord, was spending time at night with a using friend, driving under the influence, gambling and losing money. Petitioner denied any history of mental illness and the precipitating events were noted to be stress at work, family arguments, and financial debt. Petitioner gave a history of alcohol use starting at the age 19, drinking five to six beers a day for five to six days a week at the age of 24 while in the military, quitting for two years after receiving a DUI in 2005, began drinking again at age 28, with about four to five times a week at the bar drinking 5 to 7 drinks, and then for the last 1-1/2 years drinking ½ a fifth of whiskey three to four time as week. Petitioner further provided a history of cocaine use since the age of 27, using less than a gram about 3 times a week for past 1-1/2 years. Petitioner further reported that when he drank he used cocaine, had blackouts, gambled when he used drugs and drank, and woke up wondering where his money went. Petitioner reported he last drank and used cocaine on July 8, 2013. (PX1).

8) Petitioner further provided Rosecrance with a family history of alcohol and drug problems, as well as depression and bipolar disorder. Petitioner also provided a history that he previously took Ritalin, and was shot in 1997 from being in wrong place at the wrong time. At the time of his phone consultation with Rosecrance, Petitioner was diagnosed with alcohol and cocaine dependence, and ADHD, and intensive outpatient therapy program was recommended. The 10 pages of notes from Petitioner's July 10, 2013 consultation fail to reflect that Petitioner provided any history of the March 15, 2013 robbery at Respondent's store, or that Petitioner related any of his symptoms to the March 15, 2013 incident at work. (PX1).

9) The payroll records covering Petitioner's earnings from pay period of December 22, 2012 through the pay period ending October 26, 2013 reflect that following Petitioner's March 15, 2013 work incident, he continued to regularly work a 40 hour work week through pay period ending on August 31, 2012, that he regularly worked overtime from December 22, 2012 through pay period ending on August 31, 2013, varying between six to 11 hours per week. The records specifically reflect that from

March 30, 2013 through May 11, 2013, Petitioner worked 11 hours a week of overtime, and that he was paid monthly sales commissions of: $1,201.18 on January 23, 2013; $2,644.03 on February 20, 2013; $1,753.58 on March 30, 2013; $722.62 on April 27, 2013; $2,791.54 on May 29, 2013; $1,678.78 on June 26, 2013; $1,052.37 on July 24, 2013; $909.34 on August 31, 2013; $851.56 on September 28, 2013; and, $350.18 on October 26, 2013. (RX3).

10) Petitioner sought treatment at Rosecrance on July 19, 2013, at which time Petitioner reported he was a sales manager for Respondent, that he completed all but one credit hour of his associate's degree in nursing but lacked the GPA for nursing school. Petitioner further provided a history that he was severely beaten on March 15, 2013 at work when three gunmen robbed the store, and that that event resulted in depression and chemical dependence, and that he had lost about $5,000.00 in the past couple months. Petitioner further reported he last used THC, Cocaine and alcohol on July 16, 2014, that he was having blackouts and was gambling. Petitioner reported his gambling had caused financial stress, that he used gambling and alcohol to escape from his alleged post-traumatic stress (PTSD). At that time, the Rosecrance staff member noted Petitioner was at a preparation stage for recovery, and an independent outpatient program was recommended and he was also referred to Aspen Counselling for immediate concerns with regard to post-traumatic stress. The progress notes from Rosencrance reflect that Petitioner attended group counseling sessions on July 23, 2012, July 25, 2013, from 6:00p.m. until 9:00 p.m., missed six other scheduled sessions, and was discharged from outpatient counseling on August 6, 2013. (RX3).

11) Petitioner testified he went on paternity leave in the middle of August 2013, and that he did not return to work after that date. Petitioner testified that during that time he had no insurance and went to AA meetings and other church meetings, which helped rid him of his nightmares and decrease some of his symptoms, but all of his other symptoms did not subside.

12) The September 20, 2013 Leave of Absence Application completed by Petitioner reflects a request for time off from September 20, 2013 through December 1, 2013 for "child care." (RX4).

13) Petitioner testified no treatment was authorized by Respondent, and that he eventually received some treatment through the VA hospital in November of 2014. Petitioner testified that during that time, he worked off and on through different union jobs, construction jobs, but only worked for three or four months a year. (T22-26).

14) Ilka Nunez, Respondent's human resources consultant, testified that following the March 15, 2013 robbery she went to the store, that she was involved in the return to work process for Petitioner, and that immediately following the incident Petitioner was off work one week, for which he was paid. Nunez testified that Petitioner was off one week, then returned to work the final week of March 2013, as reflected in his timesheet. (T70-723, RX 3). Nunez testified that in April of 2013, Respondent accommodated Petitioner's request to transfer stores, and his work location was changed effective April 1, 2013. Nunez testified that from April 1, 2013 through the end of August 2013, she was not made aware of any injuries or accommodations that were being requested by Petitioner. Nunez testified that from April 1, 2013 through

August 28, 2013, Petitioner's timesheets reflected no attendance issues for Petitioner, with Petitioner working a five days workweek, and some overtime as well. Nunez also testified that during that April 1, 2013 through August 2013 period of time, Petitioner's manger, Brandon Poe, reported to her that Petitioner was overall a good performer from a sales perspective, with strong sales attitude and performance metrics, meaning obtaining his goals as a sales representative. (T73-75).

15) Nunez testified that she was not made aware of any time off by Petitioner at the end of August and into September of 2013, but that she was aware that Petitioner had a child around September of 2013. Nunez testified that she was also aware that Petitioner requested a leave of absence from Respondent, but that was not made until after Petitioner had already taken 12 days off for vacation, for the period of August 28, 2013 through September 9, 2013. Nunez testified that Petitioner then requested time off for the period of September 13, 2013 through December of 2013, but that Respondent was only able to offer him two additional weeks off work, from mid-September 2013 through the end of September 2013. Nunez testified that after the end of September of 2013, Respondent offered him assistance from the employee assistance program, EAP, and a backup child care program, to assist him in getting his kids to and from daycare. Nunez also testified that Petitioner was advised he could return to work part-time. Nunez testified that in mid-October 2013 Petitioner was asked to return to work, but he failed to do so. Nunez testified that for the period of August 2013 through October of 2013 she was not made aware of Petitioner's need for any time off work for any reason other than child care. Nunez testified that October 20, 2013, Petitioner's employment was terminated by Respondent. (T75-80, RX5).

16) The September 26, 2013 Rockford Health Clinic records reflect Petitioner was seen for complaints of numbness in both arms and hands for ¾ weeks, anytime he lifted his arms above shoulder level. The office note reflects Petitioner reported "manual labor concrete" and denied alcohol or drug use at that time. The note further reflects that Petitioner had a past medical history of obesity, heartburn, nicotine dependence, anxiety, and attention deficit disorder. Petitioner was diagnosed with nicotine dependence, and numbness and tingling of the upper extremities. An EMG/NCV of the upper extremities was recommended. (RX9).

17) Petitioner testified that at the age of 19 he was shot four times, in both arms, when he was robbed as a pizza delivery driver, that after that incident he had similar symptoms and nightmares, and sought psychological help which seemed to help. Petitioner testified that it was just a random thing, that a guy ran up to his car window, asked for money, that he laughed at the robber, that the robber shot him and asked if it was funny, firing the entire clip into his car only hitting him four times. (T29-30). The April 10, 1998 Swedish American Hospital Emergency Room records reflect that Petitioner was seen on that date for multiple gunshot wounds to the left and right upper extremities as a result of a drive-by shooting accident, when Petitioner was a passenger in a car and he was shot by an assailant of another car. The emergency room record contains no history of Petitioner being robbed while delivering pizzas. (RX1). In addition, the Veteran Affairs records contain a similar history of Petitioner being caught in crossfire when trying to avoid a fight at a fast food restaurant. (PX2).

18) Petitioner also testified he was in a motor vehicle accident in 2005 in Maine, when his best friend was driving. Petitioner testified another driver hit the front end of their vehicle, sent it into a fish tail, rolled down the highway and flipped six or seven times, killing his best friend. Petitioner testified he had nightmares, depression, loss of appetite and poor job performance after that incident in 2005, but that he received treatment and counseling though January of 2006, when he got out of the Navy. Petitioner testified that from 2006 until his 2013 work incident, he had no psychological treatment or medication for same. (T30-34).

19) The State of Maine Crash Report of September 30, 2005 reflects that Reflects that on that date, at 10:40 p.m., Petitioner was front seat passenger in vehicle involved in a one car crash, that the vehicle lost control, hit a guardrail, slid sideways and rolled over, coming to rest in the middle of I-275, and that the accident was fatal for the driver. The investigation report further indicates only one vehicle was involved, that the vehicle exceeded posted speed limit, and that Petitioner, the vehicle owner, was under the influence of medication/drugs/alcohol. (RX2).

20) Petitioner testified that when worked for Respondent he was the number one accessory salesman in the Midwest, and that after the robbery he was almost the worst. Petitioner testified that he was not currently working, that he needs psychological counseling as he feels depressed at times and get worked up about it, that he still has nightmares and panic attacks in large groups at restaurants or working out at YMCA. (T34-38).

21) On cross examination, Petitioner admitted that he had treatment for prior psychiatric conditions for two years after the incident when he was shot at the age of 19, and then one year of treatment after the 2005 motor vehicle accident as a result of nightmares and triggers from seeing photos from military time with his friend that was killed in the motor vehicle accident. Petitioner further admitted he sought treatment in 2014 through the Department of Veteran Affairs, seeking service-connected benefits, for any benefits he could get due to his military service, but denied it was for posttraumatic stress disorder (PTSD) from his service. Petitioner admitted that page 19 through page 26 of the VA Hospital Records reflect that he reported he was re-experiencing PTSD triggers. (PX2). Petitioner further admitted his father had a history of substance abuse, and his mother and brother had depression-related issues(T38-47).

22) The Veterans Affairs Records in evidence, PX2, reflect that Petitioner sought to file a claim for benefits, that the only thing he could claim was that he broke his ankle during his military service. Petitioner then proceeded to give a history of his being shot when he was a teenager, of his motor vehicle accident in 2005 when his good friend was decapitated. The intake case manager recorded a history that "following this, Veteran began abusing alcohol and drugs severely," struggled with addictions, but had been fairly sober and active in recovery of late. Petitioner then reported that he was discharged from military shortly after receiving a DUI, that early 2013 he was working for Respondent as store manager when he was robbed by three armed men, that he was severely beaten and locked in room with five customers, and that since then he had been fighting Respondent for healthcare fees and PTSD. (PX1).

23) On cross examination, Petitioner admitted that he testified that after the March 2013 incident he went from best to worst employee, that the commissions he received would help mark whether he was a good or bad employee, that page two of RX3 lists his commissions from January 23, 2013 through October 26, 2013, that from January 23, 2013 to March 13, 21013 his commissions were all over $1,000.00, that his April 2013 commission was $722.00, that he was off work for the incident for some weeks prior to the April 27, 2013 commission payment, that the March 2013 commissions payment shows commissions paid to him totaled $2,791.54, which is highest one on the list, and that his commissions from May until July remained above $1,000.00, and that he took time off when his child was born at the end of August 2013. Petitioner also admitted that the Rockford store he was transferred to had 15 to 20 employees on the floor with him, competing with him for sales during that time period. (T47-52, 65-67).

24) On cross examination, Petitioner admitted that he knew Respondent's procedures for asking for time off, that he did eventually take time off when his 3rd child was born at the end of August 2012, that he then asked for additional time off in September 2012 for child care and completed leave of absence paperwork, RX4, which indicates his leave of absence was for childcare for mid-September 2013 through mid-December of 2013. Petitioner admitted that he began work as a laborer, denied that he was doing so in September of 2013, but admitted the September 26, 2013 Rockford Health System record reflected he had treatment at that time for elbow issues he was having due to working as a concrete laborer. (T52-61).

25) On April 18, 2014, Petitioner was examined by Dr. Edward Tuder, a psychiatrist, pursuant to Petitioner's attorney's request. Dr. Tuder recorded a history that Petitioner was at work when he was robbed at gun point by three African Americans, that Petitioner and his co-workers were forced to pack up thousands of pieces of equipment and help load them into a truck, and that two days later Petitioner had his first ever panic attack, with crying, hyperventilating, and dizziness. Petitioner further reported that those panic attacks continued to occur, that his sales at work sales dropped, that he became preoccupied with sizing up incoming customers for safety risks, that he was uncomfortable around African American male customers, that his performance was also impacted by increased alcohol use and hangovers. Petitioner reported that he worked until August of 2013, then went on paternity leave, that he ceased working in October of 2013, and that he was starting a new job in construction the next week. (PX3).

26) Dr. Tuder recorded that Petitioner had a long history of substance abuse, that in the year prior to the robbery he would binge drink once or twice a month and use cocaine once or twice a month, that he had used marijuana daily for years, and that after the robbery his alcohol intake became excessive daily, leading to frequent cocaine use, typically to stimulate self when hungover in morning. Petitioner further advised that the alcohol and cocaine use led to him gambling, and that this became a substantial problem after the robbery with thousands of dollars in debt. Petitioner reported that he sought treatment at Rosecrance, that he continued to use substances after that but was presently 4-1/2 months without alcohol and 2-1/2 months without cocaine, but was still using marijuana daily. Petitioner further reported that he had a family history of alcoholism and bipolar disorder, that he was shot six times when he was 17

years old without any psychological problems developing from that, and that he was in motor vehicle accident in 2004 when his car flipped seven times and his friend was killed and received counseling for that. (PX3).

27) Dr. Tuder opined that there might or could be a causal relationship between Petitioner's work incident and his current state of ill-being, that his diagnosis relative to March 15, 2013 incident is PTSD, panic disorder without agoraphobia, alcohol dependence and cocaine dependence, that Petitioner required psychiatric care and a referral to a psychiatrist to treat the PTSD and panic attack disorder, that Petitioner should continue in an AA program, and that Petitioner required temporary work restrictions of not working in crowds or crowded environments, and not in environments with exposure to a substantial number of African American men. (PX3).

28) On April 29, 2014, Petitioner underwent a Section 12 examination with Dr. David Hartman, a clinical psychologist and neuropsychologist, for a neuropsych evaluation with neuropsych testing. Dr. Hartman reviewed Petitioner's treating records, records relating to Petitioner's 2005 motor vehicle accident, employment leave of absence and termination documents, and examined Petitioner. Dr. Hartman noted that Petitioner alleged all of his current psychological problems stemmed from the store robbery, after which his ability work effectively as store clerk deteriorated. Petitioner reported that after his work incident he was obviously depressed, had drug and alcohol problems, had suicidal thoughts when drunk, was unable to sleep because of fear of being robbed at home, had extreme panic and anxiety attacks, had racing thoughts, was hot tempered. Petitioner also provided a history of his mother and brother being bipolar with huge mood swings, and his father having a significant drug problem. (RX7).

29) Dr. Hartman noted that all of Petitioner's neuropsychological testing results represented consistent attempts to exaggerate and distort his presentation, and that Petitioner was an unreliable narrator of his symptoms profile and that the treaters or examiners who rely on his subjective self-report may misdiagnose or misattribute his symptoms. Dr. Hartman noted that Petitioner was claiming PTSD from the robbery of the store, and subsequent deterioration of work functioning, citing fear of individuals who resembled store robbers. Dr. Hartman noted that the information he reviewed indicated Petitioner did not stop working for Respondent for several months, and then related his departure from his employment with Respondent to paternity leave. Dr. Hartman opined that Dr. Tuder's conclusions appeared to be based upon Petitioner's self-report, and failed to consider Petitioner's family history of a bipolar disorder with regard to his mother and brother. Dr. Hartman opined that there is considerable overlap between PTSD and other psychological disorders, and that Dr. Tuder did not rule out alcohol or cocaine related anxiety symptoms as a cause for Petitioner's presentation. Dr. Hartman stated that the "anxiety" noted by Dr. Tuder appeared to be limited to Petitioner's rapidly shaking his leg for about 30 minutes, but that Dr. Tuder incorporated no objective data to corroborate Petitioner's self-report symptoms, their attributions or his supposed limitations, and that Dr. Tuder provided no methodology to distinguish between the alleged PTSD, and the very high levels of expected co-occurrence (co-morbidity) between bipolar disorder and anxiety disorder for other reasons. Dr. Hartman stated that adults with ADHD,

reportedly like Petitioner, also have higher rates of psychiatric morbidities including bipoloar disorder, anxiety disorder and substance abuse. Dr. Hartman concluded that the contributory influence of Petitioner's pre-accident traumas, pre-accident alcohol abuse/dependence, or cocaine-induced anxiety disorder did not appear to have been considered. Dr. Hartman noted that Dr. Tuder did not report using any objective methodology to rule out malingering. Dr. Hartman opined that Dr. Tuder's attribution of the work robbery to Petitioner's symptom constellation is considered speculative and non-dispositive. (RX7).

30) Dr. Hartman opined that Petitioner's current psychological profile, while highly exaggerated, appeared to be consistent with a long history of bipolar disorder, alcohol dependence, polysubstance dependence and antisocial personality disorder. He further noted that these were features of Petitioner's long-term personal and family history, and were unrelated to the robbery in question. Dr. Hartman opined there was no credible additive or aggravating diagnosis of PTSD related to the robbery in question or to prior traumas, and that if Petitioner's substance dependence and bipolar disorder were as severe as described, they completely overshadowed any hypothetical clinical influence of the March 15, 2013 incident and rendered such influence speculative. Dr. Hartman recommended immediate care for Petitioner, and advised him of same. Dr. Hartman diagnosed: bipolar disorder, unspecified; malingering; alcohol dependence syndrome; cocaine dependence; cannabis dependence; rule out drug-induced anxiety disorder; rule out alcohol induced anxiety disorder; antisocial personality disorder; and, pathological gambling. Finally he opined that there was no credible influence of the March 15, 2013 event on Petitioner's mental condition or disability, that Petitioner's mental conditions were unrelated to the incident of March 15, 2013. (RX7).

The Commission, after considering the entire record, reverses the Decision of the Arbitrator to find that Petitioner failed to prove his current condition of ill-being is causally related to his alleged accidental injuries arising out of and in the course of his employment with Respondent on March 15, 2013. The Commission finds that Petitioner failed to prove his current condition of ill-being is causally related to his March 15, 2013 work-related incident based upon his significant lack of credibility, the lengthy gap in time between his March 18, 2013 initial emergency room visit and his July 10, 2013 consultation with Rosecrance, at which time he failed to report any history of his March 15, 2013 work-related incident or any symptoms related to same, and the more persuasive opinions of Dr. Hartman.

The Commission is unable to reconcile Petitioner's testimony with his employment records, his lack of medical treatment for four months, and the persuasive opinions of Dr. Hartman. While Petitioner testified he sustained a traumatic psychological injury as a result of the robbery on March 15, 2013, Petitioner's employment records reflect that he continued to work his regular job, 40 hours a week with regularly earned overtime and significant commission checks, from April 1, 2013 until the end of August of 2013, at which time Petitioner sought and received a leave of absence for the birth of his daughter. There was nothing to indicate Petitioner's leave of absence was in any way related to his alleged traumatic mental injury of March 15, 2013. Furthermore, the record as a whole reflects that Petitioner had longstanding and ongoing substance abuse issues, as well as family history of substance abuse issues and Bipolar disorder. The Commission finds that other than Petitioner's self-serving testimony, there is

nothing in the record to reflect that this traumatic event caused a deterioration of his mental condition thereafter.

Although the Arbitrator found that Petitioner had not taken any psychiatric medication and was not under care for any psychiatric condition for seven or eight years prior to the robbery, the record reflects that upon Petitioner's arrival at Rockford Health on March 18, 2013, his first medical care following the March 13, 2015 robbery, he was presently taking Wellbutin, and Nexium, and that Petitioner had a history of anxiety. In addition, the medical records from the Veterans Affairs Department indicate Petitioner was previously diagnosed with ADHD by the Veterans Affairs Department in 2010.

The Commission further finds the robbery incident itself bizarre, as Petitioner testified that he was singled out to assist the robbers, that he was the only employee or customer in the store that was allowed to keep his cell phone, that the robbers smashed every cell phone except his, as he was able to call the police on his phone after the robbers left. Petitioner testified that he began drinking and using drugs thereafter, that his sales fell as he stayed at the back of the store when he worked as he was afraid. However, Petitioner's payroll records reflect his sales numbers post-robbery were comparable to his prior sales numbers. Petitioner testified this was merely due to the fact that the new store he transferred to was much larger, with 15 to 17 employees and there was more inventory to sell, while at the other store there were only 5 employees and he just hustled a lot. However, Petitioner's medical records reflect that he gave a history of having 17 employees at the location that was robbed, not 5, and either way there is little if any evidence Petitioner's earnings were impacted by anything other than him taking time off one week following the robbery and time off for his paternity leave of absence.

The Commission notes several instances within the record that reflect Petitioner provided less than truthful testimony. Petitioner testified that in 1998 he was shot at age of 19 as pizza delivery person, when he was robbed. However, his medical records from the Emergency Room on the date of that injury reflect that he was the victim of a drive-by shooting, and subsequent medical records reflect that he was involved in a fight with a group of men. Petitioner also testified that he was involved in a 2005 motor vehicle accident, when his friend was killed, and that the accident was caused by a car hitting them, and flipping them over seven times. However, the State of Maine crash report indicates the incident involved a single car crash into guardrail, with the car flipping once onto the road, and that drugs/alcohol were involved. The Commission notes that Petitioner testified that at the time of the robbery the robbers stuck guns in the back of his head and back. However, when Petitioner sought treatment at Rosecrance in July of 2013, and at the VA in November of 2014, he reported he was severely beaten at the time of the robbery.

Although Petitioner did seek treatment for anxiety on March 18, 2013 at Rockford Health Physicians, and complained of anxiety and insomnia after the robbery at the store when held at gunpoint, he further provided a history that from May 18, 2012 to the present he suffered from heartburn, nicotine dependence, anxiety and ADHD. Petitioner further reported that his father had issues with substance abuse, and yet he denied alcohol or drug use. While Petitioner denied a history of alcohol or drug use at the time of his March 18, 2013 office visit, he admitted both at the time of hearing and to numerous medical providers that he had longstanding issues with same. At the time of his March 18, 2013 office visit he reported he was a Rockford Memorial Health ER tech, and a nursing student, and further reported that his current medications included Wellbutrin and Nexium. The record indicates that Petitioner was already on anxiety medication,

that he was given a diagnosis of anxiety, and that he was given Klonopin and advised to seek counseling. The record indicates Petitioner sought no additional treatment until July 10, 2013, and that he continued working for Respondent, performing his regular work hours and duties with continuous, consistent and stable earnings.

The record reflects that on July 10, 2013, Petitioner called Rosencrance and the intake person conducted a Placement and Assessment over the phone. Petitioner reported that he needed treatment due to drug and alcohol abuse, and reported that he had been a binge drinker and binge user of cocaine for one year, which resulted in no shows for work, family discord, spending time at night with using friends, driving under the influence, gambling and losing money. Petitioner denied a history of mental illness, and indicated he abused alcohol and cocaine due to stress at work, family arguments/discord, and financial difficulties/debt. Petitioner provided no history of the March 15, 2013 store robbery, of being traumatized by any event at work, and instead dated his substance abuse issues to years prior. It was not until July 19, 2013 when Petitioner met with a social worker that he then claimed his chemical dependence and depression had been caused by his suffering a severe beating during a robbery, despite no evidence of any such physical beating in the record.

At the end of August 2013, Petitioner sought and received a paternity leave of absence. Petitioner testified and the leave of absence form reflects this leave was solely related to the birth of his daughter. Following the expiration of the leave of absence, Petitioner refused to return to work for Respondent, and appears to have sought new employment as a construction laborer, as evidenced by the September 26, 2013 office visit note from Rockford Health, which reflects that Petitioner was seen for complaints of numbness in both arms and hands for ¾ weeks, and that he was engaged in "manual labor concrete." The September 26, 2013 office visit note fails to reflect any complaints related to his alleged work related trauma of March 15, 2013. The record indicates Petitioner sought no additional treatment for his alleged mental condition of ill-being until November 3, 2014, when he went to the Veterans Administration to attempt to submit a claim for PTSD from military service related to his ankle injury while enlisted. Apart from that, Petitioner reported that he could not think of anything else that he could submit on a claim with regard to his military service. In conjunction with that visit to the Veterans Administration, Petitioner reported that he was shot 6 times when he was 17 years old, that after a 2005 motor vehicle accident when he was hit by an oncoming car and his car rolled 7 times, decapitating his good friend, and that after that he began abusing alcohol and drugs severely. Petitioner further reported that he struggled with addictions, but was fairly sober and active in recovery of late. Petitioner also provided a history of being discharged from the military shortly after receiving a DUI.

The Commission finds the opinions of Dr. Hartman, a clinical psychologist and neuropsychologist, more persuasive than that of Dr. Tuder, a psychiatrist. Dr. Hartman conducted significant neuropsychiatric testing, reviewed Petitioner's Veterans Administration records, hospital records, Rosecrance records, and conducted a thorough evaluation of Petitioner. Dr. Hartman found significant evidence of malingering to the point that it matched that of subjects who were asked to fake their responses. Dr. Hartman opined that Petitioner's malingering was a consciously feigned simulation of PTSD for secondary gain. Dr. Hartman opined Petitioner's psychological profile, while highly exaggerated, appeared to be consistent with a long history of bipolar disorder, alcohol dependence, polysubstance dependence and antisocial personality disorder. He opined that these were features of Petitioner's long term personal and family history, and were unrelated to the robbery. He opined there was no credible

additive or aggravating diagnosis of PTSD, related to the robbery or to prior trauma. His ICD-9 diagnoses were bipolar disorder, unspecified; malingering; alcohol dependence syndrome; cocaine dependence; cannabis dependence; rule out drug-induced anxiety disorder; rule out alcohol induced anxiety disorder; antisocial personality disorder; and, pathological gambling. Dr. Hartman further opined that there was no credible influence of the March 15, 2013 event on Petitioner's mental condition or disability, that Petitioner's mental conditions are unrelated to the incident of March 15, 2013.

Under the Act, psychological injuries are compensable under either a "physical-mental" theory, when the injures are related to or caused by a physical trauma or injury, or a "mental-mental" theory, when the claimant suffers a sudden, severe emotional shock that is traceable to a definite time, place and cause which causes physiological injury or harm. Pathfinder v. Industrial Commission, 62 Ill.2d 556(1976). Although Petitioner alleges a "physical-mental" and/or "mental-mental" injury as a result of the robbery incident on March 15, 2013, his claim is not corroborated by the evidence in the record. The Commission finds that the overwhelming evidence indicates Petitioner is lacking in credibility, and that the Petitioner failed to prove he sustained any psychological injury, either "physical-mental" trauma or "mental-mental" trauma as a result of the March 15, 2013 robbery incident at work. In our view, the preponderance of the evidence establishes that Petitioner's psychological condition of ill-being, if any, is not causally related to his March 15, 2013 work-related incident. In light of our decision with regard to causal connection, we find all other issues are moot, and the Arbitrator's awards of temporary total disability benefits and prospective medical care is hereby vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's August 17, 2015 19(b) Decision is hereby reversed for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of 85-6/7 weeks of temporary total disability benefits for the period of October 22, 2013 through June 15, 2015 at the rate of $666.67 per week is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of medical expenses incurred after March 18, 2013 is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of prospective psychiatric counseling and medication management is hereby 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.

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

DATED:
KWL/kmt JUL 7 - 2016
O-05/10/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0459

VERNETTI, DAVID
Employee/Petitioner

Case# 13WC036545

VERIZON WIRELESS
Employer/Respondent

On 8/17/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.24% 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:

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

5739 WHITT LAW LLC
BRIAN WOJICKI
70 S CONSTITUTION DR
AURORA, IL 60506

STATE OF ILLINOIS )
)SS.
COUNTY OF Winnebago )

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

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# ARBITRATION DECISION

16IWCC0459

Case # 13 WC 36545

Consolidated cases:

David Vernetti
Employee/Petitioner

v.

Verizon Wireless
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 **George Andros**, Arbitrator of the Commission, in the city of **Rockford, IL**, on **June 15, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 15, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

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

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

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

On the date of the March 15, 2013 accident, Petitioner was **34** years of age, **married**, with **2** dependant children.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ **666.67** /week for **85 & 6/7** weeks, from **October 22, 2013** through **June 15, 2015**, as provided in Section 8(b) of the Act.

- The respondent shall authorize prospective psychiatric counseling and medication management until Petitioner reaches a state of maximum medical improvement.

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

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

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

/s/ George J. Andros
Signature of Arbitrator

**August 12,2015**
Date

ICArbDec19(b)

AUG 17 2015

## STATEMENT OF FACTS 13 WC 36545

The parties stipulated that the Petitioner was an employee of the Respondent on March 15, 2013. The parties stipulated that Petitioner's earnings in the year preceding the March 15, 2013 injury were $52,000.00 with an average weekly wage of $1,000.00. The parties stipulated that Petitioner was 34 years of age as of March 15, 2013, married, with 2 dependent children.

Petitioner began working for Respondent on or around December 1, 2012 as a retail sales consultant. He worked on the sales floor at Belvidere since his hire date while selling electronics and accessories. Petitioner testified that he had worked at the Belvidere location from the date he was hired until his injury. Prior to his employment with Respondent he attended nursing school. He had also served in the armed forces in the Navy.

On March 15, 2013, at approximately 7:30 p.m., a man came into the store asking about IPhones. He told Petitioner that he was going next door to Starbucks and that he'd be back. The man returned to the store with two other men. Petitioner noted that they by decription were African American and the man who had previously been in the store now had a hood over his head. As they entered the store, they began waiving guns around and yelled out "this is a robbery." Petitioner was forced to the inventory room at gunpoint and told to shut the blinds. Petitioner testified that a gun was pushed into his back and he was pushed into the room. Everyone else was forced to the floor. The assailants made everyone empty their pockets and smashed their phones. Petitioner was handed a duffel bag and forced to fill it with product while a gun was held to the back of his head. After the bags were filled, Petitioner was led, at gunpoint, to the back of the store, where a car was waiting. After loading the car, Petitioner was put in the bathroom with everyone else and told to wait there. Once Petitioner heard the bell that sounded when the door was opened, he and the others left the room and called 911.

Petitioner attempted to return to work on March 17, 2013. However, he was only at the store for 10 minutes before he had a panic attack. He had difficulty breathing and was allowed to go home by the manager. Petitioner testified that he took approximately two weeks off work and asked to be transferred to another store. During this time, Petitioner experienced difficulty sleeping, anxiety, and nightmares. He continued to play the event over and over in his mind. Petitioner sought treatment with a Dr. Ian Schermer at Rockford Health Physicians on March 18, 2013. At that time he reported anxiety and insomnia after a robbery at his store the previous Friday in which he was held at gunpoint. (Rx. 9). Petitioner was diagnosed with anxiety, prescribed Klonopin, and advised to seek counseling. (Rx. 9).

Petitioner was transferred to Respondent's location in Rockford. Petitioner testified that he continued to experience symptoms related to the robbery. He continued to experience panic attacks. He would "freak out" when approached by African American males or people in hoodies. To cope with his symptoms, Petitioner unfortunately turned to drugs and alcohol. Petitioner began to drink to numb his emotions. However, he was then too tired or drunk to work, so he began using cocaine to increase his energy. Petitioner testified that he sought counseling at Rosecrance; however, the counseling sessions were during his work hours and Respondent would not allow him to attend. Petitioner had previously been a social drinking and occasionally smoked marijuana. However, after the incident, he began to use both drugs and alcohol heavily.

By July 10, 2013, Petitioner had to seek treatment for his drugs and alcohol. On July 19, 2013, he was admitted to Rosecrance on an outpatient basis. (Px. 1). The Rosecrance records note that Petitioner was employed as a sales manager for Respondent in Rockford. The records describe the robbery in Belvidere on March 15, 2013. The record indicates that the incident resulted in depression and chemical dependence for Petitioner. (Px. 1). At the time of his discharge on August 9, 2013, he was referred to Aspen Counseling for issues of PTSD. (Px. 1).

In August of 2013, Petitioner requested paternity leave as his wife had given birth to a premature baby. Petitioner never returned to working for Respondent. Petitioner testified that he considered returning, but psychologically could not get himself to return to work at Respondent. Petitioner sought psychiatric care, but had no insurance to see a psychiatrist. While off work, he attended AA meetings and got involved in a Christian Group that he essentially considered therapeutic for himself. As he was unable to secure additional treatment, he filed his workers' compensation claim on November 1, 2013.

On April 18, 2014, Petitioner was seen by Dr. Edward Tuder a physician in the field of psychiatry. (Px. 3). Dr. Tuder took a history from Petitioner which included the incident in question, his history with substance abuse, the shooting as a teenager, and the MVA in 2005. Dr. Tuder noted Petitioner's ongoing symptoms of frequent nightmares and flashbacks, social withdrawal, panic attacks, and anxiety. Dr. Tuder opined that there was a causal relationship between the robbery and Petitioner's current condition of ill-being. He diagnosed PTSD, panic disorder, alcohol dependence, and cocaine dependence. Dr. Tuder opined that Petitioner was in need of psychiatric care and referral to a psychiatrist. Continued AA participation was also recommended. Dr. Tuder opined that Petitioner was unable to work in crowded environments or with exposure to a substantial number of black men at the time of his evaluation. (Px. 3).

On April 29, 2014, Petitioner was referred to Dr. David Hartman, a psychologist, for a section 12 exam for Respondent. (Rx. 7). Petitioner reported the history of the incident to Dr. Hartman. He described his ongoing symptoms of anxiety, social isolation, suicidal ideation, difficulty sleeping, racing thoughts, and mood swings. Dr. Hartman performed a variety of "psychiatric tests" as part of his evaluation. Dr. Hartman noted that Petitioner presented with features of Bipolar Disorder. He noted a significant history of alcohol abuse and dependence, and a strong history of antisocial behavior. Dr. Hartman felt that the testing indicated Petitioner was malingering and exaggerating his symptoms. Dr. Hartman noted that Petitioner was continuing to abuse drugs and alcohol at the time of his evaluation. (Rx. 7). Dr. Hartman concluded that Petitioner's conditions were unrelated to the robbery in question.

On November 3, 2014, Petitioner sought treatment at the Veterans Administration Hosptial. (Px. 2). The initial VA record, from November 3, 2014, provides a detailed history of Petitioner's psychiatric condition. It noted that Petitioner had struggled with addiction after returning from the military. Then, he returned to Machesney Park, got engaged, and had 2 children. The record indicates that he was doing well until last year, when he was beaten and locked in a room, as a result of an armed robbery. Since then, he's been fighting the company for healthcare. The VA records thereafter note that Petitioner can't finish tasks or concentrate. While the record notes PTSD from military service, it also notes an exacerbation as a result of the robbery with symptoms that then included social isolation, increased depression, increased anxiety, increased nightmares, and difficulty sleeping. (Px. 2). The November 13, 2014 record noted that Petitioner was involved in Alcoholics Ananonomus (AA) and had been sober for about a year. He was prescribed Gabapentin and Sertraline. The December 19, 2014 record indicated that Petitioner was having difficulty getting counseling services. (Px. 2). Petitioner testified that he attempted to receive psychotherapy at the VA, but there is a very long list and the services are in Madison, WI.

Petitioner testified to prior traumatic events in his life. He testified that he was never in combat while in the Navy. When he was 19 years old and working as a pizza delivery driver, he was shot in both arms. (Rx. 1). He testified that he had nightmares at the time, but received psychiatric care that improved his symptoms. Petitioner was also involved in a motor vehicle accident in 2005 while riding as a passenger. (Rx. 2). The driver, his best friend, died in the accident. Petitioner testified that he'd experienced nightmares and depression after that incident as well.

However, Petitioner was in the Navy at the time and was provided significant psychiatric care. With treatment, those symptoms resolved. Petitioner testified that he would experience an occasional nightmare when something would remind him of his friend, but he was not having any ongoing symptoms of anxiety or depression at time of the accident.

From approximately 2006 through 2013, Petitioner was doing great. He testified that he was a top salesman for Verizon. Prior to the incident, he won awards and met the President of the company due to his sales record. After the robbery, his sales decreased. Petitioner was asked about commissions records which evidenced increased commissions for a couple of months. However, Petitioner explained that the Belvidere store was a "C" store with 5 reps. The Rockford store was the busiest store in the state with 25 sales representatives. Petitioner explained that his commissions were initially high due to the increased volume in business. However, the wage statement indicates that Petitioner's commissions steadily declined thereafter. (Rx. 3). Petitioner testified that after the incident, he would stay to the back of the store and frequently hide in the back when African American customers approached him.

Respondent called Ilka Nunez to testify. Ms. Nunez worked as an HR analyst for Respondent. She testified that Petitioner did not request accommodations after returning to work. She testified that Petitioner had no attendance issues and that he was attaining his sales goals. However, she did not have any documentation which would evidence Petitioner's sales or the sales goals that were established. She testified that Respondent asked Petitioner to return to work in October of 2013, but that he did not do so. As such, Petitioner was terminated on October 21, 2013. Relative to work thereafter, Petitioner attempted to return to other employment and estimated he had been able to work for about 3-4 months after leaving Respondent.He'd done occasional construction type work. He found it easier working at jobs in which he worked alone.

At time of hearing Petitioner had been sober for approximately a year and a half. He had attended AA meetings to stop drinking. Petitioner continues to experience panic attacks. He testified that he used to be very outgoing and liked to go to places like markets. Since the incident, he does not like to be confined. However, there are also days in which he's unable to get out of bed. He continues to experience nightmares. He also testified to remaining uncomfortable around African American men. Petitioner testified he would like psychiatric treatment and counseling. He feels that with appropriate care, he could return to work and better support his family.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE DISPUTED ISSUES

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

The Arbitrator adopts the Statement of Facts detailed above. Based upon the totality of the evidence the Arbitrator finds as a matter of law that an accident occurred that arose out of and in the course of Petitioner's employment by Respondent on March 15, 2013. Psychic trauma is accepted in Illinois.

In Illinois, psychological injuries are compensable under one of two theories, either "physical-mental," when the injuries are related to and caused by a physical trauma or injury, or "mental-mental," when the claimant suffers a "sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm... though no physical trauma or injury was sustained." Pathfinder v. Indus. Comm'n, 62 Ill. 2d 556 (1976).

In Pathfinder Company v. Industrial Commission, the Supreme Court indicated that psychological injuries could be compensable in either of two ways, one of which being "physical-mental" trauma. 62 Ill. 2d 556 (1976). This occurs where the psychological injuries were related to and caused by a physical trauma or injury. Id., at 563. The court noted that minor physical contact, or contact that left no objective manifestation, such as bruises, contusions, or broken bones, was sufficient to cause psychological injuries to be compensable. Id. at 564.

In the instant case, although Petitioner did not sustain any bruises, contusions or broken bones as a result of the physical contact made by the assailants on March 15, 2013, physical contact did occur. Petitioner testified credibly that he had a gun put to the back of his head. He testified that he was led through the store and into the inventory room with a gun pressed against his back. There was no testimony offered that would indicate that Petitioner's description of the robbery is inaccurate. As such, sufficient physical contact was made to cause compensable psychological injuries.

The Arbitrator also notes that the case law supports the finding that assaults in the workplace can be compensable if the dispute between the aggressor and the victim is not purely personal. Skonetski v. Dollar Tree Stores, Inc., 2007 Ill. Wrk. Comp. LEXIS 1859. *See also* Rodriguez v. Industrial Commission, 95 Ill.2d 166 (1983). As in other workers' compensation cases, the Petitioner must establish that his employment placed him at a greater risk than the general public. In this case, it is clear that the incident in question arose out of the assailant's intent to rob Respondent. Petitioner was led in to the inventory room where he was forced to fill duffel bags with merchandise. The assailants had a vehicle waiting behind the store in which to escape. No testimony was offered, or evidence presented, that would indicate there was any personal motive related to the incident in question.

As such, the Arbitrator finds as a matter of fact the assailants were motivated by the desire to rob Respondent of merchandise, resulting in an increased risk than that which the general public is exposed. As such, the Arbitrator finds that the injury suffered by Petitioner on March 15, 2013, arose out of and in the course of his employment by the Respondent.

Further, Petitioner sustained an accident that arose out of and in the course of his employment if the mental-mental theory is applied. Petitioner suffered a sudden and severe emotional shock traceable to a definite time, place, and cause. Petitioner was robbed at gunpoint. He was forced, at gunpoint, to load merchandise in to duffel bags and load it into the assailants' vehicle. Recent appellate court decisions of Diaz v. Ill. Workers' Comp. Comm'n (Vill. Of Montgomery), 2013 IL App 2d 120294WC (Ill. App. Ct. 2013) and Chi Transit Auth. v. Ill. Workers' Comp. Comm'n, 2013 IL App. (1st) 120253WC (Ill. App. Ct. 2013) are instructive. In Diaz, the petitioner worked as a patrolman and had a handgun pulled on him. Some time later, it was later discovered that the handgun had been a toy gun. The petitioner did not immediately experience anxiety after the incident and returned to work for a few days. The petitioner was then taken off work after approximately a week due to posttraumatic stress disorder. In that case, the petitioner had also described similar episodes in the past, but did not seek or obtain psychiatric treatment as a result of the prior instances. The Appellate Court found that the petitioner had suffered a sudden, severe emotional shock that had resulted in his developing posttraumatic stress disorder.

In Chi Transit Auth., the petitioner worked as a bus driver. While driving the bus away from an intersection, the petitioner was informed that someone had been hit. The petitioner exited the bus and saw the victim lying near the curb. The petitioner was later informed that the victim had died. Petitioner sought treatment approximately two months later. The Appellate Court held that "Pathfinder does not compel the claimant to prove, in additional, that the psychological injury resulting from the emotional shock was "immediately apparent." Under Pathfinder, the *emotional shock* needs to be "sudden," not the ensuing psychological injury. Thus, if the claimant shows that she suffered a sudden, severe emotional shock which caused a psychological injury, her claim may be compensable even if the resulting psychological injury did not manifest itself until some time after the shock. Chi Transit Auth., at 20.

In the instant matter, compared to the petitioners in Pathfinder and Chi Transit Auth, Petitioner was the subject of an armed robbery. Petitioner had a gun pulled on him and pointed at his head. There was no testimony provided to contradict Petitioner's account of the robbery. Petitioner testified credibly to the event and given the description, Petitioner clearly suffered a sudden, severe emotional shock traceable to a definite time place and cause. The mental manifestations of the trauma need not be instantaneous.

Petitioner's testimony and treatment records also evidence that he suffered a psychological injury as a result of the traumatic event. Petitioner attempted to return to work approximately 2 days after the robbery, but was unable to do so for more than 10 minutes. He suffered a panic attack and was allowed to leave work. The next day, Petitioner sought treatment at Rockford Health Physicians, noting anxiety and insomnia after the robbery days before. Petitioner testified to a quick deterioration in his condition thereafter. He was unable to return to work at the location of the robbery. After being transferred, he continued to experience symptoms which negatively affected his ability to perform his job. While Petitioner had prior traumatic events occur in his life, two of which required some psychiatric care, he was not under any active treatment, nor taking any psychiatric medication for 7-8 years prior to the robbery.

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

The Petitioner's psychiatric issues may be multifactorial. Based upon the totality of the evidence the Arbitrator concludes the psychic trauma and physical trauma with the gun are, separately as well as in tandem , causative factors in the development and or the exacerbation of the Petitioner's current condition of ill being. Thus, based upon the totality of the evidence, the Arbitrator finds that Petitioner's current condition of ill-being is causally related as a matter of law to his work related injury on March 15, 2013.

Petitioner testified that he continues to experience significant anxiety and panic attacks. He continues to experience flashbacks and nightmares affecting his sleep. Unfortunately, he remains fearful of African American males and isolates himself where he was very outgoing prior to the incident in question.

Under the "physical-mental" theory, the petitioner need not show that his work-related physical trauma is the sole causative factor in his condition, but he need only show that his accident is a causative factor in his subsequent mental condition. City of Springfield v. Industrial Commission, 291 Ill.App.3d 734 (1997). In determining whether a causal relationship is present, it is important to compare a claimant's condition prior to the accident with his condition thereafter.

Despite the two traumatic events Petitioner suffered, there no evidence that he was suffering any psychiatric symptoms for approximately 6-7 years prior to the incident in question. Petitioner testified that he had experienced depression and nightmares following the shooting when he was 19 and the motor vehicle accident that took his friend's life in 2005. However, Petitioner also testified that he'd been provided sufficient psychiatric care following those events and had fully recovered.

There was no evidence presented that Petitioner was receiving counseling, taking psychiatric medication, or suffering from symptoms related to those events from 2005 through March 15, 2013. In fact, Petitioner testified that he'd been in school to become a nurse during that time. Further, he was excelling at his position with Respondent prior to the March 15, 2013 incident. Respondent witness narrowly addressed his termination underscoring her assertion this U. S. military veteran did not ask for any help.

After the assault, Petitioner's condition deteriorated. He had difficulty performing his job and dealing with his residual symptoms. While it is unfortunate that Petitioner did not get the treatment he needed immediately following the incident in question, and that he turned to drugs and alcohol to self-medicate, that does not negate the continuing consequences and effects of the March 15, 2013 accident. Petitioner does have treatment records which evidence the continuing effects of the robbery; the barriers to levels of necessary therapeutic treatment are obvious and real to this Petitioner.

In fact, Petitioner was seen at Rosecrance and admitted on an out-patient basis on July 19, 2013. That record described the incident and Petitioner's drug and alcohol problem. Petitioner then gave the same history to doctors Tuder and Hartman. The Arbitrator does not find Dr. Hartman's opinion persuasive. Dr. Hartman based his opinions solely on psychological testing which he claims evidenced malingering. It should initially be noted that Petitioner was continuing to abuse drugs and alcohol at the time of that evaluation. The reliability of the testing performed by Dr. Hartman is and should be questioned given Petitioner's condition at that time. Dr. Tuder also noted Petitioner's drug and alcohol abuse, but also noted that he continued to suffer symptoms related to the March 15, 2013 incident.

The Arbitrator finds the additional records, which support Petitioner's continued symptoms following his return to sobriety, to be persuasive. The Arbitrator adopts the medical opinion of Dr. Tudor, a psychiatrist over the section 12 psychologist. Petitioner's records after getting his drug and alcohol abuse under control support a causal relationship between his current condition of ill-being and the March 15, 2013 incident.

Additionally, the comparison of Petitioner's condition prior to March 15, 2013 with his condition thereafter clearly supports the finding that his present psychological condition of ill-being is causally related to his work injury. This conclusion is supported by Petitioner's treating records and Dr. Tuder's opinions, along with Petitioner's testimony at hearing. Petitioner was subjected to long, insightful cross examination with a no holds barred so to speak probing of all past psychic issues or potential ones. Petitioner responded in the tenor of the military veteran that his is –taking full responsibility for his lot in life, in direct, forthright manner, accepting of his foibles yet firm in assertion of the facts that make this case compensable. The Arbitrator finds him not only very persuasive but extremely credible. The Arbitrator concludes he is not a malingerer with such a classification found no where except in the opinion of Dr. Hartmann, a psychologist.

Therefore, based upon the totality of the evidence , the Arbitrator finds as a matter of law that the Petitioner's current condition of ill-being is causally related to his injury of March 15, 2013, while working for Respondent as alleged in the case at bar. The Arbitrator further adopts the opinion of Dr. Tudor that he is in need of futher treatment.

K. ☒ **What temporary benefits are in dispute?**
☐ **TPD** ☐ **Maintenance** ☒ **TTD**

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.

As a result of the incident on March 15, 2013, Petitioner has been unable to return to any stable employment. Petitioner worked for a period of time, with his performance deteriorating, and with him relying more and more on drugs and alcohol. After taking paternity leave, Petitioner felt slight improvement in his symptoms and realized he could not return to work for Respondent. Petitioner has not worked in any full-time capacity since August of 2013. Due to his inability to return to work, his position was terminated on October 21, 2013. Based on the records available and Petitioner's testimony, he has not reached a state of maximum medical improvement. Petitioner continues to require dedicated psychiatric treatment to improve his residual symptoms resulting from the robbery. Dr. Tuder noted that Petitioner would not be capable of working in crowded environments or with exposure to a substantial number of black men. As a result, Petitioner has not been able to return to his prior employment. He has attempted to perform construction work, but that has been with limited success.

At the time of hearing, Petitioner continued to experience psychological symptoms which require additional treatment. Due to a lack of approval, Petitioner has never received consistent and dedicated psychiatric treatment. Based on Petitioner's medical records and his testimony at trial, he continues to be in need of additional psychiatric treatment.

As such, the Arbitrator finds that Petitioner has not reached maximum medical improvement. Having determined that Petitioner's current condition of ill-being is causally related to the March 15, 2013 work injury, the Arbitrator awards temporary total disability benefits from October 22, 2013 through the date of hearing of June 15, 2015, or 85 & 6/7 weeks at the temporary total disability rate of $666.67 per week. Further, TTD shall continue until Petitioner has reached a state of maximum medical improvement.

**O. ☒ Other - Prospective Medical Care**

The Arbitrator adopts the findings of fact and conclusions of law contained above with respect to the issues of accident and causal connection and incorporates them herein by this reference.

Having found that Petitioner's condition of ill-being is causally related to his work injury of March 15, 2013, the Arbitrator further finds as a matter of fact , and, as conclusion of law that Petitioner is in need of prospective psychiatric treatment.

Petitioner has received sporatic treatment, generally consisting of assessments due to a lack of insurance. Petitioner testified to a desire for dedicated psychiatric care. Respondent's refusal to provide Petitioner with psychiatric treatment following being held at gunpoint is not acceptable.

Petitioner credibly testified to continued symptoms of nightmares, anxiety, a lack of motivation, and social isolation. Petitioner is in need of additional counseling and psychological medication management. The evidence does not support that Petitioner is at maximum medical improvement.

Therefore, the Arbitrator find that Respondent is responsible for providing prospective medical and psychiatric care hereafter, under the terms of the Act under section eight as reasonable and necessary to alleviate the conditions of ill being.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

| | |
|---|---|
| ☐ Affirm and adopt | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☐ Reverse | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☒ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROY DEVON,

Petitioner,

**16IWCC0460**

vs.

NO: 10 WC 31454

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, and prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission finds that Petitioner is entitled to vocational rehabilitation and maintenance benefits under Section 8(a) of the Act, and remands this matter 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).

Based upon a review of the record as a whole, the Commission finds Petitioner is entitled to a vocational assessment pursuant to Section 7110.10 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission. Under the Act, an employer is obligated to provide for the physical, mental and vocational rehabilitation of the injured employee, including the costs and expense of maintenance. (See Ill. Rev. Stat. 1989, ch. 48, par. 138.8(a).) Furthermore, Rule 7110.10 "Vocational Rehabilitation" provides:

> "The employer or his representative, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care, and, if appropriate, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he was engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever first occurs." (50 Ill. Adm. Code § 7110.10 (1992).)

Section 7110.10 of the Rules requires the parties to work together to prepare a written assessment of the course of medical care, and, if appropriate, rehabilitation required to return the injured worker to employment when, as here, it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which she was engaged at the time of her injury or when the period of total incapacity for work exceeds 120 continuous days, whichever comes first. Petitioner's period of total incapacity for his work injury has clearly exceeded 120 continuous days, as he has been authorized off work by his treating physicians, Drs. Akbar and Robinson, or provided with significant work restrictions which Respondent was unable to accommodate, from June 10, 2009 through the date of hearing, January 13, 2015. In addition, the Commission concludes that Petitioner has sustained an injury which has rendered him unable to return to work for Respondent in his prior position as a highway maintainer. On December 28, 2010, Petitioner underwent a Functional Capacity Evaluation ("FCE") placing him at the medium heavy work level, which further noted that Petitioner was "unable to demonstrate kneeling or rising unassisted from a kneeling position." (PX1F). Petitioner was seen in follow up by Dr. Robinson on February 11, 2011, at which time Dr. Robinson recommended Petitioner return to work pursuant to the FCE restrictions. From February 11, 2011 through the date of hearing Dr. Robinson has continued to authorize Petitioner to return to work pursuant to the FCE restrictions. (PX1E). Petitioner testified that Dr. Robinson continues to treat him, prescribe four medications for his pain symptoms, and recommend he remain on restrictions pursuant to his Functional Capacity Evaluation. (T45-47, 58-60).

The record fails to indicate that Respondent offered work within Petitioner's FCE restrictions, or complied with Section 7110.10 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission. The record also fails to indicate that Respondent obtained a labor market survey or offered vocational rehabilitation services to Respondent.

Based upon a review of the record as a whole, and pursuant to Section 8(a) of the Act, the Commission finds Petitioner is entitled to a vocational assessment and such vocational rehabilitation as is necessary, if any, and orders Respondent to obtain a labor market survey to assist in vocational rehabilitation efforts.

16IWCC0460

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 13, 2015, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $785.31 per week for a period of 37 weeks, for the period of April 30, 2014 through January 13, 2015, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent authorize and pay for Petitioner's follow-up treatment with Dr. Robinson and the prescription medication prescribed by Dr. Robinson, pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the parties comply with Rule 7110.10 of the Act, and prepare a written assessment of the course of medical care, and rehabilitation required to return Petitioner to employment.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent obtain a labor market survey, and authorize and pay for vocational rehabilitation services pursuant to §8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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: JUL 7 - 2016
KWL/kmt
O-05/09/16
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

16IWCC0460

**DEVON, ROY**
Employee/Petitioner

Case# **10WC031454**

**IL DEPT OF TRANSPORTATION SOI**
Employer/Respondent

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

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

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

5423 NEMEROFF LAW OFFICES, LTD
DAVID NEMEROFF
180 N LASALLE ST SUITE 3112
CHICAGO, IL 60601

5165 ASSISTANT ATTORNEY GENERAL
JEANNIE D SIMS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 CMS BUREAU OF RSK MGMT
WORKERS' COMP MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

APR 13 2015

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

STATE OF ILLINOIS )
)SS.
COUNTY OF Cook )

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**
**19(b)**

**16IWCC0460**

**Roy Devon**
Employee/Petitioner

Case # **10** WC **31454**

v.

Consolidated cases: _____

**Illinois Department of Transportation**
**State of Illinois**
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica A. Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **10/14/14 and 1/13/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

# 16IWCC0460

FINDINGS

On the date of accident, **6/10/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$61,254.00**; the average weekly wage was **$1,177.96**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

- Petitioner is entitled to TTD benefits from April 30, 2014, until January 13, 2015.
- Petitioner is entitled to prospective care consistent with Dr. Robinson's recommendations, including but not limited to, follow-up appointments with Dr. Robinson and prescription medication.

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

4/7/15
Date

ICArbDec19(b)

APR 13 2015

IN THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

**ROY DEVON,**
Petitioner,

vs.

**STATE OF ILLINOIS DEPT. OF TRANSPORTATION,**
Respondent.

**16IWCC0460**

Case No: **10 WC 31454**
Arbitrator Hegarty

## ADDENDUM TO THE DECISION OF ARBITRATOR

This matter proceeded to hearing pursuant to §19b of the Illinois Workers' Compensation Act (the "Act") before Arbitrator Jessica A. Hegarty. The hearing commenced on October 14, 2014, and was continued until January 13, 2014, in the City of Chicago, County of Cook.

The issues in dispute are:

- Accident
- Causal Connection
- TTD from April 30, 2014, to present

## FINDINGS OF FACT

Petitioner was employed by Respondent, IDOT, as a highway maintainer on the alleged date of accident and had been so employed for approximately 15 years. He was 63 years old on the date of hearing.

Petitioner's duties for Respondent included driving snow plows, salt trucks, and dump trucks. During the winter season, he worked 10-12 hours a day although winter storms required working up to 18 hours a day. In the summer, he worked 8-10 hours a day driving a tractor grass mower and trimming trees. He also worked on construction sites operating a 90 pound jackhammer. Petitioner testified he usually worked with a crew of other workers and had help lifting heavy items. He also picked up litter on the shoulders and grassy areas alongside highways which would sometimes involve working on his knees. Sewer maintenance and repair was also amongst his duties. This type of work required lifting heavy tools and bricks and going up and down a step ladder multiple times.

On June 10, 2009, Petitioner was exiting a pick-up truck on the expressway when a semi-truck "kicked up" a ten pound piece of metal that ricocheted off a guard rail, striking Petitioner on the right thigh. The next day, his right thigh was swollen and bruised.

*Medical Evidence*

The initial treatment records are not in evidence. (PX D).[1]

On July 9, 2009, Petitioner consulted with Michael Romberg, M.D., of Field Surgical Associates in Harvey, Illinois. Dr. Romberg noted that Petitioner reported he "was hit on June 8th by a pin that bounced off a truck, hit the guardrail and struck him in the right thigh." (PX D. p. 17.) Petitioner brought in pictures depicting the injury which the doctor noted "were quite impressive and involved almost the entire lateral aspect of his right thigh." (Id.) Dr. Romberg noted the bruising had resolved. Petitioner reported swelling, discomfort and difficulty walking. (Id.) On exam, the doctor noted a 12 cm area on Petitioner's upper, lateral right thigh "which appears to be a fluid collection." Tenderness on palpation was noted. (Id.) Dr. Romberg recommended surgical drainage of the hematoma. (Id.)

On July 15, 2009, Dr. Romberg drained, debrided, and washed out the right thigh hematoma. (Id. at 13.) The operative report indicates "a large area was identified in the thigh about a fourth away from the hip and there was an area of little skin necrosis as well...[a]n incision was made over the site directly [and] [u]pon dissection....a large cavity was identified and old blood clots and products were found." The doctor indicated the large cavity "could have been upwards to 20 cm in size." (Id.)

On July 30, 2009, Petitioner followed up with Dr. Romberg who indicated Petitioner "has a Wound Vac in place and is doing great. His pain is almost gone." The doctor noted Petitioner's complaints of "a little bit of sticking pain at time just beneath the incision." The doctor commented that the wound would likely take a few weeks to completely heal. Petitioner was instructed to follow up in three weeks and continue the Wound Vac. (Id.)

On August 20, 2009, Petitioner presented to Dr. Romberg who noted complaints of "some blistering" after his Wound Vac was put on last week. The doctor noted "[t]his was very sore for him." (Id. at 19.) The doctor took the Wound Vac off and recommended that it be discontinued. (Id.) Upon exam, the doctor noted "a little bit of maceration around the wound edges which has caused a small area of rash." (Id.) The doctor also noted "blisters medially, probably from this maceration as well."

On September 10, 2009, Petitioner followed up with Dr. Romberg who, in reference to the wound, noted "[h]e has a little bit of indentation and states he has some burning which went upwards to the abdominal wall." (PX D at 20.) (PX D at 20.) The doctor commented, "this is probably not related to his wound as they are very far apart." (Id.) The doctor noted that the wound was now the size of a "postage stamp" for which he recommended "just placing a band-aid over the site." The Petitioner also complained of "his veins popping out over his right leg now." Dr. Romberg commented that "this could be related to his surgery but I will obtain a Venous Doppler to make sure there is no blood clot in the area." The doctor noted that if the Doppler test was normal then Petitioner would not need to follow up. (Id.)

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[1] Petitioner submitted what was marked as Petitioner's Group Exhibit 1. This exhibit contains eight separate exhibits marked as Exhibits A-H. For easy identification, the Arbitrator will cite to each exhibit individually.

There are no records indicating that Petitioner returned to Dr. Romberg.

On December 18, 2009, Petitioner presented to the office of Howard Robinson, M.D., a pain specialist. Mellissa Parram-Taylor noted that Petitioner reported being struck in his right leg by a 6-8 pound metal object directly in his right thigh. Petitioner complained of right leg pain that radiated from his calf into his right thigh and into his right buttock. (PX E at 176.) Petitioner complained of having these symptoms since the date of injury on June 9, 2009. Petitioner reported that he could not stand for more than 4 hours. (Id.) Ms. Parram-Taylor also noted he had a Doppler done at Ingalls Hospital as well as surgery for a right thigh hematoma on July 15, 2009.

Dr. Robinson's note from this visit states that after the work accident Petitioner "noted severe pain immediately and that he had to have surgery a week later. Since then he has had N/T [numbness, tingling], and burning in the anterior thigh." (Id. at 173.) The doctor noted Petitioner describing the location of pain "across the lower back and radiating to [his] right leg." (Id.)

Dr. Robinson noted that an x-ray of the right hip showed degenerative joint disease. He also noted that the "vascular studies" were "ok." (Id. at 175.) The doctor diagnosed Petitioner with femoral neuropathy, osteoarthritis, unspecified whether generalized or localized, pelivic, and thoracic or lumbosacral neuritis or radiculitis. In Dr. Robinson's treatment plan, he noted "[t]his looks like a femoral neuropathy with dropped patella reflex and altered sensation in the anterior femoral cutaneous distribution vs. lumbar radiculopathy." An MRI of Petitioner's lumbar back and an EMG of his right leg were ordered. Dr. Robinson restricted Petitioner to sedentary duty and prescribed Lyrica, Chlozoxazone, Vicodin, Effexor, Pregabalin.

On January 29, 2010, Petitioner returned to Dr. Robinson complaining of right thigh pain radiating to his shin as well as low back pain in the right side and buttock. (Id, p. 72.) Dr. Robinson noted the EMG showed the presence of a femoral neuropathy with absence of the saphenous response. (Id.) The lumbar spine MRI showed multilevel degenerative disc disease that was most severe at L5-S1 with mild stenosis at L3-L4 and L4-L5. (Id.) After reviewing the diagnostic tests, Dr. Robinson believed the femoral neuropathy was Petitioner's pain generator, not his back. (Id. at 74.) Dr. Robinson continued Petitioner on light duty restrictions and recommended work hardening. (Id.)

On February 26, 2010, Petitioner presented to Dr. Robinson who prescribed a femoral nerve block, a lumbar epidural steroid injection, and additional work hardening. (Id., p. 68-70.)

On May 7, 2010, Petitioner reported to Dr. Robinson that the right femoral nerve block provided temporary relief. Dr. Robinson ordered a repeat injection in June.

On October 15, 2010, Dr. Robinson noted Petitioner's report of 70% improvement in his lower right leg with the repeat injection but continued pain complaints in his upper thigh. The doctor prescribed additional work hardening. (Id. at 55.)

On December 15, 2010, Petitioner presented to Dr. Robinson with continued complaints of right thigh pain radiating into the ankle. He also reported that work hardening caused more pain. Dr. Robinson prescribed an FCE at Petitioner's request. (Id. at 47.)

On December 28, 2010, Petitioner participated in a Functional Capacity Exam ("FCE"). (PX F). The FCE report contains the notes the therapist took from the initial interview of Petitioner. (Id. at 191-92.) Petitioner told the therapist that his job duties included climbing up and down sewer portals, driving trucks, lifting materials around 75 pounds, working on his hands and knees, and operating a jackhammer. (Id.) Petitioner indicated light duty work is not available at IDOT. Petitioner also told the therapist the heaviest load he is required to lift is a 90 pound jackhammer. (Id.) Petitioner told the therapist that he was able to walk on a level surface and that he could stand for up to 4 hours and needed to move after sitting for hours. (Id.) Petitioner indicated he had no issues with overhead work, driving, lifting, and using his upper extremities. (Id.) After an examination and testing, the therapist determined Petitioner could work at a medium-heavy physical demand level which met Petitioner's self-reported work level. (Id.) The therapist noted that Petitioner was unable to perform was kneeling or rising unassisted from a kneeling position.

On January 17, 2011, Petitioner reported to Dr. Raza Akbar at Ingalls Occupational Health Program who noted persistent complaints of sharp pain in Petitioner's right thigh/groin made worse by walking, standing, physical therapy and work hardening. (PX G at 198). Upon examination, the doctor noted mild hip pain, leg and thigh pain. Dr. Akbar instructed Petitioner to follow up with Dr. Robinson. (Id at 202.)

On February 11, 2011, Petitioner presented to Dr. Robinson who reviewed the FCE, determining Petitioner could perform at a medium-heavy demand level. (RX. 4, p. 44) Dr. Robinson released Petitioner to work pursuant to the restrictions indicated in the FCE. (Id.) Petitioner was to follow up with Dr. Robinson in three months. (Id.)

On February 14, 2011, Petitioner presented to Dr. Akbar reporting persistent pain in his right groin thigh area at a 9/10. Petitioner reported that his right leg "gives out a little at times" and he sometimes has back pain. Petitioner reported therapy made his pain worse and that he has discontinued therapy. Petitioner reported that Dr. Robinson "had put him on medium duty based on the FCE." The doctor referred Petitioner to Dr. Anwar for a second opinion and instructed him to return to the clinic in three weeks. (PX G at 203-204.)

On February 23, 2011, Petitioner reported to Dr. Akbar who noted his continued complaints in the right thigh radiating to his ankle and primarily at the site of the initial injury. Petitioner reported receiving a letter from workers' compensation discontinuing his benefits on February 18, 2011. Petitioner voiced concern that he "[felt] the FCE did not address the meds he takes to control his pain nor the functioning of the lower half of his body." (PX G at 207). Petitioner requested a second opinion from a pain specialist and was again referred to Dr. Anwar. (Id. at 202). Dr. Akbar took Petitioner off of work noting Petitioner was unable to climb stairs and operate a commercial motor vehicle. (PX G at 205)

On March 16, 2011, Dr. Akbar authored a letter ("To Whom it May Concern") indicating a need to repeat the FCE because the first exam performed on December 28, 2010, "did not take into account [Petitioner's] job description" and the testing was largely confined to lifting abilities above the waist instead of the function of the lower extremities. The doctor indicated the repeat FCE should focus on Petitioner's job description as well as a second opinion from a pain specialist regarding further treatment options. (Id.)

On May 13, 2011, Dr. Robinson noted that Petitioner "was last seen by me on 2-11-11. At that time we chose to continue Neurontin and release to his restrictions on FCE. He still has not gone to work yet. He is taking Neurontin and Norco and these are helpful." (RX 4 at 39.) The doctor noted Petitioner's concerns regarding his driving capabilities. Dr. Robinson ordered Petitioner to take a driving evaluation. (Id.) The doctor released Petitioner to return to work per the FCE restrictions. (Id.)

On August 23 2011, Petitioner presented to Dr. Robinson who noted complaints of continued pain and weakness. (RX 4 at 35) The doctor noted Petitioner's current medications as: Gabapentin (Neurontin) 300 mg, three times a day, Norco 10-325 mg, once a day, Aripiprazole 2 mg, once a day, Lovastatin 20 mg, once a day at bedtime, Metformin 500 mg, twice a day. (Id.) Dr. Robinson again ordered Petitioner to take a driver's evaluation to make sure Petitioner would be safe driving while on his prescribed pain medications. The doctor continued prescriptions for pain medications, and released Petitioner to work per the restrictions of the FCE, noting "he cannot drive until he is cleared by the driver's evaluation program." (Id.) Dr. Robinson told Petitioner to follow up after he took the driver's evaluation. (Id.)

On November 22, 2011, Doctor Robinson noted Petitioner was "[l]ast seen by me on 8-23-11. At that time we chose to get a driver's eval. He did not do this as he would not pass based on his medications." The doctor increased the Neurontin prescription to 900 mg, three times a day, continued the Norco, prescribed Lidoderm pain patches.

Petitioner testified he never participated in the driver's evaluation ordered by Dr. Robinson.

In February of 2012, Dr. Robinson examined Petitioner noting his complaints of increased pain in his right leg. (RX 4). Dr. Robinson ordered Petitioner to work per the FCE restrictions but stated Petitioner was not to drive due to his medications. (Id.)

Petitioner continued to obtain treatment from both Dr. Akbar and Dr. Robinson throughout 2012.

On November 2, 2012, Petitioner presented to Dr. Robinson with complaints of burning pain in his right thigh and aching, burning low back pain radiating to his right knee. Petitioner reported the symptoms increase with activity and improve with lying down. Dr. Robinson prescribed the following medications: Nucynta Er 50 mg, twice a day, Flexeril 10 mg, once a day, Norco 10-325, once a day, Neurontin 300 mg, 3 times a day. Dr. Robinson noted that Petitioner was totally incapacitated. (RX 6).

On December 28, 2012, Dr. Robinson noted that the new combination of medications is helping Petitioner's pain but Petitioner is "not tremendously comfortable." Petitioner reported some leg weakness, numbness and tingling. The doctor continued his restrictions per the FCE while noting that Petitioner is "totally incapacitated". The doctor also noted "[w]e may have to consider another course of work hardening and get a new FCE just to update his restrictions." (RX 6).

On January 9, 2013, Petitioner began treatment with pain management doctor, Dr. Zaki Anwar, who noted "the patient stated his pain is mostly around the area where he has a scar from surgery and it radiates down to his leg. He described his pain as a tingling, aching, sharp and

shooting that not only goes down to his leg, but it goes to the back of his buttocks. He also reported his legs give up when the pain is sharp. Petitioner also reported pain affecting his back and trouble walking. The doctor assessed Petitioner with type I Complex Regional Pain Syndrome and antalgic gait with difficulty walking. The doctor noted that Petitioner had failed conservative trial of treatments with the "intra-scar injection" done by Dr. Robinson. The doctor's plan was to begin a series of lumbar sympathetic blocks at L2 and L3 and consider a spinal cord stimulator if the blocks failed to provide relief. The doctor continued prescriptions for Gabapentin, Nucynta and Hydrocodone. (RX 5).

Lumbar sympathetic blocks at L2 and L3 were administered to Petitioner by Dr. Anwar in March 20, 2013, May 1, 2013, May 23, 2013, May 29, 2013, June 5, 2013, June 12, 2013, and June 19, 2013. (Id.)

On June 29, 2013, Dr. Anwar requested authorization for a spinal cord stimulator trial. (Id.) It is unclear from the medical records whether Respondent authorized this trial; however, in August of 2013, Petitioner told Dr. Robinson he declined the stimulator.

On January 23, 2013, Petitioner presented to Dr. Robinson reporting sharp right thigh pain at an 8/10. (PX E at 80.) He also reported numbness and tingling in the leg with atrophy and weakness. (Id. at 79.) Petitioner reported doing better on the Nucynta combined with Norco and Tizanidine. With respect to his work status, Dr. Robinson ordered Petitioner to be off work until the next scheduled appointment in three months. The doctor noted Petitioner is "totally incapacitated at this time. Restrictions per FCE." (Id. at 78.)

On April 23, 2014, Petitioner presented to Dr. Robinson who noted Petitioner's complaints of increased right leg pain with activity. (Id. at 76.) The doctor increased the prescription of Nucynta ER to every 8 hours and continued the prescription for Norco. Petitioner was instructed to follow up in one month. Petitioner was ordered off of work for one month. The doctor noted that Petitioner is "totally incapacitated at this time. Restrictions per FCE." (Id. at 76.)

Petitioner continued to treat with Dr. Robinson on May 21, 2014, June 18, 2014, July 23, 2014, and August 20, 2014. Dr. Robinson's work restrictions remained consistent with his April 23, 2014, order.

On September 17, 2013, Petitioner consulted with Dr. Robinson with continued complaint of right thigh pain. (Id. at 57.) The doctor discontinued a prior prescription for Flexeril after Petitioner reported minimal relief. The prescription for Tizanidine was increased. The doctor noted that "we discussed side effects including sedation with this medication." (Id. at 56.) The prescriptions for Nucynta and Norco were continued. The doctor also noted that "[w]e obtained a urine drug screen last month which was clean." (Id.) Again, the doctor noted that Petitioner is "totally incapacitated at this time. Restrictions per FCE". (Id. at 54.)

On October 23, 2013, Petitioner presented to Dr. Robinson who noted he was "continuing to have a lot of thigh pain with decreased function. He notes that he is continuing to have atrophy of the right thigh." (Id. at 51.) Petitioner was prescribed MS Contin 30 mg (Morphine Sulphate) in lieu of Nucynta ER as he was having difficulty obtaining the Nucynta ER from his pharmacy. The Norco prescription was increased to 2 tablets a day, the Gabapentin and

Tizanidine were continued. (Id. at 52) Petitioner' prior work restrictions remained in effect. (Id. at 50.)

Petitioner continued to follow up with Dr. Robinson on a monthly basis. Petitioner's work restrictions remained unchanged. Petitioner continued on a pain management regimen with respect to his right leg.

On February 21, 2014, Petitioner reported his symptoms have worsened over the last couple of days and that his right thigh muscle "locked up on him." Petitioner reported 5 minutes of cramping after which, he has had continued soreness in his thigh. (Id. at 25.) Petitioner also reported his right low back, hip and anterior thigh pain had increased "after no certain activity." (Id. at 36.)

Petitioner continued to follow up with Dr. Robinson. Petitioner's work restrictions remained unchanged.

On June 18 2014, Dr. Robinson noted Petitioner's pain complaints in his right thigh at an 8/10. The doctor noted that Petitioner's recent medication regime of Morphine, Norco Tizanidine "does seem to help him". (PX E at 23). The doctor noted that Petitioner "tried to wean himself from Norco for 24 hours and notes that his pain was miserable and severe." He notes that Tylenol did not seem to help him at all." (Id.) Dr. Robinson noted "he is stable at this point. We will continue him on his current regime" and will discuss weaning him off at a later date. With respect to work restrictions, Dr. Robinson indicated Petitioner was "totally incapacitated at this time. Restrictions per FCE." (Id. at 22.)

The medical records reveal Petitioner is a long time smoker. Petitioner testified that he continues to smoke around a pack of cigarettes each day. Petitioner testified he underwent right knee surgery sometime in the 1970's. He has a history of diabetes mellitus. (RX 4).

*Dr. Gleason's IME*

On March 11, 2014, Dr. Thomas Gleason performed an Independent Medical Evaluation ("IME") at the request of Respondent. (RX 3). Petitioner's complaints of right thigh pain with occasional shooting radiating pain into his ankle. (Id.) Upon exam, the doctor noted a mild antalgic gait favoring his right lower extremity. Petitioner was able to stand on his toes and heels bilaterally and there was a normal thoracic kyphosis and lumbar lordosis. Dr. Gleason noted some pain on palpation over the right lower para-lumbar area. There was no spinal, para-spinal tenderness, no para-spinal spasm, tenseness, or asymmetry. (Id.) The straight leg raising test was negative bilaterally and sensation was intact to pin prick over the L4-L5 and S1 nerve root distributions. The doctor noted diminished sensation over Petitioner's anterior right thigh and diffusely over the right lower extremity relative to the left. (Id.) Dr. Gleason also noted a depression in Petitioner's right thigh as well as some localized numbness. The doctor performed x-rays of Petitioners spine which revealed degenerative disc disease moderate diffuse greatest at L5-S1 with associated disc space narrowing, spurring, and facet arthropathy. (Id.) X-rays of the pelvis and right femur revealed degenerative joint disease that was severe on the right with obliteration of the articular surface and subchondral cyst formation. (Id.)

Dr. Gleason noted Petitioner sustained a contusion and hematoma requiring an incision, drainage, irrigation, and debridement, resulting in a well healed incision with local numbness, a portion of atrophy of the right thigh and the findings reflected in a January of 2010 EMG/NCV. He diagnosed Petitioner with residual right femoral neuropathy with a well healed incision in the right anterior thigh with residual numbness and atrophy of the right thigh related to his June 10, 2009 work accident. (Id.) The doctor further determined Petitioner's injury has largely resolved with regards to the residual right femoral neuropathy. He concluded that Petitioner's work injury is not causally related to any current need for ongoing medical treatment. Dr. Gleason determined Petitioner had reached MMI regarding the work injury and was capable of returning to his regular job without any restrictions. (Id.)

The doctor also diagnosed Petitioner with several conditions that he determined are not related to Petitioner's work injury including degenerative joint disease of the right hip and knee with diminished range of motion, the findings of the diagnostic studies, healed incisions on the right knee post-operative from a prior surgery and obesity. (Id.) Dr. Gleason concluded Petitioner is capable of returning to full time work in at least a medium to heavy level per the Department of Labor Guidelines. (Id.)

*Petitioner's Testimony: Current Condition*

With respect to his current condition, Petitioner experiences sharp pain in his right hip bone radiating downwards. He sometimes experiences numbness and a burning sensation in his right leg. The numbness occurs at least once or twice a day. The burning sensation is felt from his groin down to his right ankle. He experiences a "pin and needles" sensation as if his leg "goes to sleep". Petitioner testified that he is "leery" of his right leg. He testified that when he wakes up in the morning his right leg is "tight" and he walks with a limp until it loosens up. Petitioner testified that he has to be very careful because his right leg "gives out" on him unexpectedly. He testified that he has had these symptoms since the accident which have worsened over time. With respect to his work duties, he testified he cannot drive a truck while taking his current medications due to the fact that he gets drowsy and the fact that he is on narcotics which are prohibited by the IDOT drivers log book.

Petitioner brought his narcotics medications to the arbitration hearing. He testified to the warning labels contained on his medications. The Tazadine prescription contains a warning "[m]ay cause drowsiness...dizziness" and to exercise caution while driving. The Hydrocodone prescription contains a similar warning with respect to drowsiness and to use care when operating a car or dangerous machinery. The Gavapentin prescription warns that it may cause drowsiness or dizziness, the Morphine prescription also warns of drowsiness and to use care when operating automobiles or dangerous machinery.

Petitioner testified that if he were to return to his work he would get terminated following a drug screen for having narcotics in his system. He further testified that the drugs make him drowsy and he would feel uncomfortable operating a heavy truck on the highway while medicated. With respect to his work with sewers, he testified he would not feel comfortable traversing the ladder due to the current condition of his right leg. As to the construction aspect of his job, he does not feel capable of operating a 90 pound jackhammer. He explained this job involves a lot of pressure which causes his whole body to shake. He does not feel his right leg could tolerate the shaking without undue burden and pain. With respect to cutting grass on the side of the highway, Petitioner explained that he uses a tractor equipped with a right sided peddle that requires force in order operate. He explained that he

sometimes would have to stand up in order to engage the peddle. He further testified that the tree trimming aspect of his job sometime requires him to stand on the back of a truck in order to trim trees. The Petitioner testified that he does not feel capable of performing this duty because he is not steady on his feet. With respect to picking up paper along the highway, he explained that the ground along these areas is not level he can have problems walking on uneven ground. He also testified that picking up paper involves kneeling down on the ground and he is not capable of kneeling without extreme pain in his right leg.

Petitioner testified that he has been treating with Dr. Robinson for 5 years and that he follows the doctor's instructions with respect to the medications. He further testified that Dr. Robinson administers urine screens every few months to ensure that Petitioner is on the proper dosage. According to Petitioner, he is currently being prescribed 4 medications for pain including morphine, hydrocodone, and tizanidine and gavapentum.

On cross-examination, Petitioner admitted that he never discussed a possible return to work with Respondent. Petitioner testified that he is subject to drug tests by Respondent when at work but admitted the drug tests were designed to detect illicit or non-prescribed drugs. Petitioner testified Dr. Robinson never told him he could return to work. Petitioner testified he does have a car and drives at least a few times each week. Petitioner testified he drives himself to his doctor appointments and runs errands in the car such as grocery shopping. Petitioner has maintained his driver's license. Petitioner testified he does travel up and down the stairs in his home and he is able to perform household tasks such as vacuuming, cleaning windows, mowing the lawn, and pulling weeds. Petitioner also testified he works out two to three times each week and performs primarily strength training exercises. Petitioner testified these exercises include weighted leg lifts/presses.

*Arbitrator's Assessment of Petitioner's Credibility*

The Arbitrator observed Petitioner throughout his testimony at the arbitration hearing. Petitioner's testimony was direct and straightforward. The Arbitrator found him to be a credible witness.

## CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of material facts in support of the following conclusions of law:

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

On the date of accident, Petitioner testified he was exiting a pickup truck on the expressway when a 10 pound piece of metal bounced off a guard rail and hit his right thigh. Petitioner testified he was on duty and engaged in work activities when this occurred. The Arbitrator notes that Petitioner's account of the accident is corroborated by the treating medical records. Based on the foregoing, the Arbitrator finds an accident did occur arising out of and in the course of Petitioner's employment with Respondent.

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

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his right thigh work injury on June 10, 2009. This finding is based Petitioner's credible testimony at trial describing the mechanism of injury and is supported by the treating medical records.

After exiting a pick-up truck on the expressway, Petitioner sustained an acute injury to his right thigh after being struck by a ten pound piece of metal that was "kicked up" from a semi-truck that ricocheted of a guard rail. The next day, his right thigh was swollen and bruised.

Dr. Romberg, after reviewing photos, noted the bruising was "quite impressive and involved almost the entire lateral aspect of his right thigh." The July 15, 2009 surgery in which the resulting right thigh hematoma was drained, debrided, and washed out, revealed some necrosis and, upon dissection a large cavity with old blood clots and "products" measuring approximately 20 cm in size. Petitioner complained of pain in subsequent follow up appointments with Dr. Romberg. Approximately one month post-op, Petitioner complained of blistering and soreness after placement of a Wound Vac. Dr. Romberg noted maceration, a small rash and blisters around the edges of the wound. Petitioner's Wound Vac treatment was discontinued. Dr. Romberg's records one month later, in September of 2009, noted Petitioner's complaints of "burning" at the wound site which was now the size of a "postage stamp" for which the doctor recommended "just putting [on] a band aid". A Venus Doppler was ordered to rule out blood clots based on Petitioner's complaints of his "veins popping out" over his right leg.

There is no evidence of any further follow-up with Dr. Romberg. The next medical record relating to treatment of Petitioner's right leg is three months later when Petitioner had an initial consult with pain management specialist, Dr. Robinson who noted Petitioner's report of a work accident which was consistent with his testimony at hearing. Petitioner's complaint's of right leg pain, radiating from his calf into his right thigh and into his right buttock since the date of injury were noted by Ms. Parram-Taylor who also noted he could not stand longer than 4 hours.

Dr. Robinson's noted complaints of "severe pain immediately" after the accident. The doctor noted post surgical complaints of numbness, tingling and burning in the right anterior thigh. The doctor indicated "[t]his looks like a femoral neuropathy with dropped patella reflex and altered sensation in the anterior femoral cutaneous distribution vs. lumbar radiculopathy." An MRI of Petitioner's lumbar back and an EMG of his right leg were ordered. At his next visit, Dr. Robinson noted complaints of right thigh pain radiating to the shin as well as low back pain in the right side and buttock. (Id, p. 72.) After review, the doctor noted the EMG revealed *the presence of a femoral neuropathy with absence of the saphenous response.* The lumbar spine MRI showed multilevel degenerative disc disease that was most severe at L5-S1 with mild stenosis at L3-L4 and L4-L5. (Id.) Based on his review of the diagnostics, Dr. Robinson believed the femoral neuropathy was Petitioner's pain generator, not his back.

The Arbitrator finds the medical records thereafter indicate consistent complaints of sharp pain, numbness, burning and radiating pain with respect to his right thigh. Petitioner has undergone sympathetic blocks, physical therapy and work hardening. Dr. Robinson's treating medical records corroborate Petitioner's complaints of pain and include off-work slips that note Petitioner to be "totally incapacitated." The Arbitrator notes that Dr. Robinson's last treatment

record in evidence continued to keep Petitioner off of work and noted he was unable to perform at the work level contained in the FCE. Petitioner takes multiple narcotic pain medications including Morphine, Norco, Gabentin, and Tizanadine to manage his pain.

The Arbitrator also notes Dr. Akbar's March 26, 2011, evaluation at Ingalls Occupational Health Program convincing. Dr. Akbar indicated that due to Petitioner's medical symptoms and pain medications, he was unable to perform the minimal requirements of his job. The doctor also noted an inability: to lift in excess of 75 pounds, climb stairs, and operate machinery due to the side effects of narcotic pain medications.

Regarding the FCE performed on December 28, 2010, the Arbitrator concludes there was a failure on the part of the therapist to take into account Petitioner's essential job duties that include operating motor vehicles, machinery, and lifting in excess of 75 pounds.

With respect to Dr. Gleason's March 11, 2014, IME report, he noted that Petitioner presented with an unsteady gait favoring his right leg, a 3 inch scar over his right thigh and complaints of difficulty with stairs, walking, and squatting. The doctor reviewed a number of Petitioner's records including his EMG noting the findings of femoral neuropathy with absence of saphenous response. The doctor diagnosed Petitioner with a residual right thigh femoral neuropathy with residual numbness and atrophy. He determined that condition to be causally connected to the work injury at issue is supportive of the Arbitrator's decision.

The Arbitrator finds the remainder Dr. Gleason's conclusions in his IME report to be unpersuasive, particularly his conclusion that Petitioner's subjective pain complaints appear to be related to pre-existing degenerative conditions of the right knee, hip, and his lumbar spine. This opinion is contradicted by Dr. Robinson's records particularly his January 29, 2010, note in which he reviewed Petitioner's EMG and lumbar MRI and concluded that femoral neuropathy was Petitioner's pain generator, not his back.

Dr. Gleason's conclusion that Petitioner has no current need for the numerous pain medications and is at MMI is not premised on any facts and is contrary to an analysis of the treating medical records.

Although the Petitioner did not present any medical opinions with respect to either causal connection or to contradict Dr. Gleason's IME report, the Arbitrator finds, after a careful consideration of the evidence contained in the record, that Petitioner has sustained his burden in proving that the work accident of June 10, 2009, is causally connected to his current condition of ill-being.

**L. What temporary benefits are in dispute?**

Because the Arbitrator has found that Petitioner's current condition of ill-being is causally connected to the work accident at issue, Petitioner is entitled to TTD benefits from April 30, 2014, to the date of hearing.

**K. Is Petitioner entitled to any prospective medical care?**

The Arbitrator finds that Petitioner is entitled to prospective care consistent with Dr. Robinson's recommendations, including but not limited to, follow- up appointments with Dr. Robinson and prescription medication.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

| | |
|---|---|
| ☐ Affirm and adopt | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☐ Reverse | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☒ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARMANDO ESCAMILLA,

Petitioner,

**16IWCC0461**

vs.

NO: 09 WC 16131
13 IWCC 586

K TEL CONSTRUCTION,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Illinois Workers' Compensation Commission on Remand from the Circuit Court of Cook County in case number 13 L 50584. On June 23, 2012 Arbitrator Kinnaman issued a Decision in 09 WC 16131, finding that the Petitioner sustained accidental injuries arising out of and in the course of his employment on November 15, 2007, when Petitioner was lifting drywall, based upon Petitioner's testimony and treating records of Dr. Aleman, but that Petitioner failed to provide timely notice of his accident to Respondent as required under Section 6(c) of the Act, and his claim for benefits was denied.

On August 21, 2012, Respondent timely filed a Petition for Review of the Arbitrator's Decision, raising issues of accident, and causal connection. On September 7, 2012, Petitioner timely filed a Petition for Review of the Arbitrator's Decision, raising the sole issue of notice.

On May 07, 2013 oral arguments were heard in the matter, with both parties represented by counsel. On June 05, 2013, the Commission, after considering the issues of accident, notice, and causal connection, and being advised of the facts and law, reversed the Decision of the Arbitrator with regard to accident, affirmed the Arbitrator's finding with respect to notice, affirmed the Arbitrator's finding that Petitioner failed to prove his current condition of ill-being is causally related to his alleged injury of November 15, 2007, and otherwise affirmed and adopted all other aspects of the July 23, 2012 Decision of the Arbitrator.

Petitioner sought judicial review in the Circuit Court of Cook County, and on August 22, 2014, Judge Robert Lopez Cepero's issued a Remand Order, reversing and remanding this matter for further proceedings consistent with the Order. The matter was remanded "for redetermination on the issue of accident with specific instructions to consider the offers of proof made by

Plaintiff." The matter was further remanded for the Commission to address whether Petitioner proved timely notice based upon a Section 8(j) of the Act.

Based upon the Remand Order, after considering the entire record, and being advised of the facts and law, the Commission affirms the Arbitrator's finding as to accident, reverses the Arbitrator's finding that Petitioner failed to provide timely notice, finds that Petitioner provided timely notice under Section 8(j), affirms the Arbitrator's finding that Petitioner failed to prove his current condition is causally related to his alleged injury of November 15, 2007, affirms the Arbitrator's ruling on the two offers of proof made by Petitioner, and otherwise affirms and adopts all other aspects of the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's finding of accident based upon Petitioner's testimony and the initial treating records of Chiropractor Aleman, reflecting Petitioner sustained a lumbar strain on November 15, 2007 while lifting drywall at work. Petitioner, a second year apprentice carpenter, testified he injured his low back on November 15, 2007 while lifting drywall, he further testified he thought it was "no big deal," that his back was hurting a bit so he immediately went to his foreman, Refugio Rangel, and let him know, but he did not request to fill out paperwork, and none was completed. (T10-11, 25-26). Petitioner sought no treatment until over a week later, during which time he continued to perform his regular work duties as a carpenter hanging drywall. Chiropractor Aleman's November 23, 2007 office notes indicate Petitioner gave a history that he injured his back at work on November 15, 2007.

The issue of notice was addressed in Gano Electric Contracting v. IC, 260 Ill. App. 3d 92, 631 N.E.2d 724, 197 Ill.Dec. 502 (4th Dist. 1994). The Appellate Court held that, (1) the purpose of the notice requirement is to enable an employer to investigate an alleged accident, (2) compliance is accomplished by placing the employer in possession of known facts related to the accident within 45 days, (3) a claim is barred only if no notice is given, (4) if some notice has been given, although inaccurate or defective, the employer must show that it has been unduly prejudiced, and (5) the legislature has mandated a liberal construction of the issue of notice. Where inaccurate or defective notice is provided Respondent has the burden to prove prejudice, but where no notice is provided at all, then the proceedings are barred, as the act of giving notice is jurisdictional and a prerequisite of the right to maintain proceeding under the Workers Compensation Act. S & H Floor Covering v. IWCC, 373 Ill.App.3d 29(2007).

Based upon a review of the record as a whole, the Commission reverses the Arbitrator's finding that Petitioner failed to provide timely notice of his alleged work-related accident, and instead finds that under Section 8(j), Petitioner timely provided timely notice. Petitioner testified, and the exhibits corroborate, that Petitioner received medical benefits under Respondent's group health plan covering non-occupational disabilities contributed to wholly or partially by the Respondent, with the last payment by Respondent's group health insurance being made on June 4, 2009. Petitioner filed an Application for Adjustment of Claim on April 14, 2009. (ARB EX2). Under Section 8(j) of the Act:

> In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering nonoccupational

disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act. In such event, the period of time for giving notice of accidental injury and filing application for adjustment of claim does not commence to run until the termination of such payments. This paragraph does not apply to payments made under any group plan which would have been payable irrespective of an accidental injury under this Act. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments only to the extent of such credit."

Under Section 8(j), Petitioner would have until July 19, 2009 within which to file an Application for Adjustment of Claim in this matter. Filing of an Application for Adjustment of Claim within the period allotted to provide notice satisfies the notice requirement. Sieber v. Industrial Commission, 224 Ill.2d 87(1980). Petitioner's filing of an Application for Adjustment of Claim three months prior to the notice deadline is more than adequate to comply with the liberal notice requirements of the Act, and specifically under Sec 8(j) of the Act. The record indicates the last medical benefits paid by Respondent's group health insurance occurred on June 4, 2009, and Petitioner's Application for Adjustment of Claim was filed on June 4, 2009, well within the requirements to file an Application for Adjustment of Claim within 45 days of the last group health insurance payment.

The Commission further addresses the issue of causal connection and finds that Petitioner failed to prove a causal connection between his November 15, 2007 work injury and his current condition of ill-being. The Commission relies on the significant one year gap in treatment between Petitioner's last office visit with his treating physician, Chiropractor Aleman, on January 10, 2008, and his next office visit of January 19, 2009. At the time of Petitioner's January 8, 2008 office visit his exam was essentially normal, having obtained progressive relief of his symptoms. Petitioner testified that he returned to work on August 8, 2008 for a new employer, Thorne Construction, and continued to work for that company for about three or four months, performing the same type of work he previously performed hanging drywall, until laid off in November of 2008. (T17-18). When Petitioner next sought treatment on January 19, 2009 he reported an aggravation of his prior work injury, while lifting drywall. (PX2). Upon referral to Dr. Malek, Petitioner provided a history of re-injury in December of 2008 when lifting drywall. (PX3). Although Petitioner denied giving a history of a re-injury, the office notes of Chiropractor Aleman and Dr. Malek contradict his testimony. Dr. Malek's office note of March 11, 2009 indicates Petitioner continued to work and had an excellent response to treatment from Chiropractor Aleman after the November 2007 incident, that he re-injured himself in December of 2008 lifting drywall, and that he had a recurrence of symptoms which were refractory to treatment. Petitioner admitted on cross-examination that he completed a patient history form at the time of his initial office visit with Dr. Malek and that he indicated therein that his condition was the result of an injury in December of 2008.

On April 6, 2011, Petitioner underwent a Section 12 exam with Dr. Levin. Dr. Levin opined Petitioner's need for surgery was related to an injury historically occurring in December of 2008 and not due to any occurrence in November of 2007.

The overwhelming evidence indicates that Petitioner's medical condition stabilized as of January 10, 2008, with no treatment for over a year, followed by Petitioner's return to work full duty in construction work in August of 2008, and a low back injury lifting drywall in December of 2008, followed by low back surgery.

With regard to the two offers of proof made by Petitioner's attorney, the Commission affirms the Arbitrator's rulings on both, finding that both offers of proof were properly denied by the Arbitrator. Petitioner made two offers of proof: (1) if Araceli Zavala was allowed to testify she would testify she told Petitioner to put his claim through group insurance because if this is a workers' compensation case and he loses the case, he would ultimately be responsible for the bills; and, (2) if Petitioner had been allowed to testify, over prior hearsay objection by Respondent, he would testify that Araceli Zavala told him that if he were to lose the case, he would be responsible for the medical bills, and that she gave him a form to fill out to say that this incident was not work related and to put everything through his group carrier so that he would not have to worry about any of the medical bills. (T5-7).

The matter proceeded to hearing on June 13, 2012, and was continued from that June 13, 2012 hearing date to June 18, 2012 hearing date for the sole purpose of Respondent to attempt to serve a witness with a subpoena. At the start of the June 13, 2012, hearing Respondent requested a continuance to try to locate a witness, whom they had previously been unable to serve with a subpoena. Petitioner's attorney stated he had no objection to Respondent's request for a continuance, and the Arbitrator granted the request for a continuance until June 18, 2012 "to give Mr. Ugaste [Respondent attorney] one more chance to locate the witness." (T8-9). Petitioner testified, as did Refugio Rangel at the June 13, 2012, hearing and Petitioner requested no additional time to present additional testimony. At the time of the June 18, 2012 hearing date, both attorneys appeared and no witness testimony was taken. Respondent stated he had no witness to present at that setting. The Arbitrator then asked if there was any rebuttal, and Petitioner then stated he "would like to make two offers of proof. The first offer of proof would have been the testimony of Ms. Aracelia Zavala." Petitioner further stated that "Ms. Aracelia Zavala was not allowed to testify. She was not here originally on 6-13-12. This trial was bifurcated. Her testimony is not being allowed today." The Arbitrator then stated that the matter was continued on June 13, 2012 for purpose of Respondent making one final attempt to find or locate a witness. The Arbitrator stated that while the parties were off the record on June 18, 2012, Petitioner made a request that a witness be allowed to testify. The Arbitrator stated the request was denied because the witness was not present when the hearing originally started, because Respondent objected, and because the case was continued for the limited purpose identified earlier in the record. (T4-5).

The Arbitrator's denial of Petitioner's attempt to present additional witness testimony on June 18, 2012 was within Arbitrator's discretion. In addition, Respondent raised a hearsay objection to Petitioner's testimony as to what a chiropractor's secretary, Araceli Zavala, told him to do with a group health claim form, and the Arbitrator properly excluded same based upon Respondent's hearsay objection and the lack of any exception to the hearsay rule.

Even assuming Zavala would testify she told Petitioner to fill out claims forms to say his condition was not work related, the Commission finds that the Arbitrator's ruling was harmless

error as the Commission and the Arbitrator both have found Petitioner sustained accidental injuries arising out of and in the course of his employment, but that his current condition of ill-being is not causally related to that work injury.

With regard to Petitioner's offer that Petitioner would testify Zavala told her to fill out a form to say that it was not work-related, the arbitrator properly denied testimony based upon Respondent's objection and the arbitrator's finding that the testimony was hearsay.

Based upon the above evidence, the Commission affirms the Arbitrator's finding of accidental injuries, reverses the Arbitrator's finding that Petitioner failed to provide timely notice under Section 8(j), and affirms the Arbitrator's finding that Petitioner failed to prove his current condition of ill-being is causally connected to his work injury of November 15, 2007. The Commission further affirms the Arbitrator's ruling on Petitioner's two offers of proof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on July 23, 2012, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that since Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on January 15, 2007, and failed to prove a causal connection between alleged work injury and his current condition of ill-being, his claim for compensation is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner provided timely notice of his alleged work related injury, under §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.

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

JUL 7 - 2016

DATED:
KWL/kmt
O-10/26/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

| | | | |
|---|---|---|---|
| STATE OF ILLINOIS ) | ☐ Affirm and adopt | ☐ 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

CINDI MANDEL,

Petitioner,

16IWCC0462

vs. NO: 10 WC 31801

STATE OF ILLINOIS (IDOT),

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 medical expenses, PPD and penalties and fees and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds no reason to disturb the Decision of the Arbitrator with respect to the findings pertaining to medical expenses and the conferred PPD award. The Commission does find, though, the record does not support the awarding of penalties and fees.

No petition for penalties and attorneys' fees is found in the evidentiary record. As such, the Commission is uncertain as to Petitioner's exact claims and bases its conclusion upon arguments made by the parties in their pleadings before the Commission and upon the Commission's own database.

The Commission finds Petitioner's Petition for Penalties and Attorneys' Fees is premised on Respondent's failure to pay for the FCE that was performed on August 12, 2014, at Function First Physical Therapy and for charges for services rendered to Petitioner by Suburban Orthopedics. For both instances, the Commission finds Petitioner failed to prove Respondent's actions were vexatious or unreasonable as contemplated under both Section 19(k) of the Act.

It is noted Petitioner's Petition for Penalties and Attorneys' Fees, per the Commission database, predates the FCE by more than a year. The petition was filed with the Commission on February 5, 2013, but the FCE was not performed until August 12, 2014. There was not claim of Petitioner's petition being amended to reflect the charges of the FCE have gone unpaid. As such, the Commission is uncertain as to how the petition addressed charges that had yet been incurred.

Furthermore, with respect to the charges for the FCE, the Commission finds no evidence of Petitioner tendering a bill for the charges associated with the FCE prior to the date of the arbitration hearing. As such, the Commission finds Respondent cannot be faulted for not making a payment on a bill that it did not possess until the arbitration hearing.

Concerning the charges incurred in relation to Petitioner's treatment with Suburban Orthopedics, the Commission finds Respondent acknowledges payment of those charges was not made. Uncertain, however, is whether some or all of the charges have gone unpaid.

Respondent claims its inaction in paying charges attributable to Petitioner's treatment at Suburban Orthopedics is due to a dispute as to the reasonableness and necessity for some of the treatment Petitioner received there. Petitioner claims that such an issue exists as Respondent did not dispute causation. The Commission finds Petitioner's counterargument unpersuasive as it finds there can be agreement or acknowledgement concerning the compensability of an accident but disagreement as to the necessity and/or reasonableness of how an injury stemming from the agreed-upon accident should be treated. In this particular case, Respondent's questioning of the need for x-rays to be taken on each of Petitioner's visits to Suburban Orthopedics, including x-rays of body parts seemingly unrelated to the claimed injured body part, is deemed to be not unreasonable or vexatious.

The totality of the evidence before it precludes the Commission from finding Respondent acted in a manner that was either vexatious or unreasonable. Accordingly, the Commission vacates the penalties and liability for attorneys' fees imposed upon Petitioner in the Arbitration Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 300 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 $669.64 per week for a period of 300 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 60% loss of the persona as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,566.00 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that awards conferred upon Petitioner in the Decision of the Arbitrator pursuant to Section 19(k) and Section 16 of the Act are vacated.

16IWCC0462

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: JUL 7 - 2016
KWL/mav
O: 5/10/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

16IWCC0462

**MANDEL, CINDI, ON BEHALF OF SPOUSE MANDEL, ALAN DECEASED**
Employee/Petitioner

Case# 10WC031801

**STATE OF ILLINOIS (IDOT)**
Employer/Respondent

On 5/11/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

1521 FITZ & TALLON LLC
NICHOLAS FITZ
30 N LASALLE ST SUITE 1510
CHICAGO, IL 60602

4987 ASSISTANT ATTORNEY GENERAL
LAURA HARTIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 CENTAL MGMGT SERVICES
WORKERS' COMP MGR
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 11 2015

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

STATE OF ILLINOIS )
)SS.
COUNTY OF Lake )

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

16IWCC0462

**Cindi Mandel on behalf of Spouse Alan Mandel, deceased**
Employee/Petitioner

Case # 10 WC 31801

v.

Consolidated cases: _____

**State of Illinois ( IDOT)**
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 **George Andros**, Arbitrator of the Commission, in the city of **2/26/15 and**, on **3/13/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0462

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **$65,547.04**; the average weekly wage was **$1,260.50**.

On the date of accident, Petitioner was **55** 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 **$194,236.28** for TTD, $ for TPD, $ for maintenance, and **$82,362.57 (medical bills previously paid)** for other benefits, for a total credit of **$276,598.85**.

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

ORDER

Respondent shall pay to Petitioner and his attorney the reasonable and necessary medical services of $1,566.00 for bill of Function 1st PT, as provided in Section 8(a) of the Act. The Respondent shall further pay to the Petitioner and his attorney the additional sum of $6887.00 for balance of services for Suburban Orthopedics S.C. This is based upon the evidence. No contrary medical opinion, medical record review or Utilization Review under the Act was provided by Respondent's claims management services in response thereto to show charges/care of the treating doctor and physical therapy services were unreasonable or unnecessary.Quite the contrary , the section 12 examiner for Respondent endorsed the treatment and makes no objections to billing even though this IBJI doctor documents 4 years post accident that he had the treating doctors records.

Respondent shall pay Petitioner and his attorney the permanent partial disability benefits of $669.64/week for 300 weeks, because the injuries sustained caused the 60% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay to Petitioner and his attorney pursuant to Section 19K the sum of $4271.50 plus pay to the attorney the sum of $854.30 under section 16 of the Act, as amended.

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

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

/s/ George Andros

May 7th, 2015

MAY 11 2015

## STATEMENT OF FACTS 10 WC 31801

The issues on the 2/26/15 stipulation Addendum are notice of accident, medical expenses, the nature and extent of the injury, penalties and beneficiaries.

The petitioner was a bridge crew worker for the State of Illinois-Department of Transportation, the Respondent at bar

. By stipulation of the attorneys and by the testimony of Respondent's own employee Vito Mazzana, the worker was injured on the job during bridge repair while using a jack hammer. The hammer point entangled with a rebar causing the undisputed accident. Vito Mazzana the lead worker plus supervisor Lou Capuzzi and co - worker Nick Cassada picked him up. The State employee –lead person testified he took the injured worker to the designated company clinic namely the occupational clinic affiliated with Alexian Brothers Medical Center. Mr. Mazzana testified the supervisors affiliated with the State instruct people to go there. Respondent employee, Mr. Mazzana, testified the worker was treated there and all attendant paperwork and notice to IDOT was done. No other State of Illinois employees testified. Mr. Capuzzi the supervisor was the one who took the worker to the company clinic. Given the ultimate restrictions Mr. Mandel never returned to work for the State after he reached medical stability post FCE and final assessment by his orthopedic doctor.

The Petitioner passed away of unrelated causes as per the death certificate in evidence. The parties agree that the death is unrelated to the condition of ill being. Widow Cindi Mandel so testified she and the Petitioner married prior to the date and injury at bar. The documentation in evidence shows said marriage. The Application was amended to show the widow in the capacity as widow and effectively a successor to the Petitioner in the Application for Adjustment of Claim 10 WC 31801. Thus the Stipulations show Cindi Mandel on behalf of Alan Mandel, deceased, as Petitioner.

The Arbitrator takes judicial notice of two filings over a decade ago under 01 WC 64918 plus 05 WC 54682. One represents 20% loss of use of the right arm under 8(e). The other represents 7.5% under 8(d)2. The records of treatment show indications of a prior shoulder injury.

After progression of treatment including diagnostics by October 11, 2010 his complaints continued.

Surgery was prescribed then completed on 1/21/11. Relative to lack of payment of medical bills and claim for penalties it is important to cite the records in evidence offered by each attorney as follows: this surgery is about 1090 days before the last medical bill review (audit) by Tristar Managed Care per Respondent Exhibit 1, pp 1-4 un-numbered). Yet, no offer of even one Tristar Bill Review record was offered for the basis for denial of bills Not any offer of proof or indication was made of a Utilization Review Report under the reform workers compensation act of 2005. Said Uitization Report would have been a prime facie statutory bar to assessment of penalties under one of the two "reform" Workers Compensation Act, 2005 & 2011.

Surgery ensued via extraction of loose bodies, a chondroplasty of glenoid and humeral head which showed microfracture, biceps tendinosis with a subacromial decompression, distal clavicle resection plus rotator cuff repair.

By mid February his shoulder symptoms were manifested while exiting a shower. This is not an intervening accident given no medical opinion designated it as such. It appears the complaints to the upper extremity continued with indications for the future surgeries to elbows and wrists.

By 8/1/11 Dr. Freeburg performed the predicted left carpal tunnel decompression, release of the Guyon's canal and median nerve neurolysis. The right hand and elbow symptoms continued per the records. Eventually, he was placed on a light or sedentary status.

On 1/23/12 he had a right CTS release, guyon canal release plus median nerve neurolysis. By June he still had numbness but the tingling resolved.

By 2013 he was seen by Dr. Freeburg's colleague for his spine, the relationship to the injury is not clear.

In March 2013 he had continuing complaints of elbow and right shoulder pain resulting in injection. He consented to a right cubital tunnel decompression with debridement of the bone. By the fall of 2013 the doctor wants to operate on the right elbow.

Dr. T. Baxamusa of Illinois Bone and Joint was Respondent section 12 examiner. He found causation to right shoulder, bilateral elbows and wrist complaints. Petitioner was not placed at maximum medical improvement.

On February 6, 2014 he had MRI to lumbar area showing degenerative pathology in great significance. He did have a shot for the left arm complaints This neck seemed to be a source of complaints but there is no clear causation.

The Petitioner is recommended a right CTD ( Arbitrator infers carpal tunnel decompression) surgery with cervical spine & evaluation due to leg pain. He reported years of leg pain after his 2010 on the job injury. Given his multifactorial medical problems no surgical indications were deemed proper. In April 2014 He was sent to Dr. Noveselsky for pain management for leg pain, lumbar stenosis and alike.

On August, 7, 2014 he saw Dr. Freedburg. He was to have an FCE to add information regarding his 10 pound lifting restriction. By then he had stage four lung cancer plus began chemo. He had significant right upper extremity complaints. An SRS disability report was completed. As to restrictions, Dr. Freedberg opined he was sedentary for shoulder, elbow and wrist issues. The record is bare for lumbar issues.

On August 12, 2014, Decedent underwent a Functional Capacity Evaluation at Function 1st Physical Therapy. The therapist upon FCE concluded he could perform 18.8% of the physical demands of a highway maintainer. It placed him in the light physical demand category. Decedent could lift 10 pounds to shoulder height and could push and pull 15 pounds. He had occasional tolerance for pinching, gross coordination, simple grasping and fine coordination.

Prior to death he told the doctor on 12/30/14 he had only brief relief from his right shoulder injection. He reported shoulder, wrist and neck problems.

The notes show the treating doctor agreed with the section 12 doctor's report. Dr. Freeburg did not pursue medical treatment, did not expect change in his clinical condition. He placed Petitioner at maximum medical improvement. He thereafter died on 1/14/15.

Cindi Mandel stated under oath Alan had one minor child at death namely Alexandra Donna Mandel, by birth certificate born November 9, 1999. Evidence shows Judgment for Dissolution of Marriage between Alan and Francine Mandel in 2002. The Judgment documents Samantha, born April 25, 1989, Nicolette born June 17, 1992 and Alexandra born November 7, 2000. Petitioner testified that she had no children with Alan either before or after they married in 2013.

Mrs. Mandel stated Alan has trouble using his hands and arms with spasms, weaknes and control issue. Activities of daily living were significantly impacted. He was depressed by her observation not by clinical diagnosis.

The entire records, highlights above are underscored, is the basis for the Conclusions of law below and the Award.

## CONCLUSIONS OF LAW

**As to the issue of Notice:**

The Arbitrator adopts the testimony of the State of Illinois employee that he, a coworker, plus supervisor Lou Capuzzi witnessed the accident. Mr. Capuzzi drove the worker to the company designated occupational clinic. Treatment ensued. Workers Compensation benefits were thereafter paid.

Based upon the totality of the evidence and by a preponderance thereof that as a matter of law and fact notice was given under section 6© of the Act.

**As to the issue of casual connection:**

The Arbitrator holds by stipulation signed by both attorneys that causal connection exists and was not in issue. However, the Arbitrator infers that stipulation exists only as to the upper extremities, shoulders , elbows and wrists. The records of both Dr. Freeburg and Dr. Baxamusa seem to agree to much of the medical basis for that stipulation. The evidence supports this conclusion.

Both the treating doctor plus Respondent section 12 examiner agree that the injury resulted in his sedentary and or light work capacity, and, deemed the functional capacity valid. The Arbitrator sees much of the FCE dealt with limited lifting but not testing road construction body mechanics and work with a jack hammer and other tasks.

Based upon the totality of the evidence and the preponderance thereof, the Arbitrator finds as a matter of law and fact that causation exists to the injury to his shoulder(s), both arms, elbows and wrists which resulted in significant physical incapacitation under section 8(d)2 to his ability to work his pre-injury trade as a road maintainer. Both doctors agree he could not perform his pre injury trade. See The Act, as amended section 8 (d) 2.

To wit: Dr. Baxamusa of IBJI report of 1/09/2014 response #5 finds causation and need for treatment. Response #6 indicates he may need future treatment. #7 indicates he may require continued physical restrictions or limitations. He agreed with a current assessment of a light duty restriction.

No treatment ensued to the cervical or lumbar area or left leg until close to three years after the accident. All records are devoid of causation to the accident. The history taken if accurate shows Alan Mandel told the doctor he had back complaints since the time of his prior accident.

**As to the reasonable and necessity of treatment and whether Respondent has paid all medical expenses under section 8 per Stipulation paragraph 7 in Second stipulation marked Amended Stipulation presented at close of proofs:**

The Stipulations show agreement by Respondent to hold Petitioner harmless for reasonable and related medical bills. Respondent documents show medical bills paid and temporary total disability paid (Rx. 1)

Petitioner exhibit 4 is a compendium of medical bills from two providers that the parties agree are unpaid. The first is the bill of Function 1st Physical therapy. (Px 4). That is for the FCE. The bill in evidence shows $1566.00.

The second bill is the balance from Suburban Orthopedics for $6887.00. Respondent counsel seems to dispute the bill based upon a medical theory the lack of need for X rays taken in this complex medical matter. Per the Statement of Facts supra, at least 12 "Bill Reviews" were performed by Respondent's agent named TriStar Managed Care through April 29, 2014. Not one scintilla of medical evidence and or a Utilization Report, even from some out of state provider, was tendered into evidence from TriStar.

Awards cannot be made by speculation or conjecture. The Award must be based upon the medical evidence adduced by the parties not by arguments of counsels.

The medical evidence shows Suburban Orthopedics treated this worker over a number of years for current significant shoulder and upper extremity and wrist issues.

Critical in the Award of bills and penalties is the Respondent's own section 12 report being the medical report dated 1/9/14 in evidence proves that Dr. T. Baxamusa of Illinois Bone and Joint Institute had the medical records of Mr. Mandel's treatment based upon his concern about the workers complete history of all his medical problems years before the section 12 exam. Thus, someone obtained and provided the section 12 expert with the workers' records of Suburban Orthopedics. However, Dr. Baxamusa offered nothing by way of a criticism or affirmation of the billing, documentation or treatment of Suburban.

The law provides two possible ways to dispute the reasonableness and necessity of medical care, either retroactively or prospectively. The first way has been and may still be now by way of the opinion of a section 12 examiner i.e. an expert witness.

For treatment after Sept 1, 2011, the newest of two "reform" Workers Compensation Acts in black letter law states the Respondent may avail itself of the officially sanctioned utilization review process. This may address either retroactive treatment or prospective treatment. See Act as amended for bar to penalties under UR.

A close, detailed study of Dr. Baxamusa's report shows no commentary or even one scintilla of dispute or question of the reasonableness or necessity of the care, treatment or charges from Suburban Orthopedics S.C. or the charges of the FCE provider. Dr. Baxamusa actually agrees on the care. It one point he does caution on the future results that may be obtained after future elbow surgery.

Respondent's claims management provider failed to obtain or furnish a statutorily sanctioned Utilization Review report to justify the nonpayment of the remaining bills from Suburban Orthopedics or the FCE . This UR statute provides the UR report, if obtained, is the absolute first line of defense to a claim for penalties for nonpayment of medical bills. To foist this claims failing on their Counsel is disingenuous on the part of claims management while counsel was diligently defending this case at every turn. Assertions from (either) counsel are not evidence on which an Award must be based.

Based upon the medical evidence, not argument by either counsel, the Arbitrator holds the Respondent is liable for the medical expenses of $8453.00.

Thus, based upon the totality of the evidence and preponderance thereof, the Respondent is ordered to pay to the Petitioner and his attorney the sum of $8453.00.

### A. What is the nature and extent of Decedent's injury?

The medical records establish that as a result of the accident, he suffered permanent injuries to his right shoulder, elbows and hands. Both the treating doctor and the section 12 examiner adopt the above mentioned functional capacity evaluation.

The evidence clearly shows Mr. Mandel sustained injuries that prevented him from returning to his usual and customary line of employment as a highway maintainer for IDOT. This conclusion comports with one of the three categories of disability that places a case under section 8(d) 2 of the Act and not section 8(e).

This case is one of what's known as disability to man as a whole and not a specific loss to the extremities. Both doctors find either sedentary/ light or light in terms of his physical ability to return to work. This category via a close reading of the records relates more to "lifting" that to on the job body mechanics of this worker. The evidence via employee from the State of Illinois is adopted that the work of a highway maintainer or bridge repairer is heavy.

See Award for Conclusion based upon the totality of the evidence that Petitioner decedent sustained as a result of the accident serious and permanent injuries under section 8 (d) 2 of the Act to the extent of sixty per cent thereof.

**As to the issue of beneficiaries:**

The Arbitrator holds both Cindi Mandel plus Alexandra Mandel are beneficiaries under the Act. They are entitled as a matter of law to the Award in the case at bar.

**As to the Issue is Respondent liable for Penalties for non payment of Medical Expenses plus attorneys fees:**

The evidence admitted on the issue of medical bills fails to show a medical opinion ,even couched by inference in the Respondent IME report, on the unreasonableness of the treatment or charges relating to treatment either before or after 9-1-11.

Moreover, per their statutory right no utilization report or medical bill review was offered to this Arbitrator why Respondent did not pay the bills of the FCE (after 9-1-11) or Suburban Orthopedics for services after 9-1-11.

The evidence failed to show even a letter advising opposing counsel why these benefits were not paid- per the Rules of the Commission.

Therefore, in an Award rarely ever given by this Arbitrator: The Arbitrator finds as a matter of law and fact the Respondent shall pay to the Petitioner and his attorneys $8543.00 (see above) for medical bills admitted plus 50% penalties under section 19 (K) thereon plus an additional 20 % attorney's fees payable to Petitioner's counsel under section 16.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ilana Bromber,
Petitioner,

vs.

No. 13 WC 23742

City of Des Plaines,
Respondent.

16IWCC0463

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, and necessity of prospective medical care, and being advised of the facts and law, modifies the §19(b) and §8(a) 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 hereby remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner, an assistant finance director for the City of Des Plaines, testified that while walking to her desk on 10/12/10, she lifted a hinged countertop to walk past it but did not lift it high enough and it fell back down on the top of her left shoulder. She applied ice and took Advil but sought no medical attention until the following day, when she went to the emergency room of Alexian Brothers Medical Center. Physical exam there revealed tenderness over the superior aspect of her left shoulder, but no soft tissue swelling or discoloration. Petitioner had full range of motion of her left shoulder and cervical spine, and her grip, pulse, and sensory exams were all normal. X-rays were negative for fracture, dislocation or separation. Petitioner was diagnosed with a shoulder contusion, advised to treat it with ice and ibuprofen, and was returned to her regular work.

After 10/13/10, Petitioner received no further medical care to her shoulder for nine months, until 7/7/11 when she saw Dr. Bicknese. She testified the gap in her treatment was because she had been really busy at work and was dealing with personal issues including problems with her 15-year-old son and the loss of her husband who passed away on 3/11/10. Petitioner testified that between the date of her accident and July 2011, her shoulder pain was unremitting and became worse. However, two months after her accident on 12/2/10, she saw Dr. Doherty for right arm problems unrelated to her work injury. Dr. Doherty's records documented no complaints of any left shoulder pain or problems at that visit. Petitioner also found time to schedule and attend a mammogram in February 2011. She lost no time from work as a result of her 10/12/10 accident, other than for physical therapy appointments which began almost 10 months following her accident. She testified she has no work restrictions and still works full duty.

In July 2011, Petitioner sought treatment with Dr. Bicknese for shoulder complaints. He ordered an MRI and referred her to Dr. Jason Koh. Petitioner also saw Dr. Nicholson and Dr. Ali for their opinions, and received cortisone injections to her shoulder. On 8/2/11, Dr. Koh commenced conservative treatment including physical therapy and medications; he also discussed possible surgery. Petitioner testified she wishes to undergo the shoulder replacement surgery which has now been recommended.

Dr. Koh testified at his deposition that Petitioner had bone-on-bone arthritis and complete loss of the joint space in her shoulder. He diagnosed severe arthritis, and found that a causal connection existed between her work accident and need for shoulder replacement surgery, based on Petitioner's report to him that she had no symptoms before her accident, but did, after. The basis of his causation opinion was Petitioner's subjective complaints, not any objective findings. Dr. Koh admitted that if Petitioner had been having left shoulder pain for several years before 2011, as documented by Dr. Nicholson, that might cause him to change his opinion: in that case, Petitioner's need for treatment and shoulder surgery might not be related to her work accident.

On 5/23/13, Petitioner was examined by Dr. Guido Marra, Respondent's Section 12 doctor. Dr. Marra agreed that Petitioner had advanced joint degeneration and needed a left shoulder replacement, but he opined this was not causally related to her work accident. The bases for his opinions included the fact that Petitioner received only a single medical treatment the day after her injury; she had no major bruising then; she requiring only ice and anti-inflammatories for treatment, and she then went a period of nine months with no treatment. Dr. Marra found Petitioner's 10/12/10 injury was not a traumatic enough event or aggravation of her preexisting condition to require a shoulder replacement; the natural progression of her osteoarthritis could have caused her current need for this. Dr. Marra testified that Petitioner's post-accident pain, which did not require narcotic pain medications, was the type that usually lasts only a couple days. Dr. Marra believed that Petitioner most likely reached MMI within a few weeks of her accident. Dr. Marra disagreed with Dr. Koh's opinion that bubbles of fluid in the rotator cuff are usually indicative of some sort of trauma, pain or damage; someone with osteoarthritis of the shoulder can develop degenerative rotator cuff tearing and marginal osteophytes which can rub the undersurface of the rotator cuff and cause bubbles or ganglion cysts.

The Commission finds Petitioner has not proven by a preponderance of the evidence that her current condition of ill-being relating to her left shoulder is causally related to her 10/12/10 accident, and reverses that finding by the Arbitrator. Contrary to the Arbitrator's finding that, "There was no medical evidence presented at trial that Petitioner suffered from left shoulder issues for several years prior to the countertop falling on her left shoulder at work," the Commission finds that Petitioner did complain to Dr. Nicholson on 11/15/11 that she had, "left shoulder pain for several years in duration." (PX7).

The Commission finds that Petitioner's work accident caused only a contusion to her left shoulder, which completely resolved within a few weeks of 10/12/10, and did not cause or accelerate her need for treatment after 10/13/10, including the recommended left shoulder replacement surgery. In so finding, the Commission adopts Dr. Marra's opinions as being more consistent and credible than Dr. Koh's. Dr. Marra testified that even if Petitioner had been asymptomatic before her accident, the natural progression of her osteoarthritis could have caused her need for a shoulder replacement.

The Commission gives Dr. Koh's opinions less weight because they were based upon Petitioner's inaccurate and incomplete medical history. In arriving at his opinions, Dr. Koh relied heavily, if not completely, upon Petitioner's subjective history and complaints, including that she was pain free before her 10/12/10 accident, but after, she had constant, progressively worsening pain. Given the other evidence presented at trial, the Commission finds Petitioner's testimony on these issues unpersuasive.

The Commission agrees with the Arbitrator that Respondent is liable for the $680.00 medical bill from Alexian Brothers Medical Group for treatment received on 10/13/10, and adopts and affirms that award. However, the Commission finds that Petitioner has not proven her treatment and related bills subsequent to that date, including $8,277.00 from NorthShore University Health System, $2,034.00 from Dr. Ali and $481.80 from Dr. Nicholson, were causally related to her work accident. The Commission therefore reverses the Arbitrator's decision and award of those bills.

Because the Commission finds that Petitioner's shoulder contusion completely resolved within a few weeks after her 10/12/10 work accident, and that her need for left shoulder treatment after 10/13/10 is not causally related to her work injury, the Commission reverses the Arbitrator's award of prospective medical care.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on 6/4/15 is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of medical benefits is modified. Respondent shall pay as provided in §8(a) and §8.2 of the Act, pursuant to the fee schedule, only the reasonable and necessary medical bill of Alexian Brothers Medical Group for treatment she received on 10/13/10. The award of all other medical bills is reversed.

16IWCC0463

IT IS FURTHER ORDERED BY THE COMMISSION that the award of prospective medical care is reversed.

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

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

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

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: JUL 8 - 2016

o-05/25/16
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

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

**BREMBER, ILANA**
Employee/Petitioner

Case# **13WC023742**

**CITY OF DES PLAINES**
Employer/Respondent

**16IWCC0463**

On 6/4/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2573 MARTAY LAW OFFICE
DAVID W MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

0863 ANCEL GLINK
ERIN BAKER
140 S DEARBORN ST 6TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS )
)SS.
COUNTY OF COOK )

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

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# ARBITRATION DECISION
## 19(b)

**ILANA BROMBER**
Employee/Petitioner
v.
**CITY OF DES PLAINES**
Employer/Respondent

Case # 13 WC 23742

16IWCC0463

An *Application for Adjustment 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 A. Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **May 21, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 16IWCC0463

On the date of accident, **10/12/2010**, 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 **$103,376.00**; the average weekly wage was **$1,988.00**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

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

Respondent is entitled to as 8(j) credit for all causally related medical paid by Respondent's group health insurance carrier.

**ORDER**

**Regarding the issue (F), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:**

The Arbitrator finds Petitioner has proven by a preponderance of the evidence that she continues to suffer left shoulder pain and that her current condition of ill-being is directly related to her work-injury on October 12, 2010 while employed by Respondent.

**Regarding issue (J), were medical services provided reasonable and necessary, the Arbitrator finds the following:**

Respondent shall be responsible for medical bills of $8,277.00 owed to NorthShore University Health System; $680.00 owed to Alexian Brothers Medical Center; $2,034.00 owed to Dr. Ali and $481.80 owed to Dr. Nicholson. All bills shall be paid per the statutory medical fee schedule

**Regarding the issue (K), Is Petitioner entitled to any prospective medical care, the Arbitrator finds the following:**

The Arbitrator awards prospective medical care which is reasonable and necessary to relieve Petitioner of her pain per the direction of Dr. Jason Koh.

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.

16IWCC0463

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

June 4, 2015
Date

ICArbDec19(b)

4826-4599-6324, v. 1

JUN 4 - 2015

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

| | | |
|---|---|---|
| ILANA BROMBER | ) | |
| | ) | |
| Petitioner, | ) | |
| vs. | ) | |
| | ) | No. 13 WC 23742 |
| CITY OF DES PLAINES | ) | |
| | ) | |
| Respondent. | ) | 16IWCC0463 |

## ARBITRATOR'S FINDINGS OF FACT

Petitioner, Ilana Bromber, was a 48 year old single woman with no children under the age of 18, and employed by the City of Des Plaines October 12, 2010. Petitioner testified she was employed by Respondent as the assistant finance director. She was hired for that position on May 6, 2009. She was working full duty with no restrictions prior to her work-injury.

Petitioner testified that on October 12, 2012 she was returning back to her desk carrying a budget book in her right hand and a coffee in her left hand when a counter top pictured in Respondent's Exhibit #1 fell striking her left shoulder. As can be evidenced in the photograph, the counter top is sort of a swinging counter which goes up and down. Petitioner immediately felt pain in the left shoulder and was offered an ice pack by a co-worker for the left shoulder.

On October 13, 2010 Petitioner presented to Alexian Brothers Medical Group in Mount Prospect for an examination (Px 5). She had left shoulder complaints and provided a history consistent with the history she testified to at trial (*id.*). She was diagnosed with a contusion and advised to apply ice to the injury, take ibuprofen for the pain and return to work at full duty (*id.*).

Petitioner did not seek further treatment until she saw Dr. Donna Bicknese at NorthShore University Health System on July 7, 2011 (Px 3). Petitioner testified that the gap in her treatment was due to several issues including the loss of her husband, personal issues with her son and being extremely busy at work. She testified that between October 2010 and July 2011, the pain in her left shoulder continued to get worse to the point she could hardly lift anything with her left arm. She indicated to Dr. Bicknese that her left shoulder was injured on October 12, 2010 when she was hit by a countertop (*id.*). Dr. Bicknese prescribed an MRI of the left shoulder (*id.*).

An MRI was done on July 22, 2011 and revealed several issues including a partial thickness articular surface tear of the supraspinatus tendon, full thickness insertional tear of the infraspinatus tendon, moderate to severe subscapularis tendinosis, mild to moderate bieps tendinosis,

severe glenohumeral osteoarthritis with diffuse degeneration of the labrum as well as a 2.9cm ganglion cyst (Px 3).

Petitioner presented to Dr. Jason Koh for an examination on August 2, 2011 with left shoulder complaints (Px 1 at 8). He noted Petitioner showed signs of left shoulder arthritis with a complete loss of joint space or bone on bone arthritis (Px 1 at 9-10). Dr. Koh recommended Petitioner attend physical therapy, take anti-inflammatory medications and noted that she may require shoulder replacement surgery (Px 1 at 10).

Petitioner saw Dr. Gregory Nicholson for an examination on November 15, 2011 and provided a history of left shoulder pain consistent with her work-injury (Px 7). Dr. Nicholson recommended Petitioner utilize a Medrol Dosepak to try and decrease her inflammation and improve her function (*id.*). He also noted Petitioner may require a left total shoulder arthroplasty (*id.*).

On February 23, 2012 Petitioner presented to Dr. Arif Ali for an examination with complaints of continued left shoulder pain from her work-injury (Px 6). Dr. Ali laid out three options for medical treatment including a subacromial steroid injection, arthroscopic surgery or a total shoulder arthroplasty which he advised against due to her young age (*id.*).

Petitioner elected the injection which was performed by Dr. Ali on March 2, 2012 (*id.*).

Petitioner followed up with Dr. Nicholson on October 16, 2012 with continued left shoulder complaints (Px 7). He noted she suffered from complete loss of joint space and bone on bone contact (*id.*) It was his opinion that she had failed all conservative care and would need a left total shoulder arthroplasty (*id.*).

At Respondent's request, Petitioner presented to Dr. Guido Marra for a Section 12 examination on May 23, 2013 (Rx 5 at 7). It was his opinion Petitioner suffered from advanced joint degeneration of the left shoulder (Rx 5 at 9). He further opined her work-injury was not the cause of her left shoulder issues (Rx 5 at 11). Lastly, he was in agreement that Petitioner required a left shoulder total arthroplasty (Rx 5 at 13).

Dr. Ali saw Petitioner again on July 16, 2013 with continued left shoulder complaints (Px 6). In order to treat some of her pain, Dr. Ali administered another left shoulder steroid injection (*id.*).

Petitioner saw Dr. Koh again on November 19, 2013 and he again noted that Petitioner had a complete loss of joint space (Px 1 at 10-11). He diagnosed her with severe left shoulder arthritis (Px 1 at 12). When questioned about causation, Dr. Koh noted, "My feeling was that she may

have had preexisting arthritis of the shoulder, but was asymptomatic until the fall and the injury. And so that the falling of a lifted countertop onto the shoulder appears to have caused development of symptoms" (*id.*). Due to her work-injury, Dr. Koh believed Petitioner required a left total shoulder arthroplasty (Px 1 at 13).

Petitioner testified she had not suffered from any left shoulder pain prior to her work-injury for roughly 20 years. There are no medical records which show Petitioner sought any medical treatment for her left shoulder since her clavicle fracture when she was 18 years old. Petitioner testified that she continues to suffer from left shoulder pain which limits the movement of her left arm. The pain is worse at night. In order to treat her left shoulder issues, she takes Aleve on a daily basis. Petitioner would like to undergo the left shoulder total arthroplasty which prescribed by multiple physicians.

**Regarding the issue (F), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:**

There is no dispute that Petitioner suffered a left shoulder injury on October 12, 2010 when she was hit in the left shoulder by a falling countertop at work. The countertop which hit her is seen in Respondent's Exhibit #1.

She presented to Alexian Brothers for an examination the following day with left shoulder complaints consistent to the injury she suffered at work the day before (Px 5).

Following the work-injury, she underwent a few years of intermittent treatment including physical therapy and steroid injections. After failing conservative care, it was recommended by Dr. Nicholson, Dr. Ali, Dr. Koh and Respondent's Section 12 physician that Petitioner undergoes a left shoulder total artoroplasty.

When questioned about causation, Dr. Koh responded, ""My feeling was that she may have had preexisting arthritis of the shoulder, but was asymptomatic until the fall and the injury. And so that the falling of a lifted countertop onto the shoulder appears to have caused development of symptoms" (Px 1 at 12). Due to the work-injury, Dr. Koh believed Petitioner required a left total shoulder arthroplasty (Px 1 at 13).

Respondent's Section 12 examiner, Dr. Marra, was in agreement that Petitioner suffered from advanced degeneration of her shoulder joint (Rx 5 at 9). Where he disagreed with Dr. Koh was in that he opined the countertop closing on Petitioner's left shoulder would not have caused the issues Petitioner was suffering from (Rx 5 at 11). The problem with Dr. Marra's opinions is that they seem inconsistent. He testified that he was in

agreement that Petitioner was probably asymptomatic prior to the work-injury (Rx 5 at 14), but he does not then explain how she would have become symptomatic following the work-injury. Dr. Marra is also in agreement that the falling of the countertop upon Petitioner's left shoulder was traumatic enough to send her to the emergency room (Rx 5 at 22). He further testified that the work-injury caused a minor aggravation of her preexisting arthritis (Rx 5 at 23).

The Arbitrator finds the opinions of Dr. Koh combined with the testimony of Petitioner to be more credible than the opinions of Dr. Marra. Petitioner credibly testified that she did suffer a left clavicle injury when she was 18 years old, but that she had not treated for any left shoulder injuries since that time. As of the date of trial, Petitioner was 53 years old. There was no medical evidence presented at trial that Petitioner had suffered from left shoulder issues for several years prior to the countertop falling on her left shoulder at work. Dr. Marra was unable to provide any viable explanation for Petitioner's left shoulder pains other than Petitioner's fractured clavicle when she was 18 years old. Petitioner's work as an assistant finance director is sedentary in nature.

Petitioner testified that she continues to suffer from left shoulder pain which limits the movement of her left arm. The pain is worse at night. In order to treat her left shoulder issues, she takes Aleve on a daily basis.

The Arbitrator finds Petitioner has proven by a preponderance of the evidence that she continues to suffer left shoulder pain and that her current condition of ill-being is directly related to her work-injury on October 12, 2010 while employed by Respondent.

**Regarding issue (J), were medical services provided reasonable and necessary, the Arbitrator finds the following:**

Having found Petitioner's current condition of ill-being is related to her work-injury on October 12, 2010, all medical care provided to Petitioner in order to resolve her left shoulder issues have been reasonable and necessary. Respondent shall be responsible for medical bills of $8,277.00 owed to NorthShore University Health System; $680.00 owed to Alexian Brothers Medical Center; $2,034.00 owed to Dr. Ali and $481.80 owed to Dr. Nicholson. All bills shall be paid per the statutory medical fee schedule.

**Regarding the issue (K), Is Petitioner entitled to any prospective medical care, the Arbitrator finds the following:**

All of Petitioner's medical care to date has been reasonable and necessary and he current condition of ill-being is related to her work-injury on October 12, 2010. Petitioner testified she still has problems with her left shoulder and wishes to proceed with a left shoulder total arthroplasty. Almost all of the physicians who have seen Petitioner are in agreement that she requires a left shoulder total arthroplasty.

Since Petitioner's present condition of ill-being is causally related to her work-injury, any further medical care Dr. Koh prescribes in order for Petitioner to reach maximum medical improvement should be deemed reasonable.

The Arbitrator awards prospective medical care which is reasonable and necessary to relieve Petitioner of her pain per the direction of Dr. Jason Koh.

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

Kenneth Weller,
Petitioner,

vs. No. 11 WC 40190

G & D Integrated,
Respondent.

16IWCC0464

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

Petitioner, a 52-year old material handler, testified that on 9/30/11 he was operating a forklift truck. As he was backing up, with both hands on the steering wheel, he turned his head to look behind him and something in his neck snapped or popped. He felt sharp pains down his shoulder, into his elbow and hand. Petitioner finished working his shift, but the following day he went to the emergency room, telling hospital personnel he had pulled something in his neck. He was given a shot and sent home.

On 10/5/11, Petitioner saw Henry Gross, M.D., whom he testified authorized him off work continuously from that date through the 4/14/15 arbitration hearing. Sometime after seeing Dr. Gross, Respondent terminated Petitioner's employment. The date and reason for the termination are not contained in the record.

On 10/17/11, Petitioner underwent a cervical MRI which showed a C6-7 disc herniation. He was given a referral to see a neurosurgeon, but he never did. Although Petitioner continued seeing Dr. Gross, Petitioner received little, if any, treatment between 2012 and the 4/15/15 arbitration hearing. On 8/24/14, Petitioner was examined by orthopedic doctor, Patrick O'Leary, M.D., who was retained by Petitioner's counsel to conduct an independent medical evaluation. Dr. O'Leary recommended conservative treatment, which Petitioner testified he hasn't received although he would like to.

Petitioner's primary care doctor, Henry Gross, M.D., examined Petitioner on 10/5/11. He testified at a 3/27/12 deposition that Petitioner sustained a work-related cervical radiculopathy and shoulder pain. Contrary to Petitioner's testimony, he did not authorize Petitioner off work on 10/5/11, though he did on 10/12/11 when Petitioner returned with a new complaint of left arm weakness. On 10/12/11, Petitioner told him he had stopped working on 10/4/11. Dr. Gross believed Petitioner had been coached to tell him he was overworked from climbing in and out of the forklift too many times; Dr. Gross had concerns about Petitioner's credibility on this issue. He admitted that the history Petitioner gave him conflicted with the history Petitioner gave to emergency room personnel on 10/1/11. On 2/2/12 Dr. Gross reported Petitioner's problem had been gradually improving. Dr. Gross opined: Petitioner has cervical radiculopathy due to a work-related herniated disc; he is temporarily totally disabled from work and he is in need of further treatment and/or consultation for surgery for a disc injury. Dr. Gross last saw Petitioner on 3/15/12.

Petitioner's expert Patrick O'Leary, M.D., testified at a 10/16/14 deposition that Petitioner's work accident likely aggravated his pre-existing cervical condition and caused a C5-6 disc herniation. Dr. O'Leary believed that based on Petitioner's 8/28/14 history, although inconsistent, Petitioner could work light duty lifting up to 25 lbs. and operating machinery, with limitations on neck movement and overhead activity.

Respondent's expert, Mark Levin, M.D. performed a Section 12 exam of Petitioner on 1/3/12. Dr. Levin testified at a 5/25/12 deposition that Petitioner complained of a popping in his left shoulder, but reported he was on no medications. Dr. Levin diagnosed degenerative arthritic cervical spondylosis and radiculopathy. He opined Petitioner's condition was not caused or aggravated by his work activities. He further opined that the herniated disc shown on Petitioner's 10/17/11 MRI had been there prior to 9/30/11 and was not acute because of the intensity changes around the disc, the lack of edema around the nerve, and the bony spur.

The Commission finds that although Petitioner has credibility issues, he did prove he sustained an accidental injury to his cervical spine arising out of and in the course of his employment on 9/30/11. Both Drs. Gross and O'Leary provided credible opinions that Petitioner injured his cervical spine when he turned his head on a forklift and that he required medical care as a result. While the Commission also finds Dr. Levin's opinions highly credible, they are less

persuasive on this issue than those of Drs. Gross and O'Leary. The Commission concurs with the Arbitrator's finding that Petitioner's job duties increased the risk of injury over that to the general public, and that Petitioner's current condition of ill being is causally related to his work injury.

The Commission finds that the medical treatment Petitioner received was reasonable, necessary and causally related to his 9/30/11 work injury. Because Petitioner is not at MMI, the Commission concurs with the arbitration award of prospective medical care for his cervical spine.

The Commission, however, modifies the award of temporary total disability benefits. Based on the evidence, the Commission finds that Petitioner proved entitlement to TTD benefits only from 10/5/11 through 10/19/11. The record shows Petitioner stopped working for Respondent on 10/4/11, before receiving medical authorization to do so. Although Petitioner saw Dr. Gross on 10/5/11, that doctor's records do not show he authorized Petitioner off work on that date. On 10/12/11, Dr. Gross reported that Petitioner's employer wanted him to return to light duty work, but noted that Petitioner claimed he could not return to or do any work. Dr. Gross then wrote Petitioner an off work note for one week, through 10/19/11. Although Dr. Gross thereafter continued seeing Petitioner periodically and continued finding him unable to work, he provided little related treatment to Petitioner after 2011.

Dr. O'Leary found it difficult to answer whether Petitioner could have worked without restrictions since his accident, finally testifying, admittedly arbitrarily, that Petitioner could work light duty, lifting up to 25 lbs. This opinion was based on Petitioner's claim that his condition was worsening, when, in fact, Dr. Gross reported on 2/2/12 that Petitioner's condition, "had been gradually improving." The Commission notes that Petitioner's Job Description in evidence indicates a lifting requirement of up to 25 lbs. It further states, "Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions." (PX4). The Commission does not find credible Drs. Gross' and O'Leary's opinions that Petitioner was unable to perform his job after 10/19/11 and/or required restrictions, as those opinions were based upon Petitioner's conflicting histories and inconsistent subjective complaints. The Commission finds Petitioner could have worked after 10/19/11, but chose not to.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 12, 2015, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is modified, and that Respondent shall pay Petitioner the sum of $400.83/week for 2-1/7 weeks commencing October 5, 2011 through October 19, 2011, that being the period of temporary total incapacity from work under §8(b) of the Act.

16IWCC0464

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

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $13,100.00. 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: JUL 8 - 2016

o-06/08/16
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

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

**WELLER, KENNETH**
Employee/Petitioner

Case# **11WC040190**

**G & D INTEGRATED**
Employer/Respondent

16IWCC0464

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

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

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

4707 LAW OFFICE OF CHRIS DOSCOTCH
DAMON YOUNG
2708 N KNOXVILLE AVE
PEORIA, IL 61604

0264 HEYL ROYSTER
VINCENT M BOYLE
PO BOX 6199
PEORIA, IL 61601

STATE OF ILLINOIS )
)SS.
COUNTY OF Peoria )

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

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# ARBITRATION DECISION
## 19(b)

**KENNETH WELLER**
Employee/Petitioner

v.

**G & D Integrated**
Employer/Respondent

Case # **11** WC **40190**

Consolidated cases: _____

**16IWCC0464**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Peoria**, on **April 14, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On the date of accident, **09/30/11**, 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 **$31,274.33**; the average weekly wage was **$601.25**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$2153.16** 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 referenced in the Arbitrator's Findings of Fact, as provided in Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary and total disability benefits of $400.83/week for 232 5/7ths weeks commencing October 5, 2011 through April 14, 2015, as provided in Section 8(b) of the Act.

Respondent shall approve medical care with Dr. O'Leary.

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. Dyl. McCarthy
Signature of Arbitrator

May 8, 2015
Date

ICArbDec19(b)

MAY 12 2015

16IWCC0464

Kenneth Weller
11 WC 40190

**FACTS:**

Petitioner testified he worked for G & D Integrated as a material handler. Petitioner testified his job duties as a material handler included driving a forklift, taking out the trash, and maintaining furnace operations. Petitioner testified he worked at the Caterpillar BB Building in East Peoria. Petitioner stated as part of his job duties he had to get on and off the forklift to make sure he was delivering the right parts to the right locations. Petitioner stated on September 30, 2011, he was working 2nd shift as a material handler for the Respondent. Petitioner testified on this particular day, the A.M. shift had to repair ovens and they came on line right when his shift began. The rate of parts being kicked out of the ovens was increased more than normal. This caused Petitioner to have to get in and out of his forklift more often.

Petitioner also stated he regularly had to drive backwards, with his head turned looking in that direction. He also testified that as he drove his fork lift, he had to turn his head repeatedly.

Petitioner testified that on September 30, 2011, as he was driving the forklift and turning his neck to check his blind spot, he felt a "pop" in his neck and a sharp pain from his neck to his left shoulder. Petitioner stated he notified Chad, his P.M. Supervisor immediately. Petitioner finished his shift.

Due to ongoing pain he followed up with OSF Medical Center the next day on October 1, 2011. (PX 3). Petitioner gave a history of posterior neck pain which radiated to his left shoulder, onset the day before. Petitioner stated he felt a "pop" in his left shoulder while driving his fork truck and noticed pain immediately. (PX 3). Petitioner denied any radiation of pain, numbness or weakness. His examination showed tenderness in the C7 level radiating to the left trapezius muscle. He was diagnosed with acute neck pain. An x-ray of the cervical spine was completed and demonstrated degenerative changes but no dislocation or fracture. Petitioner was given Hydrocodone, Ibuprofen and instructed to follow up with his general practitioner, Dr. Gross. (PX 3)

Petitioner followed up with Dr. Gross on October 5, 2011. (PX 3). Petitioner gave a history that on September 30, 2011, while at work he twisted his neck and felt a "pop". Petitioner complained of stiffness and posterior neck pain with pain and tingling into his left shoulder and arm. Dr. Gross' diagnosis was cervical radiculopathy, left shoulder pain, work related. He was prescribed Tramadol and neck exercises. (PX 3)

Petitioner next followed up with Dr. Gross on October 12, 2011. Petitioner was complaining of neck pain with tingling from the mid- shoulder blade down the left arm. He said that symptom began on Friday. (PX 3). He also told the doctor that he thought his problems were due to overwork, climbing in and out of his fork truck. He said that he

stopped working on October 4 due to his symptoms. Dr. Gross noted he was being evaluated for a work injury. Dr. Gross' diagnosis was cervical radiculopathy, work related problem with insomnia and left shoulder pain. (PX 3). Dr. Gross continued him off work and recommended an MRI. (PX 3)

A cervical MRI was performed on October 17, 2011. (PX 3). The impression was a prominent left lateral foraminal disc protrusion at C5-6 producing severe encroachment upon the left C6 foramen. Also, there was an extruded fragment producing severe encroachment upon this left C7 foramen.

Petitioner followed up with Dr. Gross on October 19, 2011. Dr. Gross reviewed the MRI. Dr. Gross noted this was a new problem which started two weeks prior with a sudden onset. The problem was gradually worsening. Dr. Gross referred Petitioner to a neurosurgeon. (PX 3).

Petitioner has continued to treat with Dr. Gross conservatively. Petitioner was denied a orthopedic follow up by the Respondent when he contacted the Illinois Neurological Institute on or about October 31, 2011. (RX 8) The notes in the facility records indicate the adjuster for the Respondent denied the treatment on November 9, 2011 and again on January 27, 2012. (Id)

The last time Petitioner was seen by Dr. Gross was on March 18, 2015. History states Petitioner was there for follow up for work related neck and shoulder pain with cervical radiculopathy and had been off work since September, 2011. Petitioner was complaining of waxing and waning symptoms which included headaches, numbness, tingling and weakness. The assessment was neck pain with continued prescription pain medications. Petitioner submitted work slips of off work from September, 2011 through date of Arbitration. (PX 8)

The deposition of Dr. Gross was taken on March 27, 2012. Dr. Gross testified he was Board Certified in Family Medicine. (PX 6, pg 4). Dr. Gross stated in the course of his practice he does have occasion to treat and examine patients with injuries to the spine, back and neck. Dr. Gross testified Petitioner gave a history that on September 30, 2011, while working for the Respondent; he twisted his neck and felt a "pop". At the October 5, 2011 visit, Dr. Gross did a physical examination and diagnosed Petitioner with cervical radiculopathy and shoulder pain as being work related problems. (PX 6, pg 10). Dr. Gross testified at the October 12, 2011 visit, Petitioner was complaining of weakness of his left arm which he had not complained of originally. (PX 6, pg 11). Dr. Gross opined that on the October 19, 2011 visit after the MRI was completed, it looked like he had a herniated disc causing a pinched nerve on the left which was consistent with his symptoms (PX 6, pg 12). He referred Petitioner to a neurosurgeon. Dr. Gross testified to a reasonable degree of medical certainty, Petitioner had cervical radiculopathy due to a herniated disc and by way of history; it appeared to be work related. (PX 6, pg 15). Dr. Gross' testimony, corroborated by his medical records, was that he treated the Petitioner on a monthly basis, during which time he had continued pain and weakness of the left arm. (PX 6, pg. 14; PX 3)

On January 3, 2012, Petitioner was seen by Dr. Levin, an orthopedist who assists on cervical surgeries, at the request of the Respondent for an Independent Medical Examination. (RX 9). The Evidence Deposition of Dr. Levin was taken on May 25, 2012. (RX 10). Dr. Levin testified Petitioner stated on September 30, 2011, he was having a very busy day and had to cover three departments. He stated he was driving a forklift and having to get on and off with no lifting. Dr. Levin testified Petitioner went to emergency room the next day. Petitioner then followed up with Dr. Gross who then ordered an MRI study of the cervical spine. Dr. Levin testified that the findings on the MRI showing a disc herniation at C6-7 were chronic and not acute. Dr. Levin opined Petitioner's neck and shoulder complaints were not coming from any work injury and were caused by chronic radicular symptoms which would have occurred irrespective of the alleged work injury. On cross examination, Dr. Levin stated his understanding was Petitioner started to have left shoulder and neck pain just driving the forklift. (RX 10, pgs 24-25). Dr. Levin testified driving a forklift involved turning one's neck and getting on and off the vehicle. He opined that those activities are activities of daily living, and present no greater risk of injury than what the general public experiences. (RX 10, pgs 23-24). Accordingly, Dr. Levin did not believe the Petitioner's activities on the fork lift constituted an accident under the Act.

On August 28, 2014, Petitioner was seen by Dr. O'Leary. Dr. O'Leary's evidence deposition was taken on October 16, 2014. Dr. O'Leary testified he was a Board Certified Orthopedic Surgeon, and performs about 250 to 300 spine surgeries a year. (PX 5, pg 4). Dr. O'Leary testified he reviewed medical records from OSF emergency room, Dr. Gross and the MRI films. Dr. O'Leary also reviewed Dr. Levin's report. (PX 5, pgs 6-7). Dr. O'Leary took a history from Petitioner that stated at the end of September, Petitioner was working for G & D Integrated on a job at Caterpillar. Petitioner was described as a forklift driver. Petitioner stated while he was looking backwards driving a forklift, he felt a "pop" in his neck and thereafter developed pain in his neck and shoulder. (PX 5, pgs 7-8). Dr. O'Leary performed a physical exam and found a mild degree of atrophy of the left tricep muscle compared to the right. (PX 5, pg 8). He also noticed a diminished pin prick in the thumb, index and middle finger on the left side. (PX 5, pg 9). Dr. O'Leary's interpretation of the MRI films was acute large disc herniation at C6-7 on the left side which compressed the C7 nerve root, along with spondylosis and stenosis at C5-6 on the left (PX 5, pg 9). Dr. O'Leary testified to a reasonable degree of medical certainty the disc herniation at C6-7 was related to the accident, and that the changes at the level above were aggravated by the accident. (PX 5, pg. 10-12). In support of his opinion, the doctor referenced the fact that the Petitioner reported a pop in his neck when turning his head behind his body and that there was no evidence that the Petitioner had any significant prior pain down the left arm. (Id at 12, 21)

Dr. O'Leary was asked if he agreed with Dr. Levin's opinion that driving a fork lift was akin to an activity of normal daily living. He said..."I mean he gives a history of being on a forklift, you know, having his hands on the wheel, having it turned and essentially behind his body, which is a routine task for a forklift driver, to maintain safety, and he

feels a pop and then develops neck and left arm pain, and so in my opinion that's ot just a regular day-in, day-out activity,..." (Id at 21-22)

Dr. O'Leary also disagreed with Dr. Levin's opinion that the changes seen on the MRI were chronic. In his narrative report, Dr. O'Leary said that his review of the films showed an acute disc herniation at C6-7 on the left which compresses the C7 nerve root. (PX 5, Dep. Exhibit 2)

Dr. O'Leary recommended a repeat cervical MRI and a follow up consultation to determine a treatment plan. (PX 5, pgs 15-16)

Respondent entered into evidence a G & D Integrated Investigation Report dated October 3, 2011, a First Report of Injury dated October 4, 2011, and a First Report of Injury dated November 23, 2011. These reports include a report by a supervisor, Mr. Thousand, mentioned that the Petitioner told him he was having neck and back pain without a mention of an accident. (RX 4) Respondent also entered into evidence a general leave of absence request form which included a statement by Dr. Gross describing the Petitioner's injury of September 30, 2011. The form was dated October 19, 2011. (RX 13). Petitioner testified at trial he did not recall filling the form out, but it was his signature and date.

On October 5, 2011, Petitioner filled out his Application for Adjustment of Claim and on the how did the accident occur section, he listed "twisted neck and shoulder on forklift".

**CONCLUSIONS:**

***In support of Arbitrator's decision relating to (C), did an accident occur that arose out of an in the course of Petitioner's employment by Respondent? And (F), is Petitioner's current condition of ill-being causally related to the injury? Arbitrator finds and concludes as follows:***

Petitioner testified while working for Respondent he had to drive a forklift, he had to drive the forklift in reverse, and as he was driving he had two hands on the steering wheel and his head was swiveling back and forth to check his blind spots. Petitioner testified he felt a "pop" in his neck and had immediate pain in his neck and shoulder. Petitioner followed up with the emergency room the next day complaining of neck and shoulder pain. Petitioner's medical records from that visit are consistent with this accident history.

Petitioner entered into evidence, his treating doctor, Dr. Gross' evidence deposition. Dr. Gross testified the work accident in question caused Petitioner's cervical condition. Petitioner also entered into evidence, a retained expert, Dr. O'Leary. Dr. O'Leary testified he is a Board Certified Orthopedic Surgeon. Dr. O'Leary causally connected Petitioner's cervical condition to the work accident.

Respondent placed into evidence Dr. Levine's evidence deposition. Dr. Levin stated any daily activities could have caused Petitioner's neck problems and did not causally connect his neck condition to the work accident. The Arbitrator notes Dr. Levin understood the accident facts as Petitioner was just driving a forklift and developed neck pain. The unrebutted testimony demonstrates Petitioner was driving a forklift backwards, both hands on the wheel and his head on a constant swivel when he suffered a "pop" in his neck. Dr. O'Leary relied upon this history.

The Arbitrator finds the accident facts clearly demonstrate Petitioner's accident was not a normal daily activity. His job duties increased the risk of injury over that of a member of the general public. Dr. O'Leary's opinion is more persuasive.

Further, Dr. O'Leary is more persuasive on the issue of whether the disc problem at C6-7 was acute and related to the accident. No evidence was presented showing the Petitioner with any pre-existing symptoms of neck pain with radiation down the left arm; symptoms he developed soon after the accident. As Dr. O'Leary explained, the Petitioner did have evidence of stenosis and spondylosis pre dating the accident at C5-6, but those conditions could have been aggravated and made symptomatic by the accident. (Id at 10)

The Arbitrator agrees with Dr. O'Leary that it is a moot point whether the Petitioner felt an immediate pop in his neck or shoulder because, either way, his symptoms were consistent with C7 radiculopathy. As he stated, it is possible that the Petitioner did not exactly know where he felt the pop. (Id at 29)

Thus, Arbitrator finds Petitioner proved an accident arose out of his course of employment and his neck injury is causally related to the September 30, 2011 work accident.

***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? Arbitrator finds and concludes as follows:***

The finding and conclusions relating to the issues of accident and causation are adopted and incorporated herein.

Petitioner introduced into evidence the follow medical expenses incurred as a result of Petitioner's September 30, 2011 work accident:

| | |
|---|---|
| OSF St. Francis #21799102 10/01/11 | $ 1,262.80 |
| OSF St. Francis #21841437 10/17/11 | $ 4,809.00 |
| OSF St. Francis #5991229 10.01/11? | $ 1,697.65 |
| CIRA #990021799102 10/01/11 | $ 78.00 |
| #16798 10/17/11 | $ 528.00 |

| | |
|---|---|
| OSF Medical Group-Dr. Gross #400012607 10/05/11-12/17/14 | $ 3,304.00 |
| OSF MG Dr. Gross 3/18/15 | $ 132.00 |
| | |
| CVS Pharmacy RX | $ 1,207.10 |
| TOTAL: | $ 13,018.55 |

Based upon the findings of accident and causation, Arbitrator finds the medical treatment rendered to Petitioner in regard to his cervical injury was reasonable and necessary and related to the work accident of September 30, 2011.

***In support of Arbitrator's decision relating to (K), is Petitioner entitled to any prospective medical care? Arbitrator finds and concludes the following:***

The finding and conclusions of Arbitrator related to the issues of accident and causation are incorporated herein.

Dr. O'Leary recommended a repeat MRI and a follow up evaluation. Petitioner testified at trial he would like to undergo treatment with Dr. O'Leary. Thus, Arbitrator finds Respondent shall approve the MRI and medical treatment with Dr. O'Leary.

***In support of Arbitrator's decision relating to (L), what temporary benefits are in dispute? Arbitrator finds and concludes the following:***

The medical records demonstrate Petitioner was maintained off work completely after October 5, 2011 and up through April 14, 2015. Arbitrator finds Petitioner is entitled to temporary total disability benefits from October 5, 2011 to April 14, 2015, for a total of 232 5/7th weeks. Respondent is entitled to credit for the TTD paid from October 5, 2011 through November 1, 2011.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

| | |
|---|---|
| ☐ Affirm and adopt | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☒ Reverse | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HUMBERTO SOTO,

Petitioner,

**16IWCC0465**

vs.

NO: 12 WC 02366

VILLAGE OF FOREST PARK,

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, medical expenses, temporaary total disability, permanent partial disability and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below.

The Decision of the Arbitrator, on the issue of accident, found Petitioner met his burden of showing that his accident arose out of and in the course of employment with that finding being based upon "the sworn testimony of Petitioner and his fellow fire fighters . . . as well as case law that clearly supports Petitioner's argument that his employment was a contributing factor to the injury, that his training was incidental to his employment and provided a benefit to him and to his employer." The Commission views the circumstances surrounding Petitioner's accident differently and finds it neither arose out nor occurred in the course of his employment.

The Supreme Court, in *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill.2d 52, 58, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989), found, "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might be reasonably be expected to perform incidental to his assigned duties." *Caterpillar*, 129 Ill.2d at 58. At the time of the occurrence of Petitioner's

injury, he was doing none of those things.

At the time of his injury, Petitioner was not performing an act demanded of him by Respondent. Petitioner actively sought the opportunity to participate in the training and completed to appropriate paperwork to that effect. Fire Chief Steve Glikne testified that Petitioner asked for permission and had to use personal time to attend the class. The evidence clearly shows Petitioner was not compelled to attend the Advanced Firefighter class.

Petitioner was not, either by common law or by statute, required to attend the Advanced Firefighter class. Petitioner testified the State of Illinois requires continuing education. Fire Chief Glinke testified the State of Illinois requires continuing education only for fire inspectors but conceded, on cross-examination, to the fire department requiring its firefighters to participate in continuing education. Fire Chief Glinke proceeded to testify that fire department-mandated continuing education is provided for by the fire department and satisfies its self-imposed continuing education requirement. Petitioner's attendance at the Advanced Firefighter class is, therefore, seen as strictly voluntary.

Nor could it be said Petitioner, at the time of his accident, was performing an act or acts which might be reasonably be expected of him incidental to his assigned duties. On November 17, 2011, Petitioner was not performing any assigned duties as he had none. He had taken time off to participate in the Advance Firefighter class. Thus, it cannot be convincingly claimed that Petitioner's accident was the result of a risk incidental to employment.

Similarly, it cannot be reasonably argued that Petitioner's attendance in the Advanced Firefighter class provided a tangible benefit to Respondent. Petitioner argues his participation in the class provides Respondent with a more capable firefighter. Fire Chief Glinke testified that what was taught in the Advanced Firefighter class was only a concentrated version of what was taught by the fire department on a regular basis and went on to testify that Petitioner was not taught any skills in the Advanced Firefighter class that weren't taught in the fire department's in-house training. Petitioner did not challenge the veracity of Fire Chief Glinke's testimony.

On balance, the testimony of Petitioner and Fire Chief Glinke show the benefit of Petitioner participating in the Advanced Firefighting class profited Petitioner more than it did Respondent. Petitioner received the tangible benefit of a $200.00 increase in his salary, 24-hours of comp time, and points added to a test for promotion. Those added points may result in Petitioner being promoted and receiving a further increase in salary and further advancement in his career. Respondent's benefit is a firefighter who has had firefighting strategies and techniques re-enforced to him and potentially another firefighter to choose from for promotion. The benefit derived from Petitioner's participation in the Advanced Firefighting class is more real to Petitioner than it is to Respondent.

The Decision of the Arbitrator also speaks to Petitioner's participation in the Advanced Firefighter class as carrying a foreseeable risk of injury and found support for this in *Scheffler Greenhouses, Inc. v. Industrial Commission*, 66 Ill.2d 361, 362 N.E.2d 325, 5 Ill.Dec. 854 (1977). The critical difference between the accident that injured the worker in *Scheffler* and the one that befell Petitioner is that accident that injured the worker in *Scheffler Greenhouses, Inc.*, occurred while the worker was at work, albeit on her lunchbreak. *Scheffler*, 66 Ill.2d at 364. The

16IWCC0465

accident that injured Petitioner occurred on a day that he had taken off. The Commission finds *Scheffler* and the present case to not be analogous.

IT IS THEREFORE ORDERED BY THE COMMISSION that Decision of the Arbitrator is reversed and compensation 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:
KWL/mav JUL 1 1 2016
O: 5/10/16
42

Kevin W. Lamborn

Michael J. Brennan

DISSENT

I respectfully dissent. Firefighter Soto was injured during his participation in the approved and appropriately sanctioned advanced firefighting course offered by neighboring Cicero Fire Department. His attendance was authorized by Fire Chief Steve Glinko.

Furthermore, the Village of Forest Park requires a mandatory minimum in training. This advanced training is not offered by his department. However, the Village of Forest Park paid for his attendance. Obviously, a better trained firefighter benefits the department as well as the Village. Along these lines, both firefighter Soto and training officer Reid credibly testified that firefighter Soto became a better firefighter after attending this training.

In addition, training officer Reid also confirmed that approximately 50% of firefighters received this training.

Firefighter Soto was also not just a firefighter; he was a trained paramedic as well. His job duties consisted of controlling and extinguishing fires, providing emergency medical assistance, aiding victims, driving and operating specialized equipment, locating and rescuing downed firefighters and completing preventative maintenance requirements.

Furthermore, it should be noted that although his attendance was voluntary, firefighter Soto received additional benefits by way of professional achievement points which aid in promotional advancement, a one-time 24 hour compensatory time off period, and an annual stipend for the duration of his time in Forest Park.

As a result, the Arbitrator correctly found Petitioner met his burden of showing that his accident arose out of and in the course of his employment based on the unrebutted factual testimony and case law. Clearly, the professional competence gained by the Petitioner inures to the benefit of his employer as well as the citizens he serves. They are in the business of saving lives, helping the public and maintaining the safety and well-being of every citizen and their brother and sister firefighters.

The majority's premise is misplaced. This was not a folly, a game or recreational activity. This was an effort to advance his skills and improve his ability to save lives. How can we turn our backs on the men and women who will risk their lives to save us and our children?

The evidence shows that firefighter Soto suffered a partial tear of the distal bicep while participating in an exercise that would hone the skill of rescuing an injured firefighter who could not help himself. Clearly, while this class was voluntary and performed on personal time, it was authorized by his superiors, encouraged by the brass, and paid for by the Village.
Firefighter Soto also received accreditation for his attendance as well as comp-time off, but most importantly both he and the citizens of Forest Park will greatly benefit from the improvement in his life saving skills.

For the foregoing reasons, I dissent and would have affirmed the Arbitrator's decision in its entirety.

Thomas J. Tyrrell

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**NOTICE OF ARBITRATOR DECISION**
CORRECTED

16IWCC0465

**SOTO, HUMBERTO**
Employee/Petitioner

Case# **12WC002366**

**VILLAGE OF FOREST PARK**
Employer/Respondent

On 10/28/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5511 DeCARLO LAW GROUP
ANITA M DeCARLO
6525 W NORTH AVE SUITE 204
OAK PARK, IL 60302

0507 RUSIN & MACIOROWSKI LTD
TOM CROWLEY
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS )
)SS.
COUNTY OF Cook )

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**AMENDED ARBITRATION DECISION**

16IWCC0465

**Humberto Soto**
Employee/Petitioner

v.

**Village of Forest Park**
Employer/Respondent

Case # 12 WC 002366

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **June 5, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

O. ☐ Other _____

**FINDINGS**

On **11/17/2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$69,925.88**; the average weekly wage was **$1,344.73**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **1** dependent children.

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

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

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

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

**ORDER**

**RESPONDENT SHALL PAY THE REASONABLE AND NECESSARY MEDICAL BILLS FROM LOYOLA UNIV. MEDICAL CENTER ($3,163.20), HOA ($539), ATHLETICO ($4026.00) AND LOYOLA PHYSICIANS ($1,371.00) AS PROVIDED IN SECTIONS 8(A) AND 8.2 OF THE ACT.**

**RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $896.49/WEEK FOR 10 2/7 WEEKS, COMMENCING 11/19/2011 THROUGH 01/29/2012, AS PROVIDED IN SECTION 8(B) OF THE ACT.**

**THE ARBITRATOR FINDS THAT PETITIONER SUSTAINED PERMANENT PARTIAL DISABILITY TO THE EXTENT OF 10% OF HIS RIGHT ARM PURSUANT TO $8(E)) 10 OF THE ACT. RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS OF $ 695.78/ WEEK FOR 25.3 WEEKS.**

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

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

Ketki S. Steffen
Signature of Arbitrator Ketki Steffen

10/27/15
Date

## FACTUAL HISTORY

The Petitioner, Humberto Soto, has worked for the Respondent, Village of Forest Park, as a firefighter and EMT for 8 years. The facts surrounding the incident/accident are largely uncontested.

Petitioner attended a training program at the Cicero Fire Academy entitled Advanced Firefighting. (Rx. 2) The course ran through November 14, 2011 to November 18, 2011. Petitioner testified that learned about the course through notice posted at work and that several of his fellow fire-fighters had attended such courses.

As required, Petitioner asked for and received permission to attend the course from his supervising fire chief, Steve Glinke. (Rx.2)

During the training, Petitioner was not in pay status but the Respondent did pay the tuition for the classes and accommodated the Petitioner by allowing him to adjust his schedule to attend the classes. Petitioner paid for his own transportation to go to and from the classes and paid for his own incidental expenses. Petitioner testified that the course attendance was purely optional and voluntary and he did so to obtain the Advance Technician Firefighter certification. This certification required the course completion as well as the Fire Service Vehicle Operator training as well as Vehicle and Machinery Operations training modules to the satisfaction of the Illinois State Fire Marshall. If he satisfactorily completed these courses he was entitled by the union contract to an annual stipend from the Village of Forest Park in the amount of $200.00 per year. Additionally, such certification also entitled him to a one-time grant of 24 hours paid time off, referred to as "comp. time", and would be eligible for up to three bonus points to be

considered in any promotional examination. This was part of his negotiated union benefits through his employer.

The Petitioner testified the completion of the course enabled him to become a better and more efficient firefighter/EMT, strengthening his techniques in firefighting including search and rescues, extractions, and assistance to other firefighters and other firefighting departments which is a benefit to the Village of Forest Park in making the community safer.

The Petitioner also testified that as a result of his completion of the requirements of the State Fire Marshall and his designation of Advanced Technician Firefighter by the Illinois State Fire Marshall, he was entitled by the union contract to an annual stipend from the Village of Forest Park in the amount of $200.00 per year. Additionally, as a result of the certification by the Illinois State Fire Marshall as an Advanced Technician Firefighter, the Petitioner was also entitled to a one-time grant of 24 hours paid time off, referred to as "comp. time", and would be eligible for up to three bonus points to be considered in any promotional examination.

The Petitioner testified the completion of the course enabled him to become a better and more efficient firefighter/EMT, strengthening his techniques in firefighting including search and rescues, extractions, and assistance to other firefighters and other firefighting departments which is a benefit to the Village of Forest Park in making the community safer.

During the week of this training at the Cicero Fire Academy, the Petitioner sustained an injury to his right arm. Specifically, on November 17, 2011, he was injured during a training exercise as he was helping lift a person. He testified that he felt a pop in his right biceps area with immediate pain and burning down to his hands.

Petitioner's partner, Tim Conrad, drove him to Loyola's emergency department at the direction of the Chief Glinke, who met them at Loyola. X-rays of the right arm were taken and

Petitioner was diagnosed with a possible distal biceps rupture. He returned to the class the next day to take a written exam but did not perform any of the physical activities. Ultimately, the Petitioner completed the course and also completed additional training modules. On October 29, 2012 he was awarded a certificate with the designation of Advanced Technician Firefighter by the Illinois State Fire Marshall. (Px. 8,9,10,11)

On November 18, 2011 Petitioner treated at Hinsdale Orthopedics with Dr. Justin M. Lareau. X-rays and MRI were taken. Petitioner also began treatment at Loyola University Medical Center with Dr. Douglas Evans. On November 21, 2011, Dr. Evans ordered an MRI of Soto's right elbow. The exam showed a moderate grade partial tear of the distal biceps. Dr. Evans reviewed the MRI and diagnosed a right elbow distal biceps tendon partial tear. It was noted that the tendon was not disrupted or retracted, and he was released with lifting restrictions not to exceed five pounds with his hand. He was also told to continue wearing the brace and follow up in four weeks. (Px. 2)

The Petitioner underwent physical therapy and strengthening exercises. He followed up with Dr. Evans on December 19, 2011. He stated he had been resting the arm. Dr. Evans felt his pain was improved. There was still tightness in the morning. It was recommended Petitioner start on physical therapy to work on stretching and anti-inflammatory modalities as well as a couple weeks of strengthening.

Dr. Evans next saw the Petitioner on January 16, 2012. It was noted the Petitioner was doing physical therapy and making progress feeling good until a week prior when he had pain after physical therapy along the lateral aspect of the biceps and progressing up his arm. A prior history of lateral epicondylitis was noted. Dr. Evans continued to recommend physical therapy

and noted the risk for complete rupturing had gone as far as it was likely. At that visit, the Petitioner was returned to work effective January 30, 2012 at full duty without restrictions.

The Petitioner was seen by Dr. Scott Sagerman for an independent medical evaluation and AMA impairment rating examination on July 10, 2012. On examination, Dr. Sagerman found normal and symmetric contour of the biceps muscle. There was no focal tenderness. Petitioner exhibited full range of motion. There was no pain with resisted flexion or supination. There was no apparent weakness, joint crepitus, or effusion. Dr. Sagerman reviewed the MRI report that showed a less than one centimeter partial tear of the biceps tendon. Dr. Sagerman noted that Petitioner had been released to return to work, and he was working without restrictions. It was Dr. Sagerman's opinion that Petitioner could continue to do so. Dr. Sagerman then performed an AMA impairment rating analysis and determined that the petitioner sustained 0% upper extremity impairment. (Rx.1)

Several other witnesses testified during the hearing. Forest Park firefighter/paramedic Bobby Reid testified for the Petitioner. He testified that he is employed as a Forest Park firefighter/paramedic as well as operating as a part-time training officer for the fire department. In his position as a part-time training officer, he schedules annual training including drills and other training that is to be performed during Petitioner's work hours. He also provides optional or voluntary training that takes place while the firefighters are not in pay status. He also posts on a bulletin board at the fire department training opportunities outside of the opportunities provided in-house by the Village of Forest Park.

Fire Chief Steve Glinke testified on behalf of the Respondent. He has been Fire Chief for the Village of Forest Park since 2007. It is his duty to set policy, create rules and regulations, and delegate authority for efficient and safe operating of the fire department. The Chief went on to

testify regarding optional training versus mandatory training as it has been practiced by the Forest Park Fire Department. If a firefighter undergoes mandatory training required by the department, the firefighter would be paid overtime as well as any incidental expenses associated with the mandatory training, including transportation costs.

Chief Glinke confirmed the Petitioner's testimony that the Advanced Firefighter course that was attended by the Petitioner at the Cicero Fire Academy when he sustained his injury was not mandatory but purely optional and voluntary. The Petitioner was not in pay status for any of the days he attended that training. The Petitioner received no salary or payments for the dates that he attended the optional training at the Cicero Academy from November 14, 2011 through November 18, 2011.

Chief Glinke further testified that the Village of Forest Park did not direct or mandate any firefighters take the Advanced Firefighting class. Chief Glinke also confirmed that pursuant to the collective bargaining agreement that was in place, the firefighters who completed all of the requirements mandated by the State of Illinois Fire Marshall and obtained the Advanced Firefighting Technician designation received an annual stipend of $200.00 and 24 hours of comp time. Completion of the advanced firefighter class in and of itself did not warrant any type of additional benefit from the Village of Forest Park, either in salary increases or promotional considerations. Additionally, pursuant to the collective bargaining agreement, if the firefighter completed all the requirements as outlined above and was awarded the Advanced Firefighting Technician designation by the State of Illinois Fire Marshall, that firefighter would be eligible for an additional three points that could be used toward a promotional examination.

Petitioner also provided testimony regarding his current situation. He testified that he has returned to full duty work with respondent as a firefighter/EMT without restrictions or accommodations. He is seeking TTD payments for lost work time from November

19, 2011 until January 29, 2012 representing 10 2/7 weeks. Petitioner indicated that is continues to suffer from stiffness in his arm on cold mornings and after working out or lifting heavy objects. He also occasionally experiences burning sensation during weight lifting and has numbness, irritation, muscle spasms and tingling on some occasions.

## FINDINGS/ANALYSIS

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

The relevant facts of the case are largely not at issue. Petitioner voluntarily attended an advanced firefighter course and was injured during the training drill. The central issue is whether the date, type, location and manner of the training course placed Petitioner outside of his employment. After a careful review of the evidence and the applicable case law the Arbitrator finds that the Petitioner's accident did arise out of and in the course of his employment with the Respondent.

Citing the Illinois Workers' Compensation Act, the Appellate Court has held that "[a]n employee's injury is compensable under the Act only if it arises out of and in the course of the employment." *University of Illinois v. Industrial Comm.*, 365 Ill. App. 3d 906, 910, 851 N.E.2d 72 (2006). The "in the course of employment" element refers to "[i]njuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work...." *Metropolitan Water Reclamation District of Greater Chicago v. IWCC*, 407 Ill. App. 3d 1010, 1013-14, 944 N.E.2d 800, (2011). The "'arising out of' component refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Metropolitan Water*

*Reclamation District*, 407 Ill. App. 3d at 1013-14 (*citing Caterpillar Tractor Co. v. Industrial Comm.*, 129 Ill. 2d 52, 58, 541 N.E.2d 665 (1989)). Where an "employee is exposed to a risk common to the general public to a greater degree than other persons, the accidental injury is also said to arise out of his employment." *Id.* That is, a claimant must demonstrate that the risk of injury was peculiar to or increased by his work duties and the "increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1014 (*citations* omitted). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of his employment) to establish that his injury is compensable. *University of Illinois*, 365 Ill. App. 3d at 910.

In the case at bar, Petitioner has met his burden by a preponderance of the evidence that his accident arose out of and in the course of employment. This decision is based on the sworn testimony of the Petitioner and his fellow fighters who testified as well as case law that clearly supports Petitioner's argument that his employment was a contributing factor to the injury, that his training was incidental to his employment and provided a benefit to him and to his employer.

Risk Incidental to Employment

An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Technical Tape Corp. v. Industrial Commission*, 58 Ill.2d 226, N.E.2d 515 (1974). Arising out of is primarily concerned with causal connection to the employment, looking to facts showing an increased risk to which the employee is subjected as compared to the general public, while performing a task in furtherance of the employer's business or incidental thereto.

There are three categories of risk to which an employee may be exposed: (a) risks distinctly associated with the employment, (b) personal risks, and (c) neutral risks that have no particular employment or personal characteristics. *Illinois Institute of Technology Research Institute v. Industrial Commission,* 314 Ill.App.3d 149, 731 N.E.2d 795, 247 Ill.Dec 22 (1st Dist. 2000). Whether an injury caused by a neutral risk arises out of employment is dependent upon whether claimant was exposed to a risk to a greater degree than the general public. *Id.* at 163. In this case, the risk from the training exercise was not a personal or neutral risk.

The Arbitrator finds the risks from training class activity arose out of and was incidental to Petitioner's employment. He received information about the class at this employment, he received approval for the same through his employer and his employer paid for the class. The nature of the training exercises, lifting a de-capacitated body akin to the work required of a firefighter, subjected Petitioner to an increased risk to that which the general public is not exposed. The class was not open to the general public and is not the type of event an ordinary individual would engage in for recreation or personal growth. Although the training is conducted at a different facility, the Arbitrator finds that he nature and the form of the training places it in the category of an activity intrinsically connected to his employment with respondent. Furthermore the time, location and approval into the program limited it to firefighters as opposed to the general public.

Personal Benefit vs. Benefit to Employer

Undoubtedly, the Petitioner is not required to enroll in the Advanced Firefighter Class. His employer offers all required training to their employees so they can maintain their qualifications. Petitioner voluntarily enrolled in the program to further his skills/techniques. In exchange, he received benefits of a possible one time stipend, a comp day off and a possible

chance for future advancement at work. The employer has bargained for these benefits with the Petitioner's union and in exchange Respondent benefits from a better trained firefighter with new skills and training. Training Officer Reid's testimony proves this benefit to the Petitioner-Employee and to Respondent-Employer. In the Arbitrator's estimation, this mutual benefit is undeniable and is arguably in the best interest of public policy.

Regardless, Respondent paid for the training and The Village of Forest Park provided the funds for Firefighter Soto to attend the Advanced Firefighting class. Both Training Officer Reid and Chief Glinke were aware of the physical nature of the class. Additionally, since approximately 50% of the 21 firefighters employed by the Forest Park Fire Department have taken Advanced Firefighter the Respondent clearly facilitated, promoted and encouraged this activity. This strengthens and supports the argument that both sides derived a benefit and that the activity was incidental to employment.

Unreasonable vs. Foreseeable Risk

Additional support for the argument that the activity arose out of employment lies in the nature of the activity. The activity is voluntarily undertaken but did not involve an unreasonable/unforeseeable risk; nor was the activity recreational in nature. Rather, the nature and risks associated with the training class were known and should have been foreseeable to the employer. In *Scheffler Greenhouses, Inc. v. Industrial Commission*, 66 Ill.2d 361, 362 N.E.2d 325, 5 Ill.Dec 854 (1977), an employee of Greenhouse was injured while swimming in a pool of a fellow employee who rented a house on Greenhouse acreage. The Employee had permission to use the pool by both the employer and the fellow employee. The court reasoned that the risk was connected with or incidental to the employment and that the conduct was not so unreasonably

dangerous that the claimant might be expected to have foreseen the danger. *Id.* In Petitioner's case, the risk, of a firefighter training exercise was obvious and reasonable, not recreational.

Therefore, Petitioner injury arose out of and in the course of his employment.

**Is Petitioner's current condition of ill-being causally connected to his injury?**

Petitioner's present condition of ill being is causally related to his injury. The arbitrator concludes that the petitioner has proven by a preponderance of the evidence that his present condition of ill being relative to his right arm is casually connected to his injury on November 17, 2011. This conclusion is based upon the testimony of the petitioner and an examination of the medical records. His injury was within the scope of his employment as he was lifting a distressed firefighter during a training exercise. His current complaints are in line with the type and nature of the injury he suffered.

**Is Respondent liable for Petitioner's outstanding medical bills?**

The Arbitrator finds that Petitioner's medical treatment was related to his accident and injury of November 17, 2011. The Petitioner has requested payment for 4 separate medical bills totaling $9,099.20 (AX1 attachment). The Arbitrator awards these bills. Respondent shall pay these reasonable and necessary medical services as provided in Section 8(A) and 8.2 of the Act.

**Is Petitioner entitled to TTD?**

Petitioner has requested TTD payments for a period of 10 2/7$^{th}$ weeks during which he was off-work following his work accident. Based on the prior causal connection finding, Respondent shall pay TTD benefits of $896.49 per week for 10 2/7 weeks, commencing November 19, 2011 through January 29, 2012, as provided in Section 8(B) of the Act.

**What is the nature and extent of the injuries?**

Petitioner sustained a moderate grade partial tear of the distal biceps. Petitioner's testimony regarding the mechanism of the injury as well as the treating records from Loyola University Medical Center, Hinsdale Orthopedics and Athletico all support and give credence to Petitioner's claim regarding his current condition. The Arbitrator finds that the Petitioner has a moderate grade partial tear of the distal biceps, has reached MMI and returned back to full duty work after successful treatment and physical therapy from December 20, 2011 to February 4, 2012.

This case arises out of a November 17, 2011accident, a date after September 1, 2011 amendment of Worker's Compensation Act ("Act"). Post amendment, pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

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

In applying these criteria to the case at bar, the Arbitrator initially notes that Dr. Scott Sagerman evaluated the Petitioner an independent medical evaluation and AMA Evaluation on

July 10, 2012. With regard to Subsection (I) of §8.1b(b), the arbitrator notes that the records contains an impairment rating of 0% of the right arm as determined by Dr. Sagerman, pursuant to the most current edition of the American Medical Association's Guides to the evaluation of the permanent impairment. (RX1 and PX 16). In assessing Dr. Sagerman's ratings, the Arbitrator notes that Dr. Sagerman did not review any of the treating records from Dr. Evans.

With regard to Subsection (II) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Firefighter Soto enjoys a full duty release back to his occupation as a firefighter.

With regard to subsection (III) of §8.1b (b), the arbitrator notes that the Petitioner was forty years old at the time of the accident. The Arbitrator finds his to be in the middle years of his job/occupation and gives this factor moderate weight.

With regard to Subsection (IV) of §8.1b(b), Firefighter Soto's future earnings capacity is not affected. He is able to continue to work in his full duty capacity. There is little or no evidence of any loss of future earnings. In fact, his training may have helped Petitioner hone his skills and may open up the prospect higher earnings in the future. This factor has little or no weight.

With regard to Subsection (V) of §8.1b(b), evidence of disability, the Arbitrator takes note of Petitioner's injury, his good recovery and his current complaints. Petitioner testified that he suffers from stiffness and occasional burning sensation in his arm following heavy lifting. He also complained of numbness, irritation, pain and occasional muscle spasms and tingling sensation. The Arbitrator finds his testimony credible and supported by the medical findings.

Based on the above factors, and the records taken as a whole, the arbitrator finds that Firefighter Soto sustained permeant partial disability to the extent of 10% loss of the right arm.

Signature of Arbitrator Ketki Shroff Steffen

Date

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Marie Garner,

Petitioner,

16IWCC0466

vs.

NO: 11 WC 14877

Burbank School District #111,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner sustained an accident arising out of and in the course of her employment with Respondent on April 28, 2010, for the reasons stated below.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. One should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the Arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

The Petitioner had worked for Respondent as a speech pathologist for fifteen years by April 28, 2010 – the manifestation date of her carpal tunnel syndrome of the right hand. She worked seven hours per day, five days per week, and saw fifty to sixty students per semester. (Tr. 7-9)

The Petitioner is right-handed. Also, she had never been diagnosed with carpal tunnel syndrome prior to April 2010 and had never sought treatment for her hands. (Tr. 8-9)

The Petitioner would confer with parents and staff verbally, and in writing. She wrote reports regarding the plan for the students, and would write notes during meetings. She would also have to fill out two permission forms per student that the families would then receive. If a student would ultimately need an Individualized Education Plan ("IEP"), Petitioner would have to update specific paperwork about the student's progress and her plan to work with them. When the Petitioner would meet with parents regarding their children, she would take notes beforehand to prepare and would take notes during the meetings with parents. (Tr. 9-13)

As part of the IEP formulation process, the Petitioner would meet with her students and tape record what they were saying. Then she would transcribe the recordings later by hand. The Petitioner would also give the students tests that could last from one to two hours. She took notes down during the testing time to annotate what they did correctly or incorrectly. After she was finished working with a student, she would write a report on their meeting. The Petitioner would share her report with the appropriate teachers, invite the student's parents back for a meeting, and then discuss the child's need for therapy. At that point the Petitioner would develop goals for the student and put them into the student's IEP. (Tr. 13-15)

The Petitioner testified that during an evaluation of a student, writing is "constantly going on" during the evaluation, whether it be by her annotating a specific answer that a student gave or just annotating a letter. After the IEP has been completed, the IEP still had to be re-evaluated once per year. Each quarter of the school year the Petitioner had to write progress reports for the parents of the students that she worked with, including updating the students' goals when needed. These reports were handwritten. (Tr. 15-17, 22-23)

Petitioner testified that she usually saw students a total of sixty minutes per week, and sometimes she would see them in groups of up to four students. She would record their responses, by hand, while quizzing them, usually with an 'X' or an 'O' for each question. She would also make picture/ flash cards for the students to take home and use. After each session with a student(s) she would write down the following: what she did with the student, how the student did, if the student was meeting his goal, and annotate suggestions for future meetings with the student. (Tr. 17-20)

The Petitioner also testified that when she met with the students, she sat at a small table, utilizing child-height chairs. She noted that it was awkward for her to take notes while sitting at the small tables. She would have the aforementioned sessions with all fifty to sixty students per semester. (Tr. 20-21)

Ms. Garner further testified that she was asked to write other reports/ statements for teachers regarding the progress of their students. The Petitioner was required Medicaid billing reports that took her fifteen to twenty minutes per student. They were completed for each session with a student, either on a daily basis or completed in a larger batch at one time. (Tr. 23-24)

The Petitioner testified that the number of emails that she sent to teachers and parents increased over the years leading up to 2010. When she was typing in 2010, her keyboard was located on top of her desk next to her computer. Also, she noted that towards the end of 2009 and the beginning of 2010 she felt a tingling feeling in her [right] arm and hand. She couldn't grasp items, and she would often wake up at night with pain in her arm that would travel up to her elbow. On April 28, 2010 the Petitioner reported her symptoms to one of the school's that she worked at. (Tr. 25-28)

She stated that she would use a mouse often with her right hand when using the computer. She also testified that there would be specifically scheduled school days for her to spend the entire day working at her computer. (Tr. 37-38)

The Petitioner testified that she waited to seek treatment for her symptoms until she received authorization to do so. She attempted to deal with her symptoms on her own by taking more breaks. She then began treating with Dr. James Schlenker on September 30, 2010 after her symptoms did not improve. The Petitioner received a cortisone injection which did improve her symptoms; but, by December of 2010 she experienced terrible pain in her [right] arm. She could not grasp anything. (Tr. 28-32)

The Petitioner testified that she had carpal tunnel surgery performed on her afflicted extremity by Dr. Schlenker on December 27, 2010, which was during Christmas break. She was paid her regular salary while she was off of work for two weeks because she was on Christmas break. (Tr. 32-33)

The Petitioner testified that she underwent physical therapy from January 11, 2011 through March 15, 2011, recommended by Dr. Schlenker. She also met with Dr. Charles Carroll for an examination. She testified that she only told Dr. Carroll that she treated speech and language disorders in children and wrote IEPs and reports, and did not detail her duties as she did while testifying at trial. On March 15, 2011, the Petitioner followed up with Dr. Schlenker. The Petitioner went into great detail about her job duties with Dr. Schlenker, who asked her "everything" about her position. (Tr. 33-35)

The Petitioner testified that at the time of trial, she had difficulty holding objects, she does not wake up at night, and she does not have the tingling that she used to have in her fingers or arm. However, she has occasional pain in her fingers which she can usually shake off. She uses a wrist pad when typing at both of the schools and a mouse pad at one of the schools. She also has her keyboard at a lower position. She uses an IPad to videotape the students, which has in turn cut down on the amount of writing that she needs to do. Also, the Petitioner denied taking any prescription or over the counter medication for occasional flare-ups (Tr. 36-40)

On cross examination, the Petitioner noted that her initial report with a student is four to five typed pages, and that the quarterly progress reports are one and a half pages in length. If she had a continuing student, the initial report would be re-done after three years. The permission forms, which are individualized per student, are completed once per year. They can be between one and three pages long. (Tr. 43-46)

The Petitioner also testified on cross-examination that when she works with the students, she alternates between interacting with the students and writing notes. The Petitioner further testified that she has approximately ten sessions with students per day, which last about thirty minutes each. During those sessions she might write a note to the parents and/ or assign homework for the student that she would annotate for them. On average, five hours of her school day is devoted to meeting with students and two hours is devoted to writing notes and reports. (Tr. 46-50)

Petitioner's Exhibit (2) contains documents related to Petitioner's electrodiagnostic testing that was completed on October 5, 2010. The physician that conducted the studies, Dr. Manisha Saraf Khanna, noted the following impression: [Petitioner's] electrical study is consistent with a bilateral median neuropathy at the wrist/carpal tunnel syndrome. This condition is of mild to moderate intensity on the right side and of borderline mild intensity on the left side."

Petitioner's Exhibit (5) contains two reports authored by Dr. Schlenker. The first report, dated March 15, 2011 states: "On the basis of my examination, [Petitioner's] work as a speech pathologist was either caused or a significant contribution to her carpal tunnel syndrome ("CTS"). She has no history of diabetes. She does have a history of hypothyroidism…Her hypothyroidism probably contributes but is not the main cause of her CTS." Dr. Schlenker's second report, dated October 25, 2011 stated that her scars post-surgery were barely visible, and that she had a full range of motion in her effected extremity. He also wrote: "She developed right CTS as a result of the repetitive activities she carried out as a speech pathologist over a long period of time."

Respondent's Exhibit (1) lists examples of duties for a speech language pathologist. It contains sixteen bullet points which either implicitly detail how Petitioner would have to write and/or type for her job duties ("Write up a format IEP for a child who qualifies for speech and/or language services."), or alludes to her having to do so ("Provide trimester progress reports to parents/guardians based on IEP goals.").

Respondent's Exhibit (2) is an on-site job analysis that was performed on October 11, 2012 with regard to Petitioner's position. It was noted that therapists can spend approximately 10% to 20% of their day completing paperwork, and that they can spend an entire day doing paperwork during certain periods of the school year.

Respondent's Exhibit (5) is a report from Dr. Charles Carroll who saw Petitioner for an independent medical evaluation. With regard to Petitioner's occupational history, Dr. Carroll devoted less than three lines in his report to a description of her work duties. He noted that upon reviewing the job description that Petitioner provided and the job description that Respondent provided, he opined that there was no causal connection between Petitioner's right CTS and her job duties.

The Commission finds Petitioner's claim to be credible. The Commission further finds that Petitioner proved by a preponderance of the evidence that her carpal tunnel syndrome of the right hand was caused by or substantially aggravated by her repetitive job duties while working for Respondent. The Commission accordingly awards the Petitioner workers' compensation benefits due under the Act.

The Petitioner testified in detail regarding the numerous work activities that she would do when working with students and completing paperwork on her own. The Commission finds that her work activities were repetitive in nature.

To obtain compensation under the Act, a claimant must prove that some act or phase of her employment was a causative factor in her ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n, 359 Ill. App. 3d 582, 592, 834 N.E.2d 583, 296 Ill. Dec. 26 (2005).* A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).*

The Commission agrees with Dr. Schlenker's causal connection opinion – that Petitioner's CTS was either caused by or significantly contributed to her CTS. The Petitioner testified that Dr. Schlenker thoroughly questioned her job duties to understand the tasks that could have contributed to her CTS. The Commission finds Dr. Schlenker's opinion to be more credible than Dr. Carroll's opinion.

With regard to temporary total disability benefits due, the Commission finds that Petitioner was temporarily and totally disabled for one week from December 27, 2010 through January 2, 2011. With regard to medical expenses, the Commission finds that Petitioner is due reasonable and necessary medical expenses incurred under §8(a) of the Act.

The Petitioner has experienced some post-surgery pain in her fingers, but overall the Petitioner has experienced a good recovery from her surgery. Accordingly, the Commission awards the Petitioner a permanent partial disability rating of 10% for the loss of use of Petitioner's right hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision, filed on April 27, 2015, is hereby reversed, as the Commission finds that Petitioner sustained an accident that arose out of and in the course of Petitioner's employment with Respondent.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $846.60 per week for a period of 1 week (from December 27, 2010 through January 2, 2011), that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall receive a credit for all amounts paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $761.95 per week for a period of 20.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 10% of Petitioner's right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses incurred under §8(a) of the Act.

16IWCC0466

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: JUL 11 2016

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

TJT/gaf
O: 5/10/16
51

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

Keith Schlink,
Petitioner,
vs.
McLean County Unit District # 5,
Respondent,

NO: 14WC 40680

DECISION AND OPINION ON REVIEW

16IWCC0467

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 2, 2015, is hereby affirmed and adopted.

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

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

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

JUL 13 2016

DATED:
MJB/bm
o-7/11/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**SCHLINK, KEITH**
Employee/Petitioner

Case# **14WC040680**

**McLEAN COUNTY UNIT DISTRICT NO 5**
Employer/Respondent

**16IWCC0467**

On 11/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0264 HEYL ROYSTER VOELKER & ALLEN
JAMES J MANNING
PO BOX 6199
PEORIA, IL 61601

STATE OF ILLINOIS )
)SS.
COUNTY OF McLean )

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

## ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION

KEITH SCHLINK
Employee/Petitioner

Case # 14 WC 040680

v.

16IWCC0467

McLEAN COUNTY UNIT DISTRICT NO. 5
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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Bloomington, Illinois** on **August 26, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

### DISPUTED ISSUES

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

16IWCC0467

On **October 8, 2012,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injuries, Petitioner earned **$41,704.00** and the corresponding average weekly wage was **$802.00.**

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

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

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services, nor is it obligated to do so.

ORDER

Having found that Petitioner has failed to sustain his burden of proof to demonstrate that he provided notice to Respondent within the requisite 45 day time period following the alleged accident as required by Section 6(c) of the Act, his claim for compensation is hereby denied.

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

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

Signature of Arbitrator

10/30/15
Date

ICArbDec p. 2

NOV 2 - 2015

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

Petitioner is alleging a repetitive trauma claim arising out of his work for Respondent as a custodian. Specifically, as it pertains to this claim, Petitioner is alleging that he sustained a trigger finger injury to the ring finger on his left hand which he claims to have been caused by the repetitive use of his hands while performing his custodial work for Respondent. Petitioner alleges an accident date of October 8, 2012. His Application for Adjustment of Claim was not filed until December 3, 2014.

Petitioner was first diagnosed with a trigger finger condition on his left third and left fourth finger by Dr. Pilcher on October 2, 2012. (PX 3) No further treatment was sought for this condition until Petitioner followed up with Dr. Jerome Oakey at McLean County Orthopedics on September 16, 2013. (PX 15)

Petitioner testified at arbitration that he is well aware of the procedures for reporting work injuries to his immediate supervisor, Craig Montgomery, the Director of Custodial Services for Respondent. However, Petitioner admitted that he did not tell Mr. Montgomery that he sustained a work related injury prior to proceeding with his first surgery with Dr. Oakey on May 20, 2014.

Just a few days prior to the surgery, Petitioner told Mr. Montgomery that he was going to be off work for a few weeks because he was having surgery. No mention was made at that time as to why he was having surgery or that he had sustained an injury to his hands arising out of his work for Respondent.

Notice of a work-related accident is required to be given to the employer no later than 45 days after the accident in accordance with Section 6(c) of the Act. Petitioner clearly failed to meet the requirements of Section 6(c) as the evidence shows that Petitioner did not notify Respondent that he sustained a work related injury until some time after May 20, 2014.

Based upon the above, the Arbitrator finds that the Petitioner has failed to provide the requisite notice to Respondent in order to state a viable claim under the Workers' Compensation Act. Therefore, the instant claim filed by Petitioner is hereby 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 | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Keith Schlink,
Petitioner,
vs.
McLean County Unit District # 5,
Respondent,

NO: 15WC 17909

16IWCC0468

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 2, 2015, is hereby affirmed and adopted.

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

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

The party commencing 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: JUL 13 2016
MJB/bm
o-7/11/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**SCHLINK, KEITH**
Employee/Petitioner

Case# **15WC017909**

**McLEAN COUNTY UNIT DISTRICT NO 5**
Employer/Respondent

16IWCC0468

On 11/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0264 HEYL ROYSTER VOELKER & ALLEN
JAMES J MANNING
PO BOX 6199
PEORIA, IL 61601

STATE OF ILLINOIS )
)SS.
COUNTY OF McLean )

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**

**KEITH SCHLINK**
Employee/Petitioner

Case # **15** WC **017909**

v.

**McLEAN COUNTY UNIT DISTRICT NO. 5**
Employer/Respondent

**16IWCC0468**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Bloomington, Illinois** on **August 26, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational
B. 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 **September 16, 2013,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injuries, Petitioner earned **$41,704.00** and the corresponding average weekly wage was **$802.00.**

On the date of the alleged accident, Petitioner was **49** 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, nor is it obligated to do so.

ORDER

Having found that Petitioner has failed to sustain his burden of proof to demonstrate that he provided notice to Respondent within the requisite 45 day time period following the alleged accident as required by Section 6(c) of the Act, his claim for compensation is hereby denied.

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

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

Signature of Arbitrator

10/30/15
Date



NOV 2 - 2015

16IWCC0468

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

Petitioner is alleging a repetitive trauma claim arising out of his work for Respondent as a custodian. Specifically, as it pertains to this claim, Petitioner is alleging that he sustained a trigger finger injury to the ring finger on his left hand which he claims to have been caused by the repetitive use of his hands while performing his custodial work for Respondent. Petitioner alleges an accident date of September 16, 2013. His Application for Adjustment of Claim was not filed until June 3, 2015.

Petitioner was first diagnosed with a left ring finger trigger finger on September 16, 2013 when he saw Dr. Jerome Oakey at McLean County Orthopedics with complaints of left ringer finger pain and locking of the finger. (PX 15) Petitioner subsequently began treating with Dr. Jerome Oakey for this condition.

Petitioner testified at arbitration that he is well aware of the procedures for reporting work injuries to his immediate supervisor, Craig Montgomery, the Director of Custodial Services for Respondent. However, Petitioner admitted that he did not tell Mr. Montgomery that he sustained a work related injury prior to proceeding with his first surgery with Dr. Oakey on May 20, 2014.

Just a few days prior to the surgery, Petitioner told Mr. Montgomery that he was going to be off work for a few weeks because he was having surgery. No mention was made at that time as to why he was having surgery or that he had sustained an injury to his hands arising out of his work for Respondent.

Notice of a work-related accident is required to be given to the employer no later than 45 days after the accident in accordance with Section 6(c) of the Act. Petitioner clearly failed to meet the requirements of Section 6(c) as the evidence shows that Petitioner did not notify Respondent that he sustained a work related injury until some time after May 20, 2014.

Based upon the above, the Arbitrator finds that Petitioner has failed to provide the requisite notice to Respondent in order to state a viable claim under the Workers' Compensation Act. Therefore, the instant claim filed by Petitioner is hereby denied.

STATE OF ILLINOIS )
) SS.
COUNTY OF )
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kelly Noonan,
Petitioner,
vs.
Illinois State Police,
Respondent,

NO: 12WC 25530

16IWCC0469

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 13, 2015 is hereby affirmed and adopted.

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

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

DATED: JUL 13 2016
MJB/bm
o-7/11/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**NOONAN, KELLY**
Employee/Petitioner

Case# **12WC025530**

**ILLINOIS STATE POLICE**
Employer/Respondent

**16IWCC0469**

On 5/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4796 SGRO HANRAHAN & BLUE
ELLEN C BRUCE
1119 S 6TH ST
SPRINGFIELD, IL 62703

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

5300 ASSISTANT ATTORNEY GENERAL
CODY KAY
500 S SECOND ST
SPRINGFIELD, IL 62706

2202 ILLINOIS STATE POLICE
124 S ADAMS ROOM 600
PO BOX 19461
SPRINGFIELD, IL 62794

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

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

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 306/14

MAY 13 2015

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)
☒ None of the above

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# ARBITRATION DECISION

**KELLY NOONAN,**
Employee/Petitioner

v.

**ILLINOIS STATE POLICE,**
Employer/Respondent

Case # **12** WC **25530**

Consolidated cases: _____

**16IWCC0469**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/20/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On **11/4/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$45,121.00**; the average weekly wage was **$867.71**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

**ORDER**

Petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her bilateral hands/arms due to repetitive work activities, that arose out of and in the course of her employment by respondent and manifested itself on 11/4/11, and failed to prove by a preponderance of the credible evidence that her current condition of ill-being is causally related to the alleged injury on 11/4/11. Petitioner's claim for compensation is denied.

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

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

Signature of Arbitrator

**5/5/15**
Date

ICArbDec p. 2

MAY 1 3 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT: 16IWCC0469

Petitioner, a 52 year old Office Associate, alleges she sustained an accidental injury to her bilateral hands/arms due repetitive work activities that arose out of and in the course of her employment by respondent that manifested itself on 11/4/11. Petitioner has worked in this position for more than 10 years. Petitioner testified that the she randomly picked an accident date of 11/4/11 because she was told she had to, and she decided on this date because it was her birthday. Petitioner reported pain before this date.

Petitioner works from 7 am to 3:30 pm and has an hour lunch, and two 15-minute breaks. She testified that she only takes one 15 minutes. Petitioner testified that her duties vary, and she performs 3 main activities a day, and works on three different systems: the Indices system, the Docuwear system, and the Kodak system. Petitioner has two different work stations. One where she does the Indicing, and the other where she scans. Petitioner testified that spends most of her day scanning and typing labels. She testified that she spends 5% of her day emailing and indicing. While at the Indices work station she spends 1/2 her time reading reports.

Petitioner testified that the way she determines how many pages she processes is by measuring her total report pages with a ruler. For each Indice and Scan report petitioner enters, she enters the same data for each, regardless of how many pages are in the report. She testified that the number of pages in a report can range from 6 to 50 pages each. Petitioner counts each page of the report, as opposed to the number of reports she actually processes daily. Petitioner testified that she enters about 10-15 words in the computer per report. This information is mostly numeric and includes the case opening number, agent ID number, where the agent works, what zone they work in the county, person's name, SSN, driver's license number, FBI#, BIC#, vehicles, date of birth, sex, height, weight, hair color, eye color, skin tone, address, and crime. It takes petitioner about 2 minutes to enter data off of each report that she scans. For each report she indices it takes 5-10 minutes.

Before petitioner can enter data into the system off the scanned documents she must first scan the documents. She does this by taking a stack of papers, removing the staples from the reports, placing a blank page between the reports, scanning the reports, and re-stapling the reports. Once all the reports are scanned, petitioner bundles the stacks up by title number and carries them to the boxes. Petitioner stated that she takes the staples out of approximately 50 to 75 reports a day. After all this is completed, petitioner then begins entering the data into the system. Petitioner testified that she spends at least one hour day scanning documents.

Catherine Kirk, Executive 2 for respondent, was called as a witness on behalf of respondent. Kirk has supervised petitioner for the past 15 years. She testified that petitioner's duties include filing, inquiring, and scanning. She stated that the actual pages that have data entry information on them varies from 53 to 250 a day. She also testified that each document that petitioner enters data from ranges in size from 6 to 50 pages. Kirk

further testified that on each report petitioner only picks the personal identifiers out of the report. However, to do this she must read the reports to find out where that data is in the report. Kirk testified that petitioner never complained of any problem with her hands or wrist before she first sought treatment.

Kirk testified that although the computers can track how many keystrokes are entered, that option is not utilized by respondent. She testified that there are 210 pages per inch when measuring with a ruler. Kirk had no idea how many pages petitioner actually handled on a daily basis. The closest estimate she could give was between 53 and 250. Kirk testified that petitioner only enters personal identifiers into the computer such as name, date of birth, sex, race, address, Social Security number, FBI number, other identifying numbers, and case class and level.

On 2/13/12 petitioner presented to Dr. Irfan Moinuddin, her primary care physician, for evaluation of pain, numbness, tingling in the upper extremities, that appeared to be neuropathic. Petitioner gave a history of neuroplasty decompression of the median nerve at the carpal tunnel, bilaterally on 1/1/00. She also reported that she is a former smoker, is postmenopausal, and has hypertension.. Dr. Moinuddin assessed cervical radiculopathy and ordered an EMG.

On 2/15/12 petitioner completed a Worker's Compensation Employees Notice of Injury form. Petitioner noted an injury to her wrist, elbow and shoulder while doing repetitive motion work on computer. She indicated that the injury occurred from typing on the computer, sorting work, and working with a mouse. She identified her date of injury as 11/4/11. She did not give any reason why this injury was not reported on the alleged date of injury, but rather on 2/15/12.

On 2/20/12 petitioner underwent an EMG/NCV performed by Dr. Trudeau. Petitioner reported that as of 11/4/11 she has had work related difficulties involving the upper extremities. She was very specific that in the course of her work activities pain and parathesias occurred in her upper extremities. Petitioner reported that her symptoms had been going on for at least a year, and the only thing that makes her symptoms better is not using them. She reported that using them for repetitive motion work duties make them worse. Dr. Trudeau's interpretation of the EMG/NCV was bilateral carpal tunnel syndrome, moderately severe on both sides; bilateral cubital tunnel syndrome, mild and neuropraxic on both sides; and right C7 radiculopathy, mild.

On 3/30/12 petitioner returned to Dr. Moinuddin. He reviewed the results of the EMG and referred petitioner for an orthopedic consultation. Dr. Moinuddin assessed bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and cervical radiculopathy.

On 5/29/12 petitioner returned to Dr. Moinuddin. She did not make any mention of her bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, or cervical radiculopathy.

On 7/25/12 petitioner filed her Application for Adjustment of Claim. She alleged an accident date of 11/4/11 due to repetitive trauma. Parts of the body affected were identified as bilateral wrists and arms, and right shoulder. She identified the nature or injury as carpal and cubital tunnel, and radiculopathy.

On 11/14/12 petitioner presented to Dr. Greatting for evaluation of her bilateral hand complaints. Dr. Greatting was petitioner's own choice for a second opinion. Petitioner completed a history sheet which noted that she had hypertension. She reported a couple of years of pain and numbness and tingling in both hands, with discomfort at night. She stated that the right side bothers her more at night than the left. She reported that during the day, she gets symptoms using a mouse with her right hand. She also reported symptoms while doing keyboarding activities, but stated that this does not bother her as much as when she uses the mouse. She gave a history of wearing splints at night intermittently for a long time, that helped some. She gave a history of previous bilateral carpal tunnel releases by Dr. MacGregor about 14 years ago. She reported that she was asymptomatic for long period of time, but then developed recurrent symptoms. She gave a history of doing a lot of keyboarding, typing and filing for respondent. Dr. Greatting noted that petitioner quit smoking in 2009. Petitioner denied any neck or shoulder pain. Petitioner stated that she uses a wrist rest with her computer keyboard at work. She described her elbows as being significantly flexed while doing her work activities such as keyboarding and using a mouse. She stated that she would intermittently rest her elbows on the arms of her chair. Dr. Greatting reviewed the results of the EMG/NCV performed by Dr. Trudeau in February 2012. Dr. Greatting examined petitioner and assessed bilateral carpal tunnel syndrome, recurrent, and bilateral cubital tunnel syndrome. He recommended surgical intervention.

On 2/26/13 petitioner underwent a release of her ulnar nerve at the right elbow, and recurrent release of her right carpal tunnel. These procedures were performed by Dr. Greatting. His postoperative diagnoses were right cubital tunnel syndrome, and recurrent right carpal tunnel syndrome. On 3/7/13 petitioner followed up with Dr. Greatting. She reported that the numbness in her hand had improved. Dr. Greatting noted that petitioner had good strength in the median and ulnar nerve distributions. He restricted petitioner to no lifting or carrying more than 5 pounds. On 3/12/13 petitioner sought additional treatment for an infection in her right carpal tunnel release incision. Petitioner was given antibiotics. By 3/21/13 it was noted that petitioner's infection had resolved almost 100%. Petitioner still reported some mild discomfort around and over the incision, but otherwise was doing well. Petitioner noted a little bit of swelling and thickening around the

incision, and some numbness and tingling in her fingers that was much improved. Petitioner was told to continue using her hand as tolerated.

On 5/1/13 petitioner underwent a release of the ulnar nerve of the left elbow, and a recurrent left carpal tunnel release. This procedure was performed by Dr. Greatting. His postoperative diagnoses were left cubital tunnel syndrome, and recurrent left carpal tunnel syndrome. Petitioner followed up postoperatively with Dr. Greatting. On 5/15/13 Dr. Greatting noted that petitioner was doing very well with respect to the right side, and noted that her numbness had improved on the left side. On 6/26/13 petitioner reported that her arms were doing great, her numbness had resolved, and her strength was good. On examination, petitioner had good motion of her elbows, wrists, and hands bilaterally. She noted some decreased flexion of her left small finger. Dr. Greatting was of the opinion that with respect to her cubital and carpal tunnel she was doing well. He released her without restrictions or limitations, and was of the opinion that she had reached maximum medical improvement. Dr. Greatting was of the opinion that petitioner may have some tenosynovitis of her left small finger. On 8/7/13 Dr. Greatting injected petitioner's little finger with a steroid injection. He was of the opinion that this condition was not related to her carpal or cubital tunnel. Petitioner continued to treat with Dr. Greatting after this date for her trigger finger, and did not make any complaints regarding her hands or elbows. On 1/2/14 petitioner was seen by Dr. Greatting's nurse practitioner complaining of a one-month history of pain in her right palm and the index, middle, and ring fingers. She described it as an aching pain that would radiate up the elbow and towards the shoulder. A new nerve conduction study was recommended.

On 1/28/14 petitioner underwent a repeat EMG/NCV performed by Dr. Trudeau. Petitioner again reiterated that her work activities bring on and aggravate her symptoms. Petitioner reported that she noticed improvement of her symptoms after her left carpal tunnel release last year. Unfortunately complaints still persist on the right side when she uses her right upper extremity for various work activities, following her right carpal tunnel release last year. She reported a persistent increase of her parathesias in the right hand. Petitioner reported a pain level of 8/10 while working, and 5/10 while at rest. The results of the EMG/NCV revealed median neuropathy at the right wrist, similar to, and largely unchanged from the prior evaluation on 2/20/12. Dr. Trudeau was of the opinion that it likely represented a persistent/residual lesion. The results further revealed ulnar neuropathy at the right elbow, that was significantly improved from 2/20/12; median neuropathy at left wrist, significantly improved from 2/20/12; and right C7 radiculopathy, similar to, and largely unchanged from the previous study on 2/20/12.

On 2/19/14 petitioner returned to Dr. Greatting. He reviewed the results of the EMG/NCV. An examination revealed a negative Tinel's and compression test over her carpal tunnel. She also had a negative

Tinel's over her nerve at the elbow. Petitioner demonstrated good strength without weakness or atrophy in the radial, median, and ulnar nerve distributions of her right arm. Dr. Greatting was uncertain as to etiology of petitioner's ongoing right upper extremity complaints. He was of the opinion that some of the complaints certainly could be related to a cervical radiculopathy. He recommended an MRI of the cervical spine.

On 4/8/14 the evidence deposition of Dr. Mark Greatting, an orthopedic surgeon, was taken on behalf of the petitioner. Petitioner drafted a Job Description for herself and presented it to Dr. Greatting. She indicated that her job requires that she "ready work and enters the data into the computer". She noted that this "involves processing anywhere from 200-400 pieces of documents a day". She indicated that "part of her job is to prepare the work for the scanner, including researching information on the computer and pulling staples out of the documents, putting page breaks in between the documents and then scanning the documents into the computer". She then noted that she has to put the documents back in the correct order by restapling. Petitioner then indicated that she enters the information into the computer. She noted that when she's done scanning and stapling the work, it is returned to boxes, which are then taken to the basement two times a month. Petitioner alleged that 100% of her day is spent handling the 200 to 400 pieces of documents. She indicated that she spends approximately 90% of her day doing data entry, and 10% removing staples, sorting, scanning, and reassembling the documents. She also indicated that she handles phone calls from Illinois State Police agents and the Illinois Gaming Board. Petitioner holds the documents in her left hand and removes the staples with her right hand, and then uses the right hand to staple the documents again after she has reassembled them. While entering information into the computer petitioner indicated that she is required to use the keyboard and mouse rapidly and accurately for the majority of her day.

Dr. Greatting testified that petitioner told him she was employed as an Office Associate for the Illinois State police for the past 24 years, and that she did a lot of typing, keyboarding, filing and use of a mouse. Dr. Greatting was of the opinion that the longer someone flexes their elbows the more significant of a problem that would be, and could possibly aggravate cubital tunnel. Dr. Greatting testified that the only information he had regarding how petitioner's hands were positioned at her desk was that she stated that she used the wrist rest on her computer. Dr. Greatting was of the opinion that there are a lot of carpal tunnel syndrome cases which are idiopathic in nature. Dr. Greatting opined that he did not know the exact cause of petitioner's carpal tunnel syndrome. However based on the history she gave, he was of the opinion that her work activities were at least an aggravating or contributing factor to her symptoms. Dr. Greatting could not say that her work directly caused her carpal tunnel syndrome. Dr. Greatting was of the opinion that there is a higher incident of carpal and cubital tunnel syndrome in people that are obese. Dr. Greatting was of the opinion that the job description petitioner

drafted included tasks that would contribute to or aggravate carpal and cubital tunnel syndrome. Dr. Greatting was of the opinion that a lot of it depended on the positioning of the body, how the elbows were positioned, and the way the wrists are positioned. Dr. Greatting opined that the treatment and evaluations he performed of petitioner were reasonable and necessary. Dr. Greatting opined that it is unclear whether or not petitioner will continue to have problems with her right upper extremities as they relate to cubital and carpal tunnel.

On cross-examination Dr. Greatting testified that he did not know what type of chair petitioner sat in or whether or not the arm rests were padded. Dr. Greatting testified that petitioner did not discuss with him what she was typing and how long she would spend typing without interruption. He also noted that petitioner did not discuss whether or not the typing was broken up by periodic intervals of filing or any other thing. Dr. Greatting noted that petitioner has a BMI of 37.45 which he would classify as obese. Dr. Greatting was of the opinion that smokers are at an increased risk of developing carpal tunnel syndrome. Dr. Greatting opined the cause of petitioner's carpal tunnel and cubital tunnel syndrome could be idiopathic.

On 8/21/14 petitioner underwent a Section 12 examination performed by Dr. James Emanuel, on behalf of the respondent. Petitioner gave a history of being employed by respondent for 26 years. She noted that her primary job was entering reports on the computer that cover the State Police for the State of Illinois. Petitioner indicated that the majority of her day, six hours per day, is spent on the computer with an additional 1 1/2 to 2 hours spent scanning documents. Petitioner indicated that respondent rotates the employees through these positions. Petitioner told Dr. Emanuel that on 11/4/11 the symptoms in her hands, which included pain and numbness, got so bad that she was unable to perform her work and had significant night pain with sleep deprivation and irritability. She stated that the onset was gradual and involved primarily her whole hand, but mainly the index and long finger of both hands. Petitioner also indicated that the discomfort radiated to her elbow and up into her shoulder. Petitioner gave Dr. Emanuel a history of her prior bilateral carpal tunnel surgeries back in the late 1990s by Dr. MacGregor. Petitioner told Dr. Emanuel that she developed psoriasis after her most recent surgery, with a component of rheumatoid arthritis. Petitioner complained of numbness and tingling in her hands with computer entry, especially when entering data constantly all day long. Petitioner reported that her night discomfort has abated.

Following an examination and record review that included a physical demand job analysis for an Office Associate, Dr. Emanuel's diagnosis was bilateral recurrent carpal tunnel syndrome, bilateral cubital tunnel syndrome, left small finger trigger finger, and C7 radiculopathy with degenerative cervical disc disease. Dr. Emanuel noted that the job description indicated that petitioner was required to lift 1 to 10 pounds less than three times per week, and lift 11 to 20 pounds less than three times per month. He also noted that the job

requires use of the hands for gross and fine manipulation for six hours per day. Dr. Emanuel was of the opinion that petitioner had reached maximum medical improvement following the surgeries on the right and left upper extremities involving both carpal tunnel and cubital tunnel. He did not believe that petitioner required any permanent physical restrictions or limitations on work duties for normal activities of daily living based on her diagnoses and the surgeries performed. He opined that the petitioner is capable of working full duty in her pre-injury job without restrictions.

On 11/20/14 Dr. Emanuel drafted a letter in response to a letter from Ms. Hill at Integrity Medicolegal Enterprises. Dr. Emanuel believed that there was no accident or injury that occurred during petitioner's employment as of the date of 11/4/11. He disagreed with Dr. Greatting's opinions that if petitioner rested her wrist while doing keyboard activities that significant flexion of the elbow while doing these activities could cause or aggravate cubital tunnel syndrome. Dr. Emanuel was of the opinion that typically cubital tunnel syndrome arises in patients with a history of repetitive elbow flexion and extension, direct trauma, heavy lifting and gripping, results of previous elbow fracture, and malalignment. He was of the opinion that it does not result from typing or data entry. He stated that it is impossible to put pressure on the ulnar nerve with the elbow in the position of typing. He was of the opinion that one would have to literally lay the elbow flat on its medial aspect in order to put pressure on the ulnar nerve at the cubital tunnel. In that position, it would make keyboard entry impossible. He opined that petitioner's job activities including data entry, and the job analysis indicating the patient was required to lift 1 to 10 pounds less than three times per week, and 11 to 10 pounds less than three times per month, are not activities that could cause carpal tunnel syndrome or cubital tunnel syndrome. He was of the opinion that carpal tunnel syndrome and cubital tunnel syndrome can occur in the general population without association to any type of workplace activity. He was of the opinion that petitioner's underlying medical condition, that include hypertension and autoimmune disease, in addition to her body habitus, are most likely the source of her carpal tunnel and cubital tunnel syndrome.

On 2/9/15 the evidence deposition of Dr. James Emanuel, an orthopedic surgeon, was taken on behalf of respondent. Dr. Emanuel identified petitioner's co- morbidities associated with her developing carpal and cubital tunnel as being markedly overweight with the stature of 5'3", weighing 248 pounds, with a body mass index of 42.89; a history of hypertension; and a recent diagnosis with of a systemic collagen vascular disease such as rheumatoid arthritis as a possibility, or psoriatic arthritis. Dr. Emanuel opined that petitioner's work duties could not cause carpal tunnel syndrome or cubital tunnel syndrome.

On cross-examination Dr. Emanuel was of the opinion that petitioner's carpal tunnel was symptomatic when she did her work activities, but her work activities were not an aggravation. He was of the opinion that

something that would physically aggravate the nerve would be something like power gripping, vibratory tools, using a hammer, or other activities like this, that petitioner did not perform. With respect to elbow activities that could physically aggravate the nerve, he identified repetitive flexion and extension of the elbow with heavy lifting, pushing and pulling. He opined that typing 4 to 6 hours a day would not aggravate carpal or cubital tunnel.

Petitioner testified that currently she still has problems when she works on the computer a lot. She testified that when she was off work following her surgeries she did not receive any temporary total disability benefits, but rather took sick and vacation time.

**C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?**
**F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?**

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case … where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injuries to his bilateral hands and arms, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;

5. The date that the petitioner first noticed the symptoms of the condition.

Petitioner is alleging a manifestation date of 11/4/11. Petitioner testified that this was not the date she first sought medical attention for her condition, not the date she was first informed by a physician that her condition was work related, not the date she was first unable to work as a result of the condition, not the date when the symptoms became more acute at work, and not the date she first noticed the symptoms of her condition. In fact, petitioner testified that she selected this date because she was told she needed an accident date and she just decided to pick 11/4/11 because it was her birthday and she would remember that date.

In addition to providing an accurate manifestation date, the petitioner must provide specific and detailed information concerning the her work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. In the case at bar it is unclear how much data petitioner actually enters into the system each day. Throughout the record, petitioner reports that she scans documents/reports and then enters data off these documents/reports into the computer system. Petitioner first testified that she scans between 300 and 400 reports a day. She later testified on cross-examination that she scans between 500 and 800 reports a day, and indices 300 to 400 reports a day. A while later in her cross-examination she estimated that she scans between 300 and 500 reports today, with a minimum being 200 a day. When she spoke to Dr. Greatting she told him that she processed between 200-400 pages a day. She also testified that she takes the staples out of approximately 50 to 75 reports a day. Each report document ranges from 6-50 pages. Petitioner also testified that respondent rotates the employees through various positions.

Petitioner then testified that the actual pages of these documents/reports that have data entry information on them, that she actually enters into the computer, varies from 53 to 250 a day. In fact, Kirk had no idea how many pages petitioner actually handled on a daily basis. The closest estimate she could give was between 53 and 250. Both testified that petitioner only enters about 10-15 items off each document/report. The arbitrator finds a range of 53-250 is quite broad, making it difficult to determine the actual amount of data petitioner enters each day.

Both petitioner and Kirk testified that petitioner must read these 6-50 page reports to find the data that needs to be entered. The arbitrator reasonably infers that this means the petitioner must read 6-50 pages of each report before she can enter the relevant 10-15 fields of data from that report. The arbitrator finds this alone shows that petitioner's typing was not of a repetitive nature. It shows she had breaks that lasted as long as it took her to read 6-50 pages in the report. In addition to typing this data in, petitioner could spend 2-3 hours a

day scanning these documents/reports into the scanner. As a result, the arbitrator not only finds petitioner's data entry was not repetitive, but also finds petitioner could not perform data entry 6-6.5 hours a day.

With respect to the medical experts having a detailed and accurate understanding of the petitioner's work activities, the arbitrator finds they did not. Petitioner told Dr. Greatting that she processes 200-400 pieces of documents a day. Based on petitioner's, as well as Kirk's testimony, the arbitrator finds this estimate is not accurate. Although petitioner may handle 200-400 pieces of paper a day, the number of documents she must retrieve 10-15 fields of data from only ranges from 53-250. Dr. Greatting also testified that the only information he had regarding how petitioner's hands were positioned at her desk was that she stated that she used the wrist rest on her computer. Dr. Greatting testified that he did not know what type of chair petitioner sat in or whether or not the arm rests were padded. He also testified that petitioner did not discuss with him what she was typing and how long she would spend typing without interruption. He also noted that petitioner did not discuss whether or not the typing was broken up by periodic intervals of filing or any other thing, which the arbitrator finds it clearly was. Dr. Emanuel only had a history of petitioner performing data entry and her lifting requirements.

With respect to any causal connection between petitioner's carpal and cubital tunnel syndrome and her work activities, Dr. Greatting was of the opinion that there are a lot of carpal tunnel syndrome cases which are idiopathic in nature, and he did not know the exact cause of petitioner's carpal tunnel syndrome. Dr. Greatting could not say that her work directly caused her carpal tunnel syndrome. Dr. Greatting was of the opinion that there is a higher incident of carpal and cubital tunnel syndrome in people that are obese, and petitioner has a BMI of 37.45 which he would classify as obese. Dr. Greatting was also of the opinion that smokers are at an increased risk of developing carpal tunnel syndrome, and petitioner had been a smoker. Dr. Greatting opined that the cause of petitioner's carpal tunnel and cubital tunnel syndrome could be idiopathic.

Dr. Emanuel was of the opinion that typically cubital tunnel syndrome arises in patients with a history of repetitive elbow flexion and extension, direct trauma, heavy lifting and gripping, results of previous elbow fracture, and malalignment, but not from typing or data entry. He stated that it is impossible to put pressure on the ulnar nerve with the elbow in the position of typing. He was of the opinion that one would have to literally lay the elbow flat on its medial aspect in order to put pressure on the ulnar nerve at the cubital tunnel, and in that position, it would make keyboard entry impossible. He opined that petitioner's job activities including data entry, and the job analysis indicating the patient was required to lift 1 to 10 pounds less than three times per week, and 11 to 10 pounds less than three times per month, are not activities that could cause carpal tunnel syndrome or cubital tunnel syndrome. He was of the opinion that carpal tunnel syndrome and cubital tunnel

syndrome can occur in the general population without association to any type of workplace activity. He was also of the opinion that petitioner's underlying medical condition, that included hypertension and autoimmune disease, in addition to her body habitus, are most likely the source of her carpal tunnel and cubital tunnel syndrome.

Dr. Emanuel identified petitioner's co- morbidities associated with her developing carpal and cubital tunnel include the fact that petitioner was markedly overweight with the stature of 5'3", weighing 248 pounds, with a body mass index of 42.89; a history of hypertension, and a recent diagnosis with of a systemic collagen vascular disease such as rheumatoid arthritis as a possibility, or psoriatic arthritis. Dr. Emanuel opined that petitioner's work duties could not cause carpal tunnel syndrome or cubital tunnel syndrome.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her bilateral hands/arms due to repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 11/4/11, and failed to prove by a preponderance of the credible evidence that her current condition of ill-being is causally related to the alleged accident on 11/4/11.

**E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT?**
**J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?**
**K. WHAT TEMPORARY TOTAL BENEFITS ARE IN DISPUTE?**
**L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?**

Given the fact that the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her bilateral hands/arms due to repetitive work activities, that arose out of and in the course of her employment by respondent and manifested itself on 11/4/11, and that petitioner has failed to prove by a preponderance of the credible evidence that her current condition of ill-being is causally related to the alleged injury, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS )
) SS.
COUNTY OF )
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Owen Marshall,

Petitioner,

vs.

NO: 14WC 29395

16IWCC0470

Walquist Farm Partnership,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner, herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, 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 2, 2015 is hereby affirmed and adopted.

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

16IWCC0470

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

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

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

DATED: JUL 13 2016
MJB/bm
o-7/11/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

**MARSHALL, OWEN**
Employee/Petitioner

Case# **14WC029395**

**WALQUIST FARM PARTNERSHIP**
Employer/Respondent

16IWCC0470

On 10/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5404 LAW OFFICE OF FOLEY & DENNY
TIMOTHY D DENNY
PO BOX 685
ANNA, IL 62906

5657 MORROW-WILLINAUER-KLOSTERMAN
KIM PARKS
500 N BROADWAY SUITE 1420
ST LOUIS, MO 63102

STATE OF ILLINOIS )
)SS.
COUNTY OF Jefferson )

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

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION
### 19(b)

**Owen Marshall**
Employee/Petitioner

v.

**Walquist Farm Partnership**
Employer/Respondent

Case # **14** WC **29395**

Consolidated cases: **N/A**

**16IWCC0470**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **August 7, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

16IWCC0470

**FINDINGS**

On the date of accident, **March 5, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**34,840.00**; the average weekly wage was $**670.00**.

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

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

Respondent shall be given a credit of $**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** for medical bills paid by its group medical plan for which credit may be allowed under Section 8(j) of the Act.

**ORDER**

Petitioner sustained an accident on March 5, 2014 but failed to prove that his condition of ill-being in his back is causally connected to that work accident. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

Nancy Lindsay
Signature of Arbitrator

**September 30, 2015**
Date

ICArbDec19(b)

OCT 2 2015

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner alleges an injury to his low back on March 5, 2014 while helping to move a barrel of iodine. The issues in dispute are accident, causation, medical expenses, prospective medical care and temporary total disability benefits. Respondent tendered no exhibits.

**The Arbitrator finds:**

Medical records from Rural Health Vienna Medical Clinic were offered into evidence as Petitioner's Exhibit 1. These records date back to June 7, 2007 and reflect treatment to Petitioner for a variety of unrelated issues except for the following. There is an x-ray from Massac Memorial Hospital dated October 17, 2011 reflecting moderate degenerative disc disease at L2-4, moderate to moderately severe degenerative disc disease at L4-S1 and anterior osteophytosis diffusely throughout the lower thoracic upper-lumbar spine. At the March 28, 2012 office visit Petitioner was noted to have some arthritis of his back and a previous surgery in 2004. Petitioner was noted to be a farmer with lots of twisting and climbing and he reported some aching in his low back. Petitioner was started on Naproxen. As of July 25, 2012 Petitioner was requesting narcotics for his chronic back pain as the Naproxen hadn't helped. Advil did and the doctor encouraged him to continue using it but not to go on naproxen due to the nature of his work activities (heavy equipment). Petitioner did not return to see his doctor at Rural Health until April 17, 2013 at which time no back complaints were noted. Similarly, no complaints were noted on May 5, 2013 and December 4, 2013. (PX 1)

Petitioner next presented to Rural Health, Inc. on March 7, 2014 regarding an "acute visit." He was seen by Amanda Endrizzi, PAC, and Dr. Ribbing Petitioner complained of numbness in his feet of three months' duration, primarily in his right foot. Petitioner described difficulty walking

and he was having a little bit of back pain. The office note records Petitioner's history of back surgery in 2004 and imaging done in 2011 showed moderate degenerative disc disease at L2-4 and moderate to moderately severe degenerative disc disease L4 to S1. Petitioner's history of alcoholism was also noted with the doctor reporting that Petitioner had recently had another bout with it and was having a difficult time coming off of it because of symptom withdrawal. Petitioner also had a history of manic depression but didn't wish to take any medication for it. Petitioner was diagnosed with alcohol withdrawal and foot numbness. An MRI of his back was ordered to see if it could be causing the foot numbness. No mention of a work accident was noted. Petitioner was to return thereafter. (PX 1)

Petitioner underwent an MRI on March 18, 2014 as a result of bilateral foot numbness. (PX 1) It revealed: neural foraminal narrowing (moderate to severe) at L5-S1 bilaterally; no significant spinal canal narrowing; disc desiccation throughout the lumbar spine with disc height loss greatest at L5-S1 which is moderate to severe: and subtle grade 1 retrolisthesis of L4 on L5 and L5 on S1.

Petitioner followed up with Rural Health, Inc. on March 21, 2014 and he and the doctor reviewed the MRI. Petitioner's complaints included his right foot (described by Petitioner as "pretty much dead") and left back pain radiating down his left leg. Petitioner had some feeling in his left foot that would come and go. Standing made it worse. Petitioner was also reportedly working on his alcohol issue. He was referred to Dr. Grubbs, a neurosurgeon, "as soon as possible" for his back pain. No mention of a work accident was made. (PX 1)

Petitioner presented to the office of Dr. Fonn on April 16, 2014. As part of the examination Petitioner completed a Patient Medical History form in which he gave an accident date of March 5, 2014 when he was helping lift a 55 gal. drum of iodine at work. Petitioner also referenced "farm related work due to lifting." He listed Dr. Thomas Wilson as a doctor he had seen. Petitioner complained of being unable to be on his feet for any period of time and experiencing pain in his

lower back and the bottom of his feet and toes with numbness and sharp shooting pains. Petitioner claimed he was unable to work and had work restrictions from a doctor. (PX 3)

According to Dr. Fonn's office note of April 16, 2014 Petitioner had a history of undergoing a microdiscectomy in September of 2004 at the L3/4 level with good relief of his left-sided symptoms. Petitioner reported that on March 5, 2014 he was working around livestock, rolling a 55 gallon drum and bent over and twisted while lifting it and felt a popping sensation in his back and developed more severe back pain. Initially his back pain was more severe than his leg pain but now it was just the opposite and Petitioner was having a difficult time walking. Petitioner reported the pain radiated into his right calf and all five toes, "right a little worse than the left." Petitioner reported undergoing physical therapy but no injections. Dr. Fonn recommended a course of lumbar epidural steroid injections at L5/S1 bilaterally and noted Petitioner might be a candidate for a fusion surgery pending the results of a CT myelogram and discogram of lumbar spine. Dr. Fonn took Petitioner off work at that time. (PX 3, p. 24)

Petitioner followed up with Rural Health, Inc. on May 21, 2014. Petitioner reported seeing Dr. Fonn, a neurosurgeon, and that he was waiting for injections but was having complications with workers' compensation which would not pay. No mention of a work accident was noted. (PX 1)

Petitioner underwent lumbar epidural steroid injections beginning on July 30, 2014. (PX 3, pp. 29-50)

Petitioner signed his Application for Adjustment of Claim herein on August 2, 2014. (AX 2)

Petitioner returned to Dr. Fonn on August 20, 2014 reporting minimal relief in his symptoms. Dr. Fonn planned to proceed with surgical intervention as he recommended a PLIF L5/S1 pending the results of the CT myelogram. (PX 3, p. 51). That procedure was performed on September 4, 2014. (PX 3, pp. 52-53). The discogram was performed on

September 11, 2014 noting concordant pain at L5/S1. (PX 3, p. 55). On September 25, 2014 Dr. Fonn re-examined Petitioner and again recommended surgical intervention at L5-S1. (PX 3, p. 57).

After additional follow-up visits Petitioner underwent surgery on October 31, 2014 at St. Francis Medical Center. The procedure consisted of L5-S1 bilateral laminectomies with decompression and fusion. (PX 3, p. 60). The operative note also notes broad based disc herniations. (PX 3, p. 61)

A January 5, 2015 CT of Petitioner's lumbar spine showed the instrumentation was in place and fusing had begun. Petitioner also reported falling out of bed a week and a half earlier with increasing pain down his legs. (PX 3, p. 64)

Ms. Endrizzi (Rural Health) prepared a note dated January 21, 2015 indicating Petitioner did state on March 7, 2014 that he was injured while working on the farm. The note also indicates he stated he would be filing a work comp claim. (PX 1)

As of February 11, 2015 another CT showed good fusion occurring with placement and instrumentation with no migration subluxation or fracture of the instrumentation. (PX 3, p. 65) Petitioner was advised to begin physical therapy, aquatic therapy, and trigger point injections. (PX 3, p. 65) As of May 14, 2015 Petitioner was hoping to return to work and advised he was retraining for a different field. Through the last office note offered into evidence on June 22, 2015 Petitioner was continuing in physical therapy under the direction of Dr. Fonn. Petitioner's recovery continued to be satisfactory and without complication. (PX 3, p. 69)

The evidence deposition of Dr. Sonjay Fonn, taken on July 8, 2015, was offered into evidence as Petitioner's Exhibit 5. Dr. Fonn has been a practicing neurosurgeon for approximately 8 years. (PX 5, p. 4) He focuses primarily on disorders of the spine but, also

does some cranial work as well as peripheral nerve work. (PX 5, p. 4) He is currently licensed to practice neurosurgery in the state of Missouri. (PX 5, p. 5)

Dr. Fonn testified that Petitioner was first seen in his practice on April 16, 2014 on referral by Dr. William Jerald Ribbing from Anna IL. (PX 5, p. 6) He confirmed that Dr. Ribbing was Petitioner's family physician at Rural Health. (PX 5, p. 7) The petitioner reported an injury that occurred on March 5, 2014 while he was working on a farm rolling a 55 gallon drum and felt a popping sensation in his back while lifting and had severe pain. (PX 5, p. 7). Upon physical examination Dr. Fonn noted weakness in the extensor halluces longus and the right side was greater than the left side. He also noted decrease sensation in the L5 distribution. (PX 5, p. 8). After review of the MRI, Dr. Fonn formulated a diagnosis with lumbar radiculopathy and spine spondylolisthesis at L45, 5/S1. (PX 5, p.9). Dr. Fonn initially recommended conservative treatment consisting of off work pain medications muscle relaxers and epidural steroid injections. (PX 5, pp. 9-10) Dr. Fonn noted the goal of injections is to decrease inflammation in the nerve that might be caused by stenosis or compression and the injection might become diagnostic in nature if the patient reports relief post injection. (PX 5, p. 10) The steroid injections calmed some of Petitioner's inflation and confirmed the initial diagnosis which was a problem of lumbar radiculopathy L5/ S1 level. (PX 5, p. 11) He recommended possible surgical correction pending results of a myelogram and discogram. (PX 5, p. 11) That study gives a lot of information regarding the boney structure and is useful when one considers a fusion and the placement of instrumentation. (PX 5, p. 12) The CT myelogram in this case confirmed a disc osteophyte primarily L5/S1 levels causing stenosis. (PX 5, p. 12). On October 31, 2014 Dr. Fonn proceeded with an L5/S1 decompression and stabilization with instrumentation as he felt the L5-S1 level was the cause of Petitioner's back and leg pain. (PX, p. 13)

Dr. Fonn offered the opinion within a reasonable degree of medical certainty that the work- related accident on March 5, 2014 was a cause of the pathology and symptoms that he diagnosed at the L5/S1 level and the conservative treatment, surgery, and post-operative care. (PX 5, p. 17). Dr. Fonn further clarified that in his experience he frequently treats patients that have performed labor and specifically farm labor. (PX 3, p.17). A part of that practice involves observing what are the limits that one person can reasonably be expected to do. (PX 5, p.17). He confirmed that a 55 gallon drum of liquid would weigh 450 pounds. (PX 5, p. 17). In his experience it would seem very unlikely that one person would be able to unload a 55 gallon drum of iodine out of the back of a truck alone. (PX 5, p. 18).

On cross-examination Dr. Fonn noted that Petitioner had a history of an antalgic gait for two months prior to his initial exam. (PX 5, p. 21). Dr. Fonn acknowledged that the note was made by his assistant and while he did not note the two months history in his note he did reference Petitioner had difficulty walking. Dr. Fonn also acknowledged he had seen no records from Rural Health Clinic. When asked regarding documentation or a referral from Dr. Ribbing at Rural Health Dr. Fonn noted that a referral is usually placed onto the online system by the receptionist and the referral does not necessarily make it to the actual physical chart. (PX 5, p. 23)

Dr. Fonn testified that his physician's assistant sometimes examines the patients and Petitioner was last seen by him personally on February 11, 2015. He confirmed that on January 5, 2015 the note indicates that Petitioner had fallen out of bed a week and a half earlier and had increased pain radiating into both legs. (PX 5, p. 32). However he noted that the physical examination was unchanged from the December 3, 2014 exam. (PX 5, p.33).

Dr. Fonn confirmed that although his notes may not specifically read that there are restrictions, the restrictions remain as previously dictated and that he had not changed the

restrictions as previously given through February 11, 2015. (PX 5, p. 34-35). Dr. Fonn was asked multiple times during cross-examination about the lack of physical examination results in his notes to which he responded that the notation of resolution of pain, or unchanged from prior visits, denotes an exam was performed and those were the essential findings. (PX 5, p. 35). He also noted that it is common for him to recommend trigger point injections post-operative before surgery because a patient commonly has muscle spasms after a fusion surgery. (PX 5, p. 36). Dr. Fonn confirmed that he had reviewed medical records from Petitioner's prior surgery in 2004. (PX 5, p. 38). Dr. Fonn also testified that his opinions in this case were based upon Petitioner's history to him as to how he hurt himself and his opinion could change if that history was inaccurate or incomplete. (PX 5, pp. 42-43)

On redirect examination Dr. Fonn noted that his common practice is to carbon copy the referring physician on patient notes and in this case he was carbon copying Dr. Ribbing. (PX 5, p. 45). Dr. Fonn also confirmed that he not only relies on the patient's history, but he also "evaluates" whether the patients account of the accident is a "plausible one." (PX 5, p. 45). For instance if someone had reported they lifted something beyond what one could reasonably expect one person to lift it would "raise a red flag in his mind." (PX 5, pp. 45-46). He also clarified that it is usual and customary for patients to follow up with the physician's post-operatively for care. (PX 5, p. 46). He reiterated that the current restrictions for Petitioner are based upon the procedure he performed, his experience, and the fact that he is ultimately responsible for his patient's care. (PX 5, p. 46). He confirmed none of the questions on cross-examination altered his opinion regarding Petitioner's injury as pertaining to this work accident. (PX 5)

The form 45 Employer's First Report of Injury was offered into evidence as Petitioner's Exhibit 6. It confirms that Petitioner reported that he was injured on March 5, 2014 and claimed a back injury two days later. (PX 6)

Petitioner's case proceeded to arbitration on August 7, 2015. Witnesses included Petitioner, Aric Walquist (Respondent's representative) and Eric Unverfehrt.

Petitioner testified he was employed as a farm hand by Respondent for approximately five years before the alleged date of accident. He testified his job duties include milking cows, feeding cows and a little bit of everything.

Petitioner testified he was working on March 5, 2014 and he was physically able to do his job. He testified a vendor was at the farm because a special order for iodine had been called in. Petitioner testified that he was inside with Aric Walquist when the vendor arrived. Mr. Walquist was on the telephone and the vendor needed assistance. Petitioner testified he went out to see if he could help and when the vendor explained he needed assistance getting the drum off the truck, Petitioner told him he didn't think he could do that. Petitioner then returned to Mr. Walquist's office to get him but he was still on the phone. Since Mr. Walquist had already been on the phone for over an hour Petitioner decided to go back out and help the vendor. Petitioner testified he helped the vendor get the tailgate off the truck, laid the barrel down and pulled it out of the truck and set it on the ground.

Petitioner testified the iodine was in a 55 gallon plastic drum and weighed approximately 450 pounds. He testified as he was helping to unload it and when they slid it off of the tailgate, it jerked and was very heavy. He testified he jerked his back "out of whack." He testified the pain came on hard later and he began having pain down the back of his leg and into his feet. Since he was already running late he put the tailgate on and went back to running the heifers when he noticed the problems with leg pain then the back of his left leg into his feet. The pain is down the left leg

around his buttocks area. Petitioner testified he had not had that type of pain for years. Petitioner testified that Aric then came out, noticed the vendor's truck was stuck, and went to help the vendor get the truck out.

Petitioner testified he had experienced that type of pain years ago and while working on the farm his back hurt him off and on. Petitioner testified he had back surgery in 2004 and he testified he had not been to any spine doctors or sought treatment for his back since that time. Petitioner testified a day or two after the alleged incident he went to his doctor and she ordered an MRI and then referred him to a neurosurgeon.

Petitioner testified when he first saw the physician's assistant, after the accident, he told her about the incident. He testified although it was not mentioned in the initial note he did discuss it with her and that she issued a supplemental note correcting the history.

Petitioner also testified he talked with Aric Walquist about the incident the day after it happened.

Petitioner testified he worked Monday, Tuesday, half a day on Wednesday, and Thursday the week of the alleged incident. He testified the accident happened on Thursday and he worked half a day on that day. He testified he did not work a full day because his back was hurting. He testified he talked to Aric's son, Andy, to see if he would milk for him and Andy indicated he would. He testified he told Andy he was having problems and he had already had three work injuries and he did not want to lose his job over something he did not know was going to be as serious an illness as it was.

Petitioner denied that he told Andy that he was battling demons. When asked if he told Andy he was fighting alcohol problems he admitted he does have alcohol problems. He testified he did not tell Andy he was going back into rehab. He then testified he was considering it but he did not go.

Petitioner testified he paid for the initial visit with Amanda Endrizzi on March 7, 2014 himself. He testified he had a $10.00 co-pay. He testified he did turn that visit in as workers' compensation. Petitioner has undergone low back surgery at St. Francis Hospital which has helped his left side problems and improved his pain. As of the day of arbitration Petitioner was still under the care of Dr. Fonn and still unable to work. Petitioner testified he was on the sliding scale at Rural Health which is why it was listed as self-pay. He also testified that he attempted to see Dr. Grubs who would not take Illinois Medicaid so he was referred to Dr. Fonn.

After his surgery in 2004 Petitioner's back pain was managed with over-the-counter medication. Petitioner does not take narcotics unless he has to because they don't agree with him. When he went to Rural Health on March 7th he was still hoping to go back to work the next week and his physician advised him he could work if he was physically able.

Aric Walquist, testified on behalf of Respondent. Mr. Walquist is a dairy and grain farmer and one of the partners of Walquist farms. He confirmed that Petitioner had worked for them for approximately five years and was employed by Respondent on March 5, 2014. He also confirmed that he was not present when the barrel of iodine was unloaded as he was in the office signing Petitioner up for Obama Care. Mr. Walquist explained that when he went outside the barrel of iodine had already been moved into the supply room. Mr. Walquist agreed that since water weighs 8.6 gallons that the barrel of iodine would weight approximately 450 pounds. He also agreed that a tractor was not used to unload the barrel and the only two people present were the vendor and Petitioner. He was unable to recall how much a barrel of iodine cost. Mr. Walquist confirmed he had no first-hand knowledge how the alleged accident occurred or how the barrel got off the truck onto the ground. The truck used to deliver the iodine is a standard pick-up truck. Although he conducted an investigation, he did not have anyone write down any statements regarding the

incident. Mr. Walquist agreed that farm work is pretty hard work and one gets a lot of bumps, bruises, and strains on a day to day basis. Mr. Walquist testified the delivery person who was present from the vendor was Eric Unverfehrt.

Mr. Walquist testified Petitioner never mentioned to him he had hurt his back or was having problems on that day. Mr. Walquist testified he did receive a telephone call from Petitioner on Friday and on that day Petitioner told him he hurt his back.

Mr. Walquist testified that in investigating the incident he talked to his son Andy. He testified he had talked to Andy about his conversation with Petitioner and that investigation did not show anything that indicated Petitioner had hurt his back. When asked if he was aware Petitioner had problems with his back before March 5, 2014 Mr. Walquist indicated Petitioner had constant nagging problems with his back the whole time he worked there. When asked how he knew, he indicated Petitioner would tell him and they had agreed he would stay away from heavy objects and mostly he was able to do that.

Mr. Walquist testified that prior to his conversation with Petitioner he received a telephone call from Petitioner's sister. He testified Petitioner's sister called pleading for Petitioner's job and he told her Petitioner no longer had a job. At the time of the conversation with Petitioner's sister, Mr. Walquist had no idea Petitioner was alleging a workers' compensation injury. Mr. Walquist then testified that Petitioner had missed work on Monday and he called in on Tuesday, but Mr. Walquist insisted he come in to milk. Petitioner then showed up on Wednesday "and the incident happened" and then Petitioner left. Mr. Walquist testified he called Petitioner at some point and he said he had alcohol problems again. Mr. Walquist testified the alleged injury had nothing to do with him telling Petitioner's sister he no longer had a job because he was not aware of the alleged injury at the time of the conversation with Petitioner's sister.

The second witness to testify on behalf of Respondent was Eric Unverfehrt. He testified he is employed by Unverfehrt Farm Supply in sales. He testified it is a family business and he was previously in the service end but now he is getting more into sales.

Mr. Unverfehrt testified he was working for Unverfehrt Farm Supply on March 5, 2014. He testified he is familiar with Walquist Farms and knows them as customers. He denied being related to the Walquists in any way. He testified when his sales guy could not make his route or could not go somewhere, he would help him out delivering chemicals. He testified iodine is considered a chemical and was something he delivered.

Mr. Unverfehrt testified he did make a delivery to Walquist Farms on March 5, 2014. He testified it was 55 gallons of pre-drip or post-drip and then some 15 gallon barrels of chlorine and some towels. He testified he was by himself that day for the delivery. He testified he had a Chevy 1500 pick-up truck and he unloaded the items by hand. He testified there was one item that he went to ask for a skid loader but they were busy so he just unloaded it by himself. He testified he went to ask Aric for a skid loader but Aric was in the office. He testified while he was unloading the 55 gallon drum Petitioner stood next to the truck but that was it. He testified at no point did he get in the back of the truck and unload the drum. He testified Petitioner did not assist in any way with putting the tailgate down, taking it off, or doing anything like that.

Mr. Unverfehrt testified he did not know exactly how much a 55 gallon drum of iodine would weigh but he would say approximately 400 pounds. Mr. Unverfehrt testified he would not be able to lift that amount by himself but if it is tipped over you can always pick it back up or you can roll it on its side and move it around. He testified he was able to maneuver the drum by himself. When asked how he got the drum off the truck, he indicated one takes the tailgate off and places a rubber mat down so it does not puncture, then you tilt the barrel up, and you let it slide down and hit the mat. He testified he had done that before March 5, 2014. He testified he did take the tailgate

off on that day. He testified no one came out to help him put the tailgate back on. Mr. Unverfehrt testified he did not have any conversation with Petitioner that day about any injury or pain in his back.

Mr. Unverfehrt testified the drums are not normally put on a pallet when they deliver them.

Petitioner's medical bills are set forth in Petitioner's Exhibit 4. They include the following:

Rural Health Inc. -- $333.85

Cedar Court Imaging -- $1691.00;

Dr. Fonn -- $145,119.00;

St. Francis Medical Center -- $222,704.66;

**The Arbitrator concludes:**

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

Petitioner sustained an accident on March 5, 2014 that arose out of and in the course of his employment with Respondent. The Arbitrator bases her determination on Petitioner's testimony and the histories included in the medical records which were consistent with Petitioner's testimony. Petitioner claims he was injured in the course of his employment with Respondent on March 5, 2014 while he was assisting the vendor unloading a 55 gallon drum/barrel of iodine. Respondent disputes that Petitioner assisted the vendor (Eric Unverfehrt) in unloading the 55 gallon drum out of the back of a Chevy 1500 pick-up and injured his back at that time. All witnesses testifying in the case confirmed that the 55 gallon drum of iodine would weigh approximately 450 pounds. Mr. Unverfehrt agreed that he had requested the use of a tractor/skid loader to assist in unloading this barrel confirming that he did not believe he could have reasonably unloaded it alone. The Arbitrator finds it highly unlikely that a person of Mr. Unverfehrt's size could successfully unload a 55 gallon drum of iodine out of a

pick-up truck by himself. Petitioner's account of what happened at the time of the accident was generally believable.

The Arbitrator further notes that Petitioner testified he spoke with Aric's son, Andy, about the accident. Andy Walquist did not testify and the Arbitrator did not find Aric Walquist's testimony about his investigation and speaking with his son, Andy, about the matter sufficient to overcome Petitioner's testimony concerning the events of the day. Mr. Walquist did not testify about any specific conversation between Petitioner and Andy; however, Petitioner credibly testified that he did so. The person in the best position to refute any conversation with Petitioner was Andy Walquist. Additionally, she notes Aric Walquist's testimony on cross-examination wherein he testified that Petitioner showed up on Wednesday, "the incident happened," and then Petitioner left. This testimony, and the manner in which he spoke, appears to suggest Mr. Walquist's belief that an incident did occur on Wednesday March 5, 2014 and that after the incident Petitioner left work. This is also consistent with Respondent's form 45 indicating the date and time of the accident was March 5, 2014 and that the employee claimed a back injury two days later.

While Eric Unverfehrt failed to corroborate Petitioner's account of the accident, Mr. Unverfehrt's testimony wasn't altogether believable by virtue of the business relationship between Respondent and Mr. Unverfehrt's employer (also his family).

While Petitioner testified that he told the nurse at Rural Health about the accident at work, her January 2015 statement doesn't corroborate Petitioner's testimony regarding the details of an accident on March 5, 2014 involving a barrel of iodine. It simply refers to work at the farm – a history found in earlier records of Rural Health also. Petitioner did, however, mention the accident to Dr. Fonn and this occurred before he had signed his Application for Adjustment of Claim herein. Therefore, given the totally of the evidence the Arbitrator gives

Petitioner the benefit of the doubt on the issue of accident and concludes that Petitioner met his burden of proof on that issue.

F. **Is Petitioner's current condition of well-being cause related to the injury?**

While Petitioner may have sustained an accident at work on March 5, 204 he failed to prove that his current condition of ill-being in his back, or the need for surgery, was/is causally connected to that work accident. In light of Petitioner's pre-existing back problems and the interesting history[1] contained in the March 7, 2014 Rural Health Clinic records, a chain of events analysis won't establish causal connection herein. Petitioner relies upon the opinions and testimony of Dr. Fonn in support of causal connection; however, Dr. Fonn readily admitted that if the history provided by Petitioner was inaccurate or incomplete, his opinion might change. He further acknowledged he had never seen or reviewed the Rural Health Clinic records.

Petitioner testified, and the records reflect, that he suffered from a back injury and underwent surgery in 2004. While Petitioner received no significant treatment for is low back between his surgery in 2004 and his accident in March of 2014, Petitioner did have occasional office visits with his family physician reporting back pain associated with his lifting duties as a farm hand. He also presented on March 7, 2014 with a very specific history of numbness in his feet for the previous three months. This would pre-date the accident. An MRI was ordered in light of Petitioner's degenerative back condition (as noted in 2011) in an effort to see if that had any causal relationship to his feet complaints. Again, Petitioner did not mention the March 5th accident nor did PAC Endrizzi address it in her 2015 statement. None of that history was provided to Dr. Fonn. Furthermore, when Petitioner presented to Dr. Fonn he gave him two sources of his back pain – the March 5th accident and his overall farm

[1] A 3 month history of foot numbness which would have pre-dated the accident.

duties. Dr. Fonn did not address this in his deposition whatsoever. Additionally, Dr. Fonn was unaware of Petitioner's prior treatment at Rural Health Clinic and did not consider that history in rendering his opinion. Finally, the Arbitrator notes Petitioner's reference to treatment for his back with Dr. Wilson. No records or testimony regarding Dr. Wilson was provided. Of additional concern was Petitioner's own testimony that he initially told the delivery guy he didn't think he could help him. The Arbitrator reasonably infers from the testimony that Petitioner didn't believe he could help him because of ongoing back issues which both he and Mr. Walquist acknowledged. Petitioner failed to meet his burden of proof on the issue of causal connection.

J. **Has Respondent paid all appropriate charges for reasonable and necessary medical services?**

The parties agreed that Respondent has not paid any of the medical bills. (AX 1) Respondent did not dispute the reasonableness and necessity of the treatment provided to Petitioner, but simply disputed liability. Consistent with her causation determination, Petitioner's request for payment of medical bills is denied. Although Petitioner did sustain an accident he failed to prove that the treatment at Rural Health, the MRI, or any of the treatment with Dr. Fonn was causally connected to the work accident.

K. **Is Petitioner entitled to prospective medical care?**

Consistent with her causation determination, prospective medical care is denied. Additionally, the Arbitrator notes that Petitioner did not seek any specific prospective medical care. He continues under the care of Dr. Fonn while he recovers from back surgery; however, none of that treatment is causally related to the accident. Prospective medical care is denied.

L. **What temporary total disability benefits are in dispute?**

Respondent did not dispute the period of temporary total disability benefits, only liability for them. Consistent with the Arbitrator's causation determination Petitioner's request for temporary total disability benefits is denied. No doctor or PAC took Petitioner off of work as a result of his March 5, 2014 accident.

**********

STATE OF ILLINOIS )
) SS.
COUNTY OF PEORIA )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jon Davis, Jr.,

Petitioner,

vs.

NO: 13 WC 04362

16IWCC0471

City of Peoria,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, permanent partial disability, 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 agrees with the Arbitrator's finding of no causal connection in this case due to a deficiency in the record. Specifically, the Petitioner annotated on his Application for Adjustment of Claim an accident date of May 9, 2011, and he testified that his work accident took place on May 9, 2011. All of the other evidence in the record does not support an accident date of May 9, 2011. (Tr. 10-13)

Petitioner's Exhibit (1) is comprised of two versions of Illinois Form 45: Employer's First Report of Injury. Version one originally shows the date of accident as May 9, 2012; however, the year was then lined through to reflect '2011.' Version two reflects the date of accident as May 9, 2012. Furthermore, the medical evidence in Petitioner's Exhibit (3) ("Px3") consistently reflects an accident date of May 9, 2012. The Commission finds that Petitioner's argument that Respondent initially made the accident date error and that it somehow "got into the medical records...[and] "was repeated over and over" is illogical. The Petitioner self-reported the date of accident of May 9, 2012 to his medical providers. For example, on the form 'Midwest Orthopaedic Center SC, Patient History: Initial Visit' located in Px3 and dated October 23, 2012, the Petitioner himself annotated that his problem first began in 'May 2012.' The Commission finds that the aforementioned discrepancies in the record cannot support an award of benefits for the Petitioner.

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**DAVIS JR, JON**
Employee/Petitioner

Case# **13WC004362**

12WC033234

**CITY OF PEORIA**
Employer/Respondent

**16IWCC0471**

On 7/1/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1004 BACH LAW OFFICE
ROBERT W BACH
110 S W ADAMS ST SUITE 410
PEORIA, IL 61602

0980 HASSELBERG GREBE SNODGRASS
JOHN G DUNDAS
401 MAIN ST SUITE 1400
PEORIA, IL 61602

16IWCC0471

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

**Jon Davis, Jr.**
Employee/Petitioner

Case # **13** WC **4362**

v.

Consolidated cases: **12 WC 33234**

**City of Peoria**
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Peoria**, on **May 19, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [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 **July 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$70,000.00**; the average weekly wage was **$1,346.16**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **0** dependent children.

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

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

ORDER

As the Arbitrator has found that the Petitioner failed to prove any condition of ill-being which is causally related to the accident, Petitioner's claim for compensation is denied.

No benefits are awarded herein.

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

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

Arbitrator Anthony C. Erbacci

June 18, 2015
Date



JUL 1 - 2015

16IWCC0471

**FACTS:**

On May 9, 2011 (Case No. 13 WC 4362) and July 11, 2012 (Case No. 12 WC 33234) the Petitioner sustained undisputed accidental injuries which arose out of and in the course of his employment by the Respondent as a firefighter. The Petitioner testified that on May 9, 2011, while fighting a fire, he fell and twisted his left knee. He reported the injury but sought no immediate medical treatment and continued working. The Petitioner testified that on July 11, 2012 he was participating in a training program which involved the burning of an abandoned home. The Petitioner testified that he was in full equipment and was going down some stairs when he slipped and twisted his left knee. The Petitioner testified that he reported the incident immediately and continued with the training exercise. The Petitioner testified that he continued to work but noticed increased swelling and pain in his knee especially with lateral movement. The Petitioner described this pain as being "new pain".

The Petitioner testified that he had previously injured his left knee in 1998 and that he underwent an ACL reconstruction surgery, done by Dr. Gibbons, following that injury. The Petitioner testified that he had no other injuries to his left knee between 2001 and 2011.

The Petitioner testified that on September 19, 2012 he sought treatment for his knee with his primary care physician, Dr. San German, who prescribed an x-ray and medications. The x-rays were performed at OSF Healthcare on September 19, 2012 and the records indicate that the Petitioner reported that he sustained twisting injuries to his knee in May and July. A prior ACL repair is also noted. The x-rays were reported to demonstrate no definite acute bony abnormality, a prior ACL repair, and medial compartment and patellofemoral degenerative changes. The Petitioner testified that the medication provided him with no relief from his symptoms and that Dr. San German referred him to Dr. Roberts at Midwest Orthopaedic Center.

The medical records indicate that the Petitioner was seen at Midwest Orthopaedic Center on October 23, 2012. On his Patient History: Initial Visit Form the Petitioner reported he had left knee pain that began in May of 2012. The Petitioner also reported that he had slipped while at a fire. In the note of that date, Dr. Brad Roberts noted that the Petitioner gave a history of an injury in May of 2012, when he slipped down some stairs at a fire, and "a very similar incident" in July of 2012, when he again slipped at work. Dr. Roberts also noted the Petitioner's previous ACL reconstruction in 1998. Dr. Roberts' assessment included; chronic left knee pain, history of previous ACL reconstruction, osteoarthritis of the left knee, and presumptive small left knee effusion. Dr. Roberts prescribed conservative treatment for the Petitioner including a knee brace, aggressive icing, physical therapy and possible steroid injections.

On November 6, 2012, Dr. Roberts noted that the Petitioner had a history of chronic left knee pain, including a prior ACL reconstruction. He also noted that the Petitioner's previous x-rays showed bone spurs consistent with patellofemoral arthritis. Dr. Roberts again noted

that the Petitioner gave a history of slipping down stairs at work in May of 2012, and of a similar incident in July of 2012. Dr. Roberts' assessment again included chronic left knee pain, history or prior ACL reconstruction of the left knee, and osteoarthritis. Dr. Roberts prescribed a different knee brace and injected the Petitioner's left knee.

On December 3, 2012, the Petitioner returned to Midwest Orthopaedic Center where he was noted to have provided a history of having injured his knee "last May" when he tripped while at a fire and experienced sharp pain laterally. No history of any other injury is noted in the record of that date. The assessment on that date included patellofemoral chondrosis, possible lateral meniscus tear and effusion. An MRI and referral to Dr. Merkley were recommended.

An MRI of the Petitioner's left knee was performed on December 7, 2012, by Dr. Stephen Pomeranz. Dr. Pomeranz concluded that the MRI showed an intact ACL graft repair, prominent tricompartmental osteoarthritis with medial joint compartment failure, asymmetric joint space narrowing, denudation of the articular cartilage, prominent osteophyte formation, associated partial maceration of the entire medial meniscus, mid-grade sprain MCL, and severe chondromalacia at the patellofemoral joint.

The Petitioner was then seen by Dr. Michael Merkley on December 31, 2012. Dr. Merkley noted that the Petitioner had degenerative medial and lateral meniscus tears and chondral defect of the medial femoral condyle and that the Petitioner had elected to

On January 31, 2013, Dr. Merkley performed an arthroscopic debridement of the Petitioner's left knee. Dr. Merkley's postoperative diagnoses included a complex tear of the posterior horn of the meniscus, a 25 mm x 20 mm chondral defect of the medial femoral condyle, tearing of the anterior horn of the lateral meniscus, and grade IV chondrosis of the lateral patellofemoral joint. The procedure included partial medial and lateral meniscectomies and chondroplasty of the medial femoral chondyle.

On February 8, 2013, the Petitioner returned to Dr. Merkley, who noted that the Petitioner reported that he was doing well and had returned to the gym doing a light exercise program. Dr. Merkley noted that there was no effusion, no calf swelling or tenderness, and the Petitioner's portals were closed. The Petitioner was directed to continue his exercise and start a functional rehabilitation program. The Petitioner then commenced a course of physical therapy. On February 20, 2013, Dr. Merkley released the Petitioner to return to work without restrictions effective February 21, 2013.

On February 21, 2013, the Petitioner was seen by Dr. Edward Moody at OSF Saint Francis Medical Center for a return to work evaluation. On the Medical Injury/Information Form completed and signed by the Petitioner, the Petitioner indicated a date of injury of "5/12". In his note of that evaluation Dr. Moody noted that the Petitioner gave a history of an accident occurring in May of 2012. Dr. Moody noted that the Petitioner had already returned to some pretty vigorous activities, and he released the Petitioner to return to regular duty work.

The Petitioner testified that he returned to his regular work as a firefighter after he was released by Dr. Merkley and Dr. Moody but that he continued to have left knee complaints for which he followed up with Dr. Merkley. The records demonstrate that the Petitioner was seen by Dr. Merkley on April 23, 2013, and reported some medial pain in his left knee. Dr. Merkley injected the Petitioner's knee and prescribed Depil cream. On May 21, 2013 the Petitioner was seen by PA-C Gale and prescribed an arthritis brace.

In a letter report dated October 8, 2013 and directed to the Petitioner's attorney, Dr. Merkley noted that the Petitioner was initially seen for his left knee pain on December 3, 2012 and he reported an injury "the previous May" when he tripped and twisted the knee and it buckled on him. Dr. Merkley noted that the Petitioner underwent an MRI which showed degenerative medial and lateral meniscal tears with a chondral defect of the medial femoral condyle and that the Petitioner underwent an arthroscopic debridement at his left knee. Dr. Merkley reported that it was his opinion that the Petitioner had pre-existing degenerative changes in his knee and that "the twisting injury" caused an aggravation of those pre-existing conditions that necessitated the need for corticosteroid injections, subsequent arthroscopic debridement, bracing and vicosupplementation. The Arbitrator notes that Dr. Merkley's report contains no specific reference to the accident dates of May 9, 2011 or July 11, 2012 upon which the Petitioner's claims are based.

On October 18, 2013 and October 29, 2013 the Petitioner was given Euflexxa injections in his knee which were reported to have given him significant pain relief.

On May 6, 2014, the Petitioner was seen again by Dr. Merkley and was noted to be doing well, with only had intermittent pain. Dr. Merkley's impression was that the Petitioner had osteoarthritis and popliteus tendinitis and. Dr. Merkley indicated that the Petitioner was not in need of any further medical intervention. No evidence of any further medical treatment for the Petitioner's left knee was offered into the record.

The Petitioner testified that he currently continues to experience occasional pain in his left knee especially with lateral movement and climbing stairs.

The Petitioner testified that he did not have any accident or injury involving his left knee in May of 2012 and that the reference to a May 2012 accident that is contained in the medical records is incorrect. The Petitioner testified that while he did see Dr. San German for his left foot in May of 2012, he did not seek treatment at Midwest Orthopaedic Center in May of 2012. No medical records from Dr. San German were offered or admitted into the record.

16IWCC0471

**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:**

It is axiomatic that the Petitioner bears the burden of proving all of the elements of his claim by a preponderance of the credible evidence. The Arbitrator finds that the Petitioner failed to meet that burden here. More specifically, the Arbitrator finds that the Petitioner failed to prove any current condition of ill-being which is causally related to either of the work accidents alleged herein.

The Petitioner has alleged two specific accidents, one occurring on May 9, 2011 and one occurring on June 11, 2012. The Arbitrator notes that the only medical opinion of causation contained in the record is the letter report of Dr. Merkley which specifies an injury "the previous May" (May of 2012) when the Petitioner tripped and twisted the knee and it buckled on him. Dr. Merkley opined that the Petitioner had pre-existing degenerative changes in his knee and that "the twisting injury" caused an aggravation of those pre-existing conditions that necessitated the need for corticosteroid injections, subsequent arthroscopic debridement, bracing and vicosupplementation. The Arbitrator notes that Dr. Merkley's report contains no specific reference to the accident dates of May 9, 2011 or July 11, 2012 upon which the Petitioner's claims are based and his opinion is premised on a twisting injury which occurred in May of 2012. The Arbitrator finds Dr. Merkley's opinions regarding causation to be unpersuasive and unreliable with regard to any causal relationship between the Petitioner's current condition of ill-being and his accidents of May 9, 2011 and June 11, 2012.

While the Petitioner testified that he did not have any accident in May of 2012, and that the reference to a May of 2012 accident contained in Dr. Merkley's records is incorrect, the Arbitrator notes that the Petitioner's testimony seems to be contradicted by the medical records. The Arbitrator notes that there is not one specific history of an accident on May 9, 2011 contained in any of the Petitioner's medical records while there are several specific references to an accident in May of 2012. Even if one assumes that the incident in "May" referenced by Dr. Merkley is the incident that the Petitioner testified occurred in May of 2011 and that all of the references in the medical records to a May 2012 incident are erroneous, the Petitioner continued to work and sought no medical treatment for his knee following the May of 2011 accident until two months after the June 11, 2012 accident which the Petitioner testified caused him to notice what he described as being "new pain" in his left knee.

It is clear from the record that the Petitioner has a history of pre-existing conditions with his left knee which date back to at least 1998 and that he underwent an ACL reconstruction surgery prior to 2001. The Petitioner bases his claims here on accidents occurring on May 9, 2011 and July 11, 2012, but the evidence does not support a finding that either incident was anything more than a temporary aggravation of his pre-existing conditions. The Petitioner described the accident occurring on May 9, 2011 as twisting his knee "a little bit", and he continued working that day. He missed no work as a result of that injury, and he did not seek any medical treatment for his left knee for at least a year following that accident. Similarly, the

16IWCC0471

Petitioner continued his training after his July 11, 2012 accident, and again missed no work. He did not seek any medical treatment following that accident until September 19, 2012, two months after the incident. Again, the Arbitrator notes that Dr. Merkley's report contains no specific reference to the accident dates of May 9, 2011 or July 11, 2012 upon which the Petitioner's claims are based, and contains no causation opinion with regard to those dates of accident. While Dr. Merkely opined that the Petitioner's "twisting injury" aggravated his pre-existing condition, there is no medical opinion in the record which specifically relates the Petitioner's current condition of ill-being to either the accident of May 9, 2011 or the accident of July 11, 2012. Without such an opinion, it would be mere speculation to conclude that the Petitioner's current condition of ill-being is causally related to either of those accidents.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that either the accident of May 9, 2011 or the accident of July 11, 2012 accelerated or permanently aggravated the Petitioner's long standing pre-existing condition, or otherwise caused the Petitioner's current condition of ill being. Therefore, the Arbitrator finds that the evidence does not support a finding that the accidents of May 9, 2011 and July 11, 2012 caused the condition of ill-being complained of by the Petitioner, and thus his claim for compensation is denied.

As the Arbitrator has found that the Petitioner has failed to prove any condition of ill-being which is causally related to either the accident of May 9, 2011 or the accident of July 11, 2012, determination of the remaining disputed issues is moot and no benefits are awarded herein.

STATE OF ILLINOIS )
) SS.
COUNTY OF PEORIA )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jon Davis, Jr.,

Petitioner,

vs.

NO: 12 WC 33234

City of Peoria,

16IWCC0472

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 1, 2015 is hereby affirmed and adopted.

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

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

16IWCC0472

The party commencing 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: JUL 13 2016
TJT/gaf
O: 5/16/16
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**DAVIS JR, JON**
Employee/Petitioner

Case# **12WC033234**

13WC004362

**CITY OF PEORIA**
Employer/Respondent

16IWCC0472

On 7/1/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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JOHN G DUNDAS
401 MAIN ST SUITE 1400
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16IWCC0472

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

**Jon Davis, Jr.**
Employee/Petitioner

Case # **12** WC **33234**

v.

Consolidated cases: **13 WC 4362**

**City of Peoria**
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Peoria**, on **May 19, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

16IWCC0472

**FINDINGS**

On **May 9, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$70,000.00**; the average weekly wage was **$1,346.16**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **0** dependent children.

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

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

**ORDER**

As the Arbitrator has found that the Petitioner failed to prove any condition of ill-being which is causally related to the accident, Petitioner's claim for compensation is denied.

No benefits are awarded herein.

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

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

Arbitrator Anthony C. Erbacci

June 18, 2015
Date



JUL 1 - 2015

16IWCC0472

**FACTS:**

On May 9, 2011 (Case No. 13 WC 4362) and July 11, 2012 (Case No. 12 WC 33234) the Petitioner sustained undisputed accidental injuries which arose out of and in the course of his employment by the Respondent as a firefighter. The Petitioner testified that on May 9, 2011, while fighting a fire, he fell and twisted his left knee. He reported the injury but sought no immediate medical treatment and continued working. The Petitioner testified that on July 11, 2012 he was participating in a training program which involved the burning of an abandoned home. The Petitioner testified that he was in full equipment and was going down some stairs when he slipped and twisted his left knee. The Petitioner testified that he reported the incident immediately and continued with the training exercise. The Petitioner testified that he continued to work but noticed increased swelling and pain in his knee especially with lateral movement. The Petitioner described this pain as being "new pain".

The Petitioner testified that he had previously injured his left knee in 1998 and that he underwent an ACL reconstruction surgery, done by Dr. Gibbons, following that injury. The Petitioner testified that he had no other injuries to his left knee between 2001 and 2011.

The Petitioner testified that on September 19, 2012 he sought treatment for his knee with his primary care physician, Dr. San German, who prescribed an x-ray and medications. The x-rays were performed at OSF Healthcare on September 19, 2012 and the records indicate that the Petitioner reported that he sustained twisting injuries to his knee in May and July. A prior ACL repair is also noted. The x-rays were reported to demonstrate no definite acute bony abnormality, a prior ACL repair, and medial compartment and patellofemoral degenerative changes. The Petitioner testified that the medication provided him with no relief from his symptoms and that Dr. San German referred him to Dr. Roberts at Midwest Orthopaedic Center.

The medical records indicate that the Petitioner was seen at Midwest Orthopaedic Center on October 23, 2012. On his Patient History: Initial Visit Form the Petitioner reported he had left knee pain that began in May of 2012. The Petitioner also reported that he had slipped while at a fire. In the note of that date, Dr. Brad Roberts noted that the Petitioner gave a history of an injury in May of 2012, when he slipped down some stairs at a fire, and "a very similar incident" in July of 2012, when he again slipped at work. Dr. Roberts also noted the Petitioner's previous ACL reconstruction in 1998. Dr. Roberts' assessment included; chronic left knee pain, history of previous ACL reconstruction, osteoarthritis of the left knee, and presumptive small left knee effusion. Dr. Roberts prescribed conservative treatment for the Petitioner including a knee brace, aggressive icing, physical therapy and possible steroid injections.

On November 6, 2012, Dr. Roberts noted that the Petitioner had a history of chronic left knee pain, including a prior ACL reconstruction. He also noted that the Petitioner's previous x-rays showed bone spurs consistent with patellofemoral arthritis. Dr. Roberts again noted

that the Petitioner gave a history of slipping down stairs at work in May of 2012, and of a similar incident in July of 2012. Dr. Roberts' assessment again included chronic left knee pain, history or prior ACL reconstruction of the left knee, and osteoarthritis. Dr. Roberts prescribed a different knee brace and injected the Petitioner's left knee.

On December 3, 2012, the Petitioner returned to Midwest Orthopaedic Center where he was noted to have provided a history of having injured his knee "last May" when he tripped while at a fire and experienced sharp pain laterally. No history of any other injury is noted in the record of that date. The assessment on that date included patellofemoral chondrosis, possible lateral meniscus tear and effusion. An MRI and referral to Dr. Merkley were recommended.

An MRI of the Petitioner's left knee was performed on December 7, 2012, by Dr. Stephen Pomeranz. Dr. Pomeranz concluded that the MRI showed an intact ACL graft repair, prominent tricompartmental osteoarthritis with medial joint compartment failure, asymmetric joint space narrowing, denudation of the articular cartilage, prominent osteophyte formation, associated partial maceration of the entire medial meniscus, mid-grade sprain MCL, and severe chondromalacia at the patellofemoral joint.

The Petitioner was then seen by Dr. Michael Merkley on December 31, 2012. Dr. Merkley noted that the Petitioner had degenerative medial and lateral meniscus tears and chondral defect of the medial femoral condyle and that the Petitioner had elected to

On January 31, 2013, Dr. Merkley performed an arthroscopic debridement of the Petitioner's left knee. Dr. Merkley's postoperative diagnoses included a complex tear of the posterior horn of the meniscus, a 25 mm x 20 mm chondral defect of the medial femoral condyle, tearing of the anterior horn of the lateral meniscus, and grade IV chondrosis of the lateral patellofemoral joint. The procedure included partial medial and lateral meniscectomies and chondroplasty of the medial femoral chondyle.

On February 8, 2013, the Petitioner returned to Dr. Merkley, who noted that the Petitioner reported that he was doing well and had returned to the gym doing a light exercise program. Dr. Merkley noted that there was no effusion, no calf swelling or tenderness, and the Petitioner's portals were closed. The Petitioner was directed to continue his exercise and start a functional rehabilitation program. The Petitioner then commenced a course of physical therapy. On February 20, 2013, Dr. Merkley released the Petitioner to return to work without restrictions effective February 21, 2013.

On February 21, 2013, the Petitioner was seen by Dr. Edward Moody at OSF Saint Francis Medical Center for a return to work evaluation. On the Medical Injury/Information Form completed and signed by the Petitioner, the Petitioner indicated a date of injury of "5/12". In his note of that evaluation Dr. Moody noted that the Petitioner gave a history of an accident occurring in May of 2012. Dr. Moody noted that the Petitioner had already returned to some pretty vigorous activities, and he released the Petitioner to return to regular duty work.

The Petitioner testified that he returned to his regular work as a firefighter after he was released by Dr. Merkley and Dr. Moody but that he continued to have left knee complaints for which he followed up with Dr. Merkley. The records demonstrate that the Petitioner was seen by Dr. Merkley on April 23, 2013, and reported some medial pain in his left knee. Dr. Merkley injected the Petitioner's knee and prescribed Depil cream. On May 21, 2013 the Petitioner was seen by PA-C Gale and prescribed an arthritis brace.

In a letter report dated October 8, 2013 and directed to the Petitioner's attorney, Dr. Merkley noted that the Petitioner was initially seen for his left knee pain on December 3, 2012 and he reported an injury "the previous May" when he tripped and twisted the knee and it buckled on him. Dr. Merkley noted that the Petitioner underwent an MRI which showed degenerative medial and lateral meniscal tears with a chondral defect of the medial femoral condyle and that the Petitioner underwent an arthroscopic debridement at his left knee. Dr. Merkley reported that it was his opinion that the Petitioner had pre-existing degenerative changes in his knee and that "the twisting injury" caused an aggravation of those pre-existing conditions that necessitated the need for corticosteroid injections, subsequent arthroscopic debridement, bracing and vicosupplementation. The Arbitrator notes that Dr. Merkley's report contains no specific reference to the accident dates of May 9, 2011 or July 11, 2012 upon which the Petitioner's claims are based.

On October 18, 2013 and October 29, 2013 the Petitioner was given Euflexxa injections in his knee which were reported to have given him significant pain relief.

On May 6, 2014, the Petitioner was seen again by Dr. Merkley and was noted to be doing well, with only had intermittent pain. Dr. Merkley's impression was that the Petitioner had osteoarthritis and popliteus tendinitis and. Dr. Merkley indicated that the Petitioner was not in need of any further medical intervention. No evidence of any further medical treatment for the Petitioner's left knee was offered into the record.

The Petitioner testified that he currently continues to experience occasional pain in his left knee especially with lateral movement and climbing stairs.

The Petitioner testified that he did not have any accident or injury involving his left knee in May of 2012 and that the reference to a May 2012 accident that is contained in the medical records is incorrect. The Petitioner testified that while he did see Dr. San German for his left foot in May of 2012, he did not seek treatment at Midwest Orthopaedic Center in May of 2012. No medical records from Dr. San German were offered or admitted into the record.

16IWCC0472

**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:**

It is axiomatic that the Petitioner bears the burden of proving all of the elements of his claim by a preponderance of the credible evidence. The Arbitrator finds that the Petitioner failed to meet that burden here. More specifically, the Arbitrator finds that the Petitioner failed to prove any current condition of ill-being which is causally related to either of the work accidents alleged herein.

The Petitioner has alleged two specific accidents, one occurring on May 9, 2011 and one occurring on June 11, 2012. The Arbitrator notes that the only medical opinion of causation contained in the record is the letter report of Dr. Merkley which specifies an injury "the previous May" (May of 2012) when the Petitioner tripped and twisted the knee and it buckled on him. Dr. Merkley opined that the Petitioner had pre-existing degenerative changes in his knee and that "the twisting injury" caused an aggravation of those pre-existing conditions that necessitated the need for corticosteroid injections, subsequent arthroscopic debridement, bracing and vicosupplementation. The Arbitrator notes that Dr. Merkley's report contains no specific reference to the accident dates of May 9, 2011 or July 11, 2012 upon which the Petitioner's claims are based and his opinion is premised on a twisting injury which occurred in May of 2012. The Arbitrator finds Dr. Merkley's opinions regarding causation to be unpersuasive and unreliable with regard to any causal relationship between the Petitioner's current condition of ill-being and his accidents of May 9, 2011 and June 11, 2012.

While the Petitioner testified that he did not have any accident in May of 2012, and that the reference to a May of 2012 accident contained in Dr. Merkley's records is incorrect, the Arbitrator notes that the Petitioner's testimony seems to be contradicted by the medical records. The Arbitrator notes that there is not one specific history of an accident on May 9, 2011 contained in any of the Petitioner's medical records while there are several specific references to an accident in May of 2012. Even if one assumes that the incident in "May" referenced by Dr. Merkley is the incident that the Petitioner testified occurred in May of 2011 and that all of the references in the medical records to a May 2012 incident are erroneous, the Petitioner continued to work and sought no medical treatment for his knee following the May of 2011 accident until two months after the June 11, 2012 accident which the Petitioner testified caused him to notice what he described as being "new pain" in his left knee.

It is clear from the record that the Petitioner has a history of pre-existing conditions with his left knee which date back to at least 1998 and that he underwent an ACL reconstruction surgery prior to 2001. The Petitioner bases his claims here on accidents occurring on May 9, 2011 and July 11, 2012, but the evidence does not support a finding that either incident was anything more than a temporary aggravation of his pre-existing conditions. The Petitioner described the accident occurring on May 9, 2011 as twisting his knee "a little bit", and he continued working that day. He missed no work as a result of that injury, and he did not seek any medical treatment for his left knee for at least a year following that accident. Similarly, the

16IWCC0472

Petitioner continued his training after his July 11, 2012 accident, and again missed no work. He did not seek any medical treatment following that accident until September 19, 2012, two months after the incident. Again, the Arbitrator notes that Dr. Merkley's report contains no specific reference to the accident dates of May 9, 2011 or July 11, 2012 upon which the Petitioner's claims are based, and contains no causation opinion with regard to those dates of accident. While Dr. Merkely opined that the Petitioner's "twisting injury" aggravated his pre-existing condition, there is no medical opinion in the record which specifically relates the Petitioner's current condition of ill-being to either the accident of May 9, 2011 or the accident of July 11, 2012. Without such an opinion, it would be mere speculation to conclude that the Petitioner's current condition of ill-being is causally related to either of those accidents.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that either the accident of May 9, 2011 or the accident of July 11, 2012 accelerated or permanently aggravated the Petitioner's long standing pre-existing condition, or otherwise caused the Petitioner's current condition of ill being. Therefore, the Arbitrator finds that the evidence does not support a finding that the accidents of May 9, 2011 and July 11, 2012 caused the condition of ill-being complained of by the Petitioner, and thus his claim for compensation is denied.

As the Arbitrator has found that the Petitioner has failed to prove any condition of ill-being which is causally related to either the accident of May 9, 2011 or the accident of July 11, 2012, determination of the remaining disputed issues is moot and no benefits are awarded herein.

STATE OF ILLINOIS )
) SS.
COUNTY OF MADISON )

| | |
|---|---|
| ☒ Affirm and adopt | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☐ Reverse | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kim Kimes,
Petitioner,

vs.

Illinois Department of Transportation,
Respondent.

**16IWCC0473**

NO: 14 WC 17750

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 20, 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.

DATED: JUL 13 2016
KWL/vf
O-7/11/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

16IWCC0473

**KIMES, KIM**
Employee/Petitioner

Case# **14WC017750**

**ILLINOIS DEPT OF TRANSPORTATION**
Employer/Respondent

On 11/20/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.33% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

3067 KIRKPARTICK LAW OFFICES
ERIC KIRKPATRICK
3 EXECUTIVE WOODS CT #100
BELLEVILLE, IL 62226

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

3291 ASSISTANT ATTORNEY GENERAL
DIANA E WISE
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

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

1430 CMS BUREAU OF RISK MANGEMENT
WORKERS' COMP MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

NOV 20 2015

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

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION** 16IWCC0473

**Kim Kimes**
Employee/Petitioner

v.

**Illinois Department of Transportation**
Employer/Respondent

Case # **14** WC **17750**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **September 25, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of 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 _____

16IWCC0473

**FINDINGS**

On **February 14, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$70,720.00**; the average weekly wage was **$1,360.00**.

On the date of accident, Petitioner was **46** 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 **$NA** for TTD, **$NA** for TPD, **$NA** for maintenance, and **$NA** for other benefits, for a total credit of **$NA**.

Respondent is entitled to a credit of **$ANY AMT PAID THRU GROUP** under Section 8(j) of the Act.

**ORDER**

The Arbitrator finds that Petitioner failed to prove she sustained an accident on February 14, 2014 that arose out of her employment with Respondent.

As such, all other issues are moot.

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

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

Signature of Arbitrator

11/20/15
Date



NOV 20 2015

16IWCC0473

**Kim Kimes v. State of Illinois/Department of Transportation**
**DOA: 2/14/2014, 14-WC-17750**

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 23, 2014, Petitioner filed an Application for Adjustment of Claim with the Illinois Workers' Compensation Commission, listing the Illinois Department of Transportation as the Respondent and alleging an accident on February 14, 2014. Petitioner's Application alleges an accident when "[s]lipped and fell on icy sidewalk," injuring her left ankle.

**The Arbitrator finds:**

Petitioner is a Safety and Claims Supervisor for District 8 of the Illinois Department of Transportation (IDOT). Petitioner works at District 8's headquarters, which are located at 1102 Eastport Plaza Drive in Collinsville, Illinois. While Illinois' Central Management Systems (CMS) owns the building and the surrounding areas, IDOT District 8 is housed in the left side of the building and Illinois State Police (ISP) are housed in the right side of the building.

There are parking lots surrounding the front, left, and right sides of the building. In the middle of the building is a main entrance and/or exit, which is the only entrance/exit available for use by the general public. While employees of IDOT District 8 also use the main entrance/exit to access the building, there are also three other entrance/exits to the building on IDOT District 8's left side: one in the front of the building and two on the left side of the building. There are a series of sidewalks leading from the parking lots to each entrance/exit.

Petitioner testified that she was not required to park in any certain area in the parking lot. Rather, Petitioner testified that she was free to park anywhere in any of the parking areas, except for two front rows of parking in the left side parking lot, which are numbered for certain IDOT-owned vehicles.

Petitioner testified that she was not required to use any specific door to enter and/or exit IDOT District 8's building. Rather, Petitioner testified that she was free to use any of the four entrance/exits available to IDOT District 8, including the main entrance/exit, the front entrance/exit and the two left side entrance/exits.

On February 14, 2014, Petitioner was on her way into work when she fell on a patch of ice and snow, spraining her ankle. When she fell, Petitioner was on the sidewalk that leads to the main entrance/exit. This sidewalk, as well as the main entrance/exit, was the route that would be used by the general public to access the building.

After falling, Petitioner, who has a mainly sit-down position, worked her normal shift. However, when Petitioner returned to her home that evening and took of her shoes, her left ankle was very swollen. As such, Petitioner went to Anderson Hospital's Emergency Room the next

morning (Saturday), where an x-ray of her ankle was taken. That x-ray showed medial and prominent lateral soft tissue swelling, as well as a "possible subtle virtually nondisplaced cortial fracture near the tip of the lateral malleolus, of uncertain age." Consequently, Petitioner was diagnosed with ankle sprain & ankle fracture and was given a splint and crutches. (PX 1)

On February 26, 2014, Petitioner saw Dr. McCormick's Nurse Practitioner, Michelle Mueller, of Washington University Orthopedics. It was noted that Petitioner still had left lateral ankle pain, although she had noticed a decrease in pain and swelling over the last few days. X-rays were obtained, which showed hypertrophy of the talus sustentaclum and mild posterior subtalar joint osteoarthritis. (PX 2)

NP Mueller noted that the Anderson Hospital "x-rays were taken and it was undetermined whether or not she had a fracture." After reviewing the x-rays, NP Mueller diagnosed Petitioner with only an ankle sprain and switched her to a walking boot, rather than a splint and crutches. She prescribed ice and elevation as needed, as well as oral anti-inflammatories, and asked her to return in 2 to 3 weeks. (PX 2)

Petitioner returned to Nurse Practitioner Mueller on March 12, 2014. Dr. McCormick noted Petitioner had been immobilized for 4 weeks in total and was feeling better. She performed a physical exam, finding mild tenderness to palpation over the left lower lateral ankle ligaments. She also noted that Petitioner did not have pain with weight bearing, but only with palpation. Finally, NP Mueller noted that she was nontender over the malleolus and the syndesmosis. (PX 2)

NP Mueller obtained additional x-rays, which showed a decrease in soft-tissue swelling. She diagnosed Petitioner with "left ankle sprain, improving" and told Petitioner to being weaning off her walking boot. NP Mueller prescribed a course of physical therapy and told Petitioner to return once that was completed. IF Petitioner had questions or concerns, NP Mueller told her to contact her. (PX 2)

Petitioner attended physical therapy on March 22, 2014 at Collinsville Physical Therapy. It was noted Petitioner was wearing a walking boot and had decreased range of motion in all planes, as well as swelling at the lateral malleolus with prolonged sitting and walking. It was also noted that Petitioner walking with decreased weight bearing on her left leg and could benefit from physical therapy to allow her to return to walking without pain. (PX 2)

Petitioner returned to NP Mueller on April 2, 2014. NP Mueller noted Petitioner was "feeling better" and was "not having any pain or swelling." She noted Petitioner was wearing regular shoes without difficulty. (PX 2)

NP Mueller performed a physical examination, which showed mild tenderness across the left ankle joint, but no redness, swelling or bruising. She noted Petitioner was nontender over the left lower lateral ankle ligaments, but did have some mild swelling over the lateral ankle.

Petitioner was noted to have "intact dorsiflexion, plantar flexion, inversion, and eversion," but some limited range of motion with dorsiflexion. (PX 2)

Petitioner's diagnosis was "left lateral ankle, improved." NP Mueller told Petitioner to take it slow and return if she had any repeated ankle sprains or if she continued to have pain in her ankle joint. (PX 2)

Petitioner was discharged from physical therapy on June 16, 2014. It was noted that she had attended 11 sessions and had partially met all of her goals. As such, she was released to a home exercise program. (PX 2)

Petitioner testified at trial that her ankle continues to occasionally have a little swelling and stiffness, especially with weather changes.

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

To be compensable under the Workers' Compensation Act, the injury complained of must be one "arising out of and in the course of the employment." 820 ILCS 305/2. A claimant bears the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of employment. 820 ILCS 305/2.

The Illinois Supreme Court has well established that accidental injuries to employees sustained on an employer's parking lot within a reasonable time before or after work are generally held to be sustained "in the course of" employment. *Rogers v. Industrial Comm'n*, 83 Ill.2d 221, 223 (IL.S.Ct. 1980). Further, under such conditions, the employee is held to be at his place of employment to the same extent as though he were at the place where his work was actually performed. *Id.*

However, while the Illinois Supreme Court has been clear that a claimant's presence on the parking lot may put him at his place of employment to satisfy the requirement that the injury be sustained in the course of employment, it does not, by itself, establish that the accident arose out of the employment. Rather, not only must the claimant establish that the accidental injury was incurred in the course of employment, but he must also prove that the accidental injury arose out of his employment. *Rogers v. Industrial Comm'n*, 83 Ill.2d 221, 223 (IL.S.Ct. 1980).

To prove that the accident injury arose out of his employment, the accident must be shown to have resulted from a risk incidental to the employment. *Id* at 224; citing *Quarant v. Industrial Comm'n*, 38 Ill.2d 490, 492, 231 N.E.2d 397 (1967). The term "arising out of employment" refers to the causal link between the employment and the injury. *Id*; citing *W. K. I. D. Broadcasting Co. v. Industrial Comm'n*, 42 Ill.2d 236, 239, 246 N.E.2d 277 (1969). For an injury to come within the Act, it must have had its origin in some risk connected with, or incidental to, the employment so that there is a causal connection between the employment and the injury. *Id*. Ordinarily, the injury does not arise out of the employment unless the danger

causing the injury is peculiar to the work and the risk is not one to which the public generally is subjected. *Id.*

In this case, Petitioner fell within a reasonable time before work on ice and snow on a sidewalk owned by the State of Illinois. As such, the Arbitrator finds that Petitioner was on Respondent's premises at an appropriate time when she was injured. Therefore, the Arbitrator finds that Petitioner's injury was "in the course of" her employment.

Consequently, the question in this case is whether Petitioner's fall "arose out of her" employment. Considering the relevant case law, the Arbitrator finds that it did not, as the Petitioner was not exposed to any risk that the general public was not exposed to.

In *Piercy v. Royal Oaks Nissan*, the Commission set forth a thorough standard for determining whether a Petitioner's slip and fall on ice and snow on Respondent's premises constituted a risk the public is not generally subjected to.

In *Piercy*, the Commission affirmed the arbitrator's decision, finding that Petitioner, who had slipped and fallen on ice on Respondent's premises, failed to prove he was exposed to a risk greater than that to which the general public is exposed. *Piercy v. Royal Oaks Nissan*, 97 IL.W.C. 9109, 2001 WL 952708 (2001).

In *Piercy*, Petitioner had slipped and fallen on a patch of ice in Respondent's parking lot. However, in denying "arising out of," the Commission found that there was no evidence whatsoever that Petitioner's fall was due to any defect of the premises or that Respondent's lot had been cleaned in an improper or defective manner, thus increasing the risk that a person could slip and fall. Rather, the Commission found that members of the general public were exposed to the same conditions as the Petitioner at the site of his fall and found that patches of ice were not unique to the site of Petitioner's fall, as they likely appeared throughout Respondent's entire premises due to the local weather conditions.

In denying "arising out of," the *Piercy* Commission stated that they were upholding the legal principles set forth in *Caterpillar* and noted that the Illinois Workers' Compensation Act was clearly not intended to insure all employees against all injuries. *Id*; citing *Caterpillar v. Industrial Comm'n, 129 Ill.2d 52, 541 N.E.2d 66 (1989) and Quarant v. Industrial Comm'n*, 38 Ill.2d 490, 231 N.E.2d 397 (1967). Further, the Commission stated that Illinois courts have soundly rejected the "positional risk doctrine" and, instead, adhere to the general requirement that one's employment must subject one to an increased risk beyond that to which the general public is exposed. *Id*; citing *Brady v. Louis Ruffolo & Sons Construction Company*, 143 Ill.2d 542 (IL.S.Ct. 1991). Therefore, the mere fact that an employee was present at the place of injury because of his employment is not sufficient to conclude that the injury arose out of the employment, unless the injury itself is the result of some risk of the employment. *Id.*

The *Piercy* Commission specifically listed several other similar decisions in supporting its denial, including *Bays v. Birmingham Steel*, *Kreis v. Advocate Home Health*, *Roeske v. Arlington in Waukegan*, *McBride v. Walgreen Drug Stores*, *Dixon v. Premark International*, and *Myers v. St. Elmo School District*.

In *Bays*, the Commission affirmed the arbitrator's denial of a claim involving an individual who slipped and fell on ice and snow in Respondent's parking lot one morning as he was going to work. *Bays v. Birmingham Steel*, 99 IL.W.C. 35213, 2001 WL 952690 (2001). The Commission found that the proximate cause of the fall was a natural accumulation of ice and snow, not any defect of Respondent's parking lot, in an area where both employees and the general public parked. Accordingly, the Commission found that the Petitioner failed to prove he was exposed to a risk greater than that to which the general public was exposed, thus his claim did not "arise out of" his employment.

In *Kreis v. Advocate Home Health*, 00 IIC 737, the Commission denied compensation to a woman who slipped and fell on ice and snow in the parking lot in front of Respondent's business. The Commission found that the Petitioner failed to show an increased risk of injury over that of the general public. On the date of accident snow had fallen while Petitioner was working. The Commission found that: (1) any person who was attempting to drive after the snow had fallen would be in an identical position as the Petitioner, (2) there was no showing that Respondent's lot was plowed or cleaned of ice in a defective or improper manner or in any manner which increased the risk that a person would slip and fall and (3) there was no showing that the lot at issue had a defective surface in any way. Accordingly, the Commission found that the Petitioner was at no more risk of slipping and falling on ice than any other employee or customer of the other business in Respondent's strip mall.

In *Roeske v. Arlington in Waukegan, Division of Arlington International Duschossois Industries*, 98 IIC 498, the Commission denied compensation to a claimant who was walking on the employer's parking lot, which was wet, snow-covered black asphalt pavement, free of debris or defects, when she slipped and fell. The employer's parking lot was equally accessible to employees and customers. Accordingly, the Commission concluded that the claimant had failed to prove that the condition of the parking lot was a contributing cause to her injury or that there was any risk not common to the general public or risk not confronted by all members of the general public who walk across parking lots.

In *McBride v. Walgreen Drug Stores*, 96 IIC 1395, the claimant's workplace was in a strip mall. She slipped and fell on snow on the sidewalk near the front entrance to Respondent's store. The Commission denied compensation because: (1) the employer did not own or maintain the parking lot or sidewalk in front of the store, (2) the area where the claimant fell was open to and regularly used by members of the general public and (3) that snow is a natural hazard to which the public is equally exposed.

In *Myers v. St. Elmo School District*, 97 IIC 322, compensation was denied to a school bus driver who finished his route, went to a parents/grandparents breakfast at a grade school, got off the bus, walked 20-30 feet, slipped and fell. It had rained recently and standing water had frozen into ice. The Circuit Court affirmed, as did the Appellate Court. In *Myers v. Industrial Commission*, No. 5-97-0878WC, Rule 23 (Fifth District, 1998), the court reasoned:

> In Illinois, icy sidewalks confront all members of the public at one time or another. There is no evidence that this sidewalk was more susceptible to icy conditions or different than any other sidewalk. There is no evidence that because of claimant's employment he was more prone to encountering icy sidewalks than was the general public. Claimant's injuries arose from a hazard to which the claimant would have been equally exposed apart from his work. Claimant failed to present evidence that because of his employment as a bus driver he was at an increased risk of crossing this sidewalk and encountering ice.

Considering all of the prior holdings, the *Piercy* Commission expanded on *Caterpillar*, where the Illinois Supreme Court expressly found that curbs, and the risks inherent in traversing them, confront all members of the public, and *Myers*, holding:

> A logical extension of the sound, supportable reasoning in the *Caterpillar* and *Myers* cases is that all exterior surfaces, such as parking lots roads, etc., are similarly susceptible to rain, ice and snow conditions. Persons traveling, driving, parking or walking anywhere in the area of severe weather conditions, be they employees of companies or the general public, are subject to the risks of slipping and falling due to the natural snow and ice accumulation. Unless there is some evidence to show that the employment presented a risk or increased the risk, i.e. an employer's parking lot was somehow defective, such as in the case of pot holes, parking bumpers, etc., then such conditions are not "risks" of the employment and injuries sustained from such general weather conditions should not be held compensable. Moreover, the Commission observes that general weather conditions, such as rain, ice, snow, etc. are not under an employer's control, unless the employer somehow contributes to the risk, such as improper or defective snow and/or ice removal.
>
> *Piercy v. Royal Oaks Nissan*, 97 IL.W.C. 9109, 2001 WL 952708 (2001)

Here, the Arbitrator finds Petitioner's claim to be nearly identical to those listed above. As such, the Arbitrator finds that Petitioner has failed to satisfy the "arising out of" requirement for accident, as Petitioner slipped and fell on the natural accumulation of ice and snow in an area of Respondent's premises that is open to and used by the general public. Therefore, members of the general public were exposed to the same conditions as Petitioner at the site of her fall. Additionally, there is no evidence that Petitioner's fall was due to any defect of the premises or that Respondent's lot had been cleaned in an improper or defective manner, and Petitioner was not directed in any way as to where to park or which entrance/exit to use. Consequently, it is clear that Petitioner was not exposed to any risk the general public was not exposed to and, therefore, Petitioner's injury did not "arise out of" her employment.

Therefore, the Arbitrator finds that Petitioner's did not sustain an accident on February 14, 2014 that arose out of her employment.

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

In that the Arbitrator has found no accident, this issue is moot.

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

In that the Arbitrator has found no accident, this issue is moot.

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

In that the Arbitrator has found no accident, this issue is moot.

STATE OF ILLINOIS )
) SS.
COUNTY OF )
JEFFERSON

| | |
|---|---|
| ☒ Affirm and adopt | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| ☐ Reverse | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sheryl Taylor,
Petitioner,
vs.

16IWCC0474
NO: 12 WC 13643

Warren G. Murphy Developmental Center,
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 total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 2, 2015 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: JUL 13 2016
KWL/vf
O-7/11/16
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## NOTICE OF ARBITRATOR DECISION

**16IWCC0474**

**TAYLOR, SHERYL**
Employee/Petitioner

Case# **12WC013643**

**WARREN G MURRAY DEVELOPMENTAL CENTER**
Employer/Respondent

On 10/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5623 GARY BEMENT
PO BOX 23926
BELLEVILLE, IL 62223

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

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

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

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

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

OCT 2 = 2015

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

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

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**

**16IWCC0474**

**Sheryl Taylor**
Employee/Petitioner

Case # **12** WC **013643**

v.

Consolidated cases: **N/A**

**Warren G. Murray Developmental Center**
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **August 5, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

FINDINGS 16IWCC0474

On **3/3/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$31,101.20**; the average weekly wage was **$598.10**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **1** dependent child.

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

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

Respondent in entitled to a general credit for any medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act.

## ORDER

Petitioner failed to prove that her condition of ill-being in her right knee was causally connected to her March 3, 2012. Petitioner did prove a causal connection between her cervical and low back conditions, resulting in sprains/strains but only through March 28, 2012. Thereafter, Petitioner failed to prove a causal connection between any conditions of ill-being in her neck and low back. Petitioner failed to prove any permanent partial disability as a result of her sprains/strains.

Petitioner is awarded the following medical bills subject to the Medical Fee Schedule as provided in Sections 8(a) and 8.2 of the Act: Mid America Radiology - $587.04; SIH Foundation - $260.00 (total amount awarded -- $847.04). Respondent shall receive credit for any medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act.

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

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

Signature of Arbitrator

**September 30, 2015**
Date



OCT - 2 2015

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

**The Arbitrator finds:**

Records from St. Mary's Good Samaritan Hospital in Centralia dated March 3, 2012 show that Petitioner presented with the chief complaint of neck pain rated a "10/10." In Triage, it was noted she had been involved in an incident with a resident at work and the resident had grabbed her hair and then she fell to the floor pulling Petitioner to the ground. A pain drawing revealed complaints of tenderness around Petitioner's neck and upper back and lower back pain. Petitioner reported she could not turn her head side to side or flex/extend due to pain. X-rays of her head, thoracic spine, and neck were taken and read as normal. She was diagnosed with a neck strain. A prior right knee surgery (ACL repair) was noted. No specific knee complaints were documented. She was given Ibuprofen and Flexeril and told to follow up with WSI on Monday. While at the hospital it was noted that Petitioner was able to walk to the examination room and was playing with her Kindle Fire. At the time of discharge she was noted to still be playing with her Kindle Fire and looking down. It was noted that she didn't seem to be paying attention at discharge. Petitioner was taken off work until seen at "WSI" on March 5th. (PX 7)

Records from Southern Illinois Healthcare Foundation dated March 6, 2012 show that Petitioner presented due to having been involved in an altercation with a patient at work on March 3, 2012. She had been seen at the emergency room at St. Mary's. Petitioner's complaints included bilateral knee pain, head and scalp pain. Petitioner reported being pulled to the floor by her hair by a client at Murray Center. Petitioner had limited range of motion with her neck and pain complaints associated with her knees and lower spine. The assessment was multiple contusions and she was given pain medication. Petitioner was taken off work until March 14, 2012. (PX 8)

Petitioner followed up at Southern Illinois Healthcare Foundation on March 12, 2012 where she continued to complain of right knee pain and upper lumbar pain. Her neck pain was slightly better. Her diagnoses remained unchanged. She was released to return to work with restrictions on March 20, 2012. (PX 8)

Petitioner was again seen at Southern Illinois Healthcare on March 19, 2012, with complaints of right knee and lumbar pain. Petitioner reported being referred to the workers' compensation doctor but she did not like him so she returned to Southern Illinois Healthcare for follow-up on her knee and back. On exam, Petitioner had left-sided low back pain and smooth range of motion of her right knee with no crepitance. Petitioner was assessed with multiple contusions due to her work injury. She was also diagnosed with right knee pain and problems with hardware. Petitioner was referred to physical therapy for treatment and kept off work. (PX 8)

Petitioner presented for physical therapy at St. Mary's Good Samaritan Hospital on March 22, 2012 completing an Admission Data Base packet. Petitioner gave a history of having noticed problems standing, walking, bending, twisting and sitting on March 3, 2012. She complained of right knee popping, throbbing, aching, and a stabbing sharp pain. She also noticed a burning pain going down her thigh with regard to her back. (PX 7)

Petitioner underwent two physical therapy visits for her back and knee on March 26th and 28th for her back and knee. (PX 7)

Petitioner returned to Southern Illinois Healthcare on March 29, 2012 reporting her right knee was still bothersome as she was experiencing right knee pain with any movement. Petitioner reported having gone to physical therapy and being advised the therapist thought she might have a meniscal tear and should undergo an MRI. Petitioner was kept off work until April 10, 2012. Petitioner then returned on April 6, 2012, at which time she was referred to Dr. McIntosh. The nurse's note indicates Petitioner's right knee had been injured at work. (PX 8)

Petitioner signed her Application for Adjustment of Claim in this matter on April 11, 2012. She alleged neck, back, and a right knee injury due to an accident on March 3, 2012 when a resident pulled her down by her hair. (AX 2)

Petitioner was seen by Dr. McIntosh on April 19, 2012. Dr. McIntosh acknowledged that Petitioner had a prior ACL reconstruction and subsequent removal of the hardware from her ACL reconstruction. She had done relatively well and was last seen by him in 2011. Petitioner reported that she had recently had an injury to her right knee while working at the Murray Center, at which time a resident used both hands to pull her hair, pulled her down on the ground with her right knee landing on the concrete and in the patient's abdomen. She had pain and swelling and was seen by Dr. Settlemoir with subsequent physical therapy. Dr. McIntosh felt Petitioner had a re-tear of her ACL and released her to return to work with a sit down only job. (PX 2)

Petitioner underwent a re-evaluation physical therapy appointment on April 23, 2012 solely with regard to her right knee. (PX 7)

Petitioner presented for her physical therapy appointment on May 8, 2012 using crutches. According to the note, she had begun using them the day before. Petitioner reported increased pain and had called her nurse and doctor about it and was told to keep her appointment for the next week. (PX 7)

Petitioner returned to Southern Illinois Healthcare on May 9, 2012 requesting pain medication (a refill) and reporting she was still waiting to see Dr. McIntosh in follow-up. A right knee brace was noted to be in place. (PX 8)

Petitioner returned to see Dr. McIntosh on May 16, 2012 reporting no improvement and problems with popping, instability and a tingling sensation down the

inside of her leg as well as occasional swelling. Petitioner had been working light duty and had been wearing a brace and undergoing physical therapy. Dr. McIntosh recommended an injection and arthroscopic surgery. (PX 2).

Petitioner again returned to Southern Illinois on May 21, 2012 for neck pain. She was noted to be using crutches. The nurse noted that Petitioner's neck appeared to have "relapsed." No history of re-injury "lately" was noted. Petitioner was to follow up in two weeks. (PX 8)

Petitioner presented for physical therapy on March 22, 2012 stating she had hurt her back and knee at work when a resident grabbed her hair and pulled her down towards the floor. She could not remember if she twisted her knee. Since then, she had been experiencing constant pain, especially in the right knee. (PX 7)

Petitioner was discharged from therapy on May 25, 2012. (PX 7)

Petitioner followed up at Southern Illinois Healthcare on May 30, 2012 as advised. She was on crutches and complaining of neck pain. No current injury was noted with the nurse stating, "had resolved from previous initial injury, no significant neck pain Mar/Apr/May so far." (PX 8) Petitioner's current work restrictions were to remain in effect. (PX 8)

Petitioner returned to see Dr. McIntosh on May 31, 2012 reporting that she wasn't much better with regard to her knee. Despite the injection and medications, she continued to report pain and she wasn't making any progress in therapy. Petitioner also reported neck pain that day along with headaches and Dr. McIntosh referred her to his colleague, Dr. Rerri, for her neck complaints. Petitioner's work restrictions remained unchanged. (PX 2)

When re-examined at Southern Illinois on June 19, 2012 Petitioner reported ongoing neck pain with the inability to move her neck that much. She denied any radiating pain or numbness or weakness in her upper extremities. (PX 8) There are no further records from Southern Illinois Healthcare after this visit.

Petitioner saw Dr. Rerri on July 10, 2012 and again reported being grabbed by the hair and pulled to the ground on March 3, 2012 with immediate neck pain and right shoulder pain. Petitioner reported trouble reaching and lifting. He noted that she had recently been walking with crutches due to her knee problems and that had exacerbated her neck and shoulder pain. On exam mild secondary impingement in her right shoulder was noted. He ordered an MRI. Dr. Rerri diagnosed Petitioner with post-traumatic cervical radiculopathy. (PX 2)

Petitioner underwent a right knee arthroscopy with a chondroplasty of the patella, synovectomy, and a lateral release on July 23, 2012 by Dr. McIntosh. According to the doctor's History and Physical Report Petitioner had sustained a twisting injury to her knee while working for Respondent. (PX 3)

Petitioner had an appointment with Dr. Rerri on July 26, 2012 during which they discussed treatment alternatives. Petitioner elected to proceed with a decompression and fusion as it seemed the most effective way to rapidly return to work. (PX 2)

Dr. McIntosh again examined Petitioner on July 27, 2012 and ordered a home exercise program. (PX 2)

Petitioner returned to see Dr. McIntosh on August 14, 2012 in follow-up for her right knee. Her neck surgery was scheduled for the next day but she was unsure if it would be going forward. Post-operative knee care in light of the pending neck surgery was discussed. (PX 2)

Petitioner was taken off work on August 16, 2012 until her recovery from surgery was complete. (PX 2)

On August 20, 2012 Petitioner presented to the St. Mary's Good Samaritan Work Safety Institute for a physical therapy evaluation per Dr. McIntosh. Petitioner gave a history of being injured on March 3, 2012 when she was "attacked by a resident." Petitioner stated that she was pulled to the ground and has experienced back, neck and knee pain since then. Petitioner had undergone knee surgery on July 23, 2012 and had been off work since her injury. Petitioner reported the inability to walk long distances. (PX 7)

Petitioner returned to see Dr. McIntosh on September 25, 2012. According to his notes, Petitioner was doing very well with excellent range of motion, minimal swelling, and good hamstring flexibility. She was working hard on her quad strength. He felt she could work full duty as a result of her knee; however, she remained off work due to her neck. (PX 2)

Petitioner underwent physical therapy for her knee between August 20, 2012 and September 26, 2012. (PX 7)

Petitioner underwent physical therapy for her knee on October 1, 2012 at 9:50 a.m. reporting that her right knee seemed to be getting better. (PX 7)

Petitioner went to the emergency room at St. Mary's Good Samaritan on October 1, 2012 at approximately 6:00 p.m. seeking pain medication as Vicodin and Ibuprofen weren't helping her. Petitioner was given medication and sent home with a friend. (PX 7)

Petitioner continued with physical therapy for her knee between October 1, 2012 and October 3, 2012. In her discharge note she was found to have been non-compliant with her appointments. (PX 7)

Petitioner next saw Dr. Rerri on October 9, 2012. His office notes indicate the surgery had been cancelled by workers' compensation, then reinstated and now set for October 17, 2012. Petitioner's complaints included neck pain, right arm pain, and headaches. Surgery proceeded the next day (an anterior cervical decompression with a fusion at C4-5 and C5-6). (PX 2; PX 3)

Post-operatively, Petitioner underwent an MRI of her cervical vertebrae with showed C4-5 and C5-6 cord compression by disc and osteophyte, which was consistent with the complaints. (PX 2)

Petitioner followed up with Dr. Rerri after her surgery and his records reflect general good progress. By November of 2012 she was allowed to drive, told to discontinue the neck brace, and was referred for physical therapy. (PX 2)

On November 29, 2012 Dr. Rerri re-examined Petitioner regarding her knee. Her only complaint was some achiness and inability to straighten her knee due to discomfort. She was on analgesic medication from Dr. Rerri and Dr. McIntosh added an anti-inflammatory medication to try and decrease her symptoms. He also wanted her back in physical therapy. (PX 2)

Petitioner participated in physical therapy between November 29, 2012 and December 26, 2012. (PX 7)

Petitioner presented to the emergency room at St. Mary's on January 1, 2013 with head complaints after hitting her head on a door the night before. (PX 7)

Petitioner continued with her therapy for her knee and neck as of January 4, 2013. (PX 7)

Petitioner followed up with Dr. Rerri on January 7, 2013 and he noted slow progress with an occasional aching in the right side of her neck, worse at night. Her gait was noted to be normal. He felt she needed a few more weeks of therapy but should then be good enough to return to her job without restrictions. He anticipated a return to work date of February 2, 2013. (PX 2)

On January 17, 2013 Petitioner returned to see Dr. McIntosh regarding her right knee. She reported difficulty going up and down steps but doing well from her neck therapy. He noted she still had some crepitus on range of motion and minimal swelling so he felt it reasonable to continue with physical therapy and to use a patellofemoral brace for support. (PX 2)

As of January 28, 2013 Dr. Rerri noted Petitioner was reporting that her neck was doing well but she was being troubled "more by left sided low back pain which started following the work injury last year." Petitioner was noted to have left paravertebral tenderness and he recommended physical therapy and mild analgesics. If she continued to complain an MRI would be ordered. (PX 2)

Petitioner attended physical therapy on February 4, 2013. She reported being back to work regular duty the preceding Friday. Her neck and back had been bothering her a lot recently. (PX 7)

Petitioner presented for a physical therapy evaluation regarding her back on February 13, 2013. According to the history, Petitioner's back problem began in 2012 but her knee and neck hurt more at that time. She added that she had not been taking any pain medication since November of 2012 and she started noticing her back pain. Additionally, returning to work on a regular duty basis was increasing her back pain most of the time. (PX 7)

In a note dated February 18, 2013 Dr. McIntosh limited Petitioner to no more than four overtime shifts per week for the next three months. (PX 2)

Petitioner's last physical therapy appointment for her back at St. Mary's was held on February 25, 2013. (PX 7)

Dr. Rerri re-examined Petitioner on March 4, 2013 regarding her complaints of back pain, left buttock and left lower extremity pain. Despite physical therapy and medication Petitioner remained progressively limited by pain. She was noted to be working. He ordered a lumbar MRI. (PX 2)

In a note dated March 18, 2013 Dr. Rerri excused Petitioner from work until she was re-examined on March 21, 2013. (PX 2)

Petitioner was examined by Dr. Rerri on March 21, 2013 regarding her back and bilateral leg pain. Her symptoms had worsened over the weekend. The MRI was to be done the next day. No treatment recommendations were noted. (PX 2)

Petitioner underwent the MRI on March 22, 2013 (PX 3) and returned to see the doctor on March 25, 2013. Dr. Rerri reviewed the MRI noting it showed a focal central protrusion at L5-S1 with asymmetry to the left which would explain Petitioner's symptoms. She was offered an L4-5 epidural steroid injection and taken off work. (PX 2)

Petitioner underwent the injection with Dr. Rerri on April 8, 2013 and was kept off work. (PX 2)

Petitioner returned to see Dr. Rerri on April 6, 2013 at which time she reported no improvement from physical therapy or the injection. Dr. Rerri offered her a two level interbody fusion which she wished to proceed with rather than pain management. She remained off work. (PX 2)

Dr. McIntosh re-examined Petitioner's knee on April 28, 2013 as she was reporting locking. Petitioner also noted occasional give away when walking on her knee

for prolonged periods of time and occasional swelling. He recommended conservative treatment in the form of bracing and exercises. (PX 2)

Petitioner returned to see Dr. Rerri on April 30, 2013 regarding her earlier neck surgery. She was doing very well and her voice was strong. Her major disability at that time was noted to be her back. She had tenderness to palpation and pain in her lower back. She remained unable to work and in need of surgery. (PX 2)

On May 28, 2013 Petitioner underwent an independent medical examination with Dr. Keith Wilkey at the request of Respondent. A written report followed. Dr. Wilkey reviewed Petitioner's account of the accident noting that she told him she was in an altercation with a client at work and the client grabbed her hair and pulled her down to the ground landing directly on the floor. Petitioner reported the immediate onset of pain in her cervical spine, lumbar spine, right shoulder, and arm, left leg, and knees. "Apparently there were two claims filed for the same incident, the second one involving the knees." (PX 10, p. 1) Petitioner reported going to the local treatment facility and following up at Salem Medical Center and then with Dr. McIntosh who treated her knee condition. Due to persistent arm and shoulder symptoms Petitioner underwent an MRI and ultimately underwent neck surgery. Petitioner reported that her right shoulder pain and radicular arm pain was completely resolved. Petitioner told the doctor that she didn't think her neck was a problem any longer and she didn't need to be evaluated for it. Her neck displayed full range of motion and no evidence of tenderness. No cranial complaints were noted.

According to his report, Petitioner's main complaint was low back pain with a true radicular pattern. She was taking up to 8 vicodin a day. No treatment, to date, had provided any relief. Petitioner reported constant pain with intermittent aggravations worse when getting up from a seated position to a standing position and bending forward. Dr. Wilkey noted no history of significant neck or arm problems. Petitioner acknowledged one episode of lower back pain requiring a trip to a doctor about two to three years earlier which resolved itself within one week.

Dr. Wilkey performed a physical examination and he reviewed the cervical and lumbar MRIs. His assessment was: right arm radiculopathy; left leg radiculopathy; pre-existing cervical arthrosis at C4-5 and C5-6; internal disc derangement at L4-5 and l5-S1; and a herniated disc central to the left at L5-S1. Based upon the data he had obtained and due to the "temporal sequence of events" it was Dr. Wilkey's opinion that Petitioner's work-related injury on March 3, 2012 resulted in Petitioner's symptoms. He noted that both levels had significant degenerative changes prior to the injury. He felt she was at maximum medical improvement with regard to her neck but agreed with the need for surgery on her back. He agreed she should remain off work although she could "possibly" do some light duty. He felt a discogram would be appropriate too to confirm concordant pain at L4-5. (PX 10)

Petitioner followed up with Dr. Rerri on May 30, 2013. She remained unable to work. (PX 2)

Petitioner was seen at the emergency room on May 30, 2013 reporting right knee pain. She stated she was starting to walk down some steps and her right knee gave out and she fell down three steps landing on her right knee on some boards. She was able to walk but it hurt to bear weight. Petitioner reported having knee problems for several years for which she would see Dr. McIntosh. She was advised to wear a knee immobilizer as needed and to follow up with an orthopedic specialist. (PX 1)

Petitioner was re-examined by Dr. McIntosh on June 4, 2013 for ongoing knee problems of giving away and locking. He felt her condition was still related to her work accident with her right knee and he recommended a repeat knee arthroscopy. (PX 2)

Petitioner underwent a two level low back fusion procedure on July 31, 2013. Petitioner's primary care physician at this time was noted to be Dr. Gautam Jha. In a "Consultation" of the same date Dr. Rerri noted Petitioner was being seen after lumbar surgery. With regard to "Past Medical History," he noted "Positive for an injury which caused her neck pain, lumbar back pain, and right knee pain." (PX 3; PX 2)

Petitioner experienced some complications post-surgery with MRSA which responded to antibiotics. She was briefly hospitalized. (PX 3) Petitioner continued to complain of some left-sided pain but by September of 2013 the doctor felt it would resolve. He told her to wean off the back brace and follow up with him in two weeks at which point he anticipated beginning physical therapy. (PX 2)

Petitioner was involved in a motor vehicle accident on September 26, 2013 in which she hit her brakes hard and felt pain in her back and legs. She followed up with Dr. Rerri on September 30, 2013 who prescribed a Medrol Dosepak and relaxants, anti-inflammatories, and pain medications. (PX 2)

Petitioner remained symptomatic regarding her back and left lower extremity and Dr. Rerri ordered an MRI to check for deep collections of fluids or abscesses. The MRI was negative and the pedicle screws showed good position. As a result, Dr. Rerri, in his November 12, 2013 office note, expressed uncertainty as to the source of Petitioner's pain complaints. He recommended a left SI joint injection arthrogram to help further diagnose the problem and address her pain complaints. (PX 2; PX 11)

Due to illness Petitioner had to cancel the arthroscopic knee surgery on two occasions. As of February 25, 2014 Dr. McIntosh noted she was still complaining of popping and giving away along with medial pain in the patellofemoral joint. He noted Petitioner had a deficient ACL knee with previous reconstruction. Her menisci were fine and he felt a lot of her pain was secondary to patellofemoral instability. He felt she might benefit from medial plication as well as debridement and they were going to schedule it once she was over a prolonged cold. (PX 2)

Dr. Rerri subsequently became affiliated with Bonutti Orthopedics in Effingham, Illinois, and Petitioner presented to him on February 28, 2014 at that location. At that time she underwent an epidural steroid injection. (PX 4)

On March 5, 2014 Petitioner completed a New Patient Questionnaire for Bonutti Clinic. In it she referenced that her chief complaint was back pain and leg pain, numbness, and weakness. She indicated that her problem had begun in March of 2012 but "resurfaced 2/20/13." (PX 4) She reported missing work since 2/20/13. She completed a pain drawing consistent with her complaints. That same day she was examined by Dr. Rerri who noted Petitioner had been unable to return to work at this point. The recent injection was of no benefit. Dr. Rerri recommended a left SI joint injection arthrogram. (PX 4)

Petitioner underwent knee surgery on March 17, 2014, involving an arthroscopy, lateral meniscectomy, and excision of synovial plica. (PX 2) Thereafter she followed up with Dr. McIntosh on March 20th and he recommended physical therapy begin. She was to remain off work. (PX 2)

Petitioner underwent the injection on April 14, 2014 and was kept off work. (PX 4)

As of May 1, 2014 Dr. McIntosh felt Petitioner's knee was doing well but Petitioner was reporting that her back was giving her more and more difficulty and was her major problem. As a result it hampered her ability to progress in physicial therapy. She had good range of motion and felt her knee was doing okay so they agreed to focus on her back. She remained off work. (PX 2)

Dr. Rerri saw Petitioner in follow up after the injection on June 4, 2014. Petitioner continued to complain of back pain and while the injections were not effective in helping with the pain, she had tried marijuana and found it very effective in controlling her pain. Dr. Rendi prescribed tramadol for pain control and ordered an MRI for her lumbar spine to check for deep infection and screw position. She remained unable to work. (PX 4)

Dr. Rerri re-examined Petitioner on July 16, 2014. At that time he described her condition as chronic pain and he felt no more surgery was necessary. He felt she could return to work with the following restrictions: no lifting over 20 lbs; limited bending, twisting, sitting, and standing; no climbing; alternating sitting and standing; and daytime work only. Those restrictions were in effect as of July 21, 2014. He also recommended that Petitioner follow up with Dr. Jha to ascertain the effectiveness of a Fentanyl patch or for a referral to a chronic pain clinic. (PX 4)

Dr. Rerri re-examined Petitioner on August 25, 2014 after she had returned to work but could not cope due to pain. "Attempt at getting pain management expertise for her has not been possible. We are still awaiting work comp approval. " She was taken off of work and a request for pain management was again noted. (PX 4)

Upon the referral of Dr. Hurford, Petitioner was seen at Apex Physical Therapy on September 29, 2014. Petitioner reported that her condition began on March 3, 2012 when she was helping a resident and her hair got pulled and she was pulled to the ground. She reported landing on her knees but being twisted around after the initial fall injuring her neck, low back, and right knee. Petitioner summarized her surgeries and treatment noting that she had received physical therapy in the past but she had so much pain it had to be stopped. Petitioner was reportedly working light duty sitting at a desk and answering the phone. Petitioner's effort was noted to be moderate with regard to guarding as she was state she was unable to attempt certain movements due to pain. (PX 5)

Petitioner failed to appear for therapy on October 7, 2014. (PX 5)

Petitioner returned to see Dr. Rerri on October 8, 2014 reporting she has been off work due to her chronic pain and unable to tolerate Cymbalta due to nausea. Her complaints included ongoing back pain and bilateral lower extremity numbness worse on the left side. Dr. Rerri noted the problem was chronic pain and Petitioner was scheduled to see Dr. Hurford the following week. She was kept off work pending that appointment. (PX 4)

Petitioner attended physical therapy on October 9, 2014. On October 10, 2014 Petitioner reported she was only supposed to attend one visit per week until she saw her doctor on October 13, 2014. (PX 5)

Per Dr. Hurford, Petitioner underwent an FCE on November 18, 2014. Petitioner gave a history of being pulled to the ground by an individual and that "she could not move as she 'pulled a muscle' and went to the emergency room. She noted immediate right knee and neck pain but noticed more low back pain the following day. While not working at the time of the FCE she reported she kept busy at home doing laundry, dishes and cooking. The evaluator noted that Petitioner's Performance Criteria Profile was most consistent with an over guarded effort if not symptom magnification. It was felt that Petitioner participated with less than full effort and her willingness to participate in activities had a marked negative effect on her observed functional tolerances. Petitioner was noted to be often joiking around with the evaluator despite her high pain ratings. Her heart rate increased during testing indicated less than full effort. Her pain questionnaire packet responses were mostly unexpected as compared to observations of functional performance. She displayed several positive Waddell's signs. It was felt that Petitioner could at least work on a part-time basis. (PX 5)

Petitioner returned to see Dr. Rerri on November 19, 2014 reporting she was seeing Dr. Hurford in St. Louis but switching to another pain specialist. She was currently on Aleve for pain. Petitioner was advised to follow up in January of 2015 for repeat x-rays of the lumbar spine at which time they would consider a CT scan if there was a question regarding the adequacy of the fusion. (PX 4)

In November of 2014, Petitioner filed an Application for employment with New Wave Repossession. In her application she stated that she had been working for American Lenders since December of 2013 and that she could perform all of the activities involved in being a repossession agent. (RX 1)

The most recent medical report is dated June 19, 2015 from Dr. Boutwell, a pain management specialist. Petitioner related no primary care physician and that she was a self referral. She reported subjectively stable to intermittently worsened low back discomfort with occasional left lower extremity radiculitis. The visit was marked as a "return" visit as Petitioner described herself as subjectively stable to occasionally worsened since her last visit. She reported the medication wasn't helping nor had she done the physical therapy prescribed at her last visit because it wasn't approved. Dr. Boutwell found a decreased range of motion in nearly all plain sight area of stiffness. Straight leg raise was positive on the left at approximately 30% and positive on the right at approximately 40-45%. She was 1+ and symmetric patellar at Achilles reflexes. Bilateral lower extremity motor and sensory exams remain within normal limits and all myotomes and dermatomes, including the left lower extremity areas where she describes paresthesias or dysesthesias. Dr. Boutwell recommended rotations of Lorzone, Tizanidine, Baclofen, and Norflex. She has recommended a left L4-5, L5-S1 transforaminal epidural steroid injection times two. She further referenced her May 22, 2015 note regarding an FCE and MRI and EMG. She was to follow up one week after the second injection that was being recommended by the doctor. (PX 9)

***The Arbitration Hearing***

Petitioner testified that she began working for Respondent as a mental health technician on February 21, 2011. Her job was to assist developmentally disabled adults with daily living skills including bathing, taking care of themselves, and getting around, without injury to themselves or others. Petitioner testified that she had been working full-time shifts without incident and without any complaints or problems due to back pain or leg pain.

Petitioner testified that on March 3, 2012 she worked a double shift. On the second shift she was assisting one of the residents with cleaning her room. Shortly afterwards she asked the resident and roommate if they wanted to go and finish cleaning their room. Petitioner testified that as the resident got up and approached Petitioner she apparently changed her mind, grabbed Petitioner by the hair with both of her hands, pulled her legs to her butt and dropped herself and Petitioner to the ground. She would not let Petitioner go until other staff arrived and pulled her off. Petitioner further testified that the nurse on duty witnessed it and sent her to the emergency room.

Petitioner testified that when she arrived at the emergency room she was mainly complaining about her neck and back. She further testified that her knee was hurting a little but not as bad as her neck and back. At the emergency room Petitioner received some muscle relaxers, a pain pill and was told to follow up with her doctor.

Petitioner testified that she followed up with the Work Safety Institute which was Respondent's facility as her supervisor sent her there. Petitioner then went and saw her own doctor, Dr. Settlemoir at Southern Illinois Healthcare Foundation. Thereafter, she came under the care of Dr. McIntosh at the Neuromuscular Orthopaedic Institute, (orthopedic surgeons in Mt. Vernon). Petitioner testified that she was familiar with Dr. McIntosh as he had operated on her knee in 2006 and again in 2011. Petitioner explained that she had had surgery for an ACL tear in 2006 and another diagnostic arthroscopy in 2010.

Petitioner testified that she told Dr. McIntosh about the incident at work and that she had a recurrence of knee pain and also neck and back pain. Dr. McIntosh performed surgery on her knee and then referred her to his associate, Dr. Rerri, who specialized in neck and back issues.

Petitioner testified that the surgery helped her knee pain.

Petitioner testified that when she presented to Dr. Rerri she told him that one of the individuals at Murray Center grabbed her by the hair, pulled her to the ground and it took several people to get her off of her. She told him that prior to her incident she again had only one minor incident of back pain stemming from an incident with a resident who had punched her in the neck and her neck was sore. She was given muscle relaxers and was fine in a couple of days.

Petitioner testified that Dr. Rerri had performed two surgeries on her including a cervical fusion (October of 2012) and a multi-level fusion in her lumbar spine (July of 2013). Petitioner testified that she has also sought pain management in St. Louis for her back to control her level of pain so that she can function better. Those doctors are Dr. Hereford and Dr. Boutwell.

Petitioner also testified to being seen by Dr. Farley [sic] as a Section 12 examiner prior to her back surgery. According to Petitioner, Dr. Farley agreed with the need for surgery.

Petitioner returned to work in September of 2014 on light-duty with restrictions of limited sitting and standing, limited lifting, no twisting, no bending, and no stooping. Petitioner testified that she was unable to perform her job and went off work a few days later. She then tried again but wasn't able to do and was ultimately terminated from her job. Petitioner was suspended in October and then terminated in November for what she described as abuse of time.

Petitioner testified that since her suspension she has worked as a repossession agent for American Lenders in Centralia and for All Cities in Granite city. She testified that she began working on her license prior to October of 2014 because Dr. Rerri had told her he didn't anticipate she would ever be able to return work doing what she wanted and would have restrictions. Repossessions kind of "fell into her lap." Petitioner explained that "the lady" that helped her get her repossessions and license in April had

her on a list as an active agent back in April but she didn't start working for her until October of 2014.

Petitioner testified that while she was off on temporary disability, she began to work on getting a license to be a repossession agent. In April of 2014 she got her repossession license, but did not start working as a repossession agent until October of 2014. At that time she was hired by American Lenders in Centralia and then later for All Cities in Granite City, Illinois. She described the repossession job as lighter duty work. As a repossession agent Petitioner would drive in her personal vehicle, locate the vehicle to be repossessed, and knock on the door of the residence to see if she could get the keys. If she could get the keys, then her co-worker would drive the other car. If she could not get the keys, she would call a tow truck and wait for a tow truck driver to arrive and follow the tow truck back. Petitioner testified that she could work her own hours and work at her own pace. She normally had 24 hours from the date of the assignment to pick the car up. When she worked for All Cities, she did not even have to knock on the door, she would just find the car and then call a tow truck driver who would come pick up the car. She testified further that from April to October, she worked as a volunteer spotter for her husband's employer, American Lenders. At that point while she was riding in the car to take her husband to work, she would look for cars that were on the repossession list and notify American Lenders where the car was. She said she did not get paid for this activity. She stopped working in January of 2015 due to her husband's illness.

Petitioner further testified that her knee is doing fairly well. She has some discomfort, although not enough that it limits her from her activities. If it hurts too bad she puts on a knee brace and maybe takes Ibuprofen. She does daily knee exercises. She testified that she could not walk for long distances without an increase in knee pain, and that she has difficulty with stairs. Her knee rarely locks up or gives out. Petitioner estimated that she takes Ibuprofen about twice a week because she has muscle relaxers that she takes for her back and it helps her knee also.

Petitioner testified that she cannot walk for long distances without experiencing pain but it is more back pain than knee pain. She cannot do more than four stairs without a rail.

Regarding her back, she testified that she has pain in her low back when she bends or twists. The best position is to lay down flat and have a heating pad on her back. If she does not keep moving, however, she gets stiff and it gets worse. It is hard for her to drive long distances or to sit for long periods of time. She has difficult time doing the dishes and laundry. She likes to rotate between standing and sitting and mentioned that sitting in a metal chair at the hearing caused her back to hurt. She uses over-the-counter medications and Icy Hot. She believes that her restrictions are not to lift over 10 pounds.

Petitioner still has neck symptoms and she testified that she has difficulty turning to the right and looking down for a long time, which causes an increase of pain and

stiffness. Looking up also causes pain and stiffness. Once in a while she gets pain radiating down her arm. She reported that she was driving a couple times in the last few months at which time she had a locking up feeling in her arm. She does daily exercises for her neck, knee, and back.

Petitioner testified that she is not currently employed; however, she is presently looking for office-type work.

On cross-examination Petitioner testified that she told emergency room personnel about her back pain when she was there on the 3rd of March. She also testified that she told the Work Safety Institute about it and the emergency room people in Salem when she presented there. She testified she wouldn't be surprised if it wasn't in the records because sometimes stuff gets overlooked. She didn't think she failed to tell them about it because she called work and told work that it was injured.

When asked if she worked four months after the accident, Petitioner responded that she worked light duty and didn't go off work until July of 2012.

Petitioner acknowledged she was engaged in "repo work" from October of 2014 though January of 2015 and that she got her repo license in April of 2014. Petitioner adamantly denied being engaged in repo work prior to October of 2014.

Petitioner acknowledged there are stairs in her house which go to a loft; however, she doesn't go up them. She also experiences pain after she lifts anything over ten pounds.

Petitioner testified that she has been forthright with her doctors and has given them complete and accurate medical information. She acknowledged a good relationship with Dr. McIntosh and Dr. Rerri and didn't know why they might write things in their notes that were untrue. Petitioner acknowledged that there was a statement in a questionnaire for Dr. Rerri where she indicated she had missed work since February of 2013 but that was wrong and it should have been March. When told the questionnaire was completed in 2014 she believed that the February date might have been correct but really wasn't sure. She acknowledged telling Dr. McIntosh in May of 2014 that her back pain was continuing to give her more and more difficulty and was her major problem and that she currently could not work. She denied every working for someone else while on TTD.

Barbara Wheat testified on behalf of Respondent. Ms. Wheat owns a repossession company and is a police officer. Ms. Wheat testified that since 2012 one has to pass a background check and have an "E" license before one can be hired with a repo company.

Ms. Wheat testified that Petitioner contacted her in October and wanted a job with the company. At that time Petitioner was "E" certified and was working for American Lenders. Petitioner filled out an application for employment in October of

2014 (RX 1) Ms. Wheat testified that the application included Petitioner's work history and Petitioner wrote that she worked for American Lenders from December of 2013 through October of 2014 until she got her license.

Ms. Wheat testified that in order to have a repo company you have to be licensed through the Secretary of State and Illinois Commerce Commission.

Ms. Wheat further testified that she and Petitioner discussed the physical requirements of the job and Petitioner stated that she did not have any physical limitations and could perform the work. Petitioner told her she could work any hours and had repo'd quite a few cars for American Lenders. She appeared very ambitious.

Ms. Wheat also testified that Petitioner advised her that the checks would need to be written to her husband because she was on disability. Petitioner told her she was suing Respondent and that was how the other repo company had done things so that she could work and be on disability. Ms. Wheat testified that she discussed the foregoing with Petitioner who laughed and responded that that was how her competitor, Terri Lyons, did it.

Ms. Wheat testified that Petitioner indicated to her in their initial phone call that she was running cars (locating them and if she couldn't get the keys she would have to call someone else and split the pay).

Ms. Wheat testified that after receiving the application she contacted the Centralia Police Department. Petitioner had mentioned she was also suing a Walgreens and a doctor's office over a wrong prescription that had caused an allergy. Ms. Wheat testified that she contacted the police department because she is mandated to report possible fraud. Thereafter Kevin Meadows, an investigator, came out. They discussed the situation.

On cross-examination Ms. Wheat acknowledged she never saw Petitioner actually working for another company and that she never actually worked for her, but that she did go to work for another company right after hers.

Christina Smith also testified on behalf of Respondent. She formerly worked for New Wave Recovery as a secretary. As such she managed the phones and dealt with applicants. She testified and presented for hearing several voice messages left by Petitioner in November of 2014 regarding a possible job. Ms. Smith testified that Petitioner had come in regarding an application and filled one out. Petitioner told Ms. Smith she was physically able to perform the job and that she had been working for American Lenders as a repo agent. She further testified that American Lenders paid Petitioner's husband for Petitioner's work and she requested a similar arrangement with New Wave. Ms. Smith was not cross-examined.

On rebuttal, Petitioner testified that from April until October she was unpaid and worked only as a volunteer. She acknowledged applying at New Wave and that she was

working for American Lenders at the time of the application. While working for American Lenders all she did was "spot cars." During this time she was being trained to get her license. With regard to her application and the fact she stated she was employed from December of 2013 through October 2014, Petitioner testified that Terri told her that since she spotted those cars and really wanted to work for her she could go ahead and put that down. Petitioner also testified that her husband, Chris, worked for both American Lenders and Competition. She denied that he was paid any money that she should have been paid for repos because she didn't start working there until October of 2014.

On further cross-examination Petitioner acknowledged that she did do "stuff" for American Lenders between December of 2013 and October of 2014 but she wasn't paid for it. Her husband would be driving to work and she would be in the car with him and have her phone and look for (spot) cars. She considers volunteering working. No one at New Wave asked her if she got paid for her work with American Lenders or not. She had no explanation for why someone would think her husband was being paid for her "work." She felt the statements to that effect by the two witnesses was incorrect.

Petitioner also testified that she and her husband were trying to get a scrap business started in January of 2013 because she could work at her own pace and lie down. She didn't remember if she was receiving TTD at that time. However, the licensing was never approved due to her husband's license having been previously denied. .

**The Arbitrator concludes:**

1. Accident.

   Petitioner sustained an accident on March 3, 2012. Petitioner's testimony regarding the accident was unrebutted. She testified that a nurse witnessed the event. That nurse was not called to testify. No accident reports were admitted into evidence. Petitioner was in the course of her duties as she was working a double shift and her accident arose out of her employment as she was engaged in tasks related to her job as a mental health technician when she fell.

   While the Arbitrator has concluded Petitioner sustained an accident on March 3, 2012, the extent/details of that accident are somewhat suspect and will be more thoroughly discussed under causal connection.

2. Causal Connection

   Petitioner's credibility is pivotal to the case. The record is full of inconsistencies and missing information casting doubt on Petitioner's overall credibility.

   At the outset the Arbitrator notes the following inconsistencies:

Petitioner testified that she was seen at the emergency room on March 3rd and given medication and told to follow up with her doctor. If one looks at the emergency room record itself, Petitioner was also referred to the Work Safety Institute the following Monday. Petitioner did not testify to that nor is there a record of such a visit found in the record as a whole. Petitioner testified that she was referred by the emergency room solely to her doctor and that her supervisor sent her to the Work Safety Institute. The ER records indicate a referral was made by it to the WSI. Some WSI records are found in PX 7, thus suggesting to this Arbitrator that either party could have introduced those records. Petitioner's failure to do so is troublesome, especially since she later told her doctor at SIH that she didn't like whoever she saw.

Petitioner testified that when she was seen at the emergency room she was complaining about her neck and back primarily and her knee hurt a little. The emergency room records document neck pain, shoulder pain, head, and upper mid-back pain complaints. There is no mention of lower back pain complaints or right leg/knee complaints. A history of a prior right knee surgery is noted but nothing more. Pain drawings are limited to Petitioner's neck and upper back/thoracic spine. Consistent with her complaints and the pain drawing Petitioner underwent a CT scan of her head and x-rays of her cervical and thoracic spines. Nothing more. She was diagnosed with a neck sprain. It is also interesting to note that medical personnel documented that throughout the time Petitioner was at the emergency room she was engaged with her Kindle Fire and had her head looking downward while using it. In contrast, she complained of difficulty/inability to flex/extend her neck. In this Arbitrator's mind there is a significant question as to whether Petitioner injured her knee at the time of the accident.

It is concerning that there are so many different accounts of the details of Petitioner's accident. Petitioner testified to one version. That version is not reflected in the emergency room record. There is no reference to a resident pulling her legs to her butt and dropping them both to the ground with the resident on top. The emergency room history indicates Petitioner's hair was grabbed and the resident fell to the floor pulling Petitioner to the ground. It was noted that Petitioner hit the front of her head on the concrete floor when she landed. She later told Dr. McIntosh that she was pulled down with her right knee landing on the concrete and in the resident's abdomen. Later she told him there was a twisting injury to her knee. At the hearing herein Petitioner didn't testify to twisting her knee at the time of the accident. The Arbitrator acknowledges that Dr. Wilkey (Respondent's examining physician) mentioned two incident reports with the second one involving Petitioner's knee. Petitioner also saw a doctor on March 6, 2012 for bilateral knee pain and was diagnosed with contusions. While such a diagnosis might be consistent with a fall onto concrete, Petitioner never testified about bilateral knee pain at the time of the accident or hitting her knees on the floor. She provided no testimony about a second incident report which might have tied some things together. In the end, there are unexplained

inconsistencies and questions for which Petitioner failed to meet her burden of proof.

Petitioner testified to prior treatment for her knee with Dr. McIntosh. None of those records were admitted into evidence, especially the ones relating to her care and treatment in 2010 – 2011.

Petitioner's FCE, which was ordered by her own treating physicians, reports nonorganic findings in 12 of the 18 categories tested. The report's author even noted that Petitioner was laughing and playful while reporting 8-9/10 pain. This is particularly troubling due to the fact that Petitioner's subjective complaints were the motivating factors to surgically repair degenerative conditions in her lumbar and cervical spine, as well as revise her prior right knee surgeries.

The Arbitrator finds the testimony of Barbara Wheat and Christina Smith to be credible. It is significant that Ms. Wheat immediately reported Petitioner's request to be illegally paid via a police report to the Collinsville Police Department. The fact that Ms. Wheat is a sworn police officer further bolsters her credibility. It must be noted that Ms. Wheat's testimony and that of Christina Smith are mutually supportive and neither party was shown to have any motivation to misstate facts under oath.

Petitioner testified that she did not work anywhere else during her employment with Respondent; however, she authored a job application with New Wave Recovery which clearly states that she worked for at least ten months between December 2013 and October 2014. Petitioner's attempt to assert that she only spotted cars for American Lenders and was not paid for her activities is not credible, as the first page of Petitioner's application indicates that she spotted cars from 12/13 through 4/14 when she received her repo certificate. Furthermore, Petitioner listed her job title with American Lenders as "repo agent" in October 2014, a time at which she was still employed by Respondent.

Respondent presented evidence that Petitioner reported on her job application that she had worked as far back as April of 2014, some four months before her termination with Respondent. It is assumed that that evidence was presented to make all of Petitioner's testimony regarding her accident appear not credible. Petitioner may have been less than honest on a subsequent employment application; however, this lack of what one might call "complete candor" when applying for jobs might not make all of her testimony regarding accident and causation unbelievable. It certainly does cast a cloud on it. If she might mislead one on her employment application, she might also mislead concerning the details of her accident and exactly what body parts were injured.

With the foregoing in mind, the Arbitrator concludes as follows:

With regard to Petitioner's right knee, Petitioner failed to prove a causal connection between her work accident and her right knee condition of ill-being. Her stories regarding how her knee was hurt have varied. What is clear from the ER record is that Petitioner hit her head on the concrete floor when she fell. There was no mention of any twisting injury or landing on her knee(s), or her knee(s) being hit in someone's abdomen. Petitioner appears to have added details of the accident as it suited her in an effort to tie her complaints to the accident and her efforts were not credible.

Furthermore, Dr. McIntosh treated Petitioner for her right knee complaints. He was under the impression she sustained a twisting injury to her right knee at the time of the accident. No such twisting injury was testified to Petitioner or described in the early treatment records. Indeed, the initial ER record contains no mention of any right knee complaints whatsoever. Petitioner then presented to SIH on March 6, 2012 with bilateral knee pain (which was never addressed or explained at trial).

With regard to Petitioner's cervical spine and lumbar spine, the Arbitrator is aware that Dr. Wilkey, Respondent's examining physician, rendered a causation opinion finding causation between Petitioner's low back condition and neck condition; however, she finds his opinion unpersuasive. First, it is unclear what, if any, treatment records or documents pre-dating his visit with Petitioner, had been reviewed. Second, he based his opinion on Petitioner's representation to him of what occurred at the time of the accident. While Petitioner did associate neck complaints with her accident, she was initially diagnosed with a strain. It further appears that within a reasonable time thereafter, those neck complaints had resolved. Indeed her primary care doctor's staff noted that she was asymptomatic in her neck for several months after the accident. (PX 8) Similarly, with regard to Petitioner's low back, she had some initial treatment post-accident, including some minimal physical therapy, but there is a gap in treatment regarding Petitioner's low back between March 28, 2012 and January of 2013. While Petitioner would have one believe she sought no treatment for her back during that time because she was focused on her knee complaints, the Arbitrator did not fully believe that testimony given the credibility issues.

The Arbitrator finds that Petitioner, at most, sustained a cervical and lumbar strain as a result of her accident on March 3, 2012. Petitioner was not a credible witness. There were too many inconsistencies in her account of the accident, an account that varied depending upon the body part she was seeking treatment for at the time. Her treatment in this case has largely derived from ongoing complaints of subjective pain and the Arbitrator has had a difficult time believing she was in as much pain as she frequently claimed. Her motivation to return to work for Respondent was suspect as the records reflect that just as she was ready to be released to return to work, she sought care for another problem associated with the accident or, alternatively, simply felt unable to return to work due to her "pain." The FCE seemed to focus in on this issue and credibly so.

Additionally, the Arbitrator notes that the records of Dr. Hurford are missing and, therefore, it is unclear what was going on when Petitioner presented to her. Similarly, an initial visit with Dr. Boutwell is missing.

Causation for Petitioner's low back condition is further hampered by the unexplained events of February 20, 2013. Petitioner completed a questionnaire for Dr. Rerri in 2014 and clearly stated that her low back and left leg complaints "resurfaced" on February 20, 2013. She provided no details. She provided no testimony regarding this. Her clear reference to a specific date rather than a general time period suggests that something very specific may have happened. There are no records of any treatment being sought at that time; however, she had stopped treating at Southern Illinois Healthcare by that time and had begun treating with Dr. Jha. No records from Dr. Jha were admitted; yet he did receive copies of subsequent operative reports suggesting to this Arbitrator that he was monitoring her care and treatment for some reason.

The Arbitrator also notes that Dr. Rerri was not deposed. He rendered no causation opinion. He reviewed no prior medical treatment records. When initially seen by him, Petitioner referenced injuring her shoulder at the time of the accident, too. However, emergency room records don't corroborate a shoulder injury or complaints. She also associated her neck and shoulder complaints with her use of the crutches; however, no one provided a causation opinion in support of that claim.

3. TTD

Petitioner's claim for TTD is denied consistent with the Arbitrator's causation determination. Petitioner failed to prove that the lost time she incurred was causally related to her accident. Furthermore, she received full salary for any lost time rendering a request for TTD moot.

4. Medical Expenses

Petitioner is awarded the radiology bill from Mid America Radiology for the diagnostic testing performed at the ER on March 3, 2012 ($587.04. She is also awarded the following bills for services at Southern Illinois Healthcare Foundation: 3/6/12 - $120.00; 3/12/12 - $70.00; and 3/19/12 - $70.00. All visits at Southern Illinois Healthcare thereafter focused in solely on Petitioner' right knee complaints which the Arbitrator has determined were not causally connected to her work accident. The Arbitrator also notes that Petitioner is seeking payment of medical bills at Southern Illinois Healthcare through December 19, 2012; however, Petitioner did not submit any office records of that provider into evidence for dates after June 19, 2012 (see PX 8).

5. Nature and Extent

Petitioner failed to prove she sustained any permanent partial disability as a result of her cervical and lumbar strains.

**********

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

Keith Schlink,
Petitioner,
vs.

NO: 14WC 18527
14WC 18528

McLean County Unit District # 5,
Respondent,

16IWCC0475

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 2, 2015, is hereby affirmed and adopted.

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

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

The party commencing 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: JUL 13 2016
MJB/bm
o-7/11/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**SCHLINK, KEITH**
Employee/Petitioner

Case# **14WC018527**
14WC018528

**McLEAN COUNTY UNIT DISTRICT NO 5**
Employer/Respondent

**16IWCC0475**

On 11/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0264 HEYL ROYSTER VOELKER & ALLEN
JAMES J MANNING
PO BOX 6199
PEORIA, IL 61601

STATE OF ILLINOIS )
)SS.
COUNTY OF McLean )

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**

KEITH SCHLINK
Employee/Petitioner

Case # 14 WC 018527
14 WC 018528

v.

McLEAN COUNTY UNIT DISTRICT NO. 5
Employer/Respondent

16IWCC0475

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Bloomington, Illinois** on **August 26, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

16IWCC0475

On **May 1, 2014 and May 7, 2014,** Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 injuries, Petitioner earned **$41,704.00** and the corresponding average weekly wage was **$802.00.**

On the date of the alleged accident, Petitioner was **49** 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, nor is it obligated to do so.

**ORDER**

Having found that Petitioner has failed to sustain his burden of proof to demonstrate that his current condition of ill being arose out of his employment with Respondent and is causally related to the claimed accident, Petitioner's claim for compensation is hereby denied.

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

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

Signature of Arbitrator

10/30/15
Date

ICArbDec p. 2

NOV 2 – 2015

**With respect to (C.) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent and (F.) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:**

Petitioner is alleging a repetitive trauma claim arising out of his work for Respondent as a custodian. In such a case, the issues of whether the accident arose out of his employment and is causally related to his conditions of ill being are properly considered together.

Specifically, as it pertains to these two claims, Petitioner is alleging that he sustained bilateral carpal tunnel and trigger finger conditions which he claims to have been caused by the repetitive use of his hands while performing his custodial work for Respondent. Petitioner alleges accident dates of May 1, 2014 and May 7, 2014.

Petitioner followed up with his treating surgeon, Dr. Jerome Oakey, on May 1, 2014 with a recurrence of pain and numbness in his hands bilaterally and symptoms of trigger fingers in his right index, middle, and ring fingers. A repeat EMG test was performed on May 7, 2014 which again showed severe median neuropathies at both wrists that were slightly worse on the left than the right. (PX 6) Petitioner subsequently underwent bilateral carpal tunnel surgery and trigger finger releases with Dr. Jerome Oakey for these conditions on May 20, 2014 and June 3, 2014.

**Petitioner's Work History Regarding His Custodial Tasks**

Petitioner testified as to his custodial duties at work while employed by Respondent and stated that he performs a variety of activities and uses his hands "all of the time". The true nature of Petitioner's particular work tasks - how much time was spent on his various tasks and which tasks in particular involved sustained, forceful use of his hands that could potentially rise to the level of compensable "repetitive trauma" - is the central issue in this case.

Petitioner testified that he has worked for Respondent as a custodian for approximately sixteen years. Since 2012, he has been working the second shift from 3:00 pm to 11:30 pm at Hudson Elementary School.

Petitioner's specific job duties as a custodian for Respondent, and the times those various tasks are performed, are well documented in a job description submitted as Respondent's Exhibit 1. Page 1 of Exhibit 1 is a site plan that depicts Hudson Elementary and the areas within the school that are assigned to Petitioner. Respondent's Exhibit 6 is a group exhibit of photographs of Petitioner's work areas.

Petitioner's work areas consist of twelve classrooms, a multi-purpose room and a computer lab (labeled IMC on the site plan included as part of Exhibit 1), two hallways and two sets of restrooms. All of the classrooms, the multi-purpose room, the computer lab, and one of the hallways in Hudson Elementary are carpeted with a low pile carpet.

Pages 2 and 3 of Respondent's Exhibit 1 set forth the custodial schedule for the day and evening custodial shifts at Hudson Elementary so that substitute custodians have a schedule to follow. Page 3 details the work performed by Petitioner during his second shift and the approximate times when the various work is performed.

Petitioner testified that his second shift work starts at 3:00 pm. Petitioner testified that he begins his shift cleaning classrooms 30-35. To clean each of these six classrooms takes Petitioner approximately twenty minutes each on average.

Petitioner testified that he would pick up pencils, pens, crayons, markers or other items on the floor, empty pencil sharpeners, wipe down the whiteboards and trays using a spray bottle to apply a cleaning solution, change light bulbs where needed, and clean glass (windows) as needed. He would also dust the classrooms and spot clean the student's desks if needed. He would then empty the garbage from the container in the classroom into the garbage barrel on his cart and change the liners in the garbage container he just emptied. He would then pick up the student's small chairs and place them on the desks and then vacuum the carpeted classrooms with a vacuum cleaner similar to that of a standard household

vacuum. Petitioner testified that he held the handle of the vacuum with his right hand and the electrical cord in his left hand as he vacuumed.

After finishing the first six classrooms, Petitioner would take a fifteen minute break. Afterwards, he would clean the primary hallway which would entail use of a 36" dust mop to sweep the terrazzo floor and vacuuming the carpeted runners by the main entrance.

During the winter months, he would first sweep and then wet mop the terrazzo floor in the hallway. Once the hallway was cleaned, Petitioner would clean the boys' and girls' restrooms at the end of that hallway.

He testified that cleaning the restrooms required checking and refilling the paper towel dispensers and toilet paper dispensers, filling the soap dispensers, cleaning the sinks with a disinfectant and wiping them down by hand, cleaning urinals and toilets with a 'Johnny mop' which is similar to a toilet bowl cleaner, cleaning mirrors, emptying the garbage and sweeping and mopping the terrazzo floors nightly.

Petitioner would then walk the school and secure the building to make sure all the exterior doors were locked and turn the outside light on over the main entry. By this time, around 6:00 p.m., most of the teachers would be gone for the evening with the exception of an occasional activity or assembly during the evening which would only occur a few times during the school year.

Once the school was secured, Petitioner resumed cleaning classroom 15, the computer lab (IMC) and the multi-purpose room which was set up with tables and chairs. He would then take a half hour dinner break, clean the remaining four classrooms, the intermediate (carpeted) hallway, clean the boys' and girls' restrooms at the end of that hallway, and then take another fifteen minute break later in the evening. At the end of his shift, Petitioner would take out the trash, walk around the school again to make sure all the doors were secure and turn off all the lights before leaving for the evening around 11:30 p.m.

In addition to the aforementioned daily duties as a custodian during the school year, Petitioner testified that he also removes snow from the door and sidewalk areas around the school, fills salt bins and spreads salt over the door and sidewalk areas to melt any ice on the walkways.

Additionally, during the summer months the custodians at Hudson Elementary would give the school a deep cleaning and clean areas not typically cleaned during the school year, scrub floors, change light bulbs and perform other minor maintenance as needed. However, Petitioner did not go into any detail as to how this work is performed or what equipment is used and did not suggest that this work was troublesome to Petitioner's hands.

Regarding his carpal tunnel condition and trigger fingers bilaterally, Petitioner testified that his custodial activities that involve vacuuming and mopping (anything that requires him to grip the handle of an object) irritates his hands and causes pain. He testified that he uses a vacuum two to four hours each evening and that he uses a mop for thirty minutes to an hour each evening and he feels this activity contributed to cause his condition of ill being.

**Testimony Regarding Causal Connection**

Petitioner's treating surgeon, Dr. Jerome Oakey, testified that Petitioner's custodial tasks involving use of his hands and gripping could potentially contribute to cause the development of his carpal tunnel and trigger finger conditions.

Dr. Oakey also admitted that Petitioner's thirty year history of smoking a pack of cigarettes per day was "absolutely a contributing factor" as smoking has a vasoconstrictive effect and decreases the blood supply causing pressure to build up in the carpal tunnel and the blood supply to the nerve in the carpal tunnel becomes compromised. When the pressure is elevated it compresses the vessels on the outside of the nerve. (PX 1, pp. 25-26) Dr. Oakey also stated that there is a predominantly idiopathic nature to carpal tunnel. (PX 1. p. 31)

Regarding the specific vacuuming activity and other custodial tasks, Craig Montgomery, Respondent's Director of Custodial Services, testified that he has performed these tasks as well as all the other cleaning tasks performed by his

custodians at Unit 5. Mr. Montgomery actually timed the work and testified that it would only take five to six minutes to vacuum the carpeting in each of the classrooms, half the time Petitioner said it takes him to vacuum. Mr. Montgomery also testified that operating the vacuum cleaner at Hudson Elementary does not require any forceful gripping or other strained use of the hands. Further, the carpets are low pile carpets which make vacuuming the floors even easier. Most importantly, however, Mr. Montgomery testified that little if any vibration is emitted by the vacuum cleaner that would be felt by the operator's hand, contrary to the suggestion made by Petitioner. Mr. Montgomery testified that he puts considerable thought into the cleaning and other equipment he purchases for the school district's custodial staff to make their jobs easier and to provide equipment that is ergonomically efficient and safe to use.

Respondent's examining physician, Dr. James Williams from Midwest Orthopedic in Peoria, testified convincingly that use of the vacuum cleaner and other equipment used by Petitioner to perform his custodial tasks could not have caused or aggravated Petitioner's carpal tunnel or trigger finger conditions.

First, operating the vacuum cleaner required very little effort to operate. Second, the operator's hands are in a relatively neutral position when holding the vacuum cleaner or when using the other custodial equipment (mops, brooms, toiler cleaners, and other items used to clean with). Third, none of the equipment requires any sustained, forceful gripping and the vibration felt to the hands is minimal and insignificant.

Dr. Williams' opinions were based upon firsthand knowledge. Dr. Williams not only visited Hudson Elementary School with Respondent's representatives to view the jobsite and work performed firsthand, but he actually performed the same custodial tasks performed by Petitioner, operated the same vacuum cleaners, mops and brooms used to clean the classrooms and hallways at Hudson Elementary, he cleaned the classrooms, wiped down desks, cleaned the white boards, stacked the chairs on the desks and vacuumed the floors. He also cleaned the restrooms, used the Johnny mop to clean the urinals and toilets and mopped the floors. Respondent's Exhibit 3 is a job video depicting many of Petitioner's daily custodial tasks and shows Dr. Williams performing the work.

Regarding the vacuum and use of a mop or push broom, Dr. Williams testified that the motion of guiding and pulling the vacuum or pushing a mop or broom is not going to cause any damage to the carpal tunnel ligament no matter how long you use it because that activity does not create sufficient force on your hands to cause carpal tunnel syndrome or a trigger finger condition.

On the other hand, Dr. Oakey's testimony that Petitioner's use of the vacuum cleaner and other equipment could have contributed to cause his carpal tunnel condition is not convincing in this matter. Dr. Oakey has never operated the floor cleaning equipment in question, has no idea how much if any vibration is emitted by the machines, and he has never visited Petitioner's school where he works to observe the equipment in use and, therefore, has no firsthand knowledge regarding the equipment's use in order to base his causation opinion.

Dr. Williams is an orthopedic hand expert, specializing in treatment of the hands and upper extremities and his medical background and training includes a fellowship at the Indiana Hand Center. Dr. Williams spent an hour going through Hudson Elementary where Petitioner works and observed and performed many of Petitioner's daily custodial tasks as is depicted in Respondent's Exhibit 3. Dr. Williams is shown in the video performing many of Petitioner's job tasks and operating the vacuum cleaner and other floor cleaning equipment and testified that the vacuum cleaner in particular (along with the floor buffer used during the summer) is pretty much self-propelled and requires very little effort to operate other than controlling the direction of the machine which can be done with one hand.

Dr. Williams testified very clearly and persuasively that none of Petitioner's work tasks could have contributed to or aggravated his underlying carpal tunnel or trigger finger conditions because none of the work tasks required sustained, forceful gripping, vibration or stressful use of the hands.

Dr. Williams testified that Petitioner's condition was more likely idiopathic in nature. Dr. Williams further testified that sixty to seventy percent of the population with carpal tunnel syndrome develop the condition idiopathically where the origin is simply unknown which accounts for the great majority of carpal tunnel cases.

Dr. Oakey agreed that a majority of carpal tunnel cases are idiopathic in nature.

**Repetitive Trauma and its Application to Instant Case**



In reviewing Petitioner's work tasks as set forth in Respondent's Exhibits 1, 2, and 3 and considering testimony from Petitioner and his supervisor, Craig Montgomery, in addition to the convincing testimony of Dr. Williams, the Arbitrator finds there was no single activity that Petitioner performed constantly and continually throughout his workday which required forceful gripping or stressful use of the hands, nor was there a particular sustained movement of his hands repeated in every operation he performed. *See Williams v. Industrial Commission*, 244 Ill. App. 3d 204 (1st Dist. 1993).

In *Williams*, the injured worker in that case performed work as a millwright working in confined spaces, occasionally using sledgehammers and performing occasional heavy lifting yet his cervical disc herniation claim was denied where the activity was found not to be repetitive within the meaning of repetitive trauma as first defined in the *Peoria County Belwood Nursing Home* case, 115 Ill. 2d 524 (1987).

Dr. Williams touched upon the repetitive trauma concept in his evidence deposition submitted as Respondent's Exhibit 5 testifying that the standard for repetitive trauma as set forth by The National Institute for Occupational Safety and Health (NIOSH), particularly in cases involving carpal tunnel conditions, requires one specific activity placing a stressful force on the hands and wrists that is done with a cycle time of less than thirty seconds for greater than fifty percent of the day. (RX 5, pp. 22-24.) Dr. Oakey testified that he was not familiar with the NIOSH standards for repetitive trauma.

Dr. Williams also testified that the type of trauma necessary would require sustained, forceful gripping or vibration as one would experience when using a jackhammer, chipper or grinder, not a vacuum cleaner. (RX 5, pp. 18-19.)

Petitioner did not describe any work tasks which meet this standard as he performs no single, stressful task on a repetitive basis sufficient to fall within the definition of repetitive trauma, nor did any of his work expose him to sustained, forceful gripping or vibration. To hold otherwise diminishes the concept of repetitive trauma and the intention of finding compensability for injuries where workers are exposed to constant or repetitive stress throughout the entire workday involving forceful torquing or other constant movement, heavy lifting or sustained stressful work. There must be some element of forceful, repetitious movement for there to be repetitive trauma.

The Arbitrator is persuaded by Respondent's witnesses that Petitioner's varied cleaning activities and tasks he performs as a custodian for Respondent did not cause or aggravate his underlying condition and therefore finds that his work for Respondent is not a contributing factor. For Petitioner's work to be a component, or a contributing factor, of his alleged condition it must be determined that his work involved sustained, forceful gripping or vibration of the hands and the evidence submitted does not support this proposition.

Given the findings above, the work activities described by Petitioner and Respondent's witnesses do not support the level of activity required for Petitioner's work to be a causative factor in his carpal tunnel or trigger finger conditions.

Based upon the above, the Arbitrator finds that Petitioner's work for Respondent did not cause or aggravate his bilateral carpal tunnel or trigger finger conditions, and therefore this claim is denied. All other issues pertaining to his medical bills, temporary total disability, and permanent partial disability are thereby rendered moot.

STATE OF ILLINOIS )
) SS.
COUNTY OF LASALLE )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Greg Rapson,
Petitioner,

vs.

NO: 09 WC 5709

16IWCC0476

Channahon Park District,
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 causation, current and prospective medical expenses, temporary total disability, permanent disability, maintenance and vocational rehabilitation and being advised of the facts and law, with the exception of the Arbitrator's findings in relationship to Section 19(d) of the Illinois Workers' Compensation Act, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission views the evidence differently than the Arbitrator and as such the Commission strikes Arbitrator's finding that Petitioner is in violation of Section 19(d) of the Illinois Workers' Compensation Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that with the exception noted above the Decision of the Arbitrator filed October 2, 2015 is hereby affirmed and adopted.

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

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

16IWCC0476

The party commencing 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: JUL 14 2016

MB/jm

O: 6/23/16

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Mario Basurto

David L. Gore

Stephen Mathis

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**RAPSON, GREG**
Employee/Petitioner

Case# **09WC005709**

**16IWCC0476**

**CHANNAHON PARK DISTRICT**
Employer/Respondent

On 10/2/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2208 CAPRON & AVGERINOS PC
STEPHEN SMALLING
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

1109 GAROFALO SCHREIBER HART ETAL
RALPH BERKE
55 W WACKER DR SUITE 1000
CHICAGO, IL 60601

5/12
5040
FAX: 798 7072
5:00 PM

16IWCC0476

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

**Greg Rapson**
Employee/Petitioner

v.

**Channahon Park District**
Employer/Respondent

Case # **09** WC **5709**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Ottawa**, on **August 28, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS** 16IWCC0476

On **October 31, 2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**13,858.52**; the average weekly wage was $**266.51**.

On the date of accident, Petitioner was **35** 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 $**41,138.09** 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 $206.67 per week for 250-5/7 weeks commencing November 1, 2008 through August 21, 2013 as provided in Section 8(a) of the Act. Respondent shall receive a credit for any TTD paid to date.

- Respondent shall pay Petitioner maintenance benefits of $206.67 a week for 50 weeks commencing August 22, 2013 through August 6, 2014 as provided in Section 8(a) of the Act. Respondent shall receive a credit for any maintenance paid to date.

- Respondent shall pay Petitioner permanent partial disability benefits of $206.67/week for 175 weeks, because the injuries sustained caused the 35% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

- Respondent shall pay the Petitioner any outstanding, related, reasonable and necessary medical expenses incurred through August 6, 2014 contained in Petitioner's Exhibit 9 as provided in Sections 8(a) and 8.2 of the Act, subject to the Fee Schedule. Petitioner's request for payment of medical care or prospective care beyond August 6, 2014 is denied.

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

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

Signature of Arbitrator

**10/1/15**
Date



OCT 2 - 2015

**16IWCC0476**

## FINDINGS OF FACT

This case was previously tried on a Section 19(b) petition on July 16, 2009. The Arbitrator's Decision, filed on August 12, 2009, found that Petitioner sustained a compensable accident; that his current low back pain was causally connected to the accident; and that he was entitled to an epidural steroid injection in conjunction with therapy as prescribed by Dr. Charuk. Upon review, the Commission affirmed the Arbitrator's decision in their Decision on Review dated March 15, 2010. The case was then remanded to the Arbitrator and later reassigned to the current Arbitrator.

This case proceeded to hearing before the current Arbitrator on the following issues: 1) causation, 2) medical expenses, 3) prospective medical care, and 4) nature and extent. On the issue of nature and extent, the Petitioner is seeking an award of permanent total disability.

Petitioner originally injured his low back while working for the Respondent as a groundskeeper on October 31, 2008. Petitioner's accident was never in dispute. The Petitioner testified that subsequent to that arbitration hearing, he has sustained no other injuries or trauma to his low back necessitating medical treatment.

The medical evidence establishes that the Petitioner was referred by Dr. Charuk to Dr. Miz for a surgical evaluation who in turn recommended a pain management program under Dr. Lipov. (P.X. 11) Thereafter, Petitioner was evaluated by Dr. Lorenz of Hinsdale Orthopedics who recommended a three level fusion which was declined by the Petitioner as he elected to continue in a pain management program with Dr. Lipov. (P.X. 2)

On December 28, 2010, Petitioner was examined by Dr. Francisco Espinoza at the direction of the Respondent. (P.X. 10) Dr. Espinoza diagnosed Petitioner with mechanical low back pain due to degenerative disc disease and recommended he continue with narcotic pain medications or undergo a three level fusion. Dr. Espinoza opined that the back condition was related to the work related trauma sustained on October 31, 2008.

The Petitioner testified that he transferred his pain management to Dr. Samir Sharma in December 2011 who was closer in proximity to his home than Dr. Lipov. Dr. Sharma diagnosed the Petitioner with lumbar radiculopathy and lower back pain and noted that his significant narcotic dosage needed to be reduced in order for further assessments to be made. Dr. Sharma prescribed a course of physical therapy and referral to a chronic pain specialist. In response to this recommendation, Petitioner was evaluated and treated at Elite Rehabilitation Institute and came under the care of Dr. Gutta, a pain specialist. (P.X. 5)

On May 8, 2012, the Petitioner was referred from Dr. Sharma to Dr. Cary Templin for purposes of a surgical evaluation. (P.X. 1) Dr. Templin recommended facet blocks and subsequent fusion in the event the injections were not successful. In conjunction with this evaluation, Petitioner also underwent a psychological evaluation on July 12, 2012 at the request of Dr. Templin to address appropriate options for potential surgical interventional care. This evaluation was performed by Tiffany Sanders, Ph.D. who noted that Petitioner was off work until a surgical evaluation could be made subsequent to which the appropriate functional capacity evaluation and validity testing could be done in order to determine his work capacity.

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As of June 19, 2012, Dr. Templin felt a three level fusion was not the perfect option for Petitioner but the only option given that he had failed all other measures at that point in time. On October 30, 2012 Dr. Templin opted against surgical intervention given the high likelihood of Petitioner being no better or worse. He was instructed to return to Dr. Sharma for future pain management and continued off work unless he was able to progress under Dr. Sharma's treatment. (P.X. 1, 1/29/13 note) Following epidural and trigger point injections, the Petitioner was evaluated by Dr. Sharma on August 21, 2013. (P.X. 3) At that time, it was noted his symptoms had improved following the last trigger point injection but the results were not sustained. At that time, Dr. Sharma deemed the Petitioner to be at maximum medical improvement and instructed him to return if he developed new or worsening symptoms. He was released to return to work with modified duty, sedentary work and instructed to return on an as needed basis.

On April 9, 2013, the Petitioner was directed to EJR Consulting, Inc. (hereinafter "EJR") by the Respondent for purposes of an initial vocational evaluation. The consultant, Edward J. Rascati recommended proceeding with job seeking skills training, including an Individual Written Rehabilitation Plan, resume development and professional advice as to conducting the job search process. He conceded that given the Petitioner's overall presentation, finding employment may prove to be a protracted experience. (P.X. 11) The Petitioner testified that he participated in the vocational rehabilitation plan instituted by EJR through June 17, 2014 at which time EJR was instructed to cease all efforts by the Respondent. (P.X. 11, 6/17/14 report) Petitioner has not looked for work since then.

On November 19, 2013, the Petitioner underwent an independent medical examination at the direction of the Respondent with Dr. Howard Konowitz. (R.X. A) As a result of the examination and his review of the medical records Dr. Konowitz opined that the pain management and prescription regimen was not sustainable or demonstrating efficacy and effectiveness. Dr. Konowitz recommended Petitioner's enrollment in the RIC/Alexian Brothers Pain Program.

Respondent authorized the enrollment in the RIC/Alexian Brothers Pain Program which was a 4-week inpatient multi-faceted program for detoxification and pain management modification, psychological treatment/training and vocational rehabilitation. Petitioner enrolled in the program on July 30, 2014.

Petitioner withdrew from the RIC/Alexian Brothers Pain Program after his last meeting with Dr. Atchinson on August 6, 2014. Petitioner testified that he believed that RIC encouraged him to do more than he could handle with regard to his pain. For example, Petitioner was not allowed to lay down and rest during his therapy. Petitioner also described not being able to walk to the pool as part of his therapy. The records of RIC (R.X. B) noted the following:

- Petitioner was "Counseled due to: Lack of acceptance of diagnosis and/or treatment plan, Compliance with treatment plan, Inconsistencies in performance." (R.X. B at p.5)
- Petitioner was counseled regarding "lack of progress/understanding/acceptance of diagnosis and/or treatment plan, non-compliance, lack of motivation, suboptimal performance. (R.X. B at p.6)
- The Team Report noted Petitioner's efforts and attitudes were poor. (R.X. B at p.6)
- Petitioner was noted to be "Not fully compliant with all components of program . . ." (R.X. B at p 7)
- Dr. Atchison documented his opinion that Petitioner should continue the program and his need to stop the opiod medications. Dr. Atchison "strongly recommend[ed] he be detoxed . . . And maintained off the opiods." (R.X. B at p.13)

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Despite the strong recommendations and opinions of Dr. Atchison, Petitioner voluntarily removed himself from the RIC/Alexian Brothers Pain Program .

Petitioner testified that the Respondent suspended payments of TTD and his medical expenses as of August 21, 2013.

Dr. Gutta testified via evidence deposition on May 20, 2015 that he diagnosed the Petitioner with chronic pain syndrome attributable to the disc herniations and degenerative disc disease. Dr. Gutta testified that over the course of Petitioner's treatment and up to the present, there has been a continuing adjustment of the Petitioner's medications with the goal of maintaining the core measures of safety, tolerability and efficacy. Dr. Gutta testified that he disagreed with Dr. Konowitz's opinion that the pain medication regimen Petitioner was on was not sustainable nor demonstrating efficacy and effectiveness. Dr. Gutta opined that the Petitioner was disabled and not medically cleared to return to any work or vocation given his physical condition. He further opined it may be necessary for the Petitioner to continue on with the opiate medications for the remainder of his life as there has been no indication he is a surgical candidate for a procedure which would relieve the underlying etiology of the pain necessitating the medications.

Petitioner continues to treat with Dr. Gutta, who continues to prescribe Petitioner narcotic medication for Petitioner's pain. Petitioner testified that he takes a combination of narcotic pain medications, including Fentanyl 4 times per day, morphine 2 times per day, and flexeril 3 times per day. Petitioner currently uses a cane, which was not prescribed by any doctor. He can walk approximately 20 feet before he notices pain down into his legs. Petitioner testified that his pain is relieved with laying down, standing and sitting alternatively. He is 5'9' tall and weighs 330 lbs. He uses an assist chair and lives with his mother. He spends most of his time at home laying down, but tries to move around the house. He relies on his mother to drive him places and bring him food. The Arbitrator noted that during the hearing, Petitioner broke into tears and took a 15 minute break to lie down at the witness stand, while his mother came up to the stand to provide him comfort.

## CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. This finding is based on both the "law of the case" and the fact that there was no evidence of any intervening incident or condition that could have broken the causation chain. Under the "law of the case," this Arbitrator is bound by the prior decisions in this case in which the issue of causation has already been resolved in favor of the Petitioner. There was no evidence presented to suggest the Petitioner's condition is due to anything other than his original work accident. Therefore, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to his October 31, 2008 accident.

2. Regarding the issue of TTD/maintenance, the Arbitrator awards the Petitioner TTD from November 1, 208 through the date he was found to be at maximum medical improvement on August 21, 2013 by Dr. Sharma. Furthermore, the Arbitrator awards the Petitioner maintenance from August 22, 2013 through August 6, 2014, the last date Petitioner attended his treatment at RIC and afterwhich voluntarily abandoned said treatment. In support of this award, the Arbitrator finds that the Petitioner's decision to voluntarily abandon his treatment at RIC was in violation of Section 19(d) of the Act which allows the suspension or reduction of benefits if an employee refuses to submit to medical treatment reasonably essential to promote his recovery.

16IWCC0476

3. With regard to the issues of medical expenses and prospective medical care, the Arbitrator finds that the Petitioner is entitled to the payment of related, reasonable and necessary medical services through August 6, 2014. Thereafter all medical expenses and any prospective medical care is denied. In support of this finding, the Arbitrator concludes that the Petitioner's decision to voluntarily abandon his treatment at RIC was in violation of Section 19(d) of the Act which allows the suspension or reduction of benefits if an employee refuses to submit to medical treatment reasonably essential to promote his recovery. The Arbitrator specifically notes that the treatment plan at RIC also included weaning Petitioner off opiate and narcotic use to improve his condition, and that in lieu of continuing with the RIC treatment plan, Petitioner chose to continue his treatment with Dr. Gutta. Petitioner's current treatment plan with Dr. Gutta is basically continuing the Petitioner on narcotic medication. As evidenced by the Petitioner's own testimony of constant pain and physical inactivity, Dr. Gutta's treatment plan does not appear to be helping the Petitioner. Accordingly, the Petitioner's request for prospective medical care is denied.

4. Regarding the issue of the nature and extent of the Petitioner's injuries, the Arbitrator finds that the Petitioner has sustained injuries resulting in 35% loss of use of the person as a whole. In support of this finding, the Arbitrator relies on the medical evidence, which show that the Petitioner sustained a back injury resulting in a herniated disc at L4-L5 that has not been surgically addressed. The Arbitrator accepts all of the evidence, and particularly that of Dr. Konowitz, that the Petitioner had reached maximum medical improvement by August 21, 2013, but with significant restrictions.

STATE OF ILLINOIS )
) SS.
COUNTY OF PEORIA )

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| ☐ 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

Jeffrey Wernsman,
Petitioner,

vs.

NO: 10 WC 40229

City of Bloomington,
Respondent.

16IWCC0477

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, permanent disability, medical expenses and evidentiary rulings 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 infers from the Arbitrator's action of issuing an Arbitration decision that Arbitrator denied Respondent's Motion to Dismiss the above captioned claim. The Commission notes that while both parties filed a Petition for Review of the above captioned claim, neither party raised the issue of whether the Arbitrator properly ruled on the Motion to Dismiss and as such neither party preserved this issue on Review. Having found the same the Commission finds that the Motion to Dismiss is not before the Commission on Review.

The Commission affirms the Arbitrator's decision finding that the evidence shows as Petitioner was a victim of a non-work related assault and that the January 3, 2009 incident was not horseplay between Petitioner and his fellow officer. The Commission further finds that since the Arbitrator ruled in the manner in which he did on the threshold issue of accident, he need not have addressed the remaining underlying issues. As such the Commission strikes all the portions of the Arbitrator's findings that deal with causation and permanency.

IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to

16IWCC0477

prove he sustained accidental injuries arising out of and in the course of his employment on January 3, 2009, his claim for compensation is hereby denied.

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

DATED: JUL 14 2016

Mario Basurto

David L. Gore

Stephen Mathis

MB/jm

O: 6/9/16

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# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**WERNSMAN, JEFFREY**
Employee/Petitioner

Case# **10WC040229**

**16IWCC0477**

**CITY OF BLOOMINGTON**
Employer/Respondent

On 10/9/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0000 RUSIN & MACIOROWSKI LTD
MARK COSIMINI
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

16IWCC0477

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

**Jeffrey Wernsman**
Employee/Petitioner

Case # **10** WC **40229**

v.

**City of Bloomington**
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Peoria**, on **August 13, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] 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?
   [x] 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** 16IWCC0477

On **January 3, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$63,381.24**; the average weekly wage was **$1,218.87**.

On the date of the alleged accident, Petitioner was **40** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of **$55,836.61** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$55,836.61**.

Respondent is entitled to a credit of **$36,034.26** under Section 8(j) of the Act.

**ORDER**

The Petitioner failed to prove that a compensable accident occurred and the Petitioner's claim for compensation is, therefore, denied.

No benefits are awarded herein.

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

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

Arbitrator Anthony C. Erbacci

October 9, 2015
Date

**FACTS:**

On January 3, 2009 the Petitioner was employed by the Respondent as a police officer, having been so employed since June of 2004. The Petitioner testified that he previously worked as a Police Officer for the City of Metamora from 1990 to 1994. He then became the Chief of Police for the City of Metamora and remained in that position until 2004. The Petitioner testified that he began his employment with the Respondent as a patrolman on June 7, 2004 and that he worked in that capacity up through December 29, 2011.

The Petitioner testified that on January 3, 2009, he was attending a mandatory briefing prior to going out on patrol. The Petitioner testified that he had punched in on the clock and was sitting amongst his fellow officers waiting for the briefing to start, when he was approached from behind by a fellow officer who he described as husky and strong. The Petitioner testified that the officer informed him that he was sitting in her chair and, when he refused to get up, the fellow officer grabbed his head and pulled his head backwards in an attempt to get him up out of the chair. The Petitioner testified that he then felt increased pain in his neck.

The Petitioner testified, and the evidence demonstrates, that the Petitioner had sustained an injury to his neck prior to January 3, 2009, while he was participating in a training exercise on January 18, 2006. Following that incident, the Petitioner complained of pain in the upper back and lower neck region and he sought treatment with a chiropractor, Dr. Kaufman. An MRI was performed on June 15, 2006 and was reported to demonstrate a moderate left-sided disc herniation at C5-6. The Petitioner testified that he continued to treat with Dr. Kaufman and received as many as 70 chiropractic treatments. The Petitioner testified that Dr. Kaufman's chiropractic treatment did not really help and Dr. Kaufman referred him to a neurosurgeon, Dr. Klopfenstein. Petitioner was first examined by Dr. Klopfenstein on July 17, 2007. Thereafter the Petitioner underwent physical therapy and cervical injections.

On December 13, 2007, the Petitioner was examined by Dr. Lange at the request of the Respondent. Dr. Lange found that the Petitioner had a symptomatic C5-6 herniation which he opined was likely causally related to the January 2006 incident. Dr. Lange recommended an anterior cervical fusion and on February 15, 2008, Dr. Klopfenstein performed a C5-6 anterior cervical fusion and discectomy.

Following the surgery, the Petitioner followed up with Dr. Klopfenstein and, on July 1, 2008, the Petitioner was released to return to regular full-duty work. The Petitioner continued to follow-up with Dr. Klopfenstein through October 7, 2008. On that date, the Petitioner complained of pain at the base of his neck and pain in the trapezius when flexing his neck in either direction. The Petitioner rated his pain as a 4 on a 10-point scale. He also complained of occasional pain in the intrascapular area and reported increased pain with increased activity. It was noted that the Petitioner reported that, overall, he was 75% better than he was prior to the surgery. The Petitioner was still taking Lyrica, Skelaxin, and high doses of ibuprofen. Physical therapy was recommended, but the Petitioner did not wish to pursue that course of action, and a referral was also made to Dr. Kevin Henry for trigger point injections. A follow-up visit was scheduled for three months later at which time cervical spine flexion/extension x-rays were to be repeated.

The Petitioner testified that he settled his Workers' Compensation claim for the injury of January 18, 2006 for $75,000.00 which corresponded to approximately 29.3% of a person as a

whole. The Arbitrator notes that the Settlement Contracts in that case (08 WC 8529) were approved on November 25, 2008.

The Petitioner testified that he did return to work in a full-duty capacity on July 1, 2008 and that he continued working in a full-duty capacity through the time of the alleged accident of January 3, 2009.

The Petitioner testified that at the time of his injury January 3, 2009, he had a previously scheduled follow-up appointment with Dr. Klopfenstein set for January 13, 2009. The Petitioner testified that his pain continued to worsen, but he knew this appointment was coming up so he waited until then to seek medical treatment. When the Petitioner presented to Dr. Klopfenstein on January 13, 2009, Dr. Klopfenstein noted that the Petitioner reported that he was doing well until 1 week prior when a coworker grabbed him by the neck, pulling his head backwards. Dr. Klopfenstein also noted that the Petitioner reported that he developed intrascapular pain a few days following the incident. The Petitioner rated his pain as a 3-4 on a 10-point scale and also indicated he was 75% to 80% better than he was prior to surgery. It was also noted that x-rays revealed a known screw fracture at the C5 level of the cervical spine which was also noted in August 2008. Dr. Klopfenstein recommended that the Petitioner continue with home exercise and ibuprofen.

The Petitioner then followed up with his chiropractor, Dr. Kaufman, and he testified that he underwent a total of 110 chiropractic treatments between April 4, 2009 and May 10, 2010. The Petitioner testified that the chiropractic treatments would help temporarily, but that, overall, they were no help. The Petitioner testified that he continued to work throughout his chiropractic treatment with Dr. Kaufman.

The Petitioner testified that on May 24, 2010, he followed up with his primary care provider, Dr. Hughes, who recommended that he lighten his load by using nylon gear instead of leather gear. The Petitioner testified that he underwent physical therapy at the recommendation of Dr. Hughes beginning in August of 2010. On August 18, 2010, the Petitioner returned to see Dr. Hughes and reported that the physical therapy was making his neck pain worse. The Petitioner also complained of radicular symptoms extending to the back of his scapula as well as shooting pain down the right arm. The Petitioner indicated he did not want to return to see Dr. Klopfenstein, and Dr. Hughes referred the Petitioner to Dr. Seibly.

On September 27, 2010 the Petitioner saw Dr. Seibly and provided a history of being pain-free for approximately 9 months prior to the reported incident of January 3, 2009. He also advised Dr. Seibly that he had immediate severe pain in his neck and shoulders following the January 3, 2009 incident. Dr. Seibly ordered a myelogram and CT-scan which was performed November 3, 2010 and noted to demonstrate a non-union at the C5-6 interspace. Dr. Seibly also noted fractures of two screws in the C5 vertebral body with gross instability. Dr. Seibly recommended surgery to remove the previously installed hardware and "redo" the fusion at the C5-6 level.

At the request of the Respondent, the Petitioner was evaluated again by Dr. David Lange on November 30, 2010. Dr. Lange diagnosed an aggravation of a pre-existing nonunion at C5-6 level and he opined that that the January 3, 2009 incident aggravated the pre-existing non-union at C5-6. Dr. Lange recommended surgery to redo the fusion.

On February 15, 2011 the Petitioner underwent an anterior cervical fusion revision at C5-6. Following the surgery, the Petitioner remained under the care of Dr. Seibly through October 10, 2011. The Petitioner testified that he went through a course of physical therapy, which did not help, and he tried to go through a work hardening program, but he was not able to do it due to increased pain in his neck. The Petitioner testified that his pain continued and was not getting any better.

A cervical MRI completed on April 12, 2011 was reported to demonstrate postsurgical changes of anterior cervical discectomy and fusion at C5-6, stable mild central canal stenosis at C3-C4 and C4-C5, and diffuse disc bulge with superimposed right paracentral broad-based disc herniation causing mild abutment of the right anterior aspect of the thecal sac at C6-7.

On July 5, 2011 the Petitioner underwent a functional capacity evaluation which was reported to be valid. The functional capacity evaluation concluded that the Petitioner demonstrated the physical capacity to perform at the light-medium to medium level of function, which was not at the level of function of required by his pre-injury job.

The Petitioner testified that pursuant to his application for a disability pension, he was examined by three physicians chosen by the Pension Board. The Petitioner testified that he was examined by Dr. Samo on November 15, 2011, Dr. Skaletsky on November 22, 2011, and Dr. Gnatz on December 2, 2011. The reports of those physicians were admitted into the record as Petitioner's Exhibits 11, 10, and 12, respectively. The Petitioner had a hearing on his application on December 29, 2011 and the Board of Trustees of the Police Pension Fund issued a Decision which was admitted in evidence as Petitioner's Exhibit 19. The Decision indicates that the Petitioner was not capable of returning to work as a Police Officer, but the basis for his inability to perform his duties was not due to an "act of duty." Based upon that finding, the Petitioner was awarded a non-duty disability pension.

At the request of the Respondent, the Petitioner was examined by Dr. Andrew Zelby on January 11, 2012. Dr. Zelby's deposition testimony of May 22, 2013 was admitted into the record as Respondent's Exhibit 11. Dr. Zelby testified as to his examination of the Petitioner and the medical records that he reviewed. Dr. Zelby indicated that the diagnostic films from before and after the January 3, 2009 incident were unchanged and that there was no anatomical change which could be attributed to the January 3, 2009 incident. Dr. Zelby also indicated that the Petitioner's symptoms were the same before and after the January 3, 2009 incident. He diagnosed the Petitioner with a cervical strain in the context of an underlying spondylosis and pseudoarthrosis and he opined that the Petitioner would have reached maximum medical improvement from the cervical strain within 8-12 weeks. Dr. Zelby testified the January 3, 2009 incident had no impact on the fusion not being solid and he opined that there was no way a pseudoarthrosis could be aggravated by the described incident. Dr. Zelby specifically opined that the fusion revision performed by Dr. Seibly February 15, 2011 was not related to the January 3, 2009 incident.

With respect to the Petitioner's ability to return to work, Dr. Zelby noted that the Petitioner demonstrated an ability to work without restrictions with the pseudoarthrosis for an extended period of time, and that there was no medical basis to suggest he could not return to work in a full-duty capacity now that the pseudoarthrosis was fixed. He pointed out Petitioner's cervical spine is better now than it was when he was working in a full-duty capacity. He testified Petitioner had a normal neurological exam and the same degenerative changes in the cervical spine as he had all along.

The Petitioner testified that he was next evaluated by his primary care provider, Dr. Hughes, on March 19, 2013 with complaints of pain, headaches, and muscle cramps in his neck and shoulders. Dr. Hughes prescribed medication and referred the Petitioner to a pain clinic where he underwent medial branch blocks and cervical blocks for pain management between April 9, 2013 and December 23, 2013. The Petitioner testified that those procedures did not help and that Dr. Hughes did not offer him any future treatment. The Petitioner was last evaluated by Dr. Hughes on March 5, 2014 and was prescribed gabapentin and flexeril.

The April 15, 2013 deposition testimony of Dr. Seibly was admitted into the record as Petitioner's Exhibit 17. Dr. Seibly testified as to the history provided to him by the Petitioner and the course of treatment he rendered to the Petitioner. Dr. Seibly noted that prior to the January 3, 2009 incident, the Petitioner was having some discomfort and was not completely recovered from the first injury but was much more functional and his pain was at a much less intense level. Dr. Seibly testified that he reviewed the Petitioner's CT myelogram and noted that there were two fractured screws at the C5 level without evidence of bony fusion. Dr. Seibly testified he did not attribute the fractured screws in the C5 vertebrae to the incident with the co-worker. Dr. Seibly testified that he performed a revision fusion at the C5-6 level on February 15, 2011. Dr. Seibly testified that he last saw the Petitioner on October 10, 2011, when he released him to return to light duty work with restrictions of no lifting over 25 pounds, no overhead work, no repetitive activities greater than 15 minutes at a time, and no pushing or pulling over 25 pounds. Dr. Seibly opined that the January 3, 2009 episode exacerbated the Petitioner's neck pain based on Petitioner's return to work before the episode, the history of accident provided by Petitioner, and his physical examination of Petitioner.

The Petitioner testified that he currently continues to have constant pain in his neck and shoulders as well as a constant headache. He testified that he uses a TENS unit and he takes Gabapentin for pain and cyclobenzaprine as a muscle relaxer.

The Petitioner testified that following the incident of January 3, 2009 he continued to work until November 3, 2010 when he was taken off work by Dr. Seibly. The Petitioner's current restrictions prevent him from returning to his employment with the Respondent and he testified that, if he were still employed in his previous position, he would be earning $80,116.64. At some point after November of 2010, the Petitioner began a "self-directed vocational effort". The Petitioner did not specifically testify as to when he began that effort or what that effort entailed but he testified that he obtained a job as a groundskeeper at a golf course beginning April 1, 2012. The Petitioner testified that the employment was seasonal and ended in October and that he worked 30 hours a week at that job during both 2012 and 2013. The Petitioner testified that he earned $9.25 to $9.50 per hour at that job. The Petitioner testified that in 2014, he only worked for the golf course for a couple months.

The Petitioner also testified that he tried to help his ten year old son start a new lawn mowing business. The Petitioner testified the business did not become profitable to him until mid-June of 2013 and that he now works 20 hours a week for the lawn-mowing business and averages $187.00 week of income as a result.

The Petitioner testified that he is currently employed by Snyder Village performing general maintenance. Petitioner testified he began that employment on February 9, 2015 and that his job duties include light maintenance work. The Petitioner testified that his employment with Snyder Village pays $12.50 per hour and that he works 40 hours per week. The Petitioner testified that

adding the $500.00 a week pay from Snyder Village with the $187.00 week from his son's lawn mowing business, results in his current gross income of $687.00 per week:

**CONCLUSIONS:**

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

The Petitioner testified that on January 3, 2009, he was attending a mandatory briefing prior to going out on patrol. The Petitioner testified that he was sitting amongst his fellow officers waiting for the briefing to start, when a fellow officer grabbed his head and pulled his head backwards in an attempt to get him up out of the chair. The Petitioner testified that he then felt increased pain in his neck.

The Petitioner testified that the actions of his fellow officer were not the result of or related to a dispute concerning actual police work or any conduct associated with police work and there is no evidence from which to conclude that the Petitioner was the victim of horseplay. There is no indication or evidence that the Petitioner's fellow officer was trying to be funny or had a history of engaging in physical shenanigans. The incident of January 3, 2009 can only be described as an assault.

An altercation which results from a conflict that has its origin in the work, such as a dispute as to how the work should be performed, is generally compensable. Similarly, if the work is to be done in some environment which poses a unique danger, the time and place of the employment may be found to have increased the risk of an assault or injury, and the claim may be compensable. Injuries sustained by an employee as the result of an unprovoked assault are, however, not compensable unless the evidence demonstrates that there was a work related reason or motive for the attack. This is also true for injuries due to an assault by a co-worker.

In the instant matter, the only dispute was the attacker's desire to sit in the chair occupied by the Petitioner. The assault had nothing to do with police work or the conduct of police work and it occurred in the police station prior to the commencement of any actual police work. While the Arbitrator recognizes that there is a certain amount of danger inherent in the job of a police officer, there is no increased risk of an assault by a co-worker inside a police station as opposed to any other work place. Thus the Arbitrator finds that the Petitioner's employment did not expose him to a risk greater than that to which the general public is equally exposed.

Based upon the foregoing, the Arbitrator finds that the Petitioner failed to prove he sustained accidental injuries which arose out of his employment by Respondent.

As the Arbitrator has found that the Petitioner failed to prove that his injury arose out of his employment with the Respondent, determination of the remaining disputed issues is moot.

The Petitioner's claim for compensation is denied.

**In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, and to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:**

Assuming, arguendo, that the Petitioner's injury on January 3, 2009 did arise out of and in the course of his employment with the Respondent, the Arbitrator would find that the Petitioner's current condition of ill-being is causally related to the injury. In so finding, the Arbitrator would rely on the opinions of Dr. Seibly, the Petitioner's treating physician, as well as the opinions of Dr. Skaletsky and Dr. Gnatz who examined the Petitioner at the request of the Police Pension Fund, and Dr. Lange who examined the Petitioner at the request of the Respondent. While the Arbitrator notes the opinions of Dr. Zelby, who also examined the Petitioner at the request of the Respondent, the Arbitrator finds the opinions of Dr. Seibly, together with the opinions of Dr. Skaletsky and Dr. Gnatz, to be sufficiently credible, reliable, and persuasive so as to satisfy the Petitioner's burden of proof. The Arbitrator also notes that prior to the injury of January 3, 2009, the Petitioner had been released to return to regular work and he had, in fact returned to regular work.

While the Arbitrator would find that the Petitioner met his burden with regard to causation, the Arbitrator would find that the Petitioner failed to prove entitlement to a wage differential award under Section 8(d)1 of the Act. In so finding, the Arbitrator notes that the Petitioner failed to provide sufficient evidence from which to conclude that he conducted a sufficient job search and failed to provide sufficient evidence of what he would be able to earn in some other suitable employment. The Petitioner provided no testimony or evidence as to the details of his alleged job search and he merely testified as to what his earnings were in the three jobs he chose to take. The Arbitrator would find that, at most, the Petitioner's injury resulted in a loss of his career as a police officer and would award permanency based on disability to the whole person under Section 8(d)2 of the Act.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas Garcia,
Petitioner,

vs.

NO: 11 WC 30545

16IWCC0478

PACE,
Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission viewed the evidence differently from the Arbitrator and finds Petitioner is permanently partially disabled to the extent of 15% man as whole under Section 8(d)2 of the Illinois Workers' Compensation Act.

IT IS THEREFORE ORDERED BY THE that Respondent pay to Petitioner the sum of $554.83 per week for a period of 75 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 15% loss of use of a man as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $90,210.61 paid to or on behalf of Petitioner for temporary total disability benefits on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $41,700.00. The party commencing the proceedings for review in the Circuit Court

16IWCC0478

shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 14 2016

MB/jm

O: 7/7/16

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Mario Basurto

David L. Gore

Stephen Mathis

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**GARCIA, THOMAS**
Employee/Petitioner

Case# **11WC030545**

**16IWCC0478**

**PACE**
Employer/Respondent

On 1/4/2016, 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 0.55% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2093 BARRETT & SRAMEK
MICHAEL B BARRETT
6446 W 127TH ST
PALOS HTS, IL 60463

1505 SLAVIN & SLAVIN
PATRICK SHIFLEY
20 S CLARK ST SUITE 510
CHICAGO, IL 60603

16IWCC0478

STATE OF ILLINOIS )
)SS.
COUNTY OF Cook )

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

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**
**NATURE AND EXTENT ONLY**

**Thomas Garcia**
Employee/Petitioner

v.

**Pace**
Employer/Respondent

Case # **11** WC **30545**

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 **Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **December 16, 2015**. By stipulation, the parties agree:

On the date of accident, **5/18/2011**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**48,085.44**, and the average weekly wage was $**924.72**.

At the time of injury, Petitioner was **47** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**90,210.61** for TTD, $**NA** for TPD, $**NA** for maintenance, and $**NA** for other benefits, for a total credit of $**90,210.61**.

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 **$554.83**/week for a further period of **62.5** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused **the partial disability of said Petitioner to the extent of 12.5% thereof.**

**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.

David A. Kane
Signature of Arbitrator

**January 4, 2016**
Date



JAN 4 - 2016

**Thomas Garcia v. Pace, 11 WC 30545**

## MEMORANDUM OF DECISION OF ARBITRATOR

In support of the Arbitrator's Decision related to: **What is the nature and extent of the injury?;** The Arbitrator finds the following facts:

Petitioner testified that he is employed by Respondent, Pace, as a bus operator, and has been employed by Pace in that position for 14 years. Petitioner testified that he was so employed on May 18, 2011.

On cross examination Petitioner testified that he had a history of prior back complaints going back to 2006, and that he had received 8 epidural steroid injections in 2009.

Petitioner testified, generally, that in preparation for a day's business, Pace buses will be lined up in a "ready row" of approximately 60 buses in a garage. The Petitioner testified that the floor under those buses will often be messy with oil, water, or fluid leaking on to the floor.

It was the Petitioner's testimony that on May 18, 2011, during his employment, he was doing a pre-trip inspection on his bus. While checking a ramp lift, he leaned over and slipped in a pool of oil and water. Petitioner testified that he fell onto his shoulder.

Petitioner testified that he felt pain in his shoulder and his back at that time. An ambulance was called for the Petitioner and he was taken to the ER at Ingalls Memorial Hospital. Petitioner testified that he was given a sling and was referred to Integrity Orthopedics.

Beginning June 13, 2011, the Petitioner received treatment from Dr. Daniel Weber at Integrity Orthopedics. (Px 3)

On July 14, 2011 Petitioner underwent surgery with Dr. Daniel Weber at Ingalls Same Day Surgery. Pursuant to the Operative Report, the

Petitioner underwent a right shoulder arthroscopy with debridement and subacromial decrompression and bicipital tendotomy. (Px 4) It was decided that the infraspinatus was un-repairable without a flap transfer. (Px 4)

On July 22, 2011 the Petitioner was released to work with modified duty. Petitioner was not to use his right arm. (Px 4) The Respondent could not accommodate at this time. Petitioner continued off work and with treatment at Integrity Orthopedics. (Px 4)

On November 9, 2011, Petitioner had an x-ray arthrogram of his right shoulder, and an MRI of his right shoulder. (Px 5) The impression was of a complete tear of the supraspinatus tendon, complete tear of the midpart of the distal subscapularis tendon, partial tear of the distal infrapsinatus tendon, and other degenerative changes. (Px 5)

On February 1, 2012 Petitioner underwent a surgery with Dr. Edward Joy at Palos Community Hospital. Pursuant to the Operative Report, the Petitioner underwent an open subscapularis repair with limited acromioplasty and latissimus dorsi transfer. (Px 6)

Post-surgery Petitioner continued treatment with Integrity Orthopedics. (Px 4)

During this time Petitioner received PT from Integrity Orthopedics. The Petitioner completed 79 PT sessions with Integrity Orthopedics. (Px 4)

Beginning in September of 2012, the Petitioner was seen at ATI for physical therapy. (Px 11) Petitioner received treatment until he was discharged on November 13, 2012. (Px 11)

Petitioner underwent both physical therapy and work conditioning. (Px 4)

On November 1, 2013, Petitioner underwent an FCE at Accelerated Rehabilitation Centers. At that time Petitioner gave "sub-maximal effort"

and an "inconsistent performance". (Px 12) It was deemed that he was capable of greater functional abilities than demonstrated because of his inconsistent effort, 46.2%, and his inconsistent pain reporting, 60%. (Px 12) He was deemed to have demonstrated ability to accomplish at least 81.4% of the demands of a Bus Driver. (Px 12)

On January 14, 2014, Dr. Joy reported that the Petitioner was confident he could return to work. Dr. Joy agreed. Dr. Joy deferred the return to work until February 7, 2014 to provide time for the FCE to be reviewed, and for a PENN shoulder score. (Px 4)

Petitioner testified that he returned to work on March 29, 2014, and that he had received TTD until that date.

On May 9, 2014 Mr. Garcia was seen by Dr. Joy. At that time Dr. Joy reported that the Petitioner was "able to perform all work duties without pain or problems." Petitioner had a PENN shoulder score of 94/100. The return to work date of February 7, 2014 was restated, and MMI reached.

Petitioner testified that he has returned to work in his original capacity. Petitioner testified that his wage since his return to work has increased following union rules. Petitioner testified that he is able to perform all of his job duties. Petitioner testified that he is able to function without pain medication other than Ibuprofen, and that he is prohibited from taking other medication by DOT rules. Petitioner testified that his job requires him to work 8 hour shifts 5 days a week.

Petitioner testified that, to the extent lifting is required, he is able to do his job. Petitioner testified that, to the extent overhead work is required, he is able to do his job. Petitioner testified that he had not missed any dates of work due to his injury. Petitioner testified that his injury has not decreased his earnings in the time since his return to work.

**IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING: WHAT IS THE NATURE AND EXTENT OF THE INJURY?, THE ARBITRATOR CONCLUDES AS FOLLOWS:**

The Arbitrator finds that the Petitioner is a 51 year old male who suffered from a compensable injury to his rotator cuff.

The Petitioner testified that he was able to resume full duty employment in his original position. While the Petitioner testified that he has some physical difficulties which he relates to his accident, the Petitioner testified that he was able to complete the full extent of his job duties without accommodation or assistance.

The Petitioner was subject to two surgeries, neither of which show significant complications. The final surgery resulted in the Petitioner's return to full duty work. The Petitioner's invalid FCE shows that he was capable of doing more than 81.4% of the duties of a bus driver while failing to put forth maximum effort.

Finally, the Petitioner's was given a PENN shoulder score. That test measures the subjective function and perceived pain and satisfaction. The Petitioner scored a 94 out of a possible 100 points. This indicates that the Petitioner reports a high degree of function and satisfaction, and a low degree of pain.

On balance, the Petitioner appears to have a moderate amount of disability. Based upon the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 12.5% disability to a 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 Choose reason | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☒ Modify Down | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gloria Navarro,

Petitioner,

16IWCC0479

vs.

NO: 11 WC 4496

Chicago Transit Authority,

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

In a decision dated July 27, 2015, the Arbitrator awarded medical expenses and prospective medical treatment in the form of a recommended right ankle brace and shoe modifications as necessary and related to Petitioner's work-related injury of July 13, 2010. The Arbitrator also awarded Petitioner temporary disability benefits of $750.40 per week for 200 and 1/7 weeks commencing July 14, 2010 through May 14, 2014 as provided in §8(b) of the Act. While we agree with the majority of the Arbitrator's decision and award, we find that Petitioner failed to prove entitlement to temporary total disability benefits after January 31, 2014, the date Petitioner's treating physician, Dr. Rubenstein, placed Petitioner at maximum medical improvement.

16IWCC0479

Respondent offered Petitioner the position of Customer Service Assistant in June of 2012. Dr. Morgenstern promptly reviewed the job description and directly responded to it on July 20, 2012. He stated that he did not believe Petitioner could tolerate required activities such as extended standing, walking, climbing, lifting and exposure to cold temperatures and he concluded that the job of Customer Service Assistant was incompatible with Petitioner's activity restrictions. He also continued to recommend additional treatment in the form of a diagnostic right ankle arthroscopy. Furthermore, Dr. Morgenstern reviewed the opinions of Dr. Holmes, Respondent's §12 examiner, and explained his opposition to Dr. Holmes' opinion that Petitioner could return to regular duty work with no further treatment. Petitioner testified that she was familiar with and previously performed the duties of a Customer Service Assistant during her employment as a Combined Rail Operator. Rather than return to work against the recommendations of her physician Petitioner elected to remain off of work and pursue further treatment recommended by Dr. Morgenstern. Ultimately Dr. Rubenstein took over Petitioner's care and performed a right ankle arthroscopy on July 9, 2013.

On January 31, 2014, Dr. Rubenstein indicated that, possibly, with appropriate stabilization of the foot and ankle, Petitioner may be able to return to her regular job. However, he found that as of his examination on January 31, 2014 Petitioner remained restricted to sedentary work not involving operation of public transportation equipment or kneeling, squatting, or traversing uneven surfaces. On March 3, 2014, Dr. Rubenstein reaffirmed his opinion that Petitioner was at maximum medical improvement and could work with restrictions. Petitioner sought no further treatment. The Arbitrator awarded payment of reasonable and necessary medical expenses including the recommended AFO brace and shoe modifications for stabilization of Petitioner's right foot and ankle.

Petitioner's employment by Respondent was terminated on August 1, 2013 due to her prolonged absence from work. Because Petitioner reached maximum medical improvement on January 31, 2014, she was no longer eligible for temporary total disability benefits. Section 8(a) of the Act provides for an award of maintenance while an employee is engaged in a prescribed rehabilitation program. Petitioner testified that she applied for sedentary position online during March of 2014, but she had no interviews and she brought no job search records to the §19(b) hearing on May 14, 2014. We find that Petitioner failed to prove entitlement to maintenance benefits after January 31, 2014. While §8(a) does not limit "rehabilitation" to formal training, the Commission cannot reasonably infer by Petitioner's reported one month of online job searching that she was engaged in substantial efforts to reenter the work force.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $750.40 per week for a period of 185 and 3/7 weeks commencing July 14, 2010 through January 31, 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 or of compensation for permanent disability, if any.

16IWCC0479

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical expenses services, pursuant to the medical fee schedule, of Gold Coast Orthopedics (dates of service September 17, 2010 through February 11, 2013), Illinois Bone and Joint Institute (dates of service May 8, 2013 through March 3, 2014), 25 East Same Day Surgery (date of service July 9, 2013), and Universal Healthcare (dates of service September 10, 2010 through August 30, 2013), as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay, pursuant to the medical fee schedule, for the AFO brace and shoe modifications as recommended by Dr. Rubinstein to Scheck & Siress Prosthetics, Inc.

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: JUL 15 2016
RWW/plv
o-5/25/16
46

Ruth W. White

Joshua D. Luskin

Charles J. DeVriendt

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

16IWCC0479

**NAVARRO, GLORIA**
Employee/Petitioner

Case# **11WC004496**

**CHICAGO TRANSIT AUTHORITY**
Employer/Respondent

On 7/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% 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:

5278 MARKS & ASSOCIATES
JASON S MARKS
495 N RIVERSIDE DR SUITE 210
GURNEE, IL 60031

0515 CHICAGO TRANSIT AUTHORITY
MICHELE D MORRIS
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

G. Navarro v. CTA , 11 WC 04496

16IWCC0479

STATE OF ILLINOIS )
)SS.
COUNTY OF Cook )

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

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

**Gloria Navarro**
Employee/Petitioner
v.
**Chicago Transit Authority**
Employer/Respondent

Case # **11** WC **04496**

An *Application for Adjustment 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 **May 14, 2014 and May 16, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

16IWCC0479

**FINDINGS**

On the date of accident, **July 13, 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 **$58,531.20**; the average weekly wage was **$1,125.60**.

On the date of accident, Petitioner was **29** years of age, ***married*** with **4** 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 **$101,486.24** for TTD, **$0** for TPD, **$0** for maintenance, and **$3,486.00** for other benefits, for a total credit of **$104,972.24**.

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 $750.40/week for 200 1/7 weeks, commencing July 14, 2010 through May 14, 2014, as provided in Section 8(b) of the Act.

***Medical benefits***

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **Gold Coast Orthopedics (dates of service 9/17/10-2/11/13), Illinois Bone and Joint Institute (dates of service 5/8/13-3/3/14), 25 East Same Day Surgery (dates of service 7/9/13), and Universal Healthcare (dates of service 9/10/10-8/30/13)**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay, pursuant to the medical fee schedule, for the AFO brace and shoe modifications as recommended by Dr. Rubinstein to Scheck & Siress Prosthetics, Inc.

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

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

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

Signature of Arbitrator

July 24, 2015
Date



JUL 27 2015

## FINDINGS OF FACT

### *Testimony of Gloria Navarro*

Petitioner resides in Chicago with her husband and four children. She is currently 33 years of age. Her highest level of education is 11th grade. She has no additional formal training or schooling.

Petitioner began working for the CTA in 2006 as a Combined Rail Operator. As a Combined Rail Operator she was required to operate trains, perform the duties of a switchman, flag man and provide customer assistance. The physical demands of her job with the CTA required extended periods of standing, walking and climbing including walking and climbing on uneven surfaces.

On July 13, 2010, Petitioner started work at approximately 2:30 p.m. At approximately 8:30 p.m. she was performing her duties as a switchman with a co-worker named Brandy. Petitioner was at the track level while Brandy was inside a CTA train as they were attempting to move the train into the shop. While directing her co-worker Petitioner rolled her right ankle. She felt and heard a pop at that time.

Petitioner finished work that day and went home. She removed her work boot and noticed significant swelling in her right foot and ankle. The following day Petitioner's foot was so swollen that she could not wear her work boot. She reported to work, but was limping. She reported the injury on July 14, 2010, and was advised to seek medical treatment.

Petitioner was seen in the emergency room at Advocate Christ Medical Center on July 14, 2010. She was examined, provided with an air cast, crutches and a prescription for Vicodin. Petitioner was provided with a referral to an orthopedic surgeon.

Petitioner eventually came under the care of Dr. Morgenstern at Gold Coast Orthopedics. She initially saw him on September 17, 2010. She had already undergone an MRI of her right foot/ankle by that time. Dr. Morgenstern recommended physical therapy as well as surgery.

On October 6, 2010, Petitioner underwent surgery of her right ankle performed by Dr. Morgenstern. She followed up with him after surgery and he recommended physical therapy. Her physical therapy was performed at Universal Healthcare. Dr. Morgenstern provided her with medications and kept her off work.

On April 19, 2011, Petitioner underwent an FCE at NovaCare. Dr. Morgenstern gave her permanent restrictions consistent with the findings of the FCE. She was not able to return to work with the CTA at this time because they did not have a job available within her restrictions. She continued to receive TTD benefits from Respondent.

Petitioner continued to treat with Dr. Morgenstern because she had little to no improvement with her symptoms. He eventually recommended additional surgery. Petitioner was not able to undergo that surgery at the time Dr. Morgenstern recommended it because Respondent would not authorize the surgery.

Another FCE was performed on February 28, 2012, also at NovaCare. Petitioner believes her restrictions remained the same following the second FCE. Once again, she was not able to return to work because Respondent did not have employment available within her restrictions. She continued to receive temporary total disability.

Dr. Morgenstern's recommendation for surgery did not change. He eventually retired and referred Petitioner to Dr. Rubinstein at Illinois Bone & Joint Institute. Dr. Rubinstein concurred with Dr. Morgenstern's recommendation for surgery. Petitioner underwent surgery of her right ankle performed by Dr. Rubinstein on July 19, 2013. She followed up with Dr. Rubinstein subsequent to surgery and he recommended physical therapy. Physical therapy was performed at Universal Healthcare.

Dr. Rubinstein eventually recommended that Petitioner obtain an ankle brace and special shoes to help with her pain and stability. Petitioner was seen at Scheck and Siress in order to be fitted for the brace and shoes. She was unable to obtain the brace and shoes because Respondent would not authorize them.

Petitioner last saw Dr. Rubinstein on March 3, 2014. He provided her with permanent restrictions. She is not able to perform her regular job duties as a Combined Rail Operator for the CTA with these restrictions.

Petitioner underwent several independent medical examinations with Dr. Holmes. Petitioner believes that Dr. Holmes eventually indicated that she could return to work full duty without restrictions.

Petitioner is no longer employed by the CTA. She was terminated as of July 31, 2013, when she did not return to her regular job without restrictions.

In June of 2012 Petitioner attempted to return to work in the Customer Assistant position. Petitioner was quite familiar with this job because the duties of a Customer Assistant are incorporated into her job title as a Combined Rail Operator. Petitioner was unable to perform the physical requirements of the Customer Assistant job due to the condition of her right ankle. Specifically, the Customer Assistant job required her to stand and walk for extended periods. She was also required to climb stairs on a regular basis.

Currently, Petitioner experiences pain and swelling of her right ankle on a daily basis. She has been searching for employment within the restrictions provided to her by Dr. Rubinstein essentially looking for a sedentary position. She has applied to various employers through the internet and has received varying responses. She has not received a request to interview for any of the positions for which she has applied. Petitioner denied prior injuries to her right foot and ankle.

### *Testimony of Karen Johnson-Barnes*

Karen Johnson-Barnes works for Respondent as a Workers' Compensation Manager. As part of her job, she works with Sedgwick CMS and helps coordinate return to work programs for injured employees. She is a member of the Accommodations Review Committee. She is not a voting member of the committee, but simply observes the proceedings and is there to answer questions.

In June of 2012 Sedgwick CMS submitted a request for accommodation on behalf of Petitioner. This request was made after Petitioner received her permanent restrictions. According to the FCE, the permanent restrictions involved occasional standing and occasional climbing. The Accommodations Review Committee agreed to offer Petitioner the job of Customer Assistant. Ms. Johnson-Barnes met with Petitioner around July 11, 2012, to discuss the position of Customer Assistant. Petitioner signed the accommodation request that was identified as Petitioner's Exhibit 11, but added, "depending on the approval of my doctor."

The job of Customer Assistant involves extended periods of standing as well as climbing up and down from station platforms. The Customer Assistant position is part of the job duties of a Combined Rail Operator.

She last spoke to Petitioner in August of 2012 at which time her doctor indicated she could attempt to return to work as a Customer Assistant while using an ankle brace and cane. Ms. Johnson-Barnes confirmed that Respondent refused to let Petitioner return to work utilizing a cane.

She is aware that Dr. Holmes authored an IME addendum in February of 2013 indicating that Petitioner could return to work as a Combined Rail Operator full duty and without restrictions. Once Dr. Holmes offered the opinion that Petitioner could return to work without restrictions, no further accommodations were provided and Petitioner was not offered work within the restrictions indicated by her treating physician.

## Medical Records

### *Advocate Christ Medical Center*

Petitioner was seen in the emergency room at Advocate Christ Medical Center on July 14, 2010, with complaints of right ankle pain. She provided a history of having "twisted/rolled" her right ankle while at work and that she "heard something snap." Her range of motion was limited secondary to pain which was rated as a seven out of ten. She was noted to be ambulating slowly and with a limp. An x-ray of the right ankle was

negative for fracture, but displayed medial and lateral soft tissue swelling. Petitioner was diagnosed with an ankle sprain, provided with an air cast, crutches and a prescription for Vicodin. She was given instructions to follow-up with an orthopedic surgeon. PX 1, p. 7 – 12.

***Gold Coast Orthopedics***

Petitioner was seen by Dr. Morgenstern of Gold Coast Orthopedics and Rehabilitation on September 17, 2010, for a consultation. She reported "stepping off a curb and twisted her right ankle" while working for the CTA on July 13, 2010. She felt a pop when she twisted her ankle and noted residual pain and swelling. Petitioner denied any prior history of injury or problems with her right ankle. PX 1, p. 2.

Dr. Morgenstern examined Petitioner and noted residual swelling to the medial and lateral malleoli of the right ankle. She had a positive anterior drawer sign and was unable to toe walk. Dr. Morgenstern reviewed the MRI of the right ankle which revealed a partial tear of the anterior talofibular ligament with chondral delamination. He diagnosed Petitioner with right ankle internal derangement and ligament tear and recommended an arthroscopy. He also indicated that Petitioner should begin therapy. Dr. Morgenstern ordered Petitioner off work. PX 1, p. 2-3.

On October 6, 2010, Petitioner underwent surgery performed by Dr. Morgenstern. He performed an extensive synovectomy and debridement, repair of the anterior talofibular ligament and repair of a lateral talor dome fracture of the right ankle. Dr. Morgenstern indicated the post-operative diagnosis as, "internal derangement right ankle, hypertrophic synovitis right ankle, torn anterior talofibular ligament right ankle, and lateral talor dome cartilage injury right ankle." PX 2, p. 5 – 6.

Petitioner continued treating with Dr. Morgenstern for the next several months. Dr. Morgenstern continued to note residual swelling and discomfort to the lateral aspect of the right ankle. His recommendation was for additional physical therapy and to remain off work. He stated that Petitioner was unable to tolerate her work duties due to her inability to weight bear for extended periods of time. PX 2, p. 14 – 19.

On March 21, 2011, Dr. Morgenstern indicated that Petitioner should have a functional capacity examination to determine any permanent work restrictions. Dr. Morgenstern had reviewed the FCE report as of the time of the office visit on May 2, 2011, and noted that Petitioner could return to "medium" duty work with regard to her carrying abilities. However, he indicated that she had continued pain, swelling and discomfort of the right ankle with extended standing and walking as noted on the FCE and therefore provided her with permanent work restrictions of no standing and walking greater than four hours in an eight hour work day. He further stated that she should utilize a cane or a shoe boot for support and relief of her right ankle symptoms. Dr. Morgenstern stated she was unable to drive a work vehicle, walk on uneven surfaces, climb ladders or walk on elevated structures. PX 2, p. 20 – 23.

On August 8, 2011, Dr. Morgenstern recommended an updated MRI due to Petitioner's ongoing symptoms. On September 19, 2011, he commented on the updated MRI indicating it demonstrated a "sprain of the ligamentous fibers of the anterior and posterior talofibular ligaments with ankle joint effusion and subchrondral edema at the lateral talor region." Based on the MRI findings, Dr. Morgenstern recommended that Petitioner undergo an additional arthroscopic procedure of the right ankle. While he stood by his opinion that additional surgery was necessary, Dr. Morgenstern did indicate, in his note of January 10, 2012, that Petitioner could have an updated FCE as recommended by Dr. Holmes to determine her current work restrictions. PX 2, p. 27 – 37.

On March 5, 2012, Dr. Morgenstern commented on the updated FCE that documented Petitioner's ability to return to "medium" duty work. He indicated that the restrictions were unchanged from her previous FCE. PX 2, p. 40.

Over the next several months Petitioner returned to Dr. Morgenstern and he noted her "chronic symptoms" of right ankle pain, swelling and discomfort especially with weight bearing and extended periods of

standing. He continued to recommend an arthroscopic evaluation of the right ankle. On June 8, 2012, Dr. Morgenstern indicated that he concurred with Dr. Holmes that Petitioner could return to work with restrictions as indicated by the functional capacity evaluation. However, he noted that these restrictions were unchanged from her prior restrictions and that Respondent has not made work available to Petitioner within the restrictions. Dr. Morgenstern stated that Petitioner's symptoms are "directly related and causally connected to the patient's accident while at work on June 13, 2010, when the patient stepped off a curb and twisted her right ankle feeling a pop." PX 2, p. 41 – 43.

On July 20, 2012, Dr. Morgenstern reviewed the CTA job description for a Customer Assistant. He noted that "due to the patient's current symptoms and the results of a functional capacity examination, the patient is unable to tolerate this job responsibility. The patient is unable to tolerate extended periods of standing and walking." PX 2, p. 45.

Petitioner continued to see Dr. Morgenstern from August of 2012 through February of 2013. Her symptoms remained unchanged. Throughout that period of time, Dr. Morgenstern reiterated her permanent restrictions as well as his recommendation for an arthroscopic evaluation of the right ankle. Petitioner was last seen by Dr. Morgenstern on February 11, 2013, when he again noted that Petitioner is "unable to return for regular work duties with her current symptoms and exam findings and the patient will require further evaluation and treatment for symptoms of right ankle internal derangement." PX 2, p. 46 – 55.

***Illinois Bone & Joint Institute – Dr. Rubinstein***

Petitioner was seen by Dr. Scott Rubinstein of Illinois Bone & Joint Institute on May 8, 2013. At that time he indicated that he had reviewed her prior records including the operative report from the prior ankle surgery. Dr. Rubinstein stated that there was evidence of an osteochondral injury to the talor dome with extensive synovitis in the ankle that was noted by Dr. Morgenstern at the time of surgery. His thought was that Petitioner was having intraarticular pathology and therefore provided her with an injection to see if it improved her discomfort. PX 3, p. 33 – 37.

Petitioner returned to see Dr. Rubinstein on May 15, 2013. He noted temporary improvement in her ankle following the injection. Dr. Rubinstein felt that the fact that she got good relief temporarily suggested some intraarticular pathology and therefore recommended a repeat arthroscopy. Dr. Rubinstein indicated that her walking and standing are "significantly limited" until such time as she is able to have the surgery. PX 3, p. 32.

On July 9, 2013, Petitioner was taken to surgery. Dr. Rubinstein performed a right ankle arthroscopy with resection of osteochondral flap tear, chondroplasty and synovectomy of the right ankle. At the time of surgery Dr. Rubinstein found "a lot of synovitis in the joint." Additionally, he noted a "loose osteochondral flap tear measuring about 6mm x 4mm" in the lateral aspect of the talor dome as well as some "impinging synovium anteriorly and laterally." His post-operative diagnosis was osteochondral tear of the right ankle. PX 3, p. 24.

Petitioner returned to see Dr. Rubinstein subsequent to surgery. He stated she was unable to return to work and recommended a course of physical therapy. On August 15, 2013, Dr. Rubinstein commented on the findings at the time of surgery. Specifically, he indicated the following:

> "She was noted to have a large flap of loose articular cartilage on the talor dome, which is what the MRI suggested and probably was present at the time of her original surgery with the underlying osteochondral fracture, but the articular surface had not yet cracked, which is why it was not easily seen at that time. I believe that this is due to the initial injury and not something that happened subsequently that was the initial causative factor. It does sometimes take a while for the articular surface to crack overlying the osteochondral fracture beneath, and that is probably why it was not fully visualized on her first arthroscopy. I do not have any evidence that there was another

> interim injury, and I feel that the need for this most recent surgery is just a progression of the problem that occurred from her initial injury. In any case, at the time of surgery, she was noted to have an osteochondral fracture and a flap tear of articular cartilage, which was removed. She was also noted to have some synovitis in the ankle joint, which was cleaned out."

Dr. Rubinstein stated that Petitioner was only capable of a sedentary position at that time. PX 3, p. 19 – 22.

On September 4, 2013, Dr. Rubinstein noted Petitioner was still having trouble regaining full range of motion of her ankle and was walking with a limp. His exam documented swelling in the ankle. He stated that due to the "talor dome deficiency and arthritic changes" that she may have continued problems. She was not yet at MMI and he indicated she could perform sedentary work. PX 3, p. 17.

On October 16, 2013, Petitioner returned to see Dr. Rubinstein. She continued to have symptoms in her right ankle and he noted that this was "not surprising" since she had "damage to her joint line and was noted to have some articular surface damage as well as some scarring within the joint" at the time of surgery. While she had regained most of her motion, extensive activity and walking cause her pain and discomfort. He provided her with a prescription for an AFO brace as well shoe modifications and stated she is unable to work. PX 3, p. 14.

Petitioner saw Dr. Rubinstein on December 6, 2013. He indicated she was at a "static state" and close to MMI. She was still having significant problems and pain with her ankle. He noted swelling and reduced range of motion at the time of her physical exam and, specifically, that she was only able to dorsiflex to neutral. He reiterated his recommendation for an AFO brace to help diminish her ankle motion and relieve pressure on her damaged articular surface. Dr. Rubinstein stated that she may need to consider an arthrodesis of her ankle at some point. He indicated his opinion that her current state of ill-being is related to her original injury and the osteochondral fracture that was seen both at the time of the surgery performed by Dr. Morgenstern as well as the subsequent surgery that he performed. PX 3, p. 11.

Dr. Rubinstein again saw Petitioner on January 31, 2014. He noted that she was unable to obtain the AFO brace and special shoes due to lack of authorization. He indicated that this is the "only other option to a surgical fusion of her ankle that is going to give her adequate pain relief." The significant deficit of the articular surface of her talus is responsible for the pain and discomfort she is having. This damage was seen at the time of both surgeries and relates back to her original injury. Dr. Rubinstein went on to state, "these particular types of injuries do not resolve on their own, and she is likely to have continued problems with her ankles without further treatment." Upon examination her ankle was noted to be swollen with pain at the end ranges of motion. Her dorsiflexion was to neutral and plantarflexion to 40 degrees with discomfort. Dr. Rubinstein indicated that Petitioner could not safely return to her job operating rail equipment for the CTA given the amount of discomfort in her right ankle and noted it would be a "safety problem." He provided her with restrictions of sedentary work only including no kneeling, squatting or walking on uneven or elevated surfaces. PX 3, p. 8 – 9.

Dr. Rubinstein last saw Petitioner on March 3, 2014. He stated she is at maximum medical improvement without any further treatment. He noted his opinion that it was "likely as is typical with damaged joints that the damage progresses over time and may likely get her to a state where she needs to do something more to become more functional, whether an ankle arthrodesis or ankle arthroplasty depending on her age at the time." He further stated he is "certain" she will require future medical care. Her restrictions remained unchanged and he recommended vocational rehabilitation. Dr. Rubinstein stated that he has nothing further to offer Ms. Navarro other than pain medication and activity restrictions. PX 4, p. 6.

***NovaCare Rehabilitation***

Petitioner underwent a functional capacity evaluation on April 19, 2011. The therapist who conducted the evaluation indicated that Petitioner's consistent performance throughout the testing in conjunction with physiological responses indicate that the results of the evaluation are an accurate representation of Petitioner's

functional abilities. The FCE concluded that Petitioner "did not demonstrate the ability to meet the physical demand requirements of a Switchman based upon the job description provided by the employer." Petitioner demonstrated the ability to function "in a limited capacity" in the medium physical demand category. Petitioner demonstrated the ability to stand, walk, stoop and climb only "occasionally." PX 7, p. 17 – 18.

Petitioner had an additional functional capacity evaluation on February 28, 2012. She again demonstrated the ability to function in the medium physical demand level. The report stated that she "did not demonstrate the ability to return to work as a Switchman for CTA." Her test performance was noted to be consistent and she had significant problems with standing, walking, climbing stairs and ladders, kneeling and balance. PX 8, p. 8 – 9.

While both FCE reports classify Petitioner's job with Respondent as "Switchman," the records from NovaCare Rehabilitation reflect that they were in possession of a job description from CTA for the position of "Customer Assistant." The job description for Customer Assistant requires the ability to "constantly" stand and "frequently" walk. Under "working conditions," the job description indicates "required to stand for extended periods of time and climb up and down from station platforms," "required to stand distributing maps and time tables, answering questions, walking to open and close station," and "required to climb stairs and balancing onboard inspections." PX 7, p. 32 – 35.

***Scheck & Siress***

Petitioner was seen at Scheck & Siress Prosthetics, Inc., on December 20, 2013, for evaluation for a custom right AFO ankle brace and "extra depth shoes with rocker bottom modification" as recommended by Dr. Rubinstein. Petitioner did not proceed with the AFO brace and shoe modification secondary to lack of authorization. PX 9, p. 5.

***IMEs – Dr. Holmes***

***July 20, 2011***

Dr. Holmes saw Gloria Navarro for an IME on July 20, 2011. He took a history from her regarding the work accident that occurred on July 13, 2010. Specifically, he noted that the injury occurred while she was "putting a train into the shop…while walking out of the shop she miscalculated her steps from the curb to the ground and landed on her ankle…she heard a pop and noted the presence and onset of immediate swelling." RX 1.

He noted that she presented with ongoing swelling and pain in the anterolateral aspect of the ankle. She reported instability with weight-bearing activities. Petitioner was using an over the counter ankle brace as well as a cane to ambulate. RX 1.

Dr. Holmes examined Petitioner and reviewed her medical records. He diagnosed her as "status post ankle sprain with arthroscopic examination of the ankle." He indicated that he would like to review the actual MRI films from August 7, 2010, as he was only able to review the report. He also recommended a possible repeat MRI scan as well as a triple phase bone scan. Dr. Holmes stated that Ms. Navarro had no preexisting conditions or illnesses and that her current symptoms "appear to have a causative onset as a result of the reported injury of July 13, 2010." RX 1.

***December 20, 2011***

Dr. Holmes authored an addendum report dated December 20, 2011. He commented on his review of the MRI films from August 7, 2010, noting they did "not demonstrate any significant area of any injury to the talor dome." The MRI did show a partial tear of the talofibular ligament which was consistent with a sprain as well as a posterior effusion. Dr. Holmes did not see any reason to proceed with an arthroscopic debridement, synovectomy and repair of the ATFL based upon his review of the MRI. RX 2.

Dr. Holmes also reviewed the report of the second MRI performed on September 2, 2011. The report documented mild Achilles tendinosis, subchondral edema and cystic changes in the lateral talor dome. There

were intermediate signal changes in the area of the anterior posterior talofibular ligaments as well as some ankle joint effusion. Since these findings were not noted on the first MRI, according to Dr. Holmes, he did not relate them to the acute injury sustained on July 13, 2010. RX 2.

Additional medical records were reviewed and Dr. Holmes opined that Petitioner's objective findings did not match her subjective complaints. Based on his review of the more recent MRI, he did not agree with the recommendation for a repeat arthroscopic examination. Specifically, he noted "no evidence of any major osteochondral lesion...no evidence of any effusion of the ankle...no evidence of any arthritis of the ankle...no evidence of a loose body within the ankle...no evidence of any exuberant synovial changes." He did state that "the changes noted in the ligaments of the ankle are related to her initial injury and are not amenable to surgical repair." RX 2.

Dr. Holmes recommended an FCE and mentioned that the test should focus on "validity parameters." He stated that he could not impose any restrictions based upon the objective medical data or his physical examination and added that it would be "helpful to obtain an FCE to formulate some objective data for me to provide some parameters for her work restrictions, if any." RX 2.

***May 11, 2012***

In his addendum dated May 11, 2012, Dr. Holmes commented on the FCE that was performed on February 28, 2012. He indicated "the results of this evaluation demonstrated the ability to function in the medium physical demand level" and "did not demonstrate the ability to return to work as a Switchman for CTA." Dr. Holmes stated that the test performance was "consistent" and identified deficits in "standing, walking, climbing stairs and ladders, kneeling and balance." RX 3.

Based upon the FCE of February 28, 2012, Dr. Holmes opined to a reasonable degree of orthopedic and surgical certainty that Petitioner was incapable of returning to her regular occupation in a full duty capacity. He recommended a return to work within the parameters of the FCE "if they can be found at her usual place of employment." RX 3.

***November 14, 2012***

Petitioner again presented to Dr. Holmes on November 14, 2012, for an independent medical examination. She reported pain and swelling over the anterolateral aspect of the ankle, and sharp, pulling and throbbing pain over the ankle, worse with weight-bearing. She was off work at the time of this examination. RX 4.

Dr. Holmes examined Petitioner and noted she had pain over the medial aspect of the ankle and some pain posterolaterally and anterolaterally. He indicated that these areas of pain differ from her previous examination when he noted pain over the dorsolateral aspect of the foot and some persistent pain posterolaterally. RX 4.

Dr. Holmes goes on to state that the "initial MRI scan in my review demonstrates sufficient pathology that would have probably warranted initial arthroscopic treatment." He further states that he had no opportunity to review the film of the second MRI that was performed and would like the opportunity to do so. Nonetheless, he indicates that Petitioner is not a candidate for further arthroscopic surgery as he "cannot find any definable lesion or abnormality that in and of itself would be the source of her diffuse pain in her foot." His opinion at that time was that if she was unable to return to work it would be more reasonable to place her at MMI as opposed to subject her to another surgery. RX 4.

***December 18, 2012***

Dr. Holmes authored an addendum report dated December 18, 2012, after having had an opportunity to review both the report and films of the MRI performed on September 2, 2011. His opinion was that the MRI does not demonstrate "any intraarticular feature of any significance" that would be amenable to arthroscopic evaluation. Therefore, Dr. Holmes stood by his opinion that Petitioner did not require a second arthroscopic evaluation. RX 5.

*January 14, 2013*

Dr. Holmes authored an addendum report on January 14, 2013, to address whether Petitioner requires a cane and/or ankle brace, whether she can work without restrictions and whether she can perform the job of Customer Assistant without accommodation. Dr. Holmes reviewed the job description for Customer Assistant provided by Respondent and he noted that it requires the ability to stand for extended periods of time, climb up and down from station platforms, stand in order to distribute maps and walk to open and close stations. It also requires stooping, climbing stairs and balancing on board for inspection. RX 6.

Dr. Holmes indicated that Petitioner does not require use of a cane. However, she can use an ankle brace for support. He goes on to state that "from an objective standpoint there are no definable objective parameters that would preclude her from working without restrictions." His opinion is that she could perform the job as Customer Assistant without any "accommodation." RX 6.

*February 11, 2013*

On February 11, 2013, Dr. Holmes authored an addendum IME report regarding Petitioner's ability to perform the job requirements of a Combined Rail Operator. Dr. Holmes noted that the position requires the ability to climb into and out of rail cars, couple and uncouple rail cars, perform repair transfer service and requires employee to stand for extended periods of time. Dr. Holmes opined that Petitioner can work as a Combined Rail Operator without restrictions "based upon the objective data accumulated by the x-rays, review of MRI, physical examination and a known natural history of her injuries." Rx 7.

## CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

### IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING C (ACCIDENT), THE ARBITRATOR FINDS AS FOLLOWS

The Arbitrator finds that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on July13, 2010 based upon the testimony of Petitioner and the medical records.

Petitioner testified credibly regarding the work accident that occurred on July 13, 2010. Specifically, Petitioner noted that she was assisting a co-worker with moving a train back into the shop in Skokie. Petitioner was working at the track level and directing her co-worker, Brandy, who was in the train. At this time, Petitioner stepped off a curb and rolled and twisted her right ankle. Petitioner testified she heard and felt a pop at the time of the incident. Petitioner has provided this history to each of the medical providers that have treated her for her injuries as well to as to Dr. Holmes, Respondent's examining physician. Respondent offered no evidence to rebut or discredit Petitioner's testimony regarding the work accident.

### IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING F (CAUSAL CONNECTION), THE ARBITRATOR FINDS AS FOLLOWS

The Arbitrator finds that there is a causal connection between the accidental injuries of July 13, 2010 and Petitioner's current condition of ill-being regarding her right foot and ankle.

Petitioner underwent an MRI of the right ankle on August 7, 2010, and subsequently began treating with Dr. Morgenstern. He recommended surgery and this was performed on October 6, 2010. At the time of surgery Dr. Morgenstern appreciated a torn anterior talofibular ligament of the right ankle, a lateral talor dome cartilage

injury as well as hypertrophic synovitis. He performed a repair of the anterior talofibular ligament and repair of the lateral talor dome fracture of the right ankle as well as an extensive synovectomy and debridement.

Petitioner had ongoing symptoms subsequent to surgery and eventually underwent an FCE on April 19, 2011. She was noted to have consistent performance throughout the test and it was deemed an accurate representation of her functional abilities. Based on the FCE Petitioner did not demonstrate the ability to return to her prior employment with Respondent and had significant deficits in her ability to stand, walk, stoop and climb. In light of continued symptoms, Dr. Morgenstern recommended another MRI which revealed a sprain of the ligamentous fibers of the anterior and posterior talofibular ligaments with ankle joint effusion and subchondral edema at the lateral talor region. Additional surgery was recommended. Dr. Morgenstern stated that Petitioner's symptoms are directly related and causally connected to her accident while at work on July 13, 2010.

Petitioner later began treating with Dr. Scott Rubinstein of Illinois Bone & Joint Institute. Dr. Rubinstein reviewed Petitioner's records and stated there was evidence of an osteochondral injury to the talor dome with extensive synovitis in the ankle which was noted at the time of the first surgery. Dr. Rubinstein performed surgery on July 9, 2013, and noted in his findings an osteochondral flap tear measuring 6mm x 4 mm in the lateral aspect of the talor dome as well as synovitis in the joint and impinging synovium anteriorly and laterally. In his office note of August 15, 2013, he discussed his surgical findings and stated that the MRI suggested the large flap of loose articular cartilage on the talor dome. Dr. Rubinstein indicated that what he saw at the time of the surgery was due to the initial injury and that his findings at the time of the second surgery were a progression of the original injury.

Petitioner saw Dr. Holmes for an IME on July 20, 2011. After examining her and reviewing her medical records, Dr. Holmes opined that Petitioner had no preexisting conditions or illnesses and that her current symptoms "appear to have a causative onset as a result of the reported injury of July 13, 2010." In his report dated December 20, 2011, after review of the MRI film from August 7, 2010, Dr. Holmes noted it did not demonstrate any "significant" injury to the area of the talor dome and stated he did not see any reason to proceed with the original arthroscopic surgery based on this MRI. However, in his report dated November 14, 2012, Dr. Holmes, after again reviewing the MRI film from August 7, 2010, noted the MRI scan did demonstrate "sufficient pathology that would have probably warranted initial arthroscopic treatment."

In his report of December 20, 2011, Dr. Holmes comments on the MRI report of September 2, 2011. While it notes subchondral edema and cystic changes in the lateral talor dome as well as signal changes in the area of the anterior posterior talofibular ligaments and ankle joint effusion, Dr. Holmes does not relate these to the acute injury sustained on July 13, 2010, despite his earlier statement that Petitioner had no preexisting conditions of her right foot or ankle. After review of the second MRI he did not agree with the recommendation for surgery noting it showed "no evidence of any major osteochondral lesion...no evidence of any effusion of the ankle...no evidence of any arthritis of the ankle...no evidence of a loose body within the ankle...and no evidence of any exuberant synovial changes. Dr. Holmes did not review the operative report from the procedure performed by Dr. Rubinstein on July 9, 2013, where he did, in fact, find a loose osteochondral flap tear, synovitis in the joint and impinging synovium anteriorly and laterally.

With regard to Petitioner's ability to return to work, it was Dr. Holmes, in his report of December 20, 2011, who recommended that Petitioner undergo an FCE to obtain "objective data" in order to determine Petitioner's ability to return to work. Dr. Holmes stated in his report of May 11, 2012, that, based on the FCE from February 28, 2012, Petitioner did not demonstrate the ability to return to work for Respondent. He pointed out that the test performance was "consistent" and identified deficits in standing, walking, climbing stairs and ladders, kneeling and balance, all of which were required by Petitioner's job. Later, on January 14, 2013, after having reviewed the CTA job description for Customer Assistant (that also requires extended periods of standing, walking and climbing), Dr. Holmes opined that Petitioner could perform that job without restrictions. Approximately four weeks later, on February 11, 2013, Dr. Holmes authored a report indicating that Petitioner

could perform her regular job duties as a Combined Rail Operator without restrictions, noting there was "no definable objective parameters" that would prevent her from working without restrictions.

In light of the above, the Arbitrator does hereby find that Petitioner's current condition of ill-being is causally related to her work accident that occurred on July 13, 2010, while in the course of her employment with Respondent. The Arbitrator relies on the opinions of Dr. Morgenstern and Dr. Rubinstein and finds those opinions to be more credible and persuasive than the varying opinions offered by Dr. Holmes. Specifically, the Arbitrator finds Dr. Holmes' opinion to be contradictory with regard to the need for the first surgery. Upon his initial review of the MRI, Dr. Homes stated the first surgery was not necessary. However, he later stated, after a second review of the MRI, that it showed sufficient pathology such that the arthroscopic procedure was warranted. Further, the Arbitrator notes that Dr. Holmes did not have the benefit of reviewing the records of Dr. Rubinstein and, more particularly, the operative report from the surgical procedure of July 9, 2013, that identified and confirmed the existence of pathology that Dr. Holmes did not see on his review of the second MRI.

Finally, Dr. Holmes' opinion with regard to Petitioner's ability to return to work is inconsistent and contradictory. Dr. Holmes relied on the objective data from the FCE of February 28, 2012, to conclude that Petitioner was not capable of returning to her regular occupation in a full duty capacity with Respondent. He later stated that Petitioner could return to work, full duty and without restrictions, finding that there were no "definable objective parameters" that would preclude her from working without restrictions, seemingly ignoring the prior objective parameters he recognized on the FCE performed on February 28, 2012.

**IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING J (REASONABLE AND NECESSARY MEDICAL SERVICES) AND K (PROSCPETIVE MEDICAL CARE), THE ARBITRATOR FINDS AS FOLLOWS**

In light of the Arbitrator's findings with regard to C (Accident) and F (Causal Connection) the Arbitrator does hereby find that Petitioner's course of medical treatment and, specifically, the surgical procedure performed by Dr. Rubinstein on July 9, 2013, was reasonable and necessary. The Arbitrator finds that Respondent shall pay for reasonable and necessary medical services rendered to Petitioner by Gold Coast Orthopedic, Illinois Bone & Joint Institute, Universal Healthcare and 25 East Same Day Surgery. Further, the Arbitrator orders that Respondent authorize and pay for the AFO ankle brace and extra depth shoes with rocker bottom modification as ordered by Dr. Rubinstein and as outlined by Sheck & Siress Prosthetics, Inc.

Respondent is entitled to a credit for all bills that it has paid.

**IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING L (TEMPORARY BENEFITS), THE ARBITRATOR FINDS AS FOLLOWS**

Petitioner was paid temporary total disability benefits from July 14, 2010, through February 18, 2013. Respondent terminated Petitioner's temporary total disability benefits after February 18, 2013, based on the opinion of Dr. Holmes that Petitioner could return to work full duty and without restrictions in her job as a Combined Rail Operator. In light of the Arbitrator's finding with regard to C (Accident) and F (Causal Connection), the Arbitrator finds that the condition of Petitioner's right ankle prevented her from returning to work full duty as of February 19, 2013. Rather, Petitioner had restrictions consistent with the objective findings of two valid FCEs which prevented her from extended periods of standing, walking and climbing all of which were required by Petitioner's job with Respondent.

Petitioner had work restrictions from February 19, 2013, through May 14, 2014, that prevented her from returning to work. Respondent did not offer Petitioner a job within her restrictions throughout the aforementioned period of time.

In light of the above, the Arbitrator finds that Petitioner is entitled to temporary total disability payments from July 14, 2010, through May 14, 2014.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARIA GOMEZ,

Petitioner,

vs.

NO: 13 WC 12730

CASA CENTRAL PADRES CORP.,

16IWCC0480

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, notice, medical expenses, and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but corrects clerical errors as outlined below.

The Commission corrects two clerical errors in the "Findings" section on page three of the decision. First, the alleged date of accident is changed from "10/31/2015" to "10/31/2012". Second, the statement that Petitioner "***did***" sustain an accident is changed to "***did not***" to correctly reflect the Arbitrator's finding on that issue.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 4, 2015, is hereby affirmed and adopted with the clerical corrections noted above.

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

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

DATED: JUL 15 2016

Charles J. DeVriendt

SE/
O: 5/25/16
49

Ruth W. White

Joshua D. Luskin

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

**GOMEZ. MARIA**
Employee/Petitioner

Case# **13WC012730**

**CASA CENTRAL PADRES CORP**
Employer/Respondent

**16IWCC0480**

On 5/4/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1427 BERG & BERG
STEPHEN M WAUCK
2100 W 35TH ST
CHICAGO, IL 60609

1596 MEACHUM & STARCK
MIKE SPINAZZOLA
225 W WASHINGTON ST SUITE 500
CHICAGO, IL 60606

16IWCC0480

Maria Gomez v. Casa Central Padres Corp.
13 WC 12730

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)**

**Maria Gomez**
Employee/Petitioner

v.

**Casa Central Padres Corp.,**
Employer/Respondent

Case # **13** WC **12730**

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 **Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **March 5, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

16IWCC0480

**FINDINGS**

On the date of accident, **10/31/2015**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$14,742.00**; the average weekly wage was **$283.50**.

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

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

Respondent shall be given a credit of **$16,059.99** for TTD, **$1,304.10** for TPD, **$0.00** for maintenance, and **$36,551.88** for other benefits, for a total credit of **$53,915.97**.

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

**ORDER**

This matter is denied as Petitioner failed to prove accident and causal connection.

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

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

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

Kelli Sharoff Steffen
Signature of Arbitrator

5/5/15
Date

ICArbDec19(b)

MAY 4 - 2015

## FACTUAL HISTORY

Maria Gomez ("Petitioner") was employed with Casa Central Padres ("Respondent") on October 31, 2012 as a homemaker. Petitioner testified with the aid of a translator. (T. 16-17). Petitioner admitted that she understands English, but stated that she not fluent. (T. 38). She also was able to read medical records that were written in English. (T. 36, 37-38). Petitioner would assist Hispanic clients in their homes and with errands. (T.18). These clients would have some type of disability and needed assistance that Petitioner provided. (T.18). Petitioner admitted to having a prior workers' compensation settlement for her back. (T.49).

On the day of the accident, Petitioner was working for a Leonore Partida. (T.19). She testified she went walking to the grocery store with Ms. Partida's sister. (T. 20). She was apparently 82 years old.(T.67). Petitioner testified she had one bag on her left shoulder, one bag on her right shoulder and one bag in her left hand. (T.20). She testified the bags weighed a combined 25 pounds. (T.53). She testified her left hand was turning blue and purple from carrying the bag. (T.21). At the time of her carrying the bags, her shoulder felt "tired". (T.22). Petitioner was unable to identify anything in the bags except milk and "juice, cereal, some fruit". (T.53, 65). Petitioner did not fall while carrying the bags, nor did she drop any of the bags. (T.53).

Petitioner reported to Occupational Health Centers of Illinois ("Occupational Health") for treatment on November 2, 2012. At that time, she gave a history of tripping and falling, sustaining injuries to her left wrist and legs. (Pet. Ex. 1, P. 2). She was diagnosed with a wrist contusion, wrist tenosynovitis and bilateral leg contusions. (Pet. Ex. 1, P. 3). She followed up on November 5, 2012. At that time, the recorded history indicates "the patient states that for the current injury, she did not fall, but indicates that at other times she had fallen and injured her legs, but we are treating her today only for the left hand injury, which is basically a sprain." (Pet.

Ex. 1, P. 5). Petitioner testified that she reported the left shoulder pain on this date and that the medical records were wrong. (T.44). Petitioner continued following up for treatment on November 12, 2012, as well as November 19, 2012. (Pet. Ex. 1, P.7, 9). Petitioner's diagnosis was wrist tenosynvitis. (Pet. Ex. 1, P.7). Petitioner testified the medical record from November 12, 2012 was wrong as she claimed to have mentioned shoulder pain on that date. (T.45). Petitioner also claimed to have reported left shoulder pain on the November 19, 2012 visit. (T.45-46).

For the first time, a medical note mentioned her left shoulder hurting in therapy on November 26, 2012. (Pet. Ex. 6, P. 56). The history in the therapy note indicates Petitioner was carrying groceries when she felt pain along the left forearm. (Pet. Ex. 6, P.56). Petitioner was released to full-duty on December 14, 2012. (Pet. Ex. 1, P.15). She was recommended to finish her remaining physical therapy, which was completed on December 19, 2012. (Pet. Ex. 6, P.68). She was to return to work on December 19, 2012; however, she remained off of work. She did not return to Occupational Health until January 4, 2013. (Pet. Ex. 1, P.16). Petitioner did report to Clinica Medica on December 20, 2012. (Pet. Ex. 4, P.50). At this visit, she was noted to have left wrist pain, but there was no mention of left shoulder pain. (Pet. Ex. 4, P.50). Petitioner testified she received an "epidural injection" for her shoulder prior to January 1, 2013. (T. 25). There are no medical records to support that testimony. (Pet. Ex. 1 & 4).

On January 4, 2013, Petitioner was complaining of left shoulder pain, which the Dr. Paloyan noted was never mentioned as part of the original injury. (Pet. Ex. 1, P.16-17). On January 14, 2013, Dr. Lewis performed an injection into Petitioner's left wrist. (Pet. Ex. 2, P.34). Dr. Giannoulias examined Petitioner's left shoulder for the first time on January 30, 2012. (Pet. Ex. 2, P.33). At that time, he recorded a history of "she works as an aide and delivers food to many clients. She carries heavy bags, and over the last couple months, she has been experiencing

pain in her left shoulder as well as her left wrist." (Pet. Ex. 2, P.33). He gave Petitioner an injection. (Pet. Ex. 2, P.33). On February 7, 2013, Petitioner returned to Dr. Lewis. (Pet. Ex. 2, P.32). On February 20, 2013, Dr. Giannoulias ordered a MRI scan of the left shoulder. (Pet. Ex. 2, P.31). Dr. Lewis released Petitioner to return to work with no lifting over 10lbs on February 28, 2013. (Pet. Ex. 2, P.30). On March 14, 2013, Dr. Lewis released Petitioner to return to work without restriction for the left wrist. (Pet. Ex. 2, P.21). Dr. Lewis noted that he "observed her earlier in occupational therapy today with full free animation and exercise motion of the left upper extremity at all levels including carrying her large purse over her left shoulder." (Pet. Ex. 2, P.21). Dr. Giannoulias gave Petitioner a second injection on March 20, 2013. (Pet. Ex. 2, P.20). On April 24, 2013, Dr. Giannoulias recommended an arthroscopic decompression. (Pet. Ex. 2, P.19). That surgery was recommended again on August 26, 2013. (Pet. Ex. 3, P.45).

Petitioner then presented to Dr. John Fernandez at Midwest Orthopedics at Rush on May 14, 2013 for a second opinion as to her wrist complaints. (Pet. Ex. 5, P.74-76). Dr. Fernandez took a history of "sudden pain" in the shoulder and "pulling" in the left wrist after carrying "heavy groceries". (Pet. Ex. 5, P.74). Dr. Fernandez recommended an EMG study, as well as a MRI scan of the left wrist. (Pet. Ex. 5, P.76). Petitioner testified to telling Dr. Fernandez of a prior left wrist fracture and surgery at Stroger Hospital. (T.35). Dr. Fernandez does not note any prior surgery, or being told of a prior left wrist injury. (Pet. Ex. 5, P.74-76). Petitioner did complete a questionnaire which inquires about prior surgeries on her September 3, 2013 visit. (Pet. Ex. 5, P.99). In the section labeled "past surgeries", Petitioner wrote "emorrodes". (Pet. Ex. 5, P.99). There is no mention of her prior wrist surgery. (Pet. Ex. 5, P.99).

The EMG study was normal. (Pet. Ex. 5, P.105). The MRI scan showed ulnar impaction with a volar radial ganglion cyst. (Pet. Ex. 5, P.102-03). Petitioner followed up with Dr. Fernandez on October 15, 2013 and indicated she wanted surgical intervention. (Pet. Ex. 5, P.

66). On January 13, 2014, Petitioner underwent a left wrist arthroscopy with a ulnar shortening osteotomy and ganglion cyst excision. (Pet. Ex. 5, P.77-79). Dr. Fernandez saw Petitioner on January 30, 2014. (Pet. Ex. 5, P.58-59). At that time, he referred Petitioner to Dr. Verma for evaluation of her shoulder complaints; however, there are no medical records from Dr. Verma. (Pet. Ex. 5). He also referred her to her primary care doctor as she was requesting a cane for unsteady gait. (Pet. Ex. 5, P.59).

On May 1, 2014, Dr. Fernandez examined Petitioner. This medical record was not submitted in Petitioner's Exhibit #5. Video surveillance of Petitioner taken on May 1, 2014 shows Petitioner waiting for her appointment at Midwest Orthopedics. (Resp. Ex. 4, Lib447022-EVR-5-1-14) (footage at 1:58). Of note, Petitioner is not wearing the brace prescribed by Dr. Fernandez. (Resp. Ex. 4, Lib447022-EVR-5-1-14) (footage at 2:56). In fact, the video depicts Petitioner putting the brace on in the waiting room before seeing Dr. Fernandez. (Resp. Ex. 4, Lib447022-EVR-5-1-14) (footage at 8:56). Petitioner testified she only takes the brace off to wash her hands after using the bathroom. (T.57). The video also shows Petitioner reaching behind her back with her left arm to take off multiple layers of clothing. (Resp. Ex. 4, Lib447022-EVR-5-1-14)(footage at 7:18). She further is seen lifting her purse over her head to put the strap across her body. (Resp. Ex. 4, Lib447022-EVR-5-1-14) (footage at 15:36) . Finally, Petitioner is seen carrying her multiple coats over her left arm as she walks back to the examination room. (Resp. Ex. 4, Lib447022-EVR-5-1-14) (footage at 15:43, 17:29, 19:54).

On May 19, 2014, Petitioner was seen at Accelerated, where she was noted to have worsening pain in the shoulder with motion. (Pet. Ex. 6, P.167). Video surveillance was taken of Petitioner on that day. The video shows Petitioner walking down the street, holding her left arm to the side of her head. (Resp. Ex. 4, Lib447022-EVR-5-19-14) (footage at 0:34). In the May 23, 2014 video, Petitioner is again seen with her left arm raised up above shoulder level. (Resp. Ex.

4, Lib447022-EVR-5-23-14) (footage at 0:21). Petitioner is later seen carrying a small bag in her left hand. (Resp. Ex. 4, Lib447022-EVR-5-23-14) (footage at 6:28). She carries the bag at chest height and above her shoulder in the video. (Resp. Ex. 4, Lib447022-EVR-5-23-14) (footage at 6:28). On June 17, 2014, Dr. Fernandez discharged Petitioner. (Pet. Ex. 5, P.116-18). He recommended no lifting greater than 10lbs. (Pet. Ex. 5, P.117). He recommended she follow up with a shoulder specialist as she was complaining of left shoulder pain. (Pet. Ex. 5, P.117). He specifically noted no further treatment was needed, but that Petitioner could follow up regarding her left wrist, if the hardware was bothering her after a year. (Pet. Ex. 5, P.117). Dr. William Heller examined Petitioner on June 24, 2014. Petitioner testified Dr. Heller spent 10 to 12 minutes examining her shoulder. (T. 64).

Petitioner admits to prior treatment at Stroger Hospital. (T.34). Petitioner initially denied any recollection of having treated at Stroger Hospital for left arm pain. (T. 34). She then was confronted with a medical record from Stroger Hospital and outright denied reporting left arm pain. (T.37). The medical records from Stroger Hospital indicate Petitioner has a long history of left arm pain, noted in 2007 as having existed for years. (Resp. Ex. 1, P.144). Petitioner also admitted to having a prior fracture to her left wrist, which she claimed was in 2008 or 2007. (T.39). The records from Stroger Hospital indicate she sustained a left wrist fracture on January 3, 2008. (Resp. Ex. 1, P. 326). She did not give these records to Dr. Fernandez. (T. 39). Petitioner admitted to having pain radiating to the left arm in 2011 as well as 2012. (T.48). She had reported chest pain; however, Stroger Hospital found the pain to be musculoskeletal in nature. (T. 40, Resp. Ex. 1, P.624).

Dr. Heller is a board-certified orthopedic surgeon. (Pet. Ex. 7, P. 217; Pet. Ex. 7, P. 238). Dr. Heller is also certified to perform AMA impairment ratings. (Pet. Ex. 7, P. 217). Dr. Heller took a history of Petitioner carrying "heavy groceries" on the alleged date of accident. (Pet. Ex. 7,

P. 220). He also noted a history of Petitioner carrying laundry and having a mild fall a few days prior to that. (Pet. Ex. 7, P.220). Dr. Heller noted Petitioner had mildly diminished range of motion in both the wrist and shoulder. (Pet. Ex. 7, P. 222). He placed Petitioner at MMI for the wrist injury. (Pet. Ex. 7, P. 223). Dr. Heller noted positive subjective pain complaints for Petitioner's shoulder; however, he did not believe the complaints were related to the October 31, 2012 incident. (Pet. Ex. 7, P. 224). Dr. Heller diagnosed a mild strain of the left shoulder. (Pet. Ex. 7, P. 224). He did not believe her persistent complaints related to the October 31, 2012 incident. (Pet. Ex. 7, P. 224). Dr. Heller did perform an AMA rating, which is not useful at this time, as the nature and extent is not currently in dispute; however, Dr. Heller did have Petitioner complete a QuickDASH score as part of that examination. (Pet. Ex. 7, P. 226). Dr. Heller explained that Petitioner's QuickDASH score was high compared to the prior 10 QuickDASH scores documented in her medical records. (Pet. Ex. 7, P. 226). He was unable to use her QuickDASH score in calculating his AMA rating. (Pet. Ex. 7, P. 227-28). Dr. Heller's report indicates Petitioner's physical capabilities did not match her physical examination and subjective complaints. (Pet. Ex. 7, P. 247).

Diana Bautista ("Ms. Bautista") testified on behalf of Respondent. She is the Human Resources Director for Respondent. (T.68). She explained the program in which Petitioner worked was a home care services program for the Hispanic community. (T.68). While grocery shopping was an activity a worker may assist with, the expectation of Respondent is for the worker to be with the client at all times. (T. 72-73).

Respondent's Exhibit 2 is the utilization review report regarding a "game ready device". The game ready device was non-certified as not medically necessary. (Resp. Ex. 2, 1-5).

## FINDINGS/ANALYSIS

I. As to the issue, did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

The Petitioner has failed to meet her burden of proving accident. Her testimony and credibility are lacking in many aspects that are crucial to her case. She claims she injured her wrist and shoulder when carrying some grocery bags for a client. Her testimony regarding the number of bags is inconsistent. She testified in court that she taken her clients to medical appointments and even for their manicures/pedicures. The supervisor Ms. Bautista testified that the "homemakers" such as Petitioner do not do grocery shopping but may occasionally pick up a missing item or two for a particular meal for a client.

The medical records including initial reports of the incident do not support Petitioner's testimony that she suffered an accident when transporting groceries. Petitioner reported to Occupational Health on November 2, 2012, with complaints of leg and left wrist pain following a fall. Petitioner testified she was carrying a bag of groceries in her left hand, when she felt pain in her left hand. She also claimed to have a bag of groceries over each shoulder. Petitioner claims she took this trip to the grocery store with her client's 82 year old sister, leaving her disabled client at home, alone. She claimed at trial she did not have shoulder pain on the alleged date of the accident, but her shoulder was "tired". This history conflicts with the initial medical records from Occupational Health, which indicate Petitioner fell and sustained a left wrist injury, as well as an injury to her legs. The Arbitrator finds this inconsistency telling and to in conflict with petitioner's in-court testimony.

On Petitioner's second visit to Occupational Health, it was recorded that Petitioner did not fall, but rather was carrying groceries when she felt pain in her left hand. There was no mention of shoulder pain in either of the first two visits to Occupational Health. In fact, the medical records do not indicate shoulder pain at all until Petitioner was in therapy on November 26, 2014. She had four visits to Occupational Health at that point with no mention of any shoulder pain, whatsoever. Petitioner did not mention shoulder pain to

Occupational Health until her January 4, 2013 visit. Petitioner testified at trial that the medical records were wrong.

Further undermining Petitioner's claims are the inconsistencies between her testimony and the treating medical records. Petitioner claims to have told Dr. Fernandez about her 2008 left wrist fracture; however, Dr. Fernandez makes no record of it. A questionnaire completed by Petitioner indicates a prior surgery for "emorrodes". The Arbitrator assumes this was an attempt to spell the Spanish word "hemorroides", which means hemorrhoids. There is no mention of the prior left wrist surgery as claimed at trial. The treating medical records are replete with various histories, including an alleged fall, carrying groceries with her left hand and carrying groceries in both hands. There is never any mention of bags being placed over Petitioner's shoulders. Furthermore, Dr. Lewis discharged Petitioner because he saw her activities during occupational therapy and they conflicted with Petitioner's reports to him.

Petitioner's version of the incident and the mechanism of the incident cast doubt upon her claim. Petitioner testified that the three bags weighed 25 pounds combined. When asked to identify groceries purchased, Petitioner could only identify milk, cereal, juice and fruit. She claimed to carry three bags, while her 82 year old companion carried 1 bag. No history, in any medical record, mentions that she went to the grocery store with her client's sister. No history indicates she placed bags over each shoulder and a separate bag in her left hand. Petitioner's testimony at trial was evasive and that calls her credibility into question. Ms. Bautista testified Petitioner leaving her client home alone would not meet the company expectations as the client was supposed to be accompanied at all times.

"To obtain compensation under this Act, an employee bears the burden of showing, by a preponderance of the evidence, that . . . she has sustained accidental injuries arising out of and in the course of the employment." 820 Ill. Comp. Stat. Ann. 305/1 (West 2012). The Arbitrator finds that Petitioner has failed to overcome this burden. Therefore, the Arbitrator finds that petitioner did not sustain an accident arising out of and in the course of her employment.

All other issues are moot.

Ketki Shroff Steffen
Signature of Arbitrator Ketki Shroff Steffen

5/5/15
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 PPD, medical | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CALVIN JONES,

Petitioner,

vs.

NO: 04 WC 22567

CITY OF CHICAGO,

16IWCC0481

Respondent,

DECISION AND OPINION ON §19(h) AND §8(a) PETITIONS

This case comes before the Commission on Petitioner's §8(a) Petition, requesting additional medical expenses along with penalties and attorney's fees, and Respondent's §19(h) Petition, alleging a material decrease in Petitioner's disability.

Hearings were held on September 22 and October 11, 2011 before Arbitrator Cronin who found that Petitioner's cervical condition of ill-being was causally related to his work injury on April 26, 2004. Petitioner was awarded 376-2/7 weeks of temporary total disability, 8-6/7 weeks of maintenance, medical expenses, and a wage differential of $913.33 per week commencing September 14, 2011. In its Decision and Opinion on Review, dated December 17, 2012, the Commission found that a wage differential is limited to the maximum permanent partial disability rate at the time of the accident and not the maximum temporary total disability rate. The Commission reduced the wage differential award to $550.47 per week.

On June 17, 2014, Petitioner filed a motion under §8(a) and a motion for penalties and attorney's fees after Respondent stopped paying his medical bills. On June 26, 2014, Respondent filed a motion under §19(h) alleging that Petitioner's disability had materially diminished or ended.

A hearing was held on these matters by Commissioner DeVriendt on January 16, 2015 in Chicago, IL and a record was made. After Petitioner's testimony and admission of his exhibits, the case was bifurcated and continued to March 10, 2015 for the submission of Respondent's evidence. It does not appear that a record was made on that date but on March 20, 2015, Petitioner filed "Petitioner's Objections to the Surveillance Video Offered Into Evidence by Respondent, City of Chicago." Respondent filed a response on April 2, 2015. On April 6, 2015, the hearing concluded with the admission of Respondent's exhibits and a record was made.

Subsequent to the arbitration hearings in 2011, Petitioner returned to Dr. Montella on April 25, 2012. He reported no significant changes in his symptoms, which included cervical

spine pain that radiated to the right arm, hand, and fingers with numbness and tingling. Other than some paraspinal tenderness and decreased range of motion with cervical flexion, extension, and axial rotation, his examination appears to have been normal. Dr. Montella opined that Petitioner was permanently and totally disabled and would require "intermittent medication and therapy for flares" and possible surgery in the future. Petitioner was on long term narcotic usage for pain management.

On September 5, 2012, Dr. Montella recorded "no significant changes in the current symptoms" but that Petitioner had difficulties with activities such as driving, lifting, and range of motion. Petitioner complained of frequent headaches that could be severe at times and dizzy spells. Dr. Montella found "no signs of incongruency or malingering" on examination and noted intermittent paraspinal spasms, limited cervical range of motion, and decreased motor function. He recommended that Petitioner continue his home exercise program, the narcotic pain management, and to remain off work.

Petitioner was supposed to return for follow up in three to four months but returned almost a year later on August 14, 2013, complaining of worsening symptoms since his last visit. These symptoms included increased pain, stiffness, and soreness due to not having any medications. His pain was 6 out of 10 and radiated from both sides of his neck down both arms, accompanied by numbness and tingling. Dr. Montella recorded that Petitioner continued to have difficulty with nearly all activities of daily living, including sitting for extended periods. On examination, he noted intermittent paraspinal spasms, decreased flexion range of motion and decreased motor function. Dr. Montella performed a cervical injection with Lidocaine.

On September 24, 2013, Petitioner underwent a Section 12 evaluation with Respondent's orthopedic surgeon, Dr. Daniel Troy, who noted "overall extreme noncompliance" on examination. Dr. Troy testified that Petitioner was unwilling to cooperate and on strength testing Petitioner would let his arms fall as he tried to resist, which shows unwillingness to participate. Dr. Troy explained that this "cogwheel rigidity" occurs when someone is trying to show that they are weak but really are not. Dr. Troy could not give a diagnosis other than Petitioner has a subjectively based statement of neck pain. He opined that, based on the examination, Petitioner should be wheel-chair bound because when they touched Petitioner's legs they would fall completely to the ground, yet he was able to easily stand after strength testing. Dr. Troy believed that there were elements of secondary gain involved and significant malingering. He opined that there was no objective basis for Petitioner to have ongoing restrictions from employment and that Petitioner did not require any additional treatment.

Petitioner saw Dr. Montella on November 13, 2013, with no significant changes in his symptoms. On examination, Petitioner had tenderness but no spasm. He had decreased strength and limited range of motion in flexion, extension, axial rotation and right and left lateral bend. The recommendations continued to include pain management and remaining off work.

On February 12, 2014, Dr. Montella recorded no significant changes in Petitioner's symptoms. Petitioner had mild tenderness on palpation and decreased range of motion with rotation and extension.

Petitioner returned to Dr. Montella on May 14, 2014, complaining of worsening symptoms including 7-8 out of 10 pain. Dr. Montella noted paraspinal muscle tenderness, weakness with flexion/extension of the neck, and decreased range of motion with flexion, extension, axial rotation, and right and left lateral bend. The treatment plan remained the same with the addition of a compound pain cream for pain.

Respondent obtained video surveillance of Petitioner on June 26, 2014. This depicts Petitioner bending over multiple times to pick up debris, looking and pointing up several times

towards the roof of a building, walking around the building, carrying an empty garbage can while bending over to pick up various items of debris, turning his head multiple times almost completely to the right, and bending over to put a cap on a fire hydrant.

On July 23, 2014, Dr. Montella recorded no significant change in Petitioner's symptoms and that the topical compound pain cream helps when he applies it. The examination revealed "no signs of incongruency or malingering," intermittent paraspinal spasms, decreased motor function, and limited range of flexion and extension.

On September 3, 2014, Dr. Montella again noted no significant change but that Petitioner still had constant neck pain that radiated to both shoulders and arms with numbness and tingling. Petition was having trouble sleeping at night, had increased pain with activity, and limited range of motion.

Petitioner's last visit with Dr. Montella was on January 7, 2015. He noted that Petitioner was still "getting constant neck pain bilaterally that radiates to both upper extremities with numbness and tingling to hands and fingers. He is also experiencing headaches every day. Has limited range of motion and increase pain with cervical rotation." Examination showed "no signs of incongruency or malingering," intermittent paraspinal spasms, decreased motor function, and limited range of motion with cervical flexion and extension. Dr. Montella continued to opine that Petitioner was permanently totally disabled, was on long term narcotic usage for pain, and was using prescribed topical compound pain cream.

Respondent introduced surveillance video from January 24 and February 3, 11, 25, and 28, 2015. These show short periods of time when Petitioner is walking, bending over to pick up debris, turning his head, and driving.

We initially address Petitioner's objections to the video surveillance. Petitioner argues that the surveillance taken after January 16, 2015, should be excluded as untimely because the hearing had already begun. We find that, although the hearing on Petitioner's §8(a) petition had begun on January 16th with Petitioner's direct testimony, cross-examination, and admission of Petitioner's exhibits, Respondent had not introduced any evidence regarding its §19(h) petition until April 6, 2015. We find that the surveillance videos obtained after January 16, 2015, were properly admitted. However, even if those videos were not admitted, it would not affect our decision since we base our finding about Petitioner's credibility on the June 26, 2014 video, which was obtained prior to the start of Petitioner's §8(a) hearing. Petitioner also argues that all of the videos are irrelevant and unfairly prejudicial. We find that the videos are relevant to Petitioner's credibility regarding his range of motion. We also find that, despite the videos showing only brief periods of time, they are probative and not unfairly prejudicial.

The primary issue in this case is Petitioner's credibility regarding his abilities and how that affects the persuasiveness of Dr. Montella's opinion regarding Petitioner's disability. Although Dr. Montella's records consistently indicate that Petitioner had diminished cervical range of motion, Petitioner testified that Dr. Montella "doesn't really ask" him to turn his head and he can't say when the last time was that he was asked to do so. This casts doubt on the validity of Dr. Montella's range of motion examination.

Petitioner testified that he has problems turning his head from side-to-side and demonstrated that, according to Commissioner DeVriendt's observation, he was able to turn about 45 degrees to the left but only 15 degrees to the right "at most." Petitioner claimed that he has been like this every day since his accident. Petitioner also claimed to have problems looking up and down and that when he looks up he only uses his eyes and doesn't even try to move his head. Petitioner testified that he has difficulty bending over to pick things up and has pain in his lower neck and back. This testimony is inconsistent with the range of motion Petitioner

16IWCC0481

exhibited in the June 26, 2014 surveillance video. Petitioner is seen bending over multiple times to pick up debris, looking and pointing up several times towards the roof of a building, walking around the building, carrying an empty garbage can while bending over to pick up various items of debris, turning his head multiple times almost completely to the right, and bending over to put a cap on a fire hydrant.

We find that Petitioner is not credible regarding the extent of his subjective symptoms and also his range of motion, which causes us to find that Dr. Montella's opinion regarding Petitioner's level of disability is based on inaccurate information. Based on the above, we find Dr. Troy's opinion more persuasive than that of Dr. Montella. The Commission, having considered the entire record, finds that Petitioner has failed to prove that he is entitled to additional medical expenses after September 24, 2013. We further find that Respondent has proven that Petitioner's disability has materially diminished and terminate the wage differential award as of September 24, 2013. Instead, Petitioner is entitled to 100 weeks of permanent partial disability benefits, beginning on that date, for the reason that Petitioner's work injuries have now resulted in 20% loss of use of the person as a whole. At the time of Petitioner's injury on April 26, 2004, his average weekly wage was $1,400.35 and the applicable maximum permanent partial disability rate was $550.47. Petitioner's permanent partial disability benefits shall be paid at $550.47 per week for 100 weeks.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §8(a) and for penalties and attorney's fees is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's Petition under §19(h) is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's entitlement to a wage differential under §8(d)1 is hereby terminated as of September 24, 2013.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $550.47 per week for a period of 100 weeks, beginning September 24, 2013, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 20% loss of use of the person as a whole.

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

The party commencing 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: JUL 2 1 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 5/25/16
49

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anna Gamez,
Petitioner,

vs. No: 13 WC 19664

Central Baptist Village,
Respondent.

16IWCC0482

DECISION AND OPINION ON REVIEW

Through a Petition for Review, Petitioner's counsel requests that the Commission modify an approved settlement contract so as to allow counsel to collect additional attorneys' fees. Specifically, Petitioner's counsel seeks to collect an additional amount that is equal to to 20% of the funds allocated to Petitioner's Medicare Set-Aside arrangement ("MSA"). In effect, counsel argues that she is entitled to base her statutory 20% maximum attorneys' fees recovery on a gross settlement amount that includes the MSA funds.[1]

The Commission denies the request of Petitioner's counsel. As explained below, the Commission has no jurisdiction to recall the approved settlement contract. For further grounds for denial, the Commission notes that Petitioner's counsel has not shown that she performed

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[1] The relevant provision of the Workers' Compensation Act reads, in pertinent part:

Section 16a: Attorneys' Fees

(B) [N]o claim of any attorney for services rendered in connection with the securing of compensation for an employee … shall exceed 20% of the amount of compensation recovered and paid, unless further fees shall be allowed to the attorney upon a hearing by the Commission fixing fees [.]

(820 ILCS 305/16a).

"extraordinary services" that would justify additional fees and notes as well that there is no legal authority for deducting attorneys' fees from a claimant's MSA. Indeed, guidance from the Centers for Medicare & Medicaid Services (CMS) provides that attorneys' fees cannot be charged against the MSA.

## I. FACTUAL BACKGROUND

On June 17, 2013, Petitioner Anna Gamez, a 63-year-old housekeeper, filed her Application for Adjustment of Claim, alleging injury to the right shoulder sustained on April 22, 2013. Subsequently, the parties entered into a settlement agreement providing for payment of a lump sum of $13,915.00 to Ms. Gamez and the funding of a Medicare Set-Aside arrangement in the amount of $9,446.76, for a gross settlement amount of $23,361.76. This initial agreement also provided attorneys' fees in the amount of $4,672.35 to Ms. Gamez' counsel. This initial attorneys' fee figure is 20% of the gross settlement amount (20% x $23,361.76 = $4,672.35).

On March 5, 2015, Arbitrator Mason returned the proposed settlement contract to counsel for the reason, among others, that Petitioner's attorney was "charg[ing] [her] client a fee on the Medicare Set-Aside."[2] The Arbitrator indicated that counsel's fee was to be limited to $2,783 (20% x $13,915.00 = $2,783).

Petitioner's attorney did not file a fee petition at that juncture, nor request that the Arbitrator formally reject the contract as drafted to permit a Commissioner to review the proposed settlement. Instead, Petitioner's attorney re-submitted the contract, this time claiming a fee of $2,783. Arbitrator Mason granted approval on May 28, 2015. Respondent issued appropriate payment. On June 22, 2015, the instant Petition for Review was filed, requesting that the Commission "review the Arbitrator's denial of attorney fees under a Medicare Set Aside." Petitioner's attorney informed the Commission that "the portion of the amount in dispute is being held in escrow until such time the attorney fee claim is resolved." Respondent had not been apprised that Petitioner or her attorney intended to object to the settlement approval.

## II. DISCUSSION

### A. The Commission Does Not Have Jurisdiction to Recall This Settlement Contract

An approval by the Commission of a settlement contract becomes a final award after 20 days if no proceeding for review is commenced in the circuit court, pursuant to Section 19(f) of the Workers' Compensation Act (820 ILCS 305/19(f)). Loyola University of Chicago v. Illinois

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[2] Specifically, on the Settlement Contract Return Form, Arbitrator Mason indicated, "Petitioner's attorney fees are based in part on a Medicare Set-Aside amount for which counsel has failed to show an entitlement to fees; counsel's fee would be limited to $2783 – you can't charge your client a fee on the Medicare Set Aside."

Workers' Compensation Comm'n, 2015 IL App (1st) 130984WC, ¶ 14, 391 Ill. Dec. 930, 31 N.E.3d 905. The Act allows the Commission to reopen or modify an existing award only in limited circumstances -- for example, where there is a clerical or computational error to be corrected under Seciton 19(f) or there has been a material change in the claimant's disability under Section 19(h). Id. at ¶ 15.

In this case, the Commission (through Arbitrator Mason) approved the settlement contract on May 28, 2015, and neither party sought judicial review in the circuit court. Thus, the settlement contract at issue constituted a final award effective June 17, 2015 under the Act. Additionally, there are no circumstances present that would allow the Commision to reopen or modify this existing award. Petitioner's counsel in this instance cannot even claim ambiguity in contract language requiring clarification or interpretation. The terms of the contract are clear, reading in relevant part as follows:

| | |
|---|---|
| Total amount of settlement | $13,915.00 (Plus $9,446.76 Medicare Set-Aside) |
| Deduction: Attorney's fees | $2,783.00 |
| Deduction: Medical reports, X-rays | $80.00 |
| Amount employee will receive | $11,052.00 |

In light of the foregoing, there is no basis now for Petitioner's attorney to take exception to the attorneys' fee so plainly set forth in the contract -- a contract she submitted to the Arbitrator for approval. The Commission has no jurisdiction to recall this approved settlement contract or otherwise modify the final award embodied in therein.

**B. Petitioner's Counsel Has Not Shown Performance of "Extraordinary Services"**

The proper procedure for Petitioner's counsel to assert a claim for additional attorneys' fees would have been to submit a "Petition to Fix Fees" under Rule 7080.10(a)(1), which provides in relevant part:

> Whether a dispute has arisen between a Petitioner and his attorney or former attorney concerning the amount of payment of fees for services rendered ... **or a claim is made for fees in excess of the fees provided in Section 16a of the Workers' Compensation Act for extraordinary services**, either the Petitioner or his attorney or former attorney may file with the Commission a Petition to Fix Fees which shall set forth the facts surrounding the dispute and the relief requested.

50 Ill.Admin.Code §7080.10(a)(1)(emphasis added). *See* Vaca v. Meijer, 9 IWCC 337, 2000 Ill. Work. Comp. LEXIS 818 (Petitioner's counsel demonstrated extraordinary services justifying one-third increase in fees above the statutory maximum). Such a fee petition is to be filed ***before***

the approval of the settlement contract. The Commission notes that Petitioner's counsel here has not offered any evidence of extraordinary services performed; she has not demonstrated that the portion of the settlement that was allocated towards Ms. Gamez' MSA was obtained through the efforts of Petitioner's counsel, much less that these efforts were extraordinary.

**C. Attorneys' Fees Cannot Be Charged Against the MSA**

As discussed above, claimants' attorneys have available to them the procedure described in Rule 7080.10 should they seek to take their fee based on a gross settlement amount that includes the MSA amount.

In no event should attorneys' fees be deducted from the funds allocated to the MSA. The Commission makes reference to the CMS' Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide (April 4, 2016) (Version 2.5). [3] This guidance instructs that attorneys' fees cannot be charged against a claimant's MSA account:

> "You **may not** use the WCMSA account to pay for: administrative fees; expenses for administration of the WCMSA; **attorney costs** for establishing the WCMSA. If such administrative funds are part of your settlement, do not combine those funds with the WCMSA, as CMS will not recognize administrative fees as legitimate WCMSA expenses."

(Reference Guide p. 53) (emphasis added). And:

> "One-time and recurrent administrative fees and expenses for administration of the WCMSA and attorney costs specifically associated with establishing the WCMSA **cannot** be charged to the WCMSA account. The payment of these costs must come from some other payment source that is completely separate from the WCMSA funds."

(Reference Guide p. 78) (emphasis included in original). In other words, all proceeds to the attorney for services rendered -- regardless of the dollar figure and the percentage of the gross settlement amount that figure represents -- must come from another part of the recovery other than the MSA. The only appropriate use of MSA funds is to pay for future injury-related care that would otherwise by covered by Medicare. CMS will not permit the settling parties to charge attorneys' fees to or against the MSA because CMS considers those costs to be a separate issue for the settling parties to negotiate (subject to the applicable laws and regulations of the pertinent State and its administrative agency, of course).

---

[3] This publication can be found at: www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/WCMSA-Reference-Guide-Version-2_5.pdf

16IWCC0482

Being mindful of both CMS policy and the interest of claimants' attorneys to be paid for the work they do, the Commission notes that the use of Rule 7080.10 in the manner described above serves to protect the interests of Medicare as a secondary payer as well as to preserve incentive for claimants' attorneys to establish properly an MSA for their clients. Where these MSA-related efforts are extraordinary (for example, where the case was exceptionally difficult or complicated), claimants' attorneys are entitled to be compensated accordingly upon proper fee petition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Review is hereby dismissed.

The party commencing 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: JUL 2 2 2016

Joshua D. Luskin

Charles J. DeVriendt

o-05/25/16
jdl/ac
68

Ruth W. White

STATE OF ILLINOIS )
) SS.
COUNTY OF WILL )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cynthia Janega,
Petitioner,
vs.

NO: 13WC 31003

Lockport Area Special Education Cooperative,
Respondent,

16IWCC0483

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical, permanent partial disability, penalties, 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 November 3, 2015, is hereby affirmed and adopted.

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

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

The party commencing 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: JUL 26 2016
o070716
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**JANEGA, CYNTHIA**
Employee/Petitioner

Case# **13WC031003**

**16IWCC0483**

**LOCKPORT AREA SPECIAL EDUCATION COOPERATIVE**
Employer/Respondent

On 11/3/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.28% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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 BRISKMAN BRISKMAN & GREENBERG
SUSAN E FRANSEN
175 N CHICAGO ST
JOLIET, IL 60432

0560 WIEDNER & McAULIFFE LTD
JUSTIN SCHOOLEY
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)
☒ None of the above

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION

**Cynthia Janega**
Employee/Petitioner

v.

**Lockport Area Special Education Cooperative**
Employer/Respondent

Case # **13** WC **31003**

Consolidated cases: _____

**16IWCC0483**

An *Application for Adjustment 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 **New Lenox**, on **10/7/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On **8/23/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$28,574.00**; the average weekly wage was **$549.50**.

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. – No liability imposed on respondent

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services. – No liability imposed on respondent

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 failed to prove the issue of accident. 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.

Signature of Arbitrator

**11/2/15**
Date



NOV 3 - 2015

## FINDINGS OF FACT

This case involves a Petitioner alleging injuries arising out of and in the course of her employment with the Respondent on August 23, 2013. Issues in dispute include: 1) accident, 2) causation, 3) medical expenses, 4) nature and extent, and 5) penalties and attorney fees.

Petitioner is employed by as a teacher's assistant, and has worked as a teacher's assistant at various locations during her tenure with respondent. Petitioner testified that her job duties included taking students to "specials," computers, helping with lesson plans, checking notebooks and backpacks, and assisting teachers in the special education program.

Petitioner testified that on August 23, 2013, she was walking within her school looking for a student's parent to return lunch money to the parent, as lunches were not being served to students as of that date. Petitioner testified that she did not see the student's mother in a guest parking lot, and therefore turned to go upstairs to look in a different location. As she turned, she hit the first step of the stairwell and fell forward. Petitioner testified that when she fell, she had papers tucked under her arm and money in her opposing hand. Petitioner testified that the papers and money were not obstructing her view and that she was not running to look for the parent.

Petitioner confirmed that following the August 23, 2013 incident, she was contacted by Ancy Mathai who obtained a recorded statement. Petitioner confirmed that prior to the commencement of arbitration, she reviewed the audio recording of the statement in the presence of both her attorney and respondent's counsel. Petitioner testified that it was her voice on the recording and that she answered all questions truthfully.

At trial, respondent introduced both an audio recording of the statement obtained by Ancy Mathai (R. Ex. 1) along with a transcript of the recorded statement (R. Ex. 2), which in pertinent parts, reflects the following:

> AM: And can you please tell me in own, in your own words what happened to you at work on or about August 23, 2013?
>
> CJ: Um, I walked in the office to get a, a parent phone number when I walked in, um, 'cause I, he didn't have lunch, so we were going to call that parents. And when I walked in the secretary said that she had just dropped off money and she goes, you might be able to catch her, so I walked down the hall, looked out the door and she wasn't there. So I went heading up the, I, I went up the stairwell, well, kind of looking backwards and looking forward at the same time. And I just kind of, like, lost my footing on the stairs and I fell forward and I had, like, just pulled a muscle in my arm and my leg, so I didn't want to hurt it, so I think in that process of trying not to hurt it, I hurt myself worse.
>
> AM: Okay, what caused you to trip and fall?
>
> CJ: I just, kind of, tripped over my own feet.
>
> AM: Okay, okay, um, were you carrying anything?
>
> CJ: I was, I, I think it was like papers and like the money that the mom had sent.
>
> AM: Did it obstruct your view in any way?

CJ: No, I just tripped over my own feet.

AM: Okay, was the lighting okay in the stairwell?

CJ: Yes.

AM: Were there any defects to the stairs?

CJ: No, they're cement, they hurt.

AM: Okay, were there any foreign substance on the floor?

CJ: No.

AM: Were you in a hurry?

CJ: Ah, no, well, not really…

On cross examination, petitioner reiterated that she tripped on her own two feet; that the papers and money she was carrying did not obstruct her view; that there were no issues with the lighting the in the stairwell; that the stairs had no defects; that there was not anything on the floor that caused petitioner to fall; and that she was not really in a hurry when she fell.

On re-direct examination, petitioner testified that she did often not use the stairs on which she fell.

With respect to her medical care, petitioner testified that prior to August 23, 2013, she had treated with a chiropractor, Dr. Ficaro, for several years and mostly treated for her back and neck. Medical records from Dr. Ficaro contained in Petitioner's Exhibit 3 reflect that prior to August 23, 2013, petitioner sought treatment with respect to her bilateral legs and knees as well. Specifically, on July 18, 2012, petitioner completed a "Patient Health Questionnaire" contained in the records of Dr. Ficaro (P. Ex. 3, R. Ex. 9), which at trial, petitioner confirmed she signed. This form reflects that petitioner's "knees, legs go out when walking." During presentation on July 24, 2012, petitioner informed Dr. Ficaro that "both of her legs seem to go out," especially when tired. (P. Ex. 3). Consideration was noted for MS. Petitioner was to undergo a gluten free diet and have a hormonal test.

During a subsequent August 1, 2012 nutritional assessment, petitioner noted health concerns with her knees in addition to other conditions. (P. Ex. 3).

At trial, petitioner also testified to an incident in June or July of 2013, when she was sitting on a recliner and became scared while watching a movie. Petitioner testified that this caused her to raise up, after which she experienced symptoms in her right leg and right arm.

Dr. Ficaro's records reflect that petitioner presented for treatment on August 17, 2013, at which point she reported right to lower arm pain. She further reported that after jumping out of a recliner chair on July 10, 2013, her right knee tended to lock up. The medical record reflects that petitioner's pain was steady and worsening. Petitioner was to begin chiropractic management with respect to the right shoulder, right knee and foot. X-rays would be if her symptoms did not improve. (P. Ex. 3).

After August 23, 2013, petitioner presented to Dr. Ficaro on August 24, 2013 and reported that she fell while going up stairs on August 23, 2013 and bruised her right lower leg and knee. Petitioner was to rule out joint arthrosis of the shoulder and knee pathology and continue chiropractic treatment. (P. Ex. 3).

On September 4, 2013, petitioner underwent X-rays of the right shoulder that found no radiographic abnormality. X-rays of the right knee on September 4, 2013 revealed mild degenerative changes, but no abnormality. (P. Ex. 3).

During presentation to Dr. Ficaro on September 5, 2013, petitioner reported that pain in the shoulder wakes her at night and her knee gives away when going up stairs. Petitioner was diagnosed with a knee sprain and shoulder sprain; referred for MRIs of the right shoulder and right knee; and provided a hinged brace. (P. Ex. 3).

On September 23, 2013, petitioner underwent an MRI of the right shoulder that revealed rotator cuff and long biceps tendinosis. That same day, petitioner also underwent an MRI of the right knee that revealed chondral degeneration involving all three components with areas to bone and areas of para-articular bone edema described, small effusion, pre-patellar edema/bursitis, infrapatellar plica and degenerative cystic changes at the tibia, severe intra-substance degeneration and partial extrusion of the medial meniscus without definite tear was seen as well. (P. Ex. 5).

Petitioner thereafter presented to Dr. Sajjad Murtaza for treatment on September 30, 2013. She reported on August 23, 2013, she was chasing after a patient with a file of papers and money in her hand when she ran into a metal stair and collapsed on her left side. Dr. Murtaza diagnosed right knee pain; right knee bursitis; right knee meniscal degeneration and edema and bursitis; and right shoulder pain and pathology of the right shoulder including rotator cuff tear and labral injury. He recommended physical therapy; a right shoulder injection; and referral to an orthopedic specialist. Petitioner was released to full duty work in the meantime.

On October 4, 2013, petitioner presented for treatment with Dr. Primus. (P. Ex. 9). Dr. Primus diagnosed shoulder pain, knee pain, adhesive capsulitis of the shoulder, rotator cuff impingement syndrome, partial tear of the rotator cuff, meniscal tear, chondromalacia, and localized knee osteoarthritis. He recommended physical therapy with respect to the shoulder and right knee. However, he also noted surgery with respect to the right knee as well.

Petitioner began physical therapy on October 9, 2013, at which time she reported right shoulder and right knee pain. As part of her October 9, 2013 handwritten questionnaire, petitioner indicated that that she had never been in physical therapy, occupational therapy, or chiropractic care before her injury. (R. Ex. 7).

Petitioner returned to Dr. Primus on November 1, 2013, and reported improvement in her right shoulder condition, but worsening right knee symptoms. Recommendations included therapy with respect to the right shoulder and surgery with respect to the right knee. Petitioner continued to be released to full duty work.

Petitioner thereafter continued therapy through November 7, 2013.

On November 28, 2014, Dr. Primus authored a narrative report pursuant to petitioner's attorney's request (P. Ex. 12). Dr. Primus indicated that petitioner was seen from October 4, 2013 through November 7, 2013 with a main complaint of right shoulder and right knee pain following a work-related injury on August 23, 2013. Dr. Primus indicated that his recommendations included physical therapy for the right shoulder and surgery for the right knee. However, petitioner was to continue working full duty.

On December 16, 2014, Dr. Primus authored a second narrative report as requested by petitioner's attorney. (P. Ex. 13). Dr. Primus noted a diagnosis of right shoulder partial rotator cuff tear with impingement, right shoulder AC joint arthrosis, right shoulder fibrosis, right knee mild to moderate arthritis, and right knee posterior horn medial meniscus tear. He noted that future treatment could include a shoulder MUA and knee arthroscopic surgery. He opined that he was unaware of a time period that petitioner was unable to work and maintained that petitioner would be able to perform her full duty functions in the immediate future.

Dr. Primus then noted that petitioner informed him that she had no prior right knee complaints, with no documentation of any prior right shoulder complaints. Given that history, or lack thereof, Dr. Primus opined that petitioner's pain and complaints that forced her to seek treatment were caused by the work injury.

At hearing, petitioner confirmed that she had neither undergone surgery for her right knee nor her right shoulder. She advised that therapy had helped alleviate her symptoms. Petitioner testified that she continued to perform some home exercises and that her symptoms were worse when the weather was cold. However, petitioner testified that she was not taking any over-the-counter medication for pain. Petitioner also testified that while she experienced some difficulty gardening, her ability to cook was not affected by her alleged work accident.

Petitioner also confirmed that the last time she sought medical treatment with respect to her right knee or right shoulder was in November of 2013. Petitioner further testified that following the alleged work accident, no doctor imposed work restrictions, and she continued to work for Lockport Area Special Education Cooperative as a teacher's assistant.

## CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has failed to meet her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony and the investigative evidence provided by Respondent. The main question underlining this issue is whether the Petitioner's described fall constituted an accident arising out of the Petitioner's employment. In this case, the Petitioner was not paying attention to where she was walking and did not realize that she had come upon the stairway, when she walked into the stairway, striking her knee and shoulder. Her recorded statement taken soon after the incident indicates that Petitioner tripped over her own feet when she fell and that although she was carrying some paperwork and money in her hands, these things did not obstruct her view. Petitioner also confirmed that there were no issues with the lighting the in the stairwell; that the stairs had no defects; that there was not anything on the floor that caused petitioner to fall; and that she was not in a hurry when she fell. Given these facts, there was no increased risk of injury presented by Petitioner's employment. The Arbitrator finds it unnecessary to go into an analysis of the question of increased/personal/neutral risk that is usually applied to stairway cases, because in this case, the Petitioner tripped over her own feet before she fell onto the stairway. As such, the Arbitrator concludes that the Petitioner's fall on August 23, 2013 did not constitute an accident that arose out of her employment with the Respondent.

2. Based on the Arbitrator's findings with regard to the issue of accident, all other issues are rendered moot.

STATE OF ILLINOIS )
) SS.
COUNTY OF )
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Whisler,

Petitioner,

vs.

NO: 15WC 12472

16IWCC0484

Schutt Sports,

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 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 January 13, 2016, 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: JUL 2 6 2016
o071416
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

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

**WHISLER, JAMES**
Employee/Petitioner

Case# **15WC012472**

**16IWCC0484**

**SCHUTT SPORTS**
Employer/Respondent

On 1/13/2016, 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:

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

0180 EVANS & DIXON LLC
ROBERT HENDERSHOT
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

16IWCC0484

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
### 19(b)

James Whisler
Employee/Petitioner

v.

Schutt Sports
Employer/Respondent

Case # 15 WC 12472

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **October 8, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [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, **January 28, 2015**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$30,587.97**; the average weekly wage was **$588.23**.

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

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

Respondent shall be given a credit of **$9,371.35** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$9,371.35**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $$272,539.01, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall authorize any further care necessary as recommended by Dr. Raskas, until Petitioner's injury reaches its permanent character.

Respondent shall pay Petitioner temporary total disability benefits of $392.15/week for 33 weeks, commencing January 29, 2015, through March 9, 2015, and April 1, 2015, through October 8, 2015, 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.

Edward Lee
Signature of Arbitrator

12/18/15
Date

ICArbDec19(b)

JAN 13 2016

16IWCC0484

STATE OF ILLINOIS )
) SS
COUNTY OF JEFFERSON )

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JAMES WHISLER
Employee/Petitioner

v.

Case # 15 WC 12472

SCHUTT SPORTS
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time of the accident, Petitioner was a 57-year-old maintenance man for Respondent. His job was to fix anything that needed to be fixed. (T.9) Prior to working for Respondent, Petitioner worked at Swan Corporation in maintenance, changing out molds and dies, and at another facility in Carlyle changing out molds. Prior to that, he was in the construction industry and the U.S. Army. Petitioner testified that he sustained no accidental injuries while working in construction, working for Swan, or as an infantryman in the U.S. Army.

The Parties stipulated that on January 18, 2015, Petitioner sustained accidental injuries at work when, while changing out lights and putting new lights in, his hands slipped because the light was dusty; and while hanging on, attempting to avoid falling to the concrete floor, he twisted his lower back.

Following the incident, he presented to Salem Township Hospital's emergency room and gave them a history consistent with his testimony at Arbitration. He was noted to have right-sided lumbar back pain. X-rays were normal, except for some mild spondylosis. He was given Mobic, Percocet, and Flexeril, and asked to follow up with a physician if his symptoms persisted. Following his emergency room visit, he was sent by his employer to Salem Medical Center, where it was noted he could not be found in the patient payer base, and workers' compensation coverage needed to be verified. The date of this visit was January 30, 2015. There, he was seen by a nurse practitioner, who took the history as follows:

> Notes: On getting off the scissor lift, was swing off and left hand slipped off and he twisted to the right while hanging from the R arm, felt the back pain as soon as he twisted in the right. R leg started getting numb later on that night along with the R lower

> back pain. Using Mobic, Flexeril and Percocet given by ER on 1/28/15. X-ray there showed no fracture.

He was noted to have trouble with position changes, especially getting out of a laying down position, and was not able to stand straight but leaned on the table for relief.

When Petitioner's symptoms persisted, Dr. Hahs, the company physician, recommended an MRI. At this time, it was noted that Petitioner had low back pain on his right that was radiating into his leg. The MRI was done on February 9, 2015, and showed:

> **IMPRESSION:**
>
> 1. Mild/moderate foraminal level disk/osteophyte complexes and mold/moderate facet arthrosis at the L5-S1 level create moderate bilateral L5-S1 neural foraminal stenosis, significantly narrowing the neural foraminal dimensions, but without significant compression of the exiting L5 nerve roots.
> 2. Milder encroachment on bilateral L2-3, L3-4, and L4-5 neural foramina.
> 3. Chronic degenerative disk changes are greatest at the lower thoracic and upper lumbar spine with prominent central endplate Schmorl's nodes; this may reflect the residuals of childhood Scheuermann's disease, but this does not create significant encroachment on neural structures.
> 4. No comparison exam.

After the MRI was done, he returned to the company doctor and asked for a referral to an orthopedic surgeon. Dr. Hahs noted:

> Again, now the patient reports never having had back pain although he would still like the referral to ortho for it. In addition he would like an excuse for work which I am comfortable giving b/c he had MRI abnormalities which I think could be causing his pain – after that, they can decide if he needs more time off. He also requested a refill of tizanidine, nothing else for pain.

Despite being comfortable with Petitioner's off-work status in the first part of his note, Dr. Hahs later stated, on the same page, that he could not explain all the abnormalities and did not think Petitioner's pain was acute, although Petitioner reported never having any prior low back pain and no records were introduced into evidence by either Petitioner or Respondent indicating same. Petitioner again asked for a referral to an orthopedic specialist. Despite having no explanation for his pain, The company doctor continued to prescribe narcotic pain medication in the form of Flexeril, Mobic, Norco, and Prednisone and diagnosed hip pain, sciatica, backache, and an injury to his back.

On February 20, 2015, Petitioner reported his pain was getting worse and radiating into his right buttock and sacral area to the lateral hip and down into his leg with his right thigh now totally numb. His condition was worsening and giving out, causing him to fall. Petitioner asked for a copy of his MRI to take to an orthopedic surgeon; however, Dr. Hahs noted, "work comp is deciding on his ortho referral and he hasn't heard back on this."

On February 24th, Petitioner again appeared requesting a referral to "an orthopedic surgeon on regular insurance rather than workers' comp;" however, the company doctor noted that it would be "scheduled within provider's discretion." Then, despite not having seen anyone but the emergency room and the company doctor, the company physician accused Petitioner of being inconsistent with his complaints and somehow seeing two providers in the office for medication. All this occurred while Petitioner's right side and leg symptoms of numbness were worsening and causing him to fall. The company physician also noted that someone from his office had called workers' comp and was told light duty existed. Meanwhile, Petitioner was trying to get into an orthopedic specialist using his own insurance, as he was getting no better.

On March 6th, Petitioner reappeared in the company physician's office, and Dr. Hahs indicated he was not comfortable keeping him off work anymore except for physical therapy. In short, Respondent's physician believed Petitioner could work except for his physical therapy appointments. He also believed that Petitioner was changing his symptoms as well as exaggerating them, and didn't keep an appointment with an orthopedist, even though there is no record of an orthopedic appointment being made or even a referral although Petitioner had asked for one on three separate occasions, even volunteering to use his own insurance. Despite there being no mention of any other providers in the medical records, and the company physician stating Petitioner was somehow getting medication from other sources. Dr. Hahs continued to prescribe narcotic pain medication. At this time, Petitioner also began physical therapy, which did not help.

On March 20, 2015, Petitioner finally got in to see Dr. Angela Freehill, an orthopedic specialist, who took a consistent history of the injury and then noted that he was referred to Dr. Hahs, Respondent's company doctor. Her history is as follows:

> Mr. Whisler is a 57-year-old gentleman I am seeing in consultation at the request of Workman's Comp and Dr. Seth Hahs for evaluation of his right leg. He had a Workman's Comp on 01/28/15. He was at work at Schutt Sports as maintenance. He was hopping out of a scissor lift on January 28. He was holding on with both hands. His left hand gave way and he was holding on with the right hand. His body actually twisted to the right and he had immediate right hip, buttock, and leg pain. He had pain shooting down to the right leg. He went to the emergency department and did file a Workman's Comp claim immediately. He was then referred to Dr. Hahs. Dr. Hahs put him on light duty and then did

> give him an order for an MRI. Apparently, he did not get Workman's Comp approval for the MRI and got this without their blessing. He has been a bit frustrated with the process since then and is now no longer treating him. He has been taking Norco, tizanidine, and Mobic. The Norco is 7.5s, four a day, Mobic 7.5 mg daily, and tizanidine 4 mg three times a day. He did do a Medrol Dosepak starting on February 6 and he did this for about 5-6 days with some mild relief. He ultimately did have an independent medical evaluation with Dr. Stiehl on 03/17 and then was referred here for further evaluation.

It is noteworthy that Dr. Freehill's examination showed Petitioner as a pleasant individual. Her exam showed a significant positive straight leg raise on the right and unable to fully extend his leg. He had significant tenderness at the sciatic notch, and at the SI joint. There is no mention in any of Dr. Freehill's records about drug seeking behavior or exaggerating his symptoms. Dr. Freehill continued his medication of Norco and Mobic and kept him on light duty. If he was not doing well, she recommended a referral to a low back specialist.

On April 1st, Petitioner saw Dr. Raskas, a board certified spine specialist who limits his practice to the treatment of the cervical and lumbar spine. He took the consistent history of the injury and reviewed the MRI scan, which showed broad based disc displacement with disc osteophyte complexes at L5-S1, which were narrowing the exit zone for the L5 nerve roots bilaterally along with the S1 nerve root, which correlated with Petitioner's sciatic symptoms. Dr. Raskas' physical examination was consistent with Dr. Freehill's in that Petitioner had a positive straight leg raising on the right, diminished sensation in his right L5 and S1 nerve root distribution, and diminished ankle jerks on the right compared to the left. Petitioner's left-sided examination findings were completely normal. Dr. Raskas believed Petitioner sustained an L5-S1 radiculopathy, and a structural injury to the disc at L5-S1. Noting that Petitioner had not been through a thorough course of conservative management, he recommended L5-S1 transforaminal epidural steroid injections and explained to Petitioner how his injury at work would have caused his symptoms and need for treatment.

When Petitioner returned on April 28, 2012, he had undergone a series of epidural steroid injections with no improvement. Petitioner's right ankle reflexes were now absent. Dr. Raskas stated:

> Mr. Whisler has worsening radiculopathy. He is getting weaker in his right foot. At this point I would like to proceed with a CT myelogram in preparation for surgical planning. We will arrange this for him. He will follow up in our office once it has been completed. He should remain off work during this time. He should also avoid driving as he does not have proper control with his right foot. Mr. Whisler voices understanding. He knows how to contact our office at any time with questions or concerns.

Dr. Raskas recommended a CT Myelogram. Petitioner returned on June 2, 2015, and Dr. Raskas believed that the diagnostic studies showed foraminal stenosis due to a combination of facet arthropathy and lumbar disc displacement at L5-S1. He noted that Petitioner had tried medication, rest, therapy, activity modification, all of which had failed. He recommended a laminectomy and posterior interbody fusion. He recommended Petitioner remain off work and stated again that Petitioner's work accident aggravated his underlying condition and caused the need for treatment.

Petitioner underwent surgery on July 30, 2015, in the form of a L5-S1 decompression, interbody fusion, and insertion of a biomechanical spacer at L5-S1. During surgery, Dr. Raskas was rewarded with objective intraoperative findings as follows:

> The patient then had meticulous preparation of the L5-S1 disc space. The herniated disc tissue was removed first. The nerve roots were protected and retracted from each site and I resected the disc bilaterally. The nerve roots were protected and retracted during the entire procedure.

Petitioner's objective findings during surgery revealed the herniated disc at L5-S1, which was causing his symptoms. At Arbitration, Petitioner testified that he had reviewed the medical records of the company physician, had taken all of the off work slips and given them to his boss, including mailing them in when he wasn't getting workers' compensation, which was started after a brief period of time. Petitioner testified that he was completely unaware that the doctors at Salem Medical Center were communicating with Respondent's insurance carrier concerning his visits, and that prior to January 28, 2015, he was not taking any sort of medication or even over-the-counter medication for any ailment to his low back. He further testified he had never even been prescribed narcotic medication during his career in the U.S. Army, construction, or his work for Swan. During the time he worked for Respondent, he never missed a day of work and had perfect attendance. He denied that the records reflected his comments, and further testified that the prescriptions he received were all done through Respondent's workers' comp carrier.

Petitioner testified that the surgery performed by Dr. Raskas has helped him tremendously, and he can now walk without pain.

Prior to Petitioner even seeing an orthopedist of his choice or a referral from the company doctor, Respondent's nurse case manager, Ann Crain, out of Lawrenceville, GA, referred him to Dr. Stiehl. Dr. Stiehl took the history of the injury and noted it was unclear whether Petitioner was improving. His examination showed discomfort over the lumbosacral junction, limited range of motion in all planes, and diminished sensation in the S1 distribution in his right leg. There were no Waddell's signs or signs of symptom magnification. Dr. Stiehl's impression was lumbar sprain with modest SI neuropathy with objective signs of sensory loss. Dr. Stiehl recommended a course of physical therapy and possibly an epidural steroid injection. According to Dr. Stiehl,

this along with 2 to 4 weeks of additional light duty would allow Petitioner to return to work and be placed at MMI.

While Petitioner was being paid workers' compensation and off under the direction of Respondent's own examining physician, Dr. Freehill and Dr. Raskas, he was terminated by a certified mail letter for no-call no-show.

Respondent then set up another examination with a new doctor, Frank Petkovich. This occurred on July 28, 2015. Dr. Petkovich took the history of the accident and noted that Petitioner brought his films to the exam. In his report, Dr. Petkovich stated that Petitioner denied ever seeing Dr. Freehill, despite Petitioner's repeated attempts to do so, and Petitioner's testimony at Arbitration. Dr. Petkovich also reviewed the post-myelogram CT scan and stated that there were no "acute findings" and no "specific" evidence of disc herniation. His exam showed limited range of motion, tenderness to palpation, and decreased sensation to pinprick in the right lower extremity over the lateral aspects of the right calf and thigh while being completely intact on the left leg. Petitioner's right-sided straight leg raising was also positive. Dr. Petkovich believed that Petitioner had a lumbar strain, right gluteal and hip strain. He believed those should have resolved within 6 weeks of the time of the accident and had now completely resolved. Despite several objective findings during his own examination, Dr. Petkovich believed that Petitioner's subjective complaints were out of proportion to his objective physical findings. At that point (two days prior to surgery which found the objective herniated disc), Dr. Petkovich believed Petitioner was completely recovered and had a 1% impairment rating.

Dr. Petkovich testified by way of deposition that he no longer performs spine surgery. (Pg. 37, 38) He charged a total of $3,416.00 for his medical/legal services in Petitioner's case. (Pg. 44, 45) Dr. Petkovich acknowledged that he did not review any medical records indicating low back pain, low back symptoms, or recommendations for any type of diagnostic studies or treatment for the low back prior to the accident of January 28, 2015. (Pg. 47, 48) Yet, he believed that Petitioner's symptoms had nothing to do with his work accident. (Pg. 49-51).

Dr. Petkovich admitted that the mechanism of Petitioner's injury could produce disc herniation or bulging and cause an increase in symptoms without causing any discernable change on diagnostic imaging studies. (Pg. 52) He admitted that Petitioner's findings on his MRI completely correlated with his symptoms. (Pg. 54, 55) Yet, he continued to believe that Petitioner only sustained an "exacerbation" or temporary worsening of his condition, even though Petitioner had not returned to the asymptomatic he enjoyed prior to the accident. (Pg. 55-57) He acknowledged that all of Petitioner's treatment at the time he evaluated him was reasonable and necessary. (Pg. 58, 59).

Dr. Petkovich testified that a patient has to be at maximum medical improvement before an AMA rating can be performed; however, he was the only physician who believed that Petitioner was at maximum medical improvement. (Pg. 61, 62) He acknowledged that an impairment rating

is dependent upon a correct diagnosis. (Pg. 65) He testified did not see the operative report and therefore was not aware of the objective intraoperative findings confirming a diagnosis of a disc herniation, which he failed to appreciate on Petitioner's MRI. (Pg. 13, 14, 48) He further acknowledged that a patient can experience significant activity limitations or participation restrictions in the absence of demonstrable impairment. (Pg. 65).

Dr. Raskas also testified by way of deposition. Dr. Raskas is board certified in spinal surgery and focuses his practice on spinal disorders. (PX12, p. 3, 4) Dr. Raskas also performs independent medical examinations; half for plaintiffs, half for defendants. *Id.* at 5.

Dr. Raskas testified that when he saw Petitioner, his physical examination findings were consistent with the mechanism of injury which Petitioner described to him. *Id.* at 8. Based on the examination and diagnostic studies, Dr. Raskas concluded that Petitioner suffered from L5 and S1 radiculopathy. *Id.* at 9. He firmly believed that Petitioner's condition was caused by his work accident of January 28, 2015. *Id.* at 9. He testified:

> Well, he didn't have L5-S1 radiculopathy prior to the accident. He was working full duties having no real problems. He reported to me no history of any prior back problems, so he had no preexisting back condition. When I saw the word "condition," I mean it because patients have conditions, and that's where my opinion comes from, is this patient didn't have the condition of radiculopathy prior to this injury, he only developed it after this injury. *Id.* at 9, 10.

Dr. Raskas testified that after failed conservative care, he recommended further testing to determine the exact etiology of Petitioner's condition, and discovered Petitioner suffered from a combination of facet arthropathy and lumbar disc displacement at L5-S1, which was causing narrowing and foraminal stenosis of his lumbar spine. *Id.* at 10. 11. Dr. Raskas subsequently recommended a performed laminectomy, which he testified improved Petitioner's condition. *Id.* at 11-14.

Dr. Raskas also reviewed the independent medical examination reports of Dr. Stiehl and Dr. Petkovich. *Id.* at 7. He testified that he did not agree with Dr. Petkovich's assessment regarding Petitioner. *Id.* at 22. He explained:

> First, when you use the diagnosis of lumbar strain, it's something that we fairly commonly do when someone has an acute back injury. But muscular strains, like Dr. Petkovich pointed out, usually get better in two to three months or so, and – but the problem is, this patient didn't get better, so that doesn't fit with that diagnosis.
>
> The other thing that you mentioned, I think, was that this was related to a degenerative condition that he had – preexisting

> degenerative condition that he had in his back. Well, actually, what he had was a degenerative findings in his back. Okay?
>
> And they were not symptomatic because everybody turns – that's at age 57 that has this man's comorbidity factors – is going to have some degenerative findings in their back, but they don't have symptoms from it. We know that from studies that have been done 25 years ago when MRIs first came out.
>
> We know that you can take asymptomatic individuals and put them in an MRI scanner, and you're going to find herniated disc and bulging disc and bone spurs and all these sorts of things, and they – these are people that never had pain ever in their life.
>
> So something is there inside the patient that changes to make it a condition, and that's the difference – is patients have conditions. MRIs have findings. And that's where I disagree with Dr. Petkovich, is because Dr. Petkovich is saying, "The patient had a preexisting condition." Well, he didn't have any preexisting condition because he never had the symptoms, so he doesn't really have the condition. He didn't have preexisting radiculopathy. That's what he was treated for. *Id.* at 22, 23.

Dr. Raskas placed significant weight on the fact that if Petitioner had merely suffered a lumbar strain, his condition would have improved in four to five months; but Petitioner did not get better without surgical intervention. *Id.* at 23, 24.

## CONCLUSION

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

The Arbitrator finds the causation opinion of Dr. Raskas to be more credible than the opinion of Dr. Petkovich. The Arbitrator notes that even Dr. Stiehl noted objective findings of sensory loss during his physical examination, which established that Petitioner suffered more than merely a strain. Dr. Petkovich felt that Petitioner had reached maximum medical improvement only 6 weeks after the accident; however, Respondent's first examiner, Dr. Stiehl, saw Petitioner 8 weeks following the injury and opined that Petitioner required more treatment. Dr. Freehill also concluded that if Petitioner did not improve, she would refer him to a low back specialist.

Dr. Petkovich's opinion was unsupported by even his own physical examination findings, and completely out of proportion with the overwhelming objective medical evidence in the record. He was the only physician to find fault with Petitioner's presentation of symptoms (as even Respondent's first retained examiner, Dr. Stiehl, found objective findings support of Petitioner's complaints), and the only physician in the record to impute ill-motives on the part of Petitioner;

and he did so without adequate basis. Consequently, the Arbitrator does not find the opinion of Dr. Petkovich to be credible.

Dr. Raskas aptly noted that Petitioner did not suffer from radiculopathy prior to his undisputed work accident of January 28, 2015. Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n,* 260 Ill.App.3d 92, 96–97, 197 Ill.Dec. 502, 631 N.E.2d 724 (1994); *International Harvester v. Industrial Comm'n,* 93 Ill.2d 59, 66 Ill.Dec. 347, 442 N.E.2d 908 (1982). A causal connection between work duties and a condition may be established by a chain of events including petitioner's ability to perform the duties before the date of the accident, and inability to perform the same duties following that date; or by a good work record; a definite accident date; a resulting disability; and petitioner's inability to work. *Darling v. Indus. Comm'n of Illinois*, 176 Ill. App. 3d 186, 193, 530 N.E.2d 1135, 1140 (1st. Dist. 1988). Based on the clear chain of events analysis and the credible opinion of Dr. Raskas, the Arbitrator finds that Petitioner met his burden of proof on the issue of causal connection.

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

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

Upon a claimant's establishment of a causal nexus between injury and illness, employers are responsible for the employees' medical care reasonably required in order to diagnose, relieve, or cure the effects of the claimant's injury. *Plantation Mfg. Co. v. Indus. Comm'n,* 691 N.E.2d 13 (2000); *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

The Arbitrator finds that all of the care rendered to Petitioner has been reasonably necessary to cure or relieve him of the effects of his work-related injury. Respondent shall therefore pay the $272,539.01 in medical expenses as outlined in Petitioner's Group Exhibit 1. Respondent shall further provide for any necessary prospective care necessary to aid Petitioner in his postoperative recovery.

**Issue (L): What temporary benefits are in dispute? (TTD)**

Based upon the above findings regarding the credibility of its examiner, the Arbitrator is not persuaded by Dr. Petkovich's opinion that Petitioner reached maximum medical improvement on July 28, 2015. Petitioner underwent surgery just 2 days later on July 30, 2015, and Dr. Raskas objectively identified the source of Petitioner's pathology and surgically corrected same. The Arbitrator therefore finds that Petitioner is entitled to a full 33 weeks of temporary total disability benefits for his period of disability from January 29, 2015, through March 9, 2015, and April 1, 2015, through October 8, 2015. Respondent shall have credit for the $9,371.35 in TTD 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 | ☐ Second Injury Fund (§8(e)18) |
| | ☐ PTD/Fatal denied |
| ☐ Modify | ☒ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Patricia Hopper,

Petitioner,

vs.

NO: 10WC 41725

16IWCC0485

State of Illinois/Department of Transportation,

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 17, 2015, is hereby affirmed and adopted.

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

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

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

DATED: JUL 2 6 2016
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DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

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

**HOPPER, PATRICIA**
Employee/Petitioner

Case# **10WC041725**

**SOI/DEPARTMENT OF TRANSPORTATION**
Employer/Respondent

**16IWCC0485**

On 12/17/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.58% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2208 CAPRON & AVGERINOS PC
MICHAEL A ROM
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

5661 ASSISTANT ATTORNEY GENERAL
MALLORY ZIMET
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
SUITE 3C
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

DEC 17 2015

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

16IWCC0485

STATE OF ILLINOIS )
)SS.
COUNTY OF LASALLE )

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

## ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION
### 19(b)

**Patricia Hopper**
Employee/Petitioner

v.

**State of Illinois/Department of Transportation**
Employer/Respondent

Case # 10 WC 41725

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Ottawa**, on **11/25/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS** 16IWCC0485

On the date of accident, **7/15/10**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$62,968.50**; the average weekly wage was **$1,210.93**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

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

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

**ORDER**

- Respondent shall pay Petitioner and her attorney reasonable and necessary medical expenses in the amount of $5,940.00 as provided in Sections 8(a) and 8.2 of the Act.
- Petitioner's request for TTD and prospective medical care is denied.

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

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

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

Signature of Arbitrator

**12/16/15**
Date



DEC 17 2015

**16IWCC0485**

**FINDINGS OF FACT**

This matter was previously tried before this Arbitrator on November 26, 2014 pursuant to Section 19(b) of the Act. [Arb. Exh.2] At that prior hearing, the issues in dispute were earnings, TTD, and maintenance, which included a request for vocational rehabilitation. Following that prior hearing, Petitioner was awarded TTD and maintenance, but the Petitioner was found to have reached MMI and both maintenance and vocational rehabilitation were denied beyond August 1, 2014. In that prior decision, it was noted that the Petitioner testified that she was not seeking any additional medical treatment and that but for acts of dishonesty against the State of Illinois, Petitioner would have been able to work in her prior job with the State, who could have accommodated her restrictions. The Commission affirmed the arbitration decision in its entirety on August 21, 2015. [Arb. Exh. 2]

This matter now comes again before this Arbitrator pursuant to Section 19(b). At issues are the following: 1) causation, 2) medical expenses, 3) TTD and 4) prospective medical treatment.

Petitioner testified that since the November 26, 2014 hearing, she continued to see Dr. Nikoleit. She testified that when she saw Dr. Nikoleit in January or February, 2015, Dr. Nikoleit continued to recommend that she undergo surgery for her left shoulder condition. Dr. Nikoleit took Petitioner off work completely in April, 2015 as she complained of increased, shooting pain, and lack of strength in her left arm. Petitioner testified that Dr. Nikoleit had recommended surgery for her left arm prior to the November 26, 2014 hearing, and that she testified at the November 26, 2014 hearing that she did not want surgery because she was scared.

Petitioner's medical records show that on January 21, 2015, Dr. Nikoleit again reiterated the need for surgery to Petitioner's left shoulder. On February 6, 2015, Dr. Nikoleit stated that Petitioner had failed all conservative measures and recommended surgery. On February 27, 2015, Dr. Nikoleit recommended a TENS unit to give Petitioner pain control for the chronic left shoulder rotator cuff tear. On April 22, 2015, Dr. Nikoleit noted that Petitioner could not sit comfortably and took her off work and reinjected the subacromial space with 40 mg of Depo-Medrol. On June 26, 2015, Dr. Nikoleit indicated that Petitioner needed a new MRI, since the last MRI was over a year old. On August 17, 2015, a repeat MRI of the left shoulder took place at Elmhurst Open MRI which revealed a recurrent full-thickness, full width rotator cuff tear with retraction of the tendon to the level of the glenohumeral joint. Dr. Nikoleit reviewed the MRI and noted that it documented a large full-thickness tear with medial retraction.

On June 16, 2015, Petitioner underwent an independent medical examination with Dr. Gregory Nicholson. [Resp. Ex. 3]. Dr. Nicholson acknowledged that her treatment to date on both her right and left shoulders had been reasonable and necessary. He also opined that her left shoulder injury is a result of her right shoulder injury. Although all treatment to date, including two surgeries on the right and one surgery on the left, have all been reasonable and necessary, Dr. Nicholson did not believe that a revision rotator cuff repair on the left would dramatically change her pain or improve her functional abilities. Dr. Nicholson opined that Petitioner was at MMI.

On August 28, 2015, Petitioner met with Dr. Nikoleit. [Pet. Ex. 1]. Dr. Nikoleit explained to Petitioner that the surgery to her left shoulder may fail to have an optimum outcome due to the length of time that it has been torn. [Pet. Ex 1]. On October 2, 2015, Petitioner returned to Dr. Nikoleit. [Pet. Ex. 1]. Dr. Nikoleit felt that Petitioner could perform light-duty desk jobs. [Pet. Ex. 1]. Per Petitioner's request, Dr. Nikoleit kept Petitioner off of any work. [Pet. Ex. 1].

On October 30, 2015, Petitioner returned to Dr. Nikoleit. [Pet. Ex. 1]. Dr. Nikoleit explained to Petitioner that it is unlikely that the surgery will achieve its goal and he expected Petitioner to have continued pain. [Pet. Ex. 1]. He recommended she work on exercising her shoulder and strengthening it on her own. [Pet. Ex. 1].

## CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. This finding is supported by the medical evidence from both parties, which show that the Petitioner's conditions in both arms are causally related to her July 15, 2010 accident. Specifically, the Arbitrator relies on the opinions of Respondent's IME, Dr. Nicholson, who opined that the Petitioner's right arm condition was causally related to the July 15, 2010 incident and that her left arm condition was indirectly related to her right shoulder condition. There was no evidence offered showing the Petitioner's current shoulder conditions were attributed to any other cause. Accordingly, the Arbitrator concludes that the Petitioner's current condition of ill-being in both her shoulders are causally connected to her July 15, 2010 work accident.

2. Regarding the issue of medical expenses, the Arbitrator finds that the Petitioner's medical expenses for treatment through the date of hearing, appear to be reasonable, related and necessary in addressing her ongoing left shoulder condition. In support of this finding, the Arbitrator relies on the medical evidence offered into evidence. Specifically, the Arbitrator notes that there was no evidence offered showing that the medical treatment and the expenses associated with that treatment thus far was not reasonable, necessary or related. Accordingly, Respondent shall pay Petitioner and her attorney reasonable and necessary medical expenses in the amount of $5,940.00 as provided in Sections 8(a) and 8.2 of the Act.

3. With regard to the issue of prospective medical treatment, the Arbitrator finds that the Petitioner's request for surgery to her left arm is not reasonable and necessary. In support of this finding, the Arbitrator relies on the medical evidence. Specifically, the Arbitrator notes both the Respondent's IME, Dr. Nicholson and Petitioner's treating physician, Dr. Nikoleit agree that a revision surgery on Petitioner's left shoulder would not improve her condition. Dr. Nikoleit, who had recommended the revision surgery prior to the Petitioner's initial hearing on November 26, 2014, indicated in no uncertain terms at Petitioner's last two visits that he did not believe a surgery would be successful and that she would continue to experience pain in her left shoulder. As such, the Arbitrator cannot order a surgery that the Petitioner's own surgeon does not believe would be beneficial or successful in alleviating Petitioner's condition. Accordingly, the Petitioner's request for prospective medical care is denied.

4. Regarding the issue of TTD, the Arbitrator finds that the Petitioner has not met her burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's testimony, the prior Commission decision and the medical evidence. The Arbitrator notes that in the Petitioner's prior November 26, 2014 hearing, the Petitioner was deemed to be at MMI and that she had undergone an FCE indicating permanent restrictions, which Respondent could have accommodated, but for her acts of dishonesty against the State of Illinois. There is no evidence that the Petitioner has worked or sought employment since the prior hearing - which calls into question the treating physician's order to take the Petitioner off work and keep her off work at the Petitioner's request. Although Petitioner testified that her left arm pain continued to get worse since the prior 19(b) hearing, no additional evidence was presented to suggest that her condition has changed since her prior hearing. Given all these facts, the Arbitrator concludes that the Petitioner has reached MMI and is not entitled to the TTD she has claimed in this case.

STATE OF ILLINOIS )
) SS.
COUNTY OF MADISON )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anne Schilling,

Petitioner,

vs.

NO: 15WC 3925

16IWCC0486

Randolph County Care Center,

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 22, 2015, is hereby affirmed and adopted.

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

16IWCC0486

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: JUL 26 2016
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DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

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

**SCHILLING, ANNE**
Employee/Petitioner

Case# **15WC003925**

**16IWCC0486**

**RANDOLPH COUNTY CARE CENTER**
Employer/Respondent

On 12/22/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.51% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

3181 BUTLER & KEMPER
ROBERT W BUTLER
2421 CORPORATE CENTRE DR
GRANITE CITY, IL 62040

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

16IWCC0486

STATE OF ILLINOIS )
)SS.
COUNTY OF Madison )

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

## ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION
### 19(b)

**Anne Schilling**
Employee/Petitioner

v.

**Randolph County Care Center**
Employer/Respondent

Case # **15** WC **03925**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Collinsville**, on **October 29, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On the date of accident, **12/11/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$2,165.96**; the average weekly wage was **$360.99**.

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

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

Respondent shall be given a credit of **$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 of $9,707.43 as set forth in PX 8 and as provided in Section 8(a) of the Act and subject to the Medical Fee Schedule.

Respondent shall pay Petitioner temporary total disability benefits of **$240.66/week** for 3 periods: (1) the first period of 1& 3/7 weeks, commencing **12/12/2014 through 12/21/2014**; (2) the second period of 4 & 1/7 weeks, commencing **12/23/2014 through 1/20/2015**; and (3) the third period of 35 & 1/7 weeks, commencing **2/26/2015 through 10/29/2015**, as provided in Section 8(b) of the Act. The total number of weeks of TTD being awarded is 40 3/7 weeks.

Respondent shall authorize and pay for the treatment, including surgery, as recommended by Petitioner's physician, Dr. Nathan Mall, and 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.

Nancy Lindsey
Signature of Arbitrator

December 16, 2015
Date

ICArbDec19(b)

DEC 22 2015

Anne Schilling v. Randolph County Care Center
Case Number: 15 WC 003925 (19(b))

## Findings of Fact and Conclusions of Law

Petitioner alleges she sustained an accident arising out of and in the course of her employment with Respondent on December 11, 2014.

**The Arbitrator finds:**

According to the medical records, on Monday, December 8, 2014 Petitioner presented to her family physician, Dr. Andrew Mahtani, with complaints of right knee pain. He noted she was five feet tall and weighed 296 pounds. Petitioner's pain was described as going down the outside of her leg in the front of her knee and she explained that the pain started in the anterior of her knee and shot down into her foot and up into her right hip. Petitioner denied any clicks, pops, or falls. Petitioner reported that her pain had begun ten days earlier. She further reported that the swelling had decreased since then. Petitioner further reported that she was dealing with bursitis and had been unable to work over the weekend. According to the office note, Petitioner had been given a prescription for hydrocodone-acetaminophen in July of 2014. It was also noted that Petitioner had a previous history of back surgery in 2010 and a prior elbow surgery. Upon physical examination Petitioner displayed small to moderate effusion in the right knee and full range of motion in both knees. Dr. Mahtani assessed Petitioner with right knee bursitis and effusion. He attempted to drain fluid from her knee but no fluid was obtained. He recommended she continue taking Ultram as needed. He advised her to take time off from work and he kept her off work from Saturday through Tuesday (December 9th). (PX 2)

On the morning of December 12, 2014 Petitioner was seen at Red Bud Regional Hospital with complaints of right knee pain. At 10:20 a.m. hospital personnel noted that Petitioner reported she had right knee pain for 2-3 weeks with increased pain the day before during "repositioning" when she heard a pop. She had been alternating between heat and cold with no relief. Petitioner had taken Tramadol 50 mg the night before. At 10:23 a.m. the triage assessment noted that Petitioner's right knee pain radiated down the right leg, her pain was a 10/10, and was described as sharp. Petitioner reported having continuous pain for 2-3 weeks, alleviated by nothing, and aggravated with increased activity and repositioning. Petitioner's range of motion was limited in her right knee. At 10:54 a.m., hospital personnel noted Petitioner had a long history of osteoarthritis in her knees and had presented with a right knee injury. Petitioner denied any history of an ACL injury. It was noted that she was at work the day before moving a patient when she had a sudden onset of right knee pain and heard a snap. Since then her pain was a 7/10. X-rays were obtained of Petitioner's right knee and revealed mild 2

compartment arthritis in the right knee, most prominent in the anterior joint space, a small bony ossicle superior to the patella (possibly a spur) and small joint effusion. (PX 1,2) Petitioner was diagnosed with a knee and leg sprain, prescribed hydrocodone-acetaminophen, and given a knee immobilizer. (PX 1)

Petitioner was seen by Dr. Mahtani on December 15, 2014 in follow-up after the emergency room visit. He noted her right knee had improved though some symptoms still persisted. Vicodin was helping. Her pain was noted as diffuse, but greater on the lateral side, and reportedly a "5/10" at rest. She reported some locking but no clicking or give away. A knee immobilizer helped as did alternating between ice and heat. Dr. Mahtani assessed her with right knee bursitis with effusion. A physical examination was limited due to sensitivity. He continued her on Vicodin and prescribed Norco 5 mg. Dr. Mahtani kept Petitioner off work until December 22, 2014. (PX 2)

On December 17, 2014 an MRI of Petitioner's right knee was obtained. It showed a meniscal root tear of the posterior horn of the medial meniscus. (PX 2, 3, 4)

In a note dated December 22, 2014 Dr. Mahtani kept Petitioner off work through January 15, 2015. (PX 2)

On January 15, 2015 Petitioner was seen by Dr. Ryan Pitts at Metropolitan Orthopedics, upon the referral of Dr. Mahtani. It was noted that Petitioner suffered a twisting injury to the right knee on December 11, 2014. She reported she was getting a wastebasket for a resident when she twisted her right knee. Petitioner reported swelling and medial knee pain which was sharp and aching and moderate to severe. The current treatment had consisted of ice and activity modification. It appeared that she was taking Xanax, Norco and Lisinopril. According to her "Condition and/or Injury Report" she had attempted going back to work on December 22, 2014 but was unable to do so. In response to the question, "Have you had the same or similar injury or illness?," Petitioner marked "No." (PX 4) Petitioner's past surgical history included lumbar spine surgery. Physical examination of the right knee showed moderate effusion of the knee, mild patellar crepitus and tenderness to palpation of the medial joint line. Dr. Pitts reviewed Petitioner's MRI. He diagnosed Petitioner with knee pain and a right medial meniscus tear. He noted that Petitioner had a well preserved medial joint space without significant medial narrowing, thus her medial knee symptoms were likely related to degenerative joint disease/osteoarthritis. However, he opined that it was his opinion that Petitioner's twisting injury while at work was the primary and prevailing factor in her current pathology and subsequent symptoms. He noted that Petitioner's work injury was consistent with a mechanism to cause a meniscus tear which was the source of her symptoms. They discussed treatment options and decided to move forward with a non operative treatment including physical therapy and/or injections. Petitioner was given a cortisone injection to the right knee on that date. (PX 4)

On January 20, 2015 Petitioner resumed working for Respondent. (PX 1, 2/14/15 ER visit)

On January 22, 2015 Petitioner filled out an Employee's Report of Injury. According to the report Petitioner was injured on December 11, 2014 at approximately 4:45 p.m. when she went to a resident's room to assistant her from her bed and the resident appeared to seem as if she was going to vomit. Petitioner turned to her right, grabbed a trashcan, and her right knee popped. (RX 4)

Petitioner followed up with Dr. Pitts on January 23, 2015. She was given another injection and a prescription for physical therapy. Dr. Pitts noted the possibility of surgical repair of her knee upon approval from work comp. (PX 4)

On January 28, 2015 Petitioner signed her Application for Adjustment of Claim alleging a permanent and disabling injury when she twisted her right knee while assisting a patient. (AX 2)

On February 4, 2015 Petitioner was seen at Red Bud Regional Hospital with complaints of acute pain in the posterior aspect of her right knee. At 11:20 a.m. Petitioner reported she injured her right knee on December 11, 2014. Petitioner was able to bear weight and ambulate but with mild difficulty. She reported she was at work when she was helping a resident, "turned quickly" and had a pop in the knee. She reported having pain in the right knee since. She reported having worsening pain since working the night before. She complained of pain with swelling and her knee "locking up." Petitioner also reported to emergency room personnel that she sustained a work accident two months prior while twisting her extremity. Petitioner reported that her symptoms became worse the previous night. Petitioner had been working since January 20, 2015. She told another emergency room staff member that she hurt her right knee on December 11, 2014 when helping a resident, turned quickly, and had a pop in the knee. On examination Petitioner had limited active range of motion due to pain and effusion. She was diagnosed with a meniscus injury and told to follow up with Dr. Pitts. Petitioner was released to return to work on February 5, 2015. (PX 1)

On March 11, 2015, Petitioner was seen by orthopedic surgeon, Dr. Nathan Mall. Dr. Mall noted that she was referred to him by Dr. Mahtani. She reported that on December 11, 2014 there was a flu bug going around the nursing home where she worked and a woman she was working with had gotten into her chair and began to get sick. She turned quickly to get a trash can for her, and her knee popped. The knee swelled in the posteromedial aspect of the knee. She had significant stiffness and pain as well as swelling. Anti-inflammatories and an injection had been given to her, giving her relief for approximately a week. She had not started any physical therapy yet. She reported to Dr. Mall that she had prior right knee symptoms about a month before the accident; however, she described them as "different" in that they were more of a

tightness type feeling in the anterior part of her knee and sounded more like patellofemoral pain than her current medial-sided pain. Upon physical examination, it was noted Petitioner was 5 feet tall and 239 lbs. Her knees were stable to varus and valgus stress testing as well as bilateral drawer testing. She had pain along the medial joint line as well as lateral joint line. There was palpable effusion on the right knee which was not present on the left knee. She had positive McMurray's examination of the right knee and pain medially and laterally with the McMurray's exam. Dr. Mall reviewed an MRI and noted a medial meniscal root tear and a lateral meniscus tear, anterior horn. There was cartilage loss of the lateral facet at the patella, which was common for her age. Dr. Mall diagnosed Petitioner was a meniscus tear in the setting of prior right knee pain relating to patellofemoral arthrosis and opined that her mechanism of injury was consistent with the meniscus tear and subsequent symptoms. He opined her condition was related to her work accident. He recommended physical therapy, light duty restrictions, and right knee arthroscopy and partial medial meniscectomy versus possible meniscal repair. (PX 5)

Petitioner presented to Sparta Physical Therapy and Sports Medicine for a physical therapy evaluation on March 19, 2015. She was referred by Dr. Mall. The history provided to the physical therapist was that on December 11, 2014 she was trying to hand something to a patient and twisted her right knee. She felt a pop and immediate pain. She reported pain at a level of 5/10. She had diffuse pain that increases with walking and standing too long. She had a limping gait with the right leg. Anterior and posterior drawer were negative, Varus/Valgus were negative and she had pain with McMurray's but no popping. The physical therapy plan was to strengthen the right lower extremity, work on balance activities and provide pain relief as needed. She continued physical therapy until May 11, 2015. Her right knee strength was a 4/5 with extension. (PX 7)

On April 8, 2015 Petitioner was evaluated by Dr. Joseph Ritchie at the request of Respondent. A written report followed. According to it, Petitioner reported that she was working as a certified nursing assistant in December and a patient was getting ready to throw up, so she turned to obtain something that the individual could throw up into, and when she turned she twisted and her knee became very painful and uncomfortable. He noted she finished her day and then woke up the next day with a swollen knee and presented to the emergency room. She reported her subsequent treatment noting she followed up with her family physician and was then referred to a Dr. Pitts about four weeks after the incident. She was given an injection which provided relief for about a week. She then came under the care of orthopedic surgeon Dr. Nathan Mall. Petitioner reported to Dr. Ritchie she saw a doctor for right knee bursitis about a month prior to the alleged incident. Dr. Ritchie noted the reported injury was not particularly remarkable or any different from a movement she would ordinarily make. He noted no mechanical problems and pain throughout the knee. She had been taking anti-

inflammatories but stopped due to stomach issues. Upon physical examination he noted she had a BMI of 46.9. Her right knee had discomfort and pain elicited around the peripatellar area of the knee, both medial and laterally there was some crepitus. There was pain and discomfort over the medial joint line as well as this being provoked with McMurray's and other provocative maneuvers. She had good range of motion and no effusion. He obtained radiological images which revealed advanced patellofemoral arthritis. He reviewed an MRI which showed advanced patellofemoral arthritis, especially of the lateral portion of the patella and lateral trochlear area. There was a posterior horn medial meniscus tear. He noted it may be a meniscus root tear. Extrusion of the meniscus was noted. A further history was obtained by review of medical records. Dr. Ritchie opined that it was impossible to know whether she further damaged her knee or exacerbated her underlying problem on December 11, 2014 because the meniscus root injury and lateral facet arthritis were quite severe. He noted a tear of the meniscus root is very common in morbidly obese people because it is part of the process as the meniscus gives out because of excess carried weight, the meniscus starts to extrude and the root tears. Dr. Ritchie further opined that the injection and previous treatment was reasonable. He opined that she was not a good operative candidate because of her morbid obesity and indicated that he would not perform a meniscus repair on Petitioner because of the likelihood the surgery would fail. Dr. Ritchie testified that the meniscus head started to migrate medially for a medial meniscus tear out of the joint, indicating that the tear has been there for some time. He noted that the extrusion of a medial meniscus head is evidence of a degenerative process. He opined she was able to work without restrictions and was at maximum medical improvement. (RX 1, dep. ex.)

Petitioner returned to Dr. Mall on May 6, 2015. She continued to have right knee pain. He noted that she attempted to return to work in a light-duty capacity, however, she was sent home. There was medial joint line tenderness and medial pain. Her knee was stable to varus and valgus stress testing as well as anterior and posterior drawer testing. She had positive McMurray's examination on the right knee. He recommended a partial meniscectomy versus meniscal repair depending on the quality of the tissue. (PX 5)

Petitioner was seen by Dr. Mahtani on May 28, 2015. No right knee complaints were noted. (PX 2)

On June 3, 2015 Petitioner followed up with Dr. Mall. She continued to have pain in the right knee. Physical examination revealed intact sensation and motor function of bilateral lower extremities. She had pain along the medial joint line. She had positive McMurray's examination. She had effusion that date. He again recommended surgical intervention. (PX 5)

On July 2, 2015 Petitioner was seen by Dr. Mahtani. She reported with a chief complaint of lung pain and requested a refill of Xanax. Petitioner reported she had persistent right knee pain from a meniscal tear that was not being covered because Dr. Mall could not definitely say it was work-related. No treatment was provided to her knee. (PX 2)

Dr. Mall was deposed on July 17, 2015. (PX 5) He testified consistent with his office notes noting that at their first visit Petitioner had pain along the medial joint line which would typically indicate a potential meniscal tear or cartilage injury. (PX 5, p. 9) Petitioner also had a positive McMurray test suggesting medial meniscus pathology. (PX 5, p. 9) Dr. Mall testified that Petitioner was very upfront with him and told him she had been experiencing pain and symptoms prior to the twisting accident but they were anterior in nature and mostly involved pain with stairs and steps and bent knee activities. Her medial-sided pain began with the work incident, according to Dr. Mall. (PX 5, pp. 12-13) Dr. Mall did not believe the meniscus tear pre-existed the work accident and he felt Petitioner's response to the injection suggested a meniscal tear. (PX 5, pp. 15-17) However, he also acknowledged that it was possible she had a tear but it was asymptomatic. (PX 5, pp. 14-15) Dr. Mall spent a significant amount of time during his deposition discussing Petitioner's pre-existing arthritis in her knee and how she lacked any arthritis in the tibiofemoral compartment, thereby supporting his belief that there was, at most, an asymptomatic tear pre-accident. (PX 5, pp. 14-15)

Petitioner returned to Dr. Mall on July 29, 2015. She had continued right knee pain that he noted was medial in nature and ongoing swelling. Physical examination revealed pain along the medial joint line. She had positive McMurray's and effusion. He recommended surgery. He noted that given the length of time since the injury and tear it would be unlikely a repair would be beneficial. He recommended a partial meniscectomy. She was to return in two months. (PX 6)

Dr. Ritchie was deposed on August 24, 2015. Dr. Ritchie testified consistent with his earlier report. While Dr. Ritchie believed that Petitioner had pre-existing arthritic symptoms in her knee, in his opinion she probably exacerbated her underlying meniscus issues as well as her degenerative issues of her patellofemoral joint. (RX 1, p. 11-12) Nevertheless, Dr. Ritchie remained of the opinion she needed no further medical treatment.

On cross-examination Dr. Ritchie testified that Petitioner indicated to him that her pain prior to the work accident was located at the front of her knee. (RX 1, p. 22) He could not recall if she reported any swelling prior to her work accident. (RX 1, p. 23) He agreed there wasn't much evidence of arthritis in the medial side of Petitioner's knee. (RX 1, p. 25) While Petitioner's MRI suggested a root tear and extrusion of the meniscus, Dr. Ritchie explained that an extrusion would not occur within six days of the injury.

He felt it had been extruded before then. However, he also acknowledged that one can have extrusion with/without a root tear. (RX 1, p. 26)

Dr. Ritchie agreed with Drs. Mall and Pitts that Petitioner's patellofemoral arthritis pre-dated her accident and that Petitioner does have a medial meniscus root tear. (RX 1, pp. 26-27) He agreed that a twisting of a knee could or might cause or aggravate a meniscus root tear. (RX 1, pp. 29,33)

On redirect examination Dr. Ritchie testified that he thought Petitioner's meniscus injury pre-dated her accident and that the popping she reported in conjunction with the incident at work was a result of her arthritis or her pre-existing tear. He didn't deny she experienced a pop. (RX 1, pp. 39-41) He also felt it significant that Petitioner was able to continue working after the injury suggests that the mechanism of injury was on the "low severity index." (RX 1, p. 42)

On September 17, 2015 Petitioner returned to Dr. Mahtani. He noted that she presented with chief complaints of shortness of breath and pain in her right lower back. She reported arthralagia/joint pain but no reports of muscle aches, no muscle cramps, no swelling in the extremities and no difficulty walking. Dr. Mahtani noted "generalized pain" and prescribed Norco. According to a handwritten office note, both of Petitioner's knees were swollen with crepitus noted on flexion and extension. (PX 2)

On October 14, 2015 Petitioner returned to Dr. Mall for a follow- up visit. He noted she continued to have pain in her right knee, mostly medial in nature. She had positive McMurray's test, intact sensation and motor function in the bilateral lower extremities. She had developed some quadriceps weakness. He recommended physical therapy to strengthen her quadriceps and range of motion. (PX 6)

Petitioner began another round of physical therapy on October 20, 2015. The history provided to her physical therapist was that on December 11, 2014 she injured her right knee while twisting at work and she felt a pop. Her pain was rated as a 3-4/10. The plan was to continue physical therapy to increase strength in the right lower extremity, perform balance exercises, gait training, and pain control. She was to return twice a week for six weeks. (PX 7)

Petitioner's case proceeded to arbitration on October 29, 2015. Petitioner was the sole witness testifying at the hearing. At the time of arbitration, the disputed issues were accident, causal connection, medical expenses, prospective medical care, and temporary total disability benefits. Respondent stipulated to the dates of temporary total disability but not liability for them. (AX 1)

Petitioner testified that she began working for Respondent in a part-time capacity on November 3, 2014. She was 51 years of age at the time of the hearing and

worked as a nurse's aide for Respondent. Petitioner's job responsibilities revolve around caring for the elderly by helping them with their everyday needs – bathing, dressing, feeding, walking, and transferring from wheelchair to bed and vice versa. Petitioner testified that she is required to lift patients as part of her job but if they are too much for her there are lifts available to utilize. She estimated that the majority of her eight hour day is spent on her feet and there is lots of walking, bending, stooping, and crouching required of her.

Petitioner acknowledged that just prior to December 11, 2014 she had been diagnosed with bursitis in her right knee. At that time her knee was swollen, tender, and achy to walk on. She further described the pain as an ache and pressure located in the front of her right knee. Petitioner testified that Dr. Mahtani had recommended ice, a prescription, and weight loss.

Petitioner testified that on December 11, 2014 she was working the 3:00 p.m. to 11:00 p.m. shift and she was involved in her accident around 4:30 p.m. Petitioner testified that she turned to the right and bent a little to retrieve the trash can sitting on the floor. As she bent and turned, she felt a pop and extreme pain in the back and side of her right knee. The pain was "beyond a ten" and she found it very hard to bear weight as the pain was shooting up and down her leg. Petitioner testified that she reported the accident to her supervisor, Cathy Carns, after the injury and told her she would try and finish her shift; however, it did not go well. Petitioner testified that when she went home she elevated her leg, put some ice on it and when she got up the next day the pain was as bad or worse so she went to the emergency room. At that point Petitioner's knee was difficult to move and locking up and she felt like it was going to give out on her when she walked. She also noted swelling.

Petitioner further testified that she was given pain medication and a knee immobilizer at the emergency room and taken off work. She then followed up with Dr. Mahtani on December 15, 2014 and he referred her to Dr. Pitts who ordered an MRI. Petitioner testified that Dr. Pitts told her she could return to work and she did so on December 22, 2014.

Petitioner testified that her return to work did not go well and she experienced a lot of difficulty walking. At the end of her shift, her knee was swollen and painful and she would go home and ice it. Petitioner eventually contacted Dr. Mahtani who took her off work until she could see Dr. Pitts. Dr. Pitts gave her a cortisone injection for her knee that helped for a week and then did nothing.

According to Petitioner, Dr. Pitts returned her to work on January 20, 2015. She still wasn't doing well and experiencing a lot of pain. If Petitioner was on her knee a lot, she would experience swelling and increased pain. She stopped working once again on

February 24, 2015. She then contacted Dr. Mahtani who again took her off work. She then followed up with Dr. Mall in March of 2015.

Petitioner testified that Dr. Mall has prescribed physical therapy to help with strengthening of her knee and leg prior to surgery. He has recommended repairing the tear and Petitioner would like to proceed with the surgery.

Petitioner has not received any temporary total disability benefits since she stopped working on February 24, 2015. According to Petitioner her right knee remains sore and painful. She has pain in the back of her knee into the outside and tenderness on the inside. She acknowledged that she had some tenderness on the inside with her bursitis and swelling prior to December 11, 2014. Currently, Petitioner can only be on her feet about thirty minutes at a time whereas prior to her accident she could do so for over an hour, "give or take."

Petitioner acknowledged that Dr. Mall has imposed restrictions; however, Respondent has not accommodated them.

On cross-examination Petitioner acknowledged that she worked part-time for Respondent. She testified that the only issue she had with her knee before her work accident was the bursitis just before the accident. When she saw Dr. Mahtani on December 8, 2014 she had not had an injury; rather, it was just "all of a sudden" that she felt swelling, tightness, and pain. She could not recall what he prescribed for her. She denied having a long history of right knee osteoarthritis.

Petitioner testified that her pain level on December 8, 2014 was "6/10."

Petitioner testified that she waited quite a while to fill out an injury report because she wasn't sure what was wrong with her knee. She wasn't sure if the bursitis was the cause of her problems but after seeing Dr. Pitts, he ruled that out.

Petitioner denied any memory of being seen at the hospital on February 4, 2015. She could not recall working on February 3, 2015 or her symptoms worsening for any reason on that date. She acknowledged intermittent increases in pain throughout this "ordeal."

On redirect examination Petitioner testified that she had no pain in the back of her knee prior to December 11, 2014 and she continues to do so at the present.

Petitioner's medical bills are contained within PX 8. They include:

| | |
|---|---|
| Red Bud Regional Hospital (IDPA reimbursement) | $ 314.65 |
| CERCUS Emergency Physicians/Dr. Theo Jefferson (IDPA reimbursement) | 32.20 |
| Dr. Gregory Holdener-radiologist (IDPA reimbursement) | 9.80 |

| | |
|---|---|
| Dr. Andrew Mahtani/Red Bud Clinic (IDPA reimbursement $79.21) | 83.11 |
| (Petitioner reimbursement $3.90) | |
| Dr. Ryan Pitts/Metro Orthopedics | 748.00 |
| Dr. Nathan Mall | 797.00 |
| Southern Illinois Imaging/Dr. Zabrowski | 247.81 |
| Sparta Hospital (Insurance reimbursement $4,408.50) | 7,149.00 |
| (Unpaid $2,740.50) | |
| Injured Workers Pharmacy | 184.68 |
| Moody Pharmacy (IDPA reimbursement $80.92) | 141.18 |
| (Petitioner reimbursement $60.26) | |
| | $9,707.43 |

**The Arbitrator concludes:**

1. **With regard to disputed issue C, "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent":**

Petitioner sustained an accident on December 11, 2014, that arose out of and in the course of her employment with Respondent. Petitioner's testimony regarding the accident was credible and unrebutted. Petitioner testified that she told her supervisor about the accident after it occurred. Her supervisor did not testify. At the time of her accident Petitioner was on duty and involved in a task associated with her job duties. While Petitioner's details regarding the accident may have varied from time to time when seeing doctors, the variations were minimal and, overall, consistent. Petitioner's delay in completing an Injury Report does not negate a finding of accident. Petitioner credibly, and without rebuttal, testified to telling her supervisor immediately after the accident. She further credibly explained why she waited to fill out the accident/injury report and that she ultimately did so in light of information given to her by Dr. Pitts.

2. **With regard to disputed issue F, "Is Petitioner's current condition of ill-being causally related to the injury?":**

Petitioner's current condition of ill-being in her right knee is causally connected to her December 11, 2014 accident. This conclusion is based upon Petitioner's credible testimony and the opinions of Dr. Pitts and Dr. Mall.

It is clear from the medical records, as well as Petitioner's credible testimony, that she had some problems with her knee prior to her work accident. Indeed, she had quite recently seen the doctor just a few days before the accident for knee complaints; however, the condition was diagnosed as bursitis and there is no evidence in the pre-accident records of medial-sided knee complaints. Generally speaking, all complaints were to the front portion of her knee at that time. While Respondent may contend that Petitioner had problems with her right knee prior to that time, including a history of osteoarthritis, no prior medical records were admitted into evidence. While Dr. Mahtani had arguably been treating Petitioner prior to the work accident and some pain medication had been prescribed in July of 2014 no records were admitted to further clarify why this medication was being prescribed or if there were any knee problems at that time. Those records were available to both parties and neither introduced them. Therefore, no negative inferences are drawn. Petitioner also consistently and credibly testified to a difference in the nature and location of her complaints before and after her work accident.

Dr. Pitts was of the opinion that Petitioner's condition of ill-being in her right knee was causally connected to her work accident. Dr. Mall also testified in that manner and his opinion is found to be more persuasive than that of Dr. Ritchie. While Dr. Ritchie did not feel Petitioner's right knee meniscal tear was caused by her work accident, he never really clearly and directly addressed the issue of aggravation. His initial report was silent on the issue and in his deposition testimony he acknowledged that the accident exacerbated her pre-existing conditions and he also acknowledged that a twisting and bending motion could aggravate a meniscus tear. Furthermore, he did not have a complete understanding of Petitioner's accident as he thought Petitioner did not experience any swelling until the next day; however, Petitioner credibly, and without rebuttal, testified to immediate swelling and difficulty walking. Also, while Dr. Mall acknowledged that he had reviewed no prior medical records pertaining to Petitioner, he did testify that Petitioner was upfront with him regarding her prior knee complaints and he credibly explained the difference in her symptoms pre and post accident.

3. **With regard to disputed issue J, "Were the medical services that were provided to Petitioner reasonable and necessary?" "Has Respondent paid all appropriate charges for all reasonable and necessary medical services?":**

Consistent with her liability determination set forth herein, Petitioner is awarded the following medical bills set forth in PX 8 subject to the Medical Fee Schedule:

| | |
|---|---|
| Red Bud Regional Hospital (IDPA reimbursement) | $ 314.65 |
| CERCUS Emergency Physicians/Dr. Theo Jefferson (IDPA reimbursement) | 32.20 |
| Dr. Gregory Holdener-radiologist (IDPA reimbursement) | 9.80 |
| Dr. Andrew Mahtani/Red Bud Clinic (IDPA reimbursement $79.21) | 83.11 |
| (Petitioner reimbursement $3.90) | |
| Dr. Ryan Pitts/Metro Orthopedics | 748.00 |
| Dr. Nathan Mall | 797.00 |
| Southern Illinois Imaging/Dr. Zabrowski | 247.81 |
| Sparta Hospital (Insurance reimbursement $4,408.50) | 7,149.00 |
| (Unpaid $2,740.50) | |
| Injured Workers Pharmacy | 184.68 |
| Moody Pharmacy (IDPA reimbursement $80.92) | 141.18 |
| (Petitioner reimbursement $60.26) | |
| | $9,707.43 |

4. **With regard to disputed issue K, "Is Petitioner entitled to any prospective medical care?":**

Petitioner is awarded prospective medical care as recommended by Dr. Nathan Mall. Respondent shall pay for such treatment and all reasonable and necessary medical treatment related thereto.

5. **With regard to disputed issue L, "What temporary benefits are in dispute (TTD)?":**

Petitioner is awarded temporary total disability (TTD) benefits from December 12, 2014[1] through December 21, 2014; December 23, 2014 through January 20,

[1] While the parties stipulated to TTD benefits beginning on 12/11/14, that was the date of accident and Petitioner worked her entire shift.

2015, and February 26, 2015 through October 29, 2015, a period of 40 3/7 weeks. Respondent did not dispute the dates of temporary total disability only liability for the benefits. (AX 1) Accordingly, Petitioner is awarded TTD benefits for the dates of disability as stipulated to between the parties.

**********

STATE OF ILLINOIS )
) SS.
COUNTY OF )
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Floyd W. Jackson,
Petitioner,
vs.

NO: 13WC 5418

16IWCC0487

Lincoln's Challenge,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, 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 February 2, 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: JUL 2 6 2016
o071416
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**JACKSON, FLOYD W**
Employee/Petitioner

Case# **13WC005418**

**16IWCC0487**

**LINCOLN'S CHALLENGE**
Employer/Respondent

On 2/2/2016, 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 0.46% 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:

0874 FEDERICK & HAGLE
PHILLIP W PEAK
129 W MAIN ST
URBANA, IL 61801

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

1368 ASSISTANT ATTORNEY GENERAL
CHRISTINA J SMITH
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

FEB 2 - 2016

Ronald A. Parisi
RONALD A. PARISI, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0487

STATE OF ILLINOIS )
)SS.
COUNTY OF CHAMPAIGN )

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

## ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION

Floyd W. Jackson
Employee/Petitioner

v.

Lincoln's Challenge
Employer/Respondent

Case # 13 WC 05418

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 William R. Gallagher, Arbitrator of the Commission, in the city of Urbana, on December 9, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of 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 1, 2012, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $39,252.00; the average weekly wage was $754.85.

On the date of accident, Petitioner was 63 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

**ORDER**

Based upon the Arbitrator's Conclusions of Law attached hereto, claim for compensation is denied.

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

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

William R. Gallagher, Arbitrator

January 25, 2016
Date



FEB 2 - 2016

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on August 1, 2012. According to the Application, Petitioner sustained an injury to his left knee and leg when his "combat-style boot" got caught on a step (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Respondent is a military school that provides training for young people who are considered to be at risk. At trial, there was no testimony as to how individuals were selected to attend this military school.

Petitioner began working for Respondent in 1998 and worked there for 17 years. Prior to working for Respondent, Petitioner was in the Air Force for 25 years. Petitioner testified that when he was at work, he was required to wear a military style uniform which he described as a "battle dress uniform." Petitioner was also required by Respondent to wear military combat boots as part of his uniform. On the day of the accident, Petitioner was wearing a pair of combat boots that had been issued to him by Respondent.

Petitioner stated that on August 1, 2012, he was in the process of moving the cadets from one floor of a building to the first floor where they would get into a formation. As Petitioner was in the process of walking down a staircase, the boot on his left foot got caught on one of the steps which caused Petitioner to sustain a "pop" in his left knee.

The building where the accident occurred is not open to the public; however, Petitioner testified that the stairs where the accident occurred did not have any defects. Photographs of the stairs were received into evidence at trial which did not reveal any defects (Respondent's Exhibit 2).

As aforestated, Petitioner was in the Air Force for 25 years prior to working for Respondent. During the time Petitioner was in the Air Force, he wore combat boots very similar to the ones he was wearing on the day of the accident. Petitioner testified that there was nothing defective with the boots that he was wearing on the day of the accident. Four photos of Petitioner's left boot were introduced into evidence at trial. The last of these photos was of the sole of the boot and, at trial, Petitioner marked the area where the boot got caught (Petitioner's Exhibit 4).

Petitioner testified that he would go up/down the flight of stairs where the accident occurred approximately 20 to 25 times per day. He also stated that he was not in a hurry to get down the stairs at the time the accident occurred.

David Penny testified on behalf of the Respondent at trial. Penny has worked for Respondent for 12 years. At the time this case was tried, Penny was the Commandant. In regard to the foot wear required by Respondent, Penny testified that the staff was required to wear any military boot that was authorized by any of the branches of U.S. military. Staff members can obtain their boots from Respondent, but they are not required to do so. Penny stated that there are some differences in the boots used by the various branches of the military; however, they are all acceptable for use

by Respondent's staff. At trial, photos of various boots were tendered into evidence (Respondent's Exhibit 3).

Following the accident, Petitioner went to Carle Physician's Group, where he was diagnosed with a left knee sprain and possible internal derangement. An MRI was ordered which was performed on August 29, 2012. The MRI revealed a partial tear of the patellar ligament (Petitioner's Exhibit 1).

Petitioner was subsequently seen by Dr. Robert Bane, an orthopedic surgeon, who examined Petitioner and reviewed the MRI on September 26, 2012. Dr. Bane treated the injury conservatively hoping to avoid surgery (Petitioner's Exhibit 1).

Petitioner was subsequently seen by Dr. Bane on October 31, 2012, and February 11, 2013. Petitioner's condition had improved at the time of both visits. When seen on February 11, 2013, Dr. Bane opined that Petitioner did not need surgery and that he was at MMI (Petitioner's Exhibit 1).

At trial, Petitioner testified that he was able to return to work without restrictions following the appointment with Dr. Bane on October 31, 2012. Petitioner subsequently retired effective May 31, 2013. Petitioner still has some complaints of pain and a burning sensation in the left knee which he stated were worse in the morning. Petitioner no longer runs, but still walks even though his knee starts hurting at about one-half of a mile.

Conclusions of Law

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

The Arbitrator concludes that Petitioner did not sustain an accidental injury arising out of and in the course of his employment for Respondent on August 1, 2012.

In support of this conclusion the Arbitrator notes the following:

There was no dispute as to the facts of this case. Petitioner sustained an accident on August 1, 2012, when the boot on his left foot got caught on a step on a flight of stairs and Petitioner was walking down.

Petitioner was at work and on Respondent's premises wearing footwear required by the Respondent. However, there were no defects on either the stairs or the footwear.

Petitioner was not in a hurry to go down the stairs and was walking in a normal manner. At that time, one of the grooves on the sole of the boot apparently got caught on one of the stairs.

For an injury to arise out of employment, the risk of injury must be peculiar to the employment or a risk to which the employee is exposed to a greater degree than the general public by reason of the employment. Caterpillar Tractor Co. v. Industrial Commission, 541 N.E.2d 665, 667 (Ill. 1989).

The Arbitrator concludes that Petitioner's walking on stairs that had no defects, while wearing boots that also had no defects, did not expose the Petitioner to a risk of injury greater than that of the general public.

Even though Petitioner was required by Respondent to wear the boots he was wearing at the time of the accident and the soles of the boots had treads, there was no evidence that the treads on the soles of the boots were defective or that they would, in some manner, increase the risk of one sustaining an accident.

The Arbitrator is not persuaded by the case cited by Petitioner's counsel in his proposed decision, Young v. Illinois Workers' Compensation Commission, 13 N.E.3d 1252 (Ill. App. 4th Dist. 2014).

In the Young case, the Appellate Court reversed the Commission and ruled that Petitioner had sustained a compensable accident. In the Young case, Petitioner was a parts inspector and he had to reach inside a box to get a spring clip that was at the bottom of the box. This box was 36" long and the opening where Petitioner had to put his hand/arm to reach in to get the part was 16" x 16". When Petitioner reached into the box, he felt a "pop" in his left shoulder.

While the Appellate Court acknowledged that reaching to pick up something is a normal activity of daily living, stretching of one's arm into a "deep, narrow box to retrieve a part for inspection was distinctly associated with his employment." Young at 1258-1259.

In this case, Petitioner was engaging in a normal activity of daily living, walking up/down stairs.

In regard to disputed issues (F), (J) and (L) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issue (C).

William R. Gallagher, Arbitrator

STATE OF ILLINOIS )
) SS.
COUNTY OF 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

James Wyse III,

Petitioner,

vs.

NO: 15WC 11721

16IWCC0488

Sangamon County Sheriff's Dept.,

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 10, 2015, is hereby affirmed and adopted.

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

16IWCC0488

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: JUL 26 2016
o071416
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

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

**WYSE, JAMES III**
Employee/Petitioner

Case# **15WC011721**

**16IWCC0488**

**SANGAMON COUNTY SHERIFF'S DEPT**
Employer/Respondent

On 12/10/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.53% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5757 MARTIN J HAXEL PC
2651 S 5TH ST
SPRINGFIELD, IL 62703

0000 RUSIN & MACIOROWSKI LTD
R MARK COSIMINI
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

16IWCC0488

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)

James Wyse III
Employee/Petitioner

v.

Sangamon County Sheriff's Dept.
Employer/Respondent

Case # 15 WC 11721

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 William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on November 18, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the 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. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

**FINDINGS**

On the date of accident, January 20, 2015, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $57,567.64; the average weekly wage was $1,107.07.

On the date of accident, Petitioner was 43 years of age, married with 3 dependent child(ren).

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

Respondent shall be given a credit of $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. At trial, the parties stipulated that TTD benefits had been paid in full.

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

**ORDER**

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the cervical disc surgery recommended by Dr. Timothy VanFleet.

Petitioner's petition for penalties and attorneys' fees is denied.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

December 7, 2015
Date

DEC 10 2015

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on January 20, 2015. According to the Application, Petitioner sustained a "cervical, left arm injury" as a result of an altercation with an inmate (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for prospective medical treatment as well as penalties and attorneys' fees. Respondent disputed liability on the basis of accident and causal relationship; however, Petitioner and Respondent stipulated that all medical and temporary total disability benefits had been paid (Arbitrator's Exhibit 1).

Petitioner has worked for Respondent as a Correctional Officer for approximately 18 years. At trial, Petitioner testified that on January 20, 2015, Petitioner had to move an inmate from the "C" block to the "B" block to put him in segregation. The inmate was not cooperative with the effort to move him and two other Correctional Officers, Marty Curry and Mihai Tudoreanu, were also present. When the inmate initially refused to be moved out of his cell, Petitioner used his taser gun to subdue him.

Officer Tudoreanu handcuffed the inmate's hands behind his back and Petitioner and Officer Tudoreanu then lifted the inmate up the three Correctional Officers subsequently proceeded to walk the inmate toward "B" block. "C" block and "B" block are adjacent to one another and, shortly after the three Correctional Officers and the inmate went through the door adjoining them, the inmate lunged his head and shoulders at the Petitioner. When this occurred, Petitioner's neck and left shoulder struck the wall. This incident occurred in a narrow hallway approximately four to four and one-half feet wide.

When the preceding occurred, Officers Tudoreanu and Curry immediately reacted to bring the inmate under control and piled on top of him. The inmate was then tased a second time. Shortly afterwards, Lieutenant Tammy Powell arrived and ordered the Correctional Officers to stand the inmate up. The inmate was subsequently moved to a padded cell.

Petitioner's counsel tendered into evidence a surveillance video of the incident. The door between "C" block and "B" block is in the upper right hand corner and there is a flight of stairs leading to it. At 3:40 PM, the door is opened and what appeared to be two Correctional Officers and an inmate walk through it. A third Correctional Officer walked through the door shortly afterward. A physical struggle occurs between the three Correctional Officers and the inmate; however, most of this altercation is not visible in the video because a significant portion of it takes place behind the open door. During the video, Lieutenant Powell was observed ascending the stairs when the inmate began to struggle (Petitioner's Exhibit 6).

On January 20, 2015, Petitioner prepared two reports regarding the incident. In the Employer's First Report of Injury, Petitioner described the altercation with the inmate and that he had bruises, scratches and stiffness in the back of his neck and left shoulder. Petitioner also prepared a Memorandum which described the incident and that Petitioner hit his shoulder/neck against the wall (Petitioner's Exhibit 1).

Petitioner sought medical treatment at the ER of St. John's Hospital on January 20, 2015. The ER records contained a history of the incident and that Petitioner had left thumb and left shoulder symptoms; however, the records did not contain any reference to Petitioner having neck symptoms (Petitioner's Exhibit 2). At trial, Petitioner testified that he informed the attending physician of the fact that he had neck pain, but the doctor only spent a minimal amount of time with him.

On February 21, 2015, Lieutenant Powell prepared a Supervisor's Accident Investigation report which described the incident and that Petitioner had struck his left shoulder against a wall and that Petitioner had shoulder and neck pain afterward (Petitioner's Exhibit 3).

Petitioner was subsequently seen by Dr. Pramila Venigalla, his family physician, on January 23, 2015. Dr. Venigalla's record of that date contained a history of the accident and that Petitioner sustained a left shoulder injury. While there was no specific reference to Petitioner having sustained a neck injury, one of Petitioner's active problems described in the record was "Cervicalgia" (Petitioner's Exhibit 4).

Dr. Venigalla referred Petitioner to Dr. Rodney Herrin, an orthopedic surgeon, who saw Petitioner on January 26, 2015. Dr. Herrin's record of that date contained a history of the accident and that Petitioner had struck the superior aspect of his left shoulder and lateral neck on the wall. Most of Petitioner's symptoms were in his left shoulder and Dr. Herrin suspected that Petitioner sustained a contusion/strain of the trapezius and acromioclavicular joint. He ordered physical therapy (Petitioner's Exhibit 5).

Petitioner was again seen by Dr. Herrin on February 23, 2015. At that time, Dr. Herrin noted that Petitioner had physical therapy on the left shoulder and cervical spine. Because most of Petitioner's complaints were because of neck symptoms, Dr. Herrin ordered an MRI of the cervical spine which was performed on February 24, 2015. The MRI revealed disc protrusions at C5-C6 and C6-C7 (Petitioner's Exhibit 5).

Petitioner was subsequently seen by Dr. Timothy VanFleet, an orthopedic surgeon associated with Dr. Herrin, on February 27, 2015. Dr. VanFleet examined Petitioner, reviewed the MRI scan and ordered more physical therapy. When Dr. VanFleet saw Petitioner on April 1, 2015, Petitioner advised that the physical therapy had caused his neck pain to worsen. Dr. VanFleet recommended that Petitioner undergo surgery consisting of a C5-C6 and C6-C7 discectomy and fusion (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Kevin Rutz, an orthopedic surgeon, on June 2, 2015. In connection with his examination of Petitioner, Dr. Rutz reviewed medical records, the MRI scan and the surveillance video. Dr. Rutz agreed with Dr. VanFleet's diagnosis and that the surgery recommended by him was reasonable and necessary. In regard to causality, Dr. Rutz noted that the history provided by Petitioner was consistent with his injuries. However, based on the fact that he could not see the actual incident when he watched the video, Dr. Rutz opined that Petitioner's condition was not work-related (Respondent's Exhibit 1).

Marty Curry testified on behalf of Respondent when this case was tried. He recalled the incident and also watched the surveillance video. Curry stated that he did not see Petitioner strike the

wall. On cross-examination, Curry agreed that when the inmate lunged at the Petitioner, most of his attention was directed at bringing the inmate under control. He also acknowledged that it was possible Petitioner hit the wall even though he did not see it.

Mihai Tudoreanu testified on behalf of Respondent when this case was tried. He testified that the inmate lunged at the Petitioner after being escorted through the door leading to "B" block and that Petitioner pushed the inmate down. He did not see Petitioner strike a wall; however, on cross-examination, he agreed that the incident occurred in a narrow hallway. He also agreed that it was possible that Petitioner struck the wall as a result of the incident.

Lieutenant Powell also testified on behalf of Respondent when this case was tried. She reaffirmed that she was not present when the incident occurred; however, she agreed that Petitioner informed her that he had sustained injuries to both the shoulder and neck.

Petitioner testified that he has pain in his neck on a daily basis and wants to have the surgery recommended by Dr. VanFleet. He denied any prior neck injuries or symptoms.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of his employment for Respondent on January 20, 2015, and that his current condition of ill-being in regard to his left shoulder and neck is causally related to same.

In support of this conclusion the Arbitrator notes the following:

The fact that Petitioner was involved in a physical altercation with an uncooperative inmate that was being moved from one cell block to another was unrebutted.

There was also no dispute that the inmate lunged at Petitioner while being moved. The primary factual dispute was whether Petitioner did, in fact, strike his left shoulder and neck against the wall as a result thereof.

The Arbitrator watched the relevant portion of the surveillance video several times and noted that only a portion of the altercation between the Correctional Officers and inmate was visible. The remaining part of the altercation occurred behind the open door. Further, the Arbitrator notes that the quality of the video is marginal with the portion of the altercation that could be observed is in the upper right hand corner. The Arbitrator finds this video to be of minimal probative value.

Petitioner reported the accident in a timely manner and, in both reports prepared on the day of the accident, he stated that he had pain in both the left shoulder and neck.

The fact that the two Correctional Officers that were present at the time of the altercation, Curry and Tudoreanu, did not see Petitioner strike a wall does not mean that it did not occur. Obviously, at the time of this incident, the primary focus of all of the Correctional Officers was to bring the inmate under control.

Lieutenant Powell's reports and testimony confirmed that Petitioner informed her that he had neck pain as a result of the accident.

While the ER record does not contain a specific reference to Petitioner having neck pain, the subsequent medical record of Dr. Venigalla contained the diagnosis of cervicalgia and the records of Dr. Herrin and Dr. VanFleet both contained consistent histories of the accident and Petitioner having sustained a neck injury.

The Arbitrator is not persuaded by the opinion of Respondent's Section 12 examiner, Dr. Rutz. Dr. Rutz's opinion that Petitioner's condition was not work-related was based primarily on the fact that he was unable to observe Petitioner strike the wall when he reviewed the surveillance video. As is noted herein, the Arbitrator has found the surveillance video to be of minimal probative value.

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

The Arbitrator concludes that Petitioner is entitled to prospective medical treatment including, but not limited to, the cervical disc surgery and fusion recommended by Dr. VanFleet.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that the surgery recommended by Dr. VanFleet is reasonable and necessary.

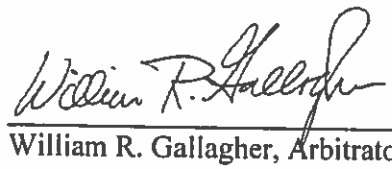
In regard to disputed issue (M) the Arbitrator makes the following conclusion of law:

Arbitrator concludes that Petitioner is not entitled to Section 19(k) and Section 19(l) penalties or Section 16 Attorneys' Fees.

In support of this conclusion the Arbitrator notes the following:

While the Arbitrator found that Petitioner sustained a compensable injury and that his current condition of ill-being was causally related to same, the opinion of Dr. Rutz provided Respondent a reasonable basis to dispute liability. Accordingly, the Arbitrator does not find Respondent's refusal to authorize the surgery to be either vexatious or unreasonable.

Further, even if the Arbitrator were to conclude that Respondent's refusal to authorize the surgery was vexatious and unreasonable, pursuant to Hollywood Casino-Aurora, Inc. v. Illinois Workers' Compensation Commission, 967 N.E.2d 848 (Ill. 2nd Dist. 2012), he does not have authority under the Act to award either penalties or attorneys' fees.



William R. Gallagher, Arbitrator

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Katie Bell,
Petitioner,
vs.

NO: 14WC 1381

Addus Healthcare,
Respondent,

16IWCC0489

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 3, 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: JUL 2 6 2016
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DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**BELL, KATIE**
Employee/Petitioner

Case# **14WC001381**

**16IWCC0489**

**ADDUS HEALTHCARE**
Employer/Respondent

On 2/3/2016, 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 0.46% 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:

0222 GOLDBERG WEISMAN & CAIRO LTD
SANTIAGO J ECHEVESTE
ONE E WACKER DR SUITE 3900
CHICAGO, IL 60601

0766 HENNESSY & ROACH PC
ERICA A LEVIN
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS )
)SS.
COUNTY OF Cook )

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

## ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION

**Katie Bell**
Employee/Petitioner
v.
**Addus Healthcare**
Employer/Respondent

Case # 14 WC 01381

16IWCC0489

An *Application for Adjustment 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 **January 19, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

**FINDINGS**

On **December 27, 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 **$16,952.56**; the average weekly wage was **$326.01**.

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

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

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

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

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

**ORDER**

The Arbitrator finds that Petitioner did not suffer an accident which arose out of and in the course of her employment. Because no compensable accident occurred, benefits are denied.

Due to the Arbitrator's findings on the issues of accident and causation, all other issues are rendered moot.

Therefore, compensation is hereby denied.

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

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

David A. Kane
Signature of Arbitrator

**February 3, 2016**
Date



FEB 3 - 2016

16IWCC0489

**BEFORE THE STATE OF ILLINOIS WORKERS' COMPENSATION COMMISSION**

| | | |
|---|---|---|
| Katie Bell, Petitioner, | ) | |
| v. | ) | No. 14 WC 01381 |
| Addus Health Care Respondent. | ) | |

# ADDENDUM

## Statement of Facts

On December 27, 2013, Katie Bell, the petitioner, was employed as a home health aide for Addus, the respondent. On that date, the petitioner suffered an injury to her left foot/ankle when she tripped on a chair in her own home. The primary question in issue is whether that accident arose out of an in the course of the petitioner's employment with the respondent.

On December 27, 2013, the petitioner was assigned to work with two clients, Ms. Annie Lawson and Mr. Ricky Nathan. The petitioner worked for Ms. Lawson for 2-6 hours in the morning after which she had a break of approximately 1 hour. The petitioner was then assigned to begin work for Mr. Nathan at 1:00 p.m. and she testified that the number of hours with Mr. Nathan varied each day. The petitioner testified that Mr. Nathan is wheelchair bound as he is paralyzed for the waist down.

The petitioner's job duties include assisting her client's with non-medical services and support in accordance with the client's care plan. (Resp. Ex. #4) According to Mr. Nathan's care plan, the petitioner's primary tasks were to assist with eating, bathing, dressing, incontinence, preparing meals, and house work with each of these tasks to be performed between 19 and 23 days per month. Additional tasks to be performed 1 to 8 days each month included grooming, managing money, laundry and "outside home". (Resp. Ex. #5) For "outside home" work, the petitioner would provide transportation and assistance her client for running errands such as grocery shopping. When the petitioner transported a client, she drove her own, personal vehicle which was not provided by the respondent. The petitioner testified that, on December 27, 2013, she was driving a PT Cruiser which was a four door vehicle with a trunk.

The petitioner testified that the day prior to the alleged accident, she completed her work with Mr. Nathan and then went to a store to buy products for him while she was off the clock. The petitioner stated that the products were purchased with cash Mr. Nathan had provided. She then took those products to her home. According to the "Employee Injury Report and Statement" completed by the petitioner, she had the Mr. Nathan's detergent and bleach at her home on December 27, 2013. The petitioner did not testify that there were any perishable groceries or other products at her home for her client.

According to the testimony presented by Ms. Cassandra Pharrow, a representative from Addus who is responsible for employee training and maintaining and enforcing company policies, if

an employee takes cash from a client in order to purchase products without the client present, the employee must report the transaction and complete a form which indicates the amount of cash provided, the location at which purchases were made, the amount of the purchase and the amount of change returned to the client. The petitioner did not present any testimony or evidence to dispute the existence of this policy and did not give any indication that she was not aware of the requirement to report such cash transactions. Ms. Pharrow testified that this policy is in place and is important to the respondent in order avoid any co-mingling of funds or any appearance of impropriety on the part of the employee. Ms. Pharrow testified that the petitioner did not complete the required forms and the respondent therefore had no record of the transaction between the petitioner and her client or of the petitioner making purchases for her client without him present. Ms. Pharrow stated that the petitioner would have been disciplined for failing to follow company policy if the respondent was aware that she was making purchases with the client's money without notifying the respondent and completing the required forms.

On December 27, 2013, the petitioner performed her regular work with her first client, Ms. Lawson and she testified that she then proceeded to Mr. Lawson's home. According to her testimony, she picked up Mr. Lawson and took him out to run errands which were to include a stop at the Post Office and at Walgreens to pick up his prescription medication. Ms. Pharrow testified that the respondent has no record of the petitioner beginning work for Mr. Nathan on that date. Ms. Pharrow testified that employees are required to call in to

their supervisor from the client's home phone at the start of their work hours for a client in order to "clock in". Ms. Pharrow testified that the petitioner did not do so on December 27, 2013 and the respondent therefore had no record of the time she began work with Mr. Nathan on that date. The petitioner provided no testimony or documentation to the contrary and no explanation for the fact that she did not clock in to account for her work with Mr. Nathan on that day.

While running errands with Mr. Nathan, the petitioner testified that she stopped at her own home in order to pick up the products she had bought for Mr. Nathan the night before. Her written injury report also shows that the purpose of the stop at her home was to pick up her own timesheet, a single piece of paper. According to pages 15-16 of the Addus policies, employees are always required to take a timesheet to work with them for the client to sign. That document is to be signed by the client each day before the employee leaves work. (Resp. Ex. #6) Ms. Pharrow testified that the timesheet has to be signed each day and an employee is not allowed to have a client sign for multiple days at one time. The petitioner presented no testimony to dispute this policy or to indicate that she was not required to follow the policy. The petitioner also presented no testimony as to the reason why she did not take the timesheet with her at the beginning of her work day.

When the petitioner stopped at home, her client remained in the car while she went inside for his products. While inside, the petitioner's sock caught on a chair causing her to fall and injure her left foot/ankle. The petitioner testified that her partner, Andrea, called 911 and she was transported to the hospital via ambulance. The

medical records show that the petitioner was treated at St. James Hospital for a closed fracture of the left distal fibula and ankle dislocation.

On January 8, 2014, the petitioner underwent surgery to the ankle which included open reduction and internal fixation. The petitioner's post-operative treatment included physical therapy and periodic appointments with Dr. Michael Kornblatt. On May 6, 2014, Dr. Kornblatt released the petitioner to return to work the following Monday. On July 15, 2014, the medical records show that the petitioner's ankle was stable with a healed fracture in anatomical position. She was advised to continue independent exercise and utilization of an elastic ankle support and she was released from treatment.

The petitioner did, in fact, return to work for the respondent on May 15, 2014 and that she has continued working in her full duty capacity since that time. She testified that she experiences some ongoing pain and swelling in the ankle but that she is able to perform her regular job without restriction.

Ms. Pharrow provided further testimony regarding policies put in place by the respondent which are meant to ensure the best interests of the respondent and its employees. These include policies against accepting gifts from clients, having access to a client's debit card, credit card or bank account and providing a client with an employee's home address or telephone number. Ms. Pharrow stated that these policies are essential to maintaining a professional relationship between the employee and the client and preventing any appearance of impropriety. Ms. Pharrow further testified that the

respondent emphasizes to its employees that they are employed by Addus, not by the client. When questioned, Ms. Pharrow clarified that this would mean that any "authorization" referred to in the company policies and client services plans, such as "shopping or running errands, only as authorized" and not volunteering "to perform tasks not authorized by the Supervisor", would refer to authorization provided by the respondent, not the client. Ms. Pharrow stated that an employee who is known to have violated a company policy would face discipline, up to and potentially including termination and those policies are regularly enforced. Ms. Pharrow testified that the respondent was not aware of the petitioner's violation of company policies including taking cash from a client for purchases without providing documentation, failing to take her timesheet with her to her client's home, and bringing her client to her own home address and the petitioner would have been disciplined if the respondent had been aware of those violations.

The petitioner acknowledged that she had received training at the time of her hiring by the respondent and that she was required to participate in four inservice programs per year in order to undergo further training, including training on company policies. Ms. Pharrow testified that every employee, including the petitioner, is provided with a company handbook outlining the company polies upon their hire. The petitioner did not dispute that fact and provided no testimony to suggest that she was unaware of the company policies or procedures to which Ms. Pharrow testified.

## Conclusions of Law

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

The Arbitrator finds that the petitioner did not suffer an injury which arose out of and in the course of her employment by the respondent. The Arbitrator's conclusion is supported by the testimony of the petitioner, the respondent's witness and the documentary evidence.

An employee's injury is compensable under the Act only if it arises out of and in the course of her employment and both elements must be present. *Illinois Bell Telephone Co. v. Industrial Comm'n,* 131 Ill.2d 478, 483, 137 Ill.Dec. 658, 546 N.E.2d 603 (1989). "In the course of" refers to the time, place and circumstances under which the accident occurred. And an injury "arises out of" one's employment if there is a causal connection between the employment and the accidental injury, *i.e.* the injury has its origin in some risk connected with, or incidental to, the employment or the injury is caused by some risk to which the employee is exposed to a greater degree than the general public by virtue of her employment. *Caterpiller Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 57, 133 Ill.Dec. 454, 541 N.E.2d 665 (1989).

The Arbitrator finds that the petitioner failed to satisfy her burden of proof that the injuries suffered on December 27, 2013 occurred in the course of her employment. While she testified that she had picked up Mr. Nathan prior to stopping at her home, the evidence shows that the respondent had no record of the petitioner

clocking in to begin her work with Mr. Nathan on that date and the petitioner presented no testimony to dispute that fact. A timesheet which included a start time was eventually provided to the respondent but the petitioner failed to follow the daily procedure to call in to report her start of work with Mr. Nathan on December 27, 2013. Ms. Pharrow testified that the petitioner's work with Mr. Nathan was scheduled to begin at 1:00 p.m. on December 27, 2013 while the EMS records relating to the accident show that EMS reported to the petitioner's home at approximately 1:00 p.m. The petitioner presented no testimony as to why she would have started work with Mr. Nathan earlier than scheduled and she clearly testified that she would perform tasks for Mr. Nathan while she was not working and not getting paid by Addus. Thus, the timeline of events combined with the undisputed testimony that the respondent had no record of the petitioner beginning her work with Mr. Nathan prior to the accident having occurred lead the Arbitrator to conclude that the petitioner failed to prove that her injuries occurred in the course of her employment for the respondent.

The Arbitrator further finds that the petitioner failed to satisfy her burden of proof that the injuries arose out of her employment with the respondent. In the present case, the petitioner would be considered to be a traveling employee at the time of the accident as she was required to travel away from her work location, the client's home, in order to perform her job. The test of whether a traveling employee's injuries arose out of and in the course of employment is the reasonableness of the conduct in which she was engaged at the time of the injury and whether the conduct might have been

anticipated or foreseen by the employer. *Venture-Newberg Perini Stone & Webster v. Illinois Workers' Compensation Comm'n,* 2012 IL App (4th) 110847 WC, 12, 367 Ill.Dec. 363, 981 N.E.2d 1091. The Arbitrator finds that the petitioner's actions were neither reasonable nor foreseeable based upon the testimony and documentary evidence.

The petitioner testified that she did not take Mr. Nathan's "groceries" with her at the start of her day because she had to transport Ms. Lawson, a wheelchair bound client, to a doctor's appointment in the morning. However, it is clear that the products purchased for Mr. Nathan would have fit in her vehicle with the client and the wheelchair. As indicated above, the petitioner was driving a four door vehicle with a trunk on the date of the accident. The products purchased for Mr. Nathan could have been placed in the backseat or trunk in the morning. The petitioner's suggestion that the products would not have fit in the car with her first client of the day is disingenuous given that, her own testimony shows that they would have fit in her car when Mr. Nathan, who was also wheelchair bound, was in the vehicle. The injury report completed by the petitioner following the accident states that she stopped at her home to pick up detergent and bleach for washing. There is no evidence that the items to be picked up included any perishable goods which could not have been kept in the vehicle from the start of the day.

Furthermore, the petitioner presented no evidence of any urgency for having the detergent and bleach at Mr. Nathan's house that day. There was no testimony that the client was out of those products or that the petitioner was required to perform the washing

tasks on the date of the accident. While the petitioner testified that she generally did the client's laundry on a specific day each week and needed the products to do laundry that day, she also testified that she worked 6 days per week with Mr. Nathan. A review of Mr. Nathan's services plan shows that she was only required to do laundry for this client 8 days per month for a total of four hours per month. (Resp. Ex. #5). The petitioner also testified that her client did not request that she purchase the products at any specific store and she would have been taking the client to Walgreens, a store where she could have purchased the detergent and bleach, after the stop at the Post Office.

By the petitioner's own testimony, the petitioner's home and those of her clients were all in the same general area and were fairly close to each other. Per Ms. Pharrow's undisputed testimony, the petitioner was scheduled to begin work for Mr. Nathan at 1:00 p.m. on December 27, 2013. The petitioner testified that she completed her work with Ms. Lawson at approximately 12:00 p.m. that day and there was no evidence presented to suggest that the petitioner had to begin work for Mr. Nathan earlier than scheduled. Therefore, the proximity of the petitioner's home to her work location and the timeline of events that day show that, even if she chose not to take the products for Mr. Nathan and her timesheet with her to her first assignment, she could have stopped at her home prior to picking up Mr. Nathan. All of these facts show that there were no demands or exigencies of the job which required Ms. Bell to violate company policies and stop at her home with her client present on that date in order to pick up the detergent and bleach. Therefore, her actions which led to her injury on December 27, 2013 can not be deemed reasonable.

As stated above, the Arbitrator also finds that the petitioner's actions could not have been anticipated or foreseen by the respondent. As Ms. Pharrow testified, the respondent has several policies in place which are meant to avoid situations which could be viewed as improper and which would have alerted the respondent to the petitioner's actions. By failing to adhere to those policies, the petitioner actually prevented the respondent from anticipating her actions. The petitioner's failure to follow the procedures which would have required her to complete a report when she took cash from a client to make purchases without him present, made it impossible for the respondent to anticipate or foresee that she would then take the items purchased to her own home and to stop at her home with the client present in order to retrieve them. Not only did the petitioner fail to alert the respondent through the required procedure, but she specifically testified that she did not notify her supervisor or anyone at Addus of her actions.

The petitioner also testified that she had not been disciplined for any policy violations. She did not present any testimony or evidence to suggest that the respondent was aware of her actions or that she was not disciplined for known violations. Furthermore, there was no evidence to dispute Ms. Pharrow's testimony that all known violations of company policy, by any employee, result in discipline. This provides further evidence in support of the conclusion that the petitioner's actions were not foreseeable to the respondent.

The Arbitrator also finds that the petitioner was acting in her own interests, not the interests of the respondent, when she stopped at her home on December 27, 2013. The company policies state that

the petitioner was required to take her timesheet with her to her client's home to be signed by the client on each day of work. The policy further states "failure to adhere to this procedure may result in delayed processing of your timesheet". (Resp. Ex. #6). Whether the petitioner forgot or chose not to take her timesheet with her before picking up her client, it is clear that the need to pick it up from her home before the end of her work day was a personal need to her sole benefit and provided no benefit to the respondent.

The Arbitrator acknowledges that the Appellate Court of Illinois found injuries suffered by a traveling employee during a stop at her own home between assignments did arise out of and in the course of her employment in *Mlynarczyk v. Illinois Workers' Compensation Commission* 2013 IL App (3d) 120411WC (2013). However, the Arbitrator finds that the present case is distinguishable from the facts in *Mlynarczyk,* for several reasons. In *Mlynarczyk,* the employer provided a vehicle to the employee and was aware that the employee used the vehicle to travel to her home for breaks between assignments. There was no indication in that case that the employee's actions were not reasonable or foreseeable by the employer. Further, in finding the case to be compensable the Appellate Court stated that the claimant's injuries occurred on a public sidewalk, not the claimant's personal property and specifically relied upon an analysis of whether the petitioner was exposed to the hazards of the street. In the present case, the Arbitrator has concluded that the petitioner's actions were not reasonable and foreseeable. Also, most significantly, the petitioner's injuries occurred within her own home, not in a location which exposed her to the

hazards of the streets. The petitioner specifically testified that the fall occurred in her own home when she tripped of a chair that was placed by her or a member of her household. There was no set of facts presented to suggest that the petitioner's injuries were caused by a hazard to which she was exposed to a greater degree by virtue of her job duties. Therefore, the analysis used by the Appellate Court in *Mlynarczyk*, does not apply to the facts at hand.

Instead, the Arbitrator looks to the cases of *Hoffman v. Industrial Commission of Illinois,* 470 N.E.2d 507, 83 Ill.Dec. 381, 21 Ed. Law Rep. 274, and *Heinkel v. Metro Medical Service,* 09 IL.W.C. 07536 (Ill.Indus.Com'n), 13 I.W.C.C. 0085, 2013 WL 769266, for guidance. In *Hoffman,* the claimant, a nurse employed a director of health services for a regional office of education, sought benefits for an injury suffered when she stopped at a store on her way back to the regional office after visiting schools in outlying areas. The Appellate Court held that the nurse was a traveling employee but her injuries did not arise out of or in the course of her employment. In that case, the petitioner testified that she stopped at the store in order to pick up pen, tables and benches for a staff meeting which was to take place at her home on an unspecified date. The Court stated that there was no showing that there was any urgent and immediate necessity to obtain the items on the day of the injury. They further noted that there had been no discussion regarding the purchase of the tables and chairs. The combination of these factors led to the conclusion that the acts of the claimant were nor reasonable or foreseeable by the respondent. Similarly, in the case at bar, the there was not showing that there was any urgent or immediate necessity to obtain

the detergent and bleach from the petitioner's home and no discussion between the petitioner and the respondent regarding the items being purchased for the client. Therefore, the Arbitrator's conclusion that the petitioner's actions were not reasonable or foreseeable in the present case is supported by the Appellate Court's analysis in *Hoffman.*

In *Heinkel*, the Commission found that the petitioner failed to prove that he sustained accidental injuries arising out of his employment as a paramedic when he stopped at his home with his partner while returning to the station in order to obtain equipment and material which he needed to repair damage to drywall at his employer's location. In that case, the respondent agreed that the petitioner was a travelling employee but argued that the stop at his home was unforeseeable and was a deviation that took him out of the course of his employment. The evidence showed that the petitioner was not directed to pick up the materials by the respondent and had no urgency to obtain the materials. The Commission found that the stop was for the petitioner's own purposes and was not reasonable or foreseeable from the employer's perspective. Referencing the *Hoffman* decision, the Commission in *Heinkel* also noted that the petitioner did not have to deviate from his return to the station and stop at his home to collect supplies on that date.

These facts are akin to those in the present case. In *Heinkel*, the petitioner had his partner with him when he made the stop at his home just as the petitioner had her client present with her when she stopped at home. Similarly, as in *Heinkel*, the petitioner in this case presented no evidence that the stop to pick up products for her client

had to be done that day and her need to pick up her timesheet shows that it was for her own purposes.

Based upon all of the information above, the Arbitrator concludes that the petitioner's actions were not reasonable or foreseeable and her accident did not arise out of or in the course of her employment with the respondent.

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

Given that the Arbitrator has found that the petitioner did not suffer an injury which arose out of an in the course of her employment, the question of causation is moot and the Arbitrator finds that the petitioner's condition of ill-being is not causally related to any compensable injury or accident.

Due to the Arbitrator's findings on the issues of accident and causation, all other issues are rendered moot.

Therefore, compensation is hereby denied.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alphonso Alexander,

Petitioner,

vs.

NO: 08WC 27369

16IWCC0490

PACE Suburban Bus Company,

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 15, 2015, is hereby affirmed and adopted.

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

16IWCC0490

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: JUL 2 6 2016
o060916
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

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

**ALEXANDER, ALPHONSO**
Employee/Petitioner

Case# **08WC027369**

**16IWCC0490**

**PACE SUBURBAN BUS COMPANY**
Employer/Respondent

On 12/15/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.58% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

1505 SLAVIN & SLAVIN
PATRICK SHIFLEY
20 N CLARK ST SUITE 510
CHICAGO, IL 60603

16IWCC0490

A Alexander v PACE Suburban Bus Co., 08 WC 027369

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)

**Alphonso Alexander**
Employee/Petitioner

v.

**PACE Suburban Bus Company**
Employer/Respondent

Case # 08 WC 027369

An *Application for Adjustment 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 **January 15, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **3/22/2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$41,442.37**; the average weekly wage was **$796.97**.

On the date of accident, Petitioner was **58** 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 **$74,770.11** for TTD, **$.00** for TPD, **$.00** for maintenance, and **$.00** for other benefits, for a total credit of **$74,770.11**.

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

ORDER

- Respondent shall pay Petitioner **temporary total disability benefits of $ 531.31/week for 302 4/7ths** weeks, from **3/25/2008-5/4/2008** and **5/8/2008-1/15/2014**, as provided in Section 8(b) of the Act,
- Respondent shall pay the further sum of **$ 1,923.50** for necessary medical services, as provided in Sections 8(a) and 8.2 of the Act.
- Respondent shall authorize and pay for the tendon transfer procedure and pain management services offered by Dr. Pinzur, along with all related services.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

Arbitrator Jeffrey Huebsch

December 15, 2015
Date

ICArbDec19(b)



DEC 15 2015

## FINDINGS OF FACT

Petitioner was employed by Respondent as a Bus Operator. He was hired in 2004. As a suburban bus operator, Petitioner had to drive a 40,000 pound bus in stop and go traffic. He was required to have a CDL license. Petitioner was a Type II diabetic, since age 25. He had no problems with his right foot and ankle prior to the date of the alleged accident.

On March 22, 2008, Petitioner injured his right foot, getting off his bus when he stepped onto a rock and rolled his right ankle. The accident occurred at the end of Petitioner's shift, inside of Respondent's terminal. Petitioner noticed pain in his right ankle and it was hard to put pressure on his foot. Petitioner testified that he did not report the incident since he did not think it was serious at first. He went home and iced it. Petitioner testified that he did report the accident on the following work day since the pain persisted.

On March 24, 2008, Petitioner presented to the Emergency Room at Westlake Hospital. Petitioner was diagnosed with a severe ankle sprain. No fracture was noted in x-rays that were taken. Petitioner was provided crutches and discharged. Petitioner was placed on light duty work, with no driving.

On March 25, 2008, after reporting the injury to his employer, Petitioner presented to Respondent's clinic, Alexian Brothers Occupational Medicine Clinic. Petitioner provided a consistent history of injuring his right ankle at 7:40 pm on March 22, 2008 and presenting to Westlake Hospital E.R. Dr. Jennifer Sabath diagnosed Petitioner with an ankle sprain/strain. X-rays taken were negative. The doctor ordered an air cast and crutches. Petitioner was placed on sedentary work only. TTD benefits were initiated.

Petitioner returned to Dr. Sabath on March 29, 2008. The air cast was removed from Petitioner's foot to evaluate. The doctor noted mild swelling and tenderness. The cast was replaced.

On April 1, 2008, Petitioner was again seen by Dr. Sabath. Petitioner was placed on restricted work duties of alternating standing and sitting with no walking or climbing. Petitioner was also prescribed pain medication. The doctor recommended a follow up appointment in the orthopedic department.

Petitioner returned to Alexian Brothers on April 8, 2008. Petitioner was instructed to continue wearing the air cast at work and to continue the previous work restrictions. Petitioner next was seen at Alexian Brothers on April 11, 2008 to consult with Dr. Sindhu Perumal. Petitioner was released to modified work duties of alternating sitting and standing but it was noted that no light duty was available, so Petitioner remained off work. Therapy was prescribed. Petitioner returned to Alexian Brothers on April 17, 2008. Petitioner's work restrictions were continued and he was still unable to work, due to light duty not being available.

On April 21, 2008, Petitioner began a course of physical therapy at Accelerated Rehabilitation Centers. Petitioner continued to receive therapy at Accelerated through the end of the year. Petitioner returned to Alexian Brothers on April 24, 2008. Petitioner's restricted work duties were continued, as well as the use of the splint and physical therapy.

On May 1, 2008, Petitioner was again seen by Dr. Sabath at Alexian Brothers. Petitioner asked to be placed on regular work duties. Dr. Sabath released Petitioner to return to full duty work on May 5, 2008 and instructed him to continue physical therapy.

Petitioner returned to Alexian Brothers on May 8, 2008. Petitioner reported that he had worked a full shift the day before and now was experiencing increased pain, especially when walking and using the brake/gas pedals. Petitioner was referred to Dr. Howard Freedburg, an orthopedic surgeon, for evaluation. Petitioner's work restrictions were reduced to "limited repetitive motion."

On May 30, 2008, Petitioner underwent an MRI of the right ankle. The study revealed a ruptured anterior tibial tendon with edema and hematoma.

Petitioner was seen by Dr. Freedburg on June 3, 2008. Dr. Freedburg reviewed the MRI and recommended surgery. Petitioner was taken off of work until after surgery was performed. Dr. Freeburg noted that Petitioner needed to be at full duty capability in order to return to work.

On June 16, 2008, Petitioner was seen for an IME by Dr. Vinci. Dr. Vinci concurred with the recommendation for surgery.

On July 7, 2008, Petitioner underwent a right anterior tibialis reconstruction procedure at Alexian Brothers by Dr. Freedburg. The surgery was performed without complication. Petitioner returned for follow up on July 15, 2008 with Dr. Freedburg. Petitioner was continued off of work until further notice.

On August 12, 2008, Dr. Freedberg recommended that Petitioner begin physical therapy. On September 16, 2008 and October 14, 2008, Dr. Freedberg approved more physical therapy at Accelerated. Petitioner returned to Alexian Brothers' Bensenville location for several follow up visits from May 17, 2008 through December 9, 2008. Petitioner was continued off of work during this time. Petitioner was prescribed further physical therapy by Dr. Freedberg on December 10, 2008.

On January 13, 2009, Petitioner returned to Alexian Brothers. Petitioner was noted to still be suffering from pain. An orthopedic boot was recommended. Petitioner was instructed to return in one month.

Petitioner was scheduled for a repeat IME on February 11, 2009 with Dr. Vinci. Dr. Vinci agreed with Dr. Freedburg that Petitioner should continue physical therapy and wear a brace. Dr. Vinci released Petitioner to sedentary work.

On February 17, 2009, Petitioner returned to Alexian Brothers. Petitioner reiterated what Dr. Vinci had told him during his IME. Petitioner still had not received his orthopedic boot. Petitioner followed up again on March 24, 2009 and April 28, 2009. Petitioner noted that he did not feel safe driving a bus at that time. Petitioner did receive the orthopedic boot. The doctor continued Petitioner off of work and ordered an MRI.

On May 12, 2009, Petitioner returned to Alexian Brothers. The doctor reviewed petitioner's MRI which showed a cyst had developed adjacent to the tendon. Petitioner had been scheduled for a second opinion from Dr. Belich. Petitioner was continued off of work.

On May 19, 2009, Petitioner returned to Dr. Vinci for a third evaluation. Dr. Vinci recommended that Petitioner undergo work hardening followed by an FCE.

Petitioner returned to Alexian Brothers on June 30, 2009. The IME report from Dr. Vinci was reviwed. The doctor noted that Dr. Vinci wanted Petitioner to undergo an FCE and placed Petitioner at maximum medical improvement. Petitioner was continued off of work.

Dr. Freedburg reviewed Dr. Belich's report with Petitioner on July 14, 2009. Dr. Freedburg disagreed with Dr. Belich that further conservative treatment should be pursued since Petitioner had been pursuing conservative treatment for over a year since his surgery. Petitioner had a flip/flop foot. Dr. Freedburg suggested that Petitioner may need further surgery involving repair or possible tendon transfer and that the only other option was to have an FCE. If there was no surgery, Dr. Freedburg believed that Petitioner would not be able to return to his former occupation and would be left in great pain.

On August 17, 2009, Petitioner presented for an IME with Dr. Armen Kelikian at Northwestern Orthopaedic Institute at the request of Respondent. Dr. Kelikian ordered an ultrasound of Petitioner's ankle. Dr. Kelikian recommended that Petitioner undergo a gastroc resection or an allograft with re-repair. Dr. Kelikian noted that surveillance video shows petitioner walking and driving his personal vehicle without significant trouble.

Dr. Freedburg continued to endorse surgery on September 22, 2009. The doctor noted that an ultrasound of Petitioner's ankle showed muscle atrophy but no re-tear of the tendon.

Petitioner returned in follow up with Dr. Freedburg on November 24, 2009. Dr. Freedburg noted that he had spoken with Dr. Kelikian regarding potential surgery. Dr. Kelikian believed that the only necessary surgery was a Strayer gastrocnemius resection. Dr. Freedburg discussed the Strayer procedure, along with exploration surgery of the anterior tibialis tendon with tenolysis with Petitioner, who stated that he could not deal with the pain and wanted to proceed.

On December 11, 2009, Petitioner underwent a second surgery by Dr. Freedburg at St. Alexius Medical Center. Dr. Freeburg performed a right Strayer gastrocnemius resection with tenotomy of the plantar tendon and open anterior tibialis tenolysis with repair, debridement and removal of multiple sutures.

Petitioner followed up post-operatively on December 15, 2009. Petitioner's ankle seemed to be healing well and Dr. Freedburg prescribed physical therapy and continued to take Petitioner off of work.

Petitioner presented for a new PT initial evaluation at Accelerated Rehabilitation on December 17, 2009. Petitioner continued to receive therapy until April of 2010.

Petitioner followed up post-surgery on January 19, 2010 with Dr. Freedburg. Petitioner noted significant improvement with motion. Dr. Freedburg noted that Petitioner should aggressively pursue physical therapy and electrical muscle stimulation. Petitioner was continued off of work.

Petitioner followed up once more with Dr. Freedburg on February 16, 2010. The doctor noted that Petitioner was making some improvement but Petitioner's pain tolerance was low and it was hindering his progress.

On March 16, 2010 Petitioner again returned to Dr. Freedburg. Petitioner continued to make progress and it was estimated that Petitioner would be able to return to work on April 13, 2010.

Accelerated Rehabilitation recommended that Petitioner undergo work conditioning and an FCE and be discharged from physical therapy on April 8, 2010. On April 13, 2010, Dr. Freedberg reviewed the physical therapist's recommendations and agreed to progress Petitioner to work conditioning, followed by an FCE. Dr. Freedburg concluded that Petitioner was not able to return to work yet.

On May 20, 2010, Petitioner underwent an FCE evaluation at Accelerated Rehabilitation Center. Petitioner's exam was determined to be valid and he was placed at a sedentary work level. The driving simulation portion of the FCE showed that Petitioner could flex his right foot against 3.5# of force times 55 minutes. Petitioner testified that the bus simulation did not require the same foot pressure as is required to drive a 40' bus. Respondent's Job Analysis for a bus operator shows depressing the brake (beak?) requires up to 20# of force. (ResEx. 13)

On June 8, 2010 Petitioner was released to return to work without restrictions. Petitioner was told to report to the employer for classroom training, as well as required bus driving with an instructor before he was permitted to return to the position of bus operator.

On or about June 16, 2010, Petitioner attempted to operate a bus with an instructor. Petitioner reported that he was unable to properly operate the pedals with his right foot secondary to weakness and pain. He felt that he could not operate the bus' brake pedal safely. His foot was in pain.

Petitioner reported to the Emergency Room at Westlake Hospital on June 20, 2010 complaining of foot pain and calf pain. Petitioner gave a history of the pain beginning when he was practicing driving a PACE bus for work for two days prior. Petitioner was provided vicodin and instructed to follow up with Dr. Freedburg. No work status was evaluated.

Petitioner returned to Dr. Freedburg on June 22, 2010. X-rays did not reveal any abnormalities. Dr. Freedburg continued Petitioner on full duty.

Petitioner testified that on the recommendation of the Respondent's nurse case manager he then sought out a second opinion from Dr. Pinzur of Loyola. Petitioner presented to Dr. Pinzur on August 3, 2010. Petitioner reported that he was unable to work due to muscle pain and weakness and insecurity about those issues. Dr. Pinzur placed Petitioner at light duty capabilities. Dr. Pinzur stated that Petitioner needed an ankle-foot orthosis and should return for re-evaluation in 4-6 weeks to determine work capabilities.

On September 10, 2010, Petitioner returned to Dr. Kelikian for a repeat IME. Dr. Kelikian noted that Petitioner was greatly improved and placed him at maximum medical improvement. Dr. Kelikian suggested an FCE to assess validity.

Petitioner presented to Dr. Pinzur on September 21, 2010. Dr. Pinzur noted that the ankle brace was working well but that it did not help alleviate Petitioner's pain. Petitioner was referred to pain management specialists to undergo a possible nerve block. Dr. Pinzur suggested that if the nerve block was ineffective then Petitioner should be treated by Dr. Harden at Rehabilitation Institute of Chicago. Petitioner was taken off of work until he could be evaluated by the pain management specialists.

On January 4, 2011, Petitioner returned to Dr. Pinzur. Petitioner noted that he was no longer covered under workers' compensation insurance. Petitioner complained of continued foot pain. Dr. Pinzur noted that Petitioner was still wearing an ankle brace and referred Petitioner to a pain management doctor.

The deposition of Dr. Michael Pinzur was taken by Petitioner on August 25, 2011 and October 31, 2013. Dr. Pinzur opined that Petitioner may benefit from further surgery to improve foot and ankle function. Dr. Pinzur opined that the job duties of a bus driver were higher than sedentary. Dr. Pinzur also opined that the FCE, performed in May of 2010, was inaccurate since it did not take into account the dexterity of Petitioner's ankle

and his ability to move his foot from the gas pedal to brake pedal. Dr. Pinzur did not think that Petitioner possessed this dexterity. Dr. Pinzur disagreed with Dr. Perns's opinion that the tendon rupture was spontaneous and stated that it was in fact due to the injury described. Dr. Pinzur further noted that the text relied upon by Dr. Perns was an opinion piece from a podiatric textbook, without citation to any references and not a study.

Respondent deposed two experts, Dr. Kelikian and also Dr. Perns. Dr. Kelikian agreed that Petitioner's condition of ill-being was caused by the work accident, but that he did not agree with Dr. Pinzur's recommendation for surgery. Dr. Kelikian did, however, agree that Dr. Pinzur was a highly qualified and experienced surgeon and one that he would consult if he had an issue with a patient. Dr. Kelikian said that Dr. Pinzur was one of the top 3 or 4 expert physicians on the diabetic foot in the world. Respondent's second expert, Dr. Perns, testified that Petitioner's condition of ill-being was due to a spontaneous rupture solely attributed to his diabetes and not the result of the work accident. Dr. Perns also testified that the surgery recommended by Dr. Pinzur was necessary, contradicting the opinion of Respondent's first expert Dr. Kelikian.

Respondent presented the testimony of Shari Pappas, Respondent's Safety and Training Manager. Ms. Pappas testified that she did have a file on this workers' compensation claim, but that she did not bring it with her to testify and was relying solely upon her memory. According to Ms. Pappas, Petitioner refused to return to work after the training episode in June of 2010 and was later fired for failing to maintain his CDL. Ms. Pappas was unable to provide any answer as to why the Petitioner's surgery was not authorized since her own expert, Dr. Perns, testified it was necessary, and in fact appeared to not even be aware that a surgery had been proposed. Ms. Pappas also was unable to provide any basis for the recently raised dispute as to accident, other than testifying that after the accident was reported she went to where the bus was parked and could not find the rock Petitioner claimed he rolled his foot on. She did admit, however, that there were rocks in the garage where the incident occurred. The garage holds 97 40' x 10.5' buses. This investigation took place in a bus garage days after the accident occurred. Ms. Pappas had no direct knowledge as to what happened while Petitioner was engaged in the road test with the instructor. Petitioner's foot or ankle hurt and Petitioner could not drive, per the instructor. Pappas was not aware that Dr. Pinzur agreed that it would not be safe for Petitioner to return to work driving a bus with responsibility for the safety of passengers. Pappas would not let a person with the restrictions given by Dr. Pinzur drive a bus for Respondent. Petitioner was not offered other employment with Respondent. Pappas did not know if Petitioner was eligible for re-hire. Petitioner did not contact Pappas regarding return to work or benefits.

Petitioner testified that he has foot pain and balance issues. He does not think that he can properly move his foot from the gas pedal to the brake pedal on a bus. He can drive his car. The bus pedal requires more pressure and you have to hold the brake to let passengers on and off the bus. Petitioner has not returned to work. He wants the surgery offered by Dr. Pinzur in order to correct his foot problems.

## CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Petitioner's testimony is found to be credible.

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

The Arbitrator finds that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent of March 22, 2008 when he rolled his right ankle on a rock, exiting his bus in respondent's garage. This finding is based upon the credible and unrebutted testimony of Petitioner and the medical records. Dr. Perns' opinion that Petitioner's injury was due to a spontaneous rupture of the anterior tibialis tendon related to Petitioner's diabetic condition is not persuasive in this case.

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

Petitioner's current condition of ill-being regarding his right foot and ankle (Status post anterior tibialis tendon rupture, with surgical repair times two, with not favorable result) is causally related to the injury, based upon Petitioner's testimony, the medical records and the credible and persuasive causal connection opinions of Drs. Pinzur and Kelikian.

Dr. Pinzur and Dr. Kelikian are well respected board certified orthopedic surgeons, with decades of clinical experience, who specialize in treatment of the foot and ankle. They have treated Petitioner's condition many times and their opinion on causation is given great weight.

Dr. Perns' opinion that the tendon rupture was spontaneous and due to Petitioner's diabetic condition is not persuasive. He has never treated a ruptured tibialis tendon. His opinion was based upon an article in a podiatric text.

**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 medical bills submitted as Petitioner's Exhibit 11 are found to be reasonable and necessary to cure or relieve the effects of the injury and the same are awarded, in the amount of $1,923.50, pursuant to §§ 8(a) and 8.2 of the Act. Respondent is entitled to a credit for all awarded bills that have been paid.

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

Based upon the Arbitrator's findings above with respect to accident and causation and the credible and persuasive opinion of Dr. Pinzur, the proposed surgery by Dr. Pinzur and follow-up pain management is found to be reasonable, necessary and causally related to the injury. Dr. Pinzur did opine that the surgery would

improve foot and ankle function and pain management would possibly relieve Petitioner's pain complaints, which could be neuropathic in nature. Accordingly, Respondent is ordered to authorize and pay for the tendon transfer surgery offered by Dr. Pinzur, along with the recommended pain management treatment and all services related thereto.

**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 has not reached MMI. Dr. Pinzur's recommended treatment has not been completed. Dr. Kelikian's opinion on this issue is not persuasive. Petitioner is entitled to TTD until his condition stabilizes and he reaches MMI. Interstate Scaffolding v. Workers' Compensation Comm'n, 236 Ill.2d 132 (2010)

Dr. Pinzur's opinion that Petitioner is disabled from work as a bus driver is found to be persuasive. Dr. Pinzur is Petitioner's treating physician and a world expert in the treatment of the diabetic foot. Dr. Kelikian's opinion that Petitioner could return to work as a bus driver is not persuasive. The FCE was said to be a part of the basis of Dr. Kelikian's opinion on return to work, and the FCE was shown to not accurately recreate brake pedal effort in operating a bus. Petitioner felt that he was not able to operate the brake and gas pedals on Respondent's bus, thereby exposing people to the possibility of injury.

Accordingly, Respondent shall pay Petitioner TTD benefits of $531.31/week for the time periods of 3/25/2008 – 5/4/2008 and 5/8/2008 – 1/15/2014, a period of 302-4/7 weeks.

**WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:**

The medical issues in this case are complicated. Even though Respondent accepted the claim and did not dispute accident until close to the time of trial, it can rely on the opinion of Dr. Perns in disputing causal connection and accident. It can also rely upon the opinion of Dr. Kelikian in disputing TTD. Respondent's disputes were in good faith and are found to not be unreasonable or vexatious. Thus, Petitioner's claim for penalties and attorney's fees is denied.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Gill,

Petitioner,

vs.

NO: 10WC 15607

16IWCC0491

ABF Freight System Inc.,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, 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 November 17, 2015, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: JUL 26 2016
o070716
DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

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

**GILL, JAMES**
Employee/Petitioner

Case# **10WC015607**

**16IWCC0491**

**ABF FREIGHT SYSTEMS INC**
Employer/Respondent

On 11/17/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.33% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
MARK WEISBURG
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

2965 KEEFE CAMPBELL BIERY & ASSOC
TIMOTHY J O'GORMAN
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

16IWCC0491

STATE OF ILLINOIS )
)SS.
COUNTY OF Cook )

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

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## CORRECTED
## ARBITRATION DECISION
## 19(b)

**James Gill**
Employee/Petitioner

v.

**ABF Freight System Inc**
Employer/Respondent

Case # **10** WC **15607**

An *Application for Adjustment 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 A. Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **8/26/15 & 9/24/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [x] Maintenance [x] TTD
M. [x] 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, **10/1/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$93,251.08**; the average weekly wage was **$1,793.29**.

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

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

Respondent shall be given a credit of **$33,304.50** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$33,304.50**.

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 $1,195.53/week for 233 3/7 weeks, commencing 10/2/09 through 4/14/10 (27-6/7 weeks) and4/19/10 through 3/27/14 (205-4/7) , as provided in Section 8(b) of the Act.

**Maintenance**

Respondent shall pay Petitioner maintenance benefits of $1,195.53/week for 78 weeks, commencing 3/28/14 through 9/24/15, as provided in Section 8(a) of the Act, as forth below in the attached.

**Vocational Rehabilitation**

Respondent shall pay for Vocational Rehabilitation through the provider of Petitioner's choice

**Medical benefits**

Respondent shall pay reasonable and necessary medical services of $206,771.29, as provided in Section 8(a) of the Act, pursuant to the medical fee schedule.

All benefits awarded above are to be paid to petitioner through his attorney. Payment to any other entity will not be considered payment of this award and will create no credit.

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.

16IWCC0491

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

David A. Kane
Signature of Arbitrator

November 16, 2015
Date

ICArbDec19(b)

NOV 17 2015

## STATEMENT OF FACTS

10/1/09 Petitioner was driving a semi-truck with a loaded trailer when he came into a construction area with no signs stating there was uneven pavement. His truck fell off a three to four inch drop-off which made him jolt causing neck and back pain. He released off his seat approximately four inches and landed back onto the seat in a flexion-extension position. The air ride seat bottomed out as he went forward. He initially felt a stinging sensation in his back but it went away. As he continued to drive however, he had increasing complaints of neck pain, as well as low back pain. When he reached Illinois he had to stop driving, he pulled over and called 911. Medics went to get him and he was transported to the hospital via ambulance.

He was treated at Union County Hospital emergency department. The physician record states that Petitioner presented with acute onset of lower back pain while driving after he hit a bump in the road. It was noted that his injury happened while working.

CT of the lumbar spine revealed possibility of an early/minimal broad-based disc bulge at L2/L3. Examination otherwise within normal limits.

Clinical impression: acute right low back pain, acute sciatica right leg.
Diagnosis: Cervical and lumbar muscular strain.

Petitioner was treated with Toradol and Dilaudid.

10/2/09 Petitioner underwent MRI cervical spine at Radiologic Associates of Northwest Indiana.

MRI cervical lumbar Impression: Moderate osteoarthritic and discogenic degenerative change. There is mild effacement of the thecal sac and there is bilateral neural foraminal stenosis at multiple levels.

Petitioner underwent MRI lumbar spine.
Impression: Very minor osteoarthritic and discogenic

degenerative change without evidence of significant central canal or neural foraminal stenosis.

Petitioner was admitted to Pinnacle Hospital.
Discharge diagnosis: Inflammation of the spinal cord secondary to trauma from motor vehicle accident.
Dr. John Brown treated Petitioner with prednisone and placed him off work until further evaluation. He recommended that Petitioner be fit with braces for the affected areas.

10/3/09 Dr. Gene Feder examined Petitioner reviewed MRIs taken the previous day. He recommended physical therapy and cervical pain injection.

11/18/09 Petitioner was examined by Dr. Nitin Khanna at Orthopaedic Specialists of Northwest Indiana. Dr. Khanna noted Petitioner's work injury on October 1, 2009.

Dr. Khanna noted that Petitioner's MRI of the cervical spine demonstrated C3-C4 disk bulge/herniation. No evidence of significant neural compression was noted. Lumbar spine MRI was completely normal.
Petitioner was taking Vicodin, Cyclobenzaprine, Voltaren, and Acetaminophen.

Assessment: Patient with a C3-C4 disk herniation likely causing some of his symptoms.

Dr. Khanna recommended cervical traction and a physical therapy program for the neck and shoulders. He also recommended a thoracic spine MRI, and an anti-inflammatory.

Dr. Khanna placed Petitioner off work.

12/1/09 MRI Petitioner underwent MRI of the dorsal spine at Advanced Medical Imaging Center. The study revealed minimal degenerative change near the thoracolumbar junction.

12/14/09 Petitioner was examined for a second opinion by Dr. Kern

Singh, a spine surgeon at Rush University Medical Center.

Assessment:
Cervical degenerative disc disease, L3-4, L4-5.
Lumbar muscular strain.

Dr. Singh restricted Petitioner to light duty with no lifting greater than ten pounds; no pushing or pulling greater than ten pounds; no bending, kneeling, stooping, squatting, or twisting; alternate sitting and standing every thirty minutes.

Dr. Singh recommended physical therapy to treat the cervical and lumbar spine, with cervical traction, three times a week for four weeks.

Dr. Singh recommended anti-inflammatory medication including Celebrex 200mg daily.

12/15/09 Dr. Khanna ordered cervical spine X-rays and physical therapy to treat neck and back pain two to three times a week for four weeks.

12/17/09 **P.T.** Petitioner started physical therapy at Accelerated Rehabilitation Centers to treat lumbago, cervicalgia. He was to attend therapy two to three times a week for four weeks.

His dates of attendance were: December 17, 21, 23, 29, and 31 of 2009. He continued to attend in 2010 on January 6, 13, 14, 18, 20, and 22, and February 2, 4, 5, 8, 10, 12, 15, 17, and 22. He attended a total of twenty sessions of physical therapy according to the progress reports.

1/13/10 Petitioner underwent cervical spine X-rays at Sisters of Saint Anthony Health Services.
Impression: Multilevel early disc degeneration between C3-C7. There is slightly limited range of motion during extension.

1/13/10 Dr. Nitin Khanna at Orthopaedic Specialists of Northwest Indiana continued Petitioner off work and prescribed Celebrex and Neurontin.

Diagnosis: Patient with severe cervical neck strain and possible occipital neuralgia.
Dr. Khanna continued physical therapy to treat the cervical spine, and ordered a cervical traction machine for home use.

1/27/10 Dr. Khanna continued Petitioner off work. In physical therapy, he was to work on neck range of motion and strengthening.
Assessment: Patient with axial neck pain after a work related injury.

2/24/10 Dr. Khanna put Petitioner's physical therapy on hold until he could recover from his flu virus, and continued him off work.

3/10/10 Dr. Khanna referred Petitioner to Dr. Kanuru for consideration of a facet injection, and continued him off work.

3/16/10 Petitioner was seen by Dr. Ramesh Kanuru at Kanuru Interventional Spine and Pain Institute.
Diagnosis:
1. Cervical facet joint syndrome.
2. Cervical degenerative disc disease.
3. Bilateral cervical foraminal stenosis.
4. Lumbar degenerative disc disease.
5. Right lumbar radiculopathy at the L5 distribution.

Dr. Kamesh prescribed Zanaflex.

3/19/10 At Pinnacle Hospital, Dr. Kamesh performed a diagnostic blockade of the medial branch of the dorsal ramus facet joint injection at the level of C3, C4, C5, C6 and third occipital nerve bilaterally.

3/29/10 Dr. Khanna assessed persistent axial neck pain after a work related injury. Petitioner did not report any benefit from the recent cervical facet joint injections.

Dr. Khanna recommended a functional capacity evaluation and continued Petitioner off work.

| | |
|---|---|
| 4/5/10 | Petitioner followed up with Dr. Kanuru. Dr. Kanuru noted that Petitioner stated that he did not get any relief from the recent cervical facet joint injections. However, Dr. Kanuru felt that, based on Petitioner's pain diagram, the drawing did show significant improvement in the pain pattern. Dr. Kanuru recommended a cervical epidural steroid injection.<br><br>Diagnosis:<br>1. Cervical facet joint syndrome.<br>2. Cervical degenerative disc disease.<br>3. Bilateral cervical foraminal stenosis.<br>4. Lumbar degenerative disc disease.<br>5. Right lumbar radiculopathy at the L5 distribution. |
| 4/9/10<br>FCE | Petitioner attempted to undergo a functional capacity evaluation at Accelerated Rehabilitation Centers.<br><br>Petitioner testified that he had to stop due to pain. |
| 4/14/10<br><br>MMI<br>RTW full duty | Dr. Khanna released Petitioner to work with no restrictions. He believed Petitioner was at maximum medical improvement because there was nothing further he could do for him. He noted that Petitioner's Functional Capacity Evaluation was considered invalid due to inconsistencies and because Petitioner left early.<br><br>Dr. Khanna wrote, "Unfortunately the patient still persists with significant neck pain."<br><br>Petitioner testified that the employer's nurse case manager was present and convinced Dr. Khanna to issue the full duty release, and that this was not his original plan. The respondent failed to call any witness to rebut this testimony. |
| 4/22/10<br><br>MRI | Petitioner underwent MRI of the cervical spine at Advanced Imaging Medical Center.<br>Impression:<br><br>1. Multilevel degenerative disc disease and facet arthropathy, with associated central spinal canal stenosis, |

neural foraminal narrowing, and mass effect upon the spinal cord, as described. Please see above comments for full details.
2. Minimal degenerative reversal of mid/upper cervical curvature in the sagittal plane.
3. Marrow signal reflects a combination of degenerative discogenic endplate change, and a background of patchy yellow marrow conversion, likely physiologic.

5/14/10 Petitioner was seen at i-Spine Institute by Dr. Jamie Gottlieb.
Assessment: Cervical and lumbar spondylosis with cervical and lumbar strain-type syndrome.
Dr. Gottlieb recommended a course of Neurontin to help with neuropathic pain, and one-on-one therapy for myofascial release and possible traction.

6/2/10 Dr. Gottlieb released Petitioner to sedentary duty with restrictions to lift no greater than ten pounds, and limited over the shoulder activity.

6/11/10 Dr. Gottlieb continued to restrict Petitioner to lifting no greater than ten pounds, and also restricted him to no bending or twisting, and to change position every thirty to forty-five minutes.

Dr. Gottlieb continued Petitioner on Neurontin and recommended physical therapy. If physical therapy did not help, he would recommend injections.

6/14/10 Petitioner started physical therapy at Premier Physical Therapy to treat cervical and lumbar spondylosis.
He attended on June 14, 16, 18, 21, 22, 24, and 28 of 2010.

7/9/10 Dr. Gottlieb prescribed Norco for severe pain and recommended injections, specifically an epidural at the C6-6 level as well as selective nerve root injections at L3-4, L4-5 bilaterally.
The physical therapy was causing pain to flare up in Petitioner's right thigh.

9/16/10 Dr. Gottlieb referred Petitioner to pain management.

9/22/10 Petitioner had an initial consultation with Dr. Irina Dudar at Health Benefits Pain Management Services.
Dr. Dudar noted Petitioner's work injury, writing, "The patient relates the beginning of his neck and back pain to accident at work when he hit drop-off on the road while driving a truck. He tried to return to work, but was not able to perform his regular job duties secondary to severe exacerbation of his pain."

Assessment:
1. Chronic low back pain with history of work-related injury.
2. Lumbar degenerative joint disease and degenerative disc disease rule out lumbar radiculopathy.
3. Chronic neck pain, history of degenerative disc disease, disc bulge, and disc osteophyte complex with mild spinal stenosis.
4. Myofascial pain syndrome/muscle spasm of neck.

Dr. Dudar scheduled a cervical epidural steroid injection and started the Petitioner on Flexeril. She was considering diagnostic branch blocks, EMG, and lumbar injections.

Dr. Dudar placed Petitioner off work.

9/24/10 Petitioner underwent a cervical epidural steroid injection at Health Benefits Pain Management Services, with good results.

10/13/10 Dr. Irina Dudar at Health Benefits Pain Management Services continued Petitioner off work. She did check off on the Work Status Report that Petitioner's injury was work related.

In her treatment report, she addressed causation writing, "The patient is a 57-year-old Caucasian male who presents with his chronic neck and back pain status post accident at work."

Assessment:
1. Chronic low back pain with history of work-related injury.
2. Lumbar degenerative joint disease and degenerative disc disease of lumbar spine.
3. Neuropathic pain of right lower extremity.
4. Chronic neck pain, degenerative disc disease, degenerative joint disease, disc bulge, and disc osteophyte complex with mild spinal canal stenosis - improved.
5. Myofascial pain syndrome/muscle spasm of neck and low back.

Dr. Dudar scheduled the patient for transforaminal epidural steroid injection at L3-L4, L4-L5 on the right side under fluoroscopy with sedation based on clinical picture of pain presentation.

Dr. Dudar continued Flexeril and prescribed Lyrica. She recommended EMG/Nerve conduction and a lumbar diagnostic block and possible cervical diagnostic block.

10/22/10 Dr. Dudar continued Petitioner off work.
She performed a transforaminal epidural steroid injection at L3-L4, L4-L5 on the right side under fluoroscopic guidance.

11/2/10 Petitioner underwent EMG/NCS at Electrodiagnostics Lab. Petitioner's work injury on October 1, 2009 was noted. Dr. Rosania wrote, "The patient has been reporting low back pain with right lower extremity referral status post a work related injury10/01/09."

EMG
NCS

Dr. David Rosania interpreted:
1. There is electrodiagnostic evidence for a bilateral tibial motor mononeuropathy with axonal degeneration at the left ankle but without any conduction slowing bilaterally.
2.There is no electrodiagnostic evidence for a right lumbosacral radiculopathy.

Dr. Rosania continued Petitioner off work.

11/10/10 Dr. Dudar continued Petitioner off work and prescribed physical therapy. She checked off on the Work Status

Report that the injury was **work related**.

Assessment:
1. Chronic low back pain/history of work-related injury.
2. Degenerative joint disease and degenerative disc disease of lumbar spine.
3. Neuropathic pain of right leg.
4. Chronic neck pain/degenerative disc disease, degenerative joint disease, disc bulge, and disc osteophyte complex with mild spinal stenosis - improving.
5. Myofascial pain syndrome/muscle spasm of low back.

Plan:
1. I will schedule the patient for diagnostic medial branch block of lumbar facet joints on the right side to see if facet joint pain contributes to his usual low back pain. If the patient responds with 50% relief of muscle spasm and pain, he might be a candidate for radiofrequency ablation of facet joints on the right side of lumbar spine.
2. I will refer the patient for physical therapy for low back pain.
3. Increase Lyrica to 50 mg b.i.d. for his neuropathic pain. I instructed to continue the patient take Flexeril 10 mg b.i.d. and the patient may do with just diclofenac for exacerbation of low back pain on p.r.n. basis.
4. I encouraged the patient to increase his physical activity at home with restriction no heavy lifting and no pulling or pushing. Follow up in two to three weeks after the procedure.

11/17/10 Petitioner started a new course of physical therapy at Premier Physical Therapy to treat low back pain and right leg pain.
He was to attend three times a week for four weeks.

11/19/10 Dr. Dudar performed diagnostic medial branch block of facet joints of lumbar spine at L3, L4, L5, at L5 at ala on the right side under fluoroscopic guidance.
She continued Petitioner off work and checked on the Work Status Report that the injury was work related.

11/21/10 Petitioner presented to the Dyer Campus Emergency Department with sciatica. He complained of sever right hip pain.

He was treated with Toradol, Norflex, Motrin, Flexeril and Norco and discharged.

11/24/10 Petitioner was examined by Dr. Dudar.
Assessment:
1. Exacerbation of chronic low back pain/history of work-related injury.
2. Right leg neuropathic pain.
3. Degenerative disc disease, degenerative joint disease with disc osteophyte complex at L5-S1 level, facet arthropathy L4-L5 and L3-L4 level.
4. Chronic neck pain, improved.

Plan:
1. Since the patient did not have any improvement with epidural steroid injection performed transforaminal on the right side and diagnostic medial branch of lumbar facet joints on the right side did not give any pain relief after the procedure, I will need to rule out discogenic pain.
2. I will schedule the patient for discography at Mount Prospect with sedation with post discography CT scan after the procedure.
3. I encouraged the patient to continue to take Lyrica 50 mg b.Ld. for neuropathic pain, Flexeril 10 mg b.Ld. for muscle spasm, restart diclofenac 75 mg b.i.d. and prescription for Vicodin 5/500 mg up to three times a day was given today to the patient.
4. Follow up in two weeks after the procedure.
5. If discography is truly positive for disc tear, we will need to get neurosurgical consult for possible fusion in the future.

She continued Petitioner off work and checked on the Work Status Report that the injury was work related.

2/11/11 Petitioner underwent lumbar provocative discogram L3-L4, L4-L5, and L5-S1 under fluoroscopy.

Dr. Dudar concluded that the provocative discogram was negative.

2/16/11 Dr. Dudar assessed:

1. Chronic low back pain/history of work-related injury.
2. Right leg neuropathic pain.
3. Degenerative disc disease, degenerative joint disease with disc osteophyte complex at L5-S1, facet arthropathy L4-L5, and L3-L4 level.
4. Chronic neck pain, improved.

Dr. Dudar recommended a trial of spinal cord stimulation. She recommended a surgical consultation for ongoing low back pain but did not believe that he was a likely candidate for surgery at that time.

Dr. Dudar continued Petitioner off work and checked on the Work Status Report that the injury was **work related**.

3/9/11 Dr. Dudar referred Petitioner for a surgical evaluation.

3/18/11 Petitioner was examined by Dr. Thomas McNally at Suburban Orthopaedics for a surgical consultation. Petitioner's work injury on October 1, 2009 was described. Dr. McNally addressed causation, writing, "Fifty-eight year old male who was **injured at work on October 1, 2009**. He had significant neck and back pain that has improved with interventional pain management. However, after returning to work for one day in April 2010, he has had right buttock and thigh pain that has not improved with medications, injections or physical therapy."

Dr. McNally ordered a new MRI of the lumbar spine.

3/18/11

MRI lumbar

Petitioner underwent MRI of the lumbar spine at Louis A. Weiss Hospital. The report was read by Dr. Stephanie Rosania.
Impression:

Tiny a focal right lateral disc protrusion at L3-4 results in very slight narrowing of the inferior aspect of the neural foramen on the right at this level. There is mild lateral recess and foraminal narrowing at L4-5 that is consistent with his right thigh complaints.

3/25/11 Petitioner was examined by Dr. Thomas McNally at Suburban Orthopaedics for a surgical consultation. Diagnosis: Lumbar disc displacement.

Dr. McNally addressed causation. He wrote, "58 year old male who was **injured at work on 10/1/2009**. He had significant neck and back pain that improved with interventional pain management.
After returning to work for one day in April 2010, he has had right buttock and thigh pain (burning, tingling and numbness) that has not improved with medications, injections or physical therapy.
The work related injury of 10/1/2009 did not cause the degenerative changes in the patient's lumbar spine. To a reasonable degree of medical and surgical certainty, the work related injury of 10/1/2009 aggravated and accelerated the pre-existing previously asymptomatic degenerative lumbar spinal conditions, caused them to become symptomatic and require treatment."

Dr. McNally was waiting to obtain past medical records and images, and an EMG of bilateral lower extremities. He discussed with Petitioner the risks of surgical and nonsurgical interventions.

Dr. McNally continued Petitioner off work and stated that his current condition was related to work. He ordered an EMG.

4/15/11 NCV EMG Dr. Ranjeet Singh performed NCV and EMG of bilateral lower extremities at Health Benefits Pain Management.

Impression:
Abnormal exam. Results show evidence for mild slowing of the right lateral femoral cutaneous nerve (i.e. meralgia paresthetica). It is of importance to know, that the lateral

femoral cutaneous nerve is a technically difficult nerve to analyze via nerve conduction studies, therefore any abnormalities to it should be compared to the clinical exam, and in this patient's case, the distribution of numbness is along the dermatome covered by this nerve. Furthermore, there was an incidental finding of a right chronic L5 radiculopathy.

Recommendations:
Can use anti-inflamrnatories ro reduce any swelling of the LFC nerve. Suggest wearing looser fitting clothing and avoid wearing tight belts/pants. L5 radiculopathy can cause parasthesias down the leg, however, pt has no symptoms below the knee. The radiculopathy symptoms may be well controlled pain-wise from his last set of ESI s, but pt still has residual denervation from it to the motor branch of the nerve root and therefore can repeat ESI' s if radicular symptoms ever return.

4/22/11 Dr. McNally diagnosed:
Lumbar disc displacement
Radiculopathy
Meralgia paresthetica

Dr. McNally recommended that Petitioner continue with Dr. Dudar for pain management, and that he continue with physical therapy and injections.
Dr. McNally addressed causation, explaining again, "The work related injury of 10/1/2009 did not cause the degenerative changes in the patient's lumbar spine. To a reasonable degree of medical and surgical certainty, **the work related injury of 10/1/2009 aggravated and accelerated the pre-existing previously asymptomatic degenerative lumbar spinal conditions, caused them to become symptomatic and require treatment.**"

5/26/11 Petitioner was examined by Dr. Ranjeet Singh at Health Benefits Pain Management Services. Causation was addressed. Dr. Singh wrote, "The patient in the past suffered a **work-related injury** back in October 2009, as he was driving a truck and came up on a step off upon which the

patient felt acute low back pain and
eventually was diagnosed later as having lumbago, facet arthropathy, and lumbar radiculopathy. The patient also at the same time suffered neck injury and the patient eventually underwent a series of cervical epidural steroid injections that actually gave him great improvement in terms of his pain in his neck."

Assessment:
1. Meralgia paresthetica.
2. Lumbago.
3. Chronic pain due to trauma/work-related injury.
4. Facet arthropathy.
5. Neuralgia/neuritis.

Plan:
1. I have given the patient a prescription for physical therapy upon which time the patient will complete a six-week course in hopes of improving his symptoms of his burning and sensory loss in his right lower extremity. The patient will follow up with me accordingly in one month's time to further evaluate his progress regarding his therapy.
2. I have given the patient a script for naproxen 550 mg pox. q.12h. p.r.n., Lyrica 150 mg pox. q.12h., as well as Medrol Deepak dispensed one pack. Risks and benefits of all medications described in detail to the patient with the patient fully understanding what they are.
3. If the patient does not benefit from the current PT and conservative management and medications, we will consider continued epidural steroid injections and/or nerve blocks to further evaluate what is causing his pain for diagnostic and therapeutic benefit.
4. The patient to follow up in approximately one month's time.

Dr. Singh continued Petitioner off work and checked on the Work Status Report that the injury was work related. He ordered physical therapy to treat Petitioner's condition three times a week for six weeks.

6/8/11 Petitioner started physical therapy to treat thoracic and

| | |
|---|---|
| P.T. | lumbosacral radiculopathy, and injury to cutaneous sensory nerve, lower limb at Maximum Rehabilitation Services.<br><br>He attended therapy on June 8, 9, 10, 14, 16, 17, 20, 22, 27, 30 and July 1, 6, 7, 11, 13.<br>He was discharged on September 12, 2011 due to a long-term hold put on his physical therapy. Further therapy was not recommended at that time. |
| 6/23/11 | Petitioner was examined in follow-up by Dr. Singh. Petitioner continued to complain of burning, numbness and tingling into his right lower extremity.<br><br>Dr. Singh continued Petitioner off work and checked on the Work Status Report that the injury was work related. |
| 7/29/11 | Dr. McNally released Petitioner to light duty.<br>He wrote that Petitioner's lumbar disc displacement was related to work. He recommended a functional capacity evaluation to assess permanent restrictions. |
| 12/7/11<br><br>FCE Light-Medium | Petitioner underwent a valid KEY functional capacity assessment at A.T.I.<br><br>He demonstrated his functional capabilities at the LIGHT-MEDIUM Physical Demand Level during the assessment. He had subjective lower back pain reports as well as right thigh radicular symptoms.<br><br>Petitioner's capabilities did not meet the medium physical demand level needed for his former employment as truck driver. |

| | | |
|---|---|---|
| Above Shoulders Lift- Bilateral | 36.8 occasional | 25.8 frequent |
| Desk/Chair Lift· Bilateral | 45.6 occasional | 32.4 frequent |
| Chair/Floor Lift· Bilateral | 32.4 occasional | 19.2 frequent |
| Push | 106.3 occasional | |
| Pull | 106.3 occasional | |
| Carry· Right | 32.0 occasional | 17.0 |

frequent
Carry· Left
frequent

32.0 occasional 12.0

Petitioner was only capable on an occasional basis of the following activities: Balance, bend/stoop, stair climb, crouch, head/neck flexion, head/neck rotation, kneel and squat.

12/16/11 Dr. McNally restricted Petitioner to **light duty** status, prescribed Nortriptyline 10mg, and ordered a lumbar MRI and EMG and nerve conduction study.
Diagnosis: Lumbar disc displacement.
Dr. McNally stated that Petitioner's condition was work-related.

12/28/11 Petitioner underwent a bilateral lower extremity EMG and nerve conduction study conducted by Dr. Olga Brazil.

**EMG NCS** Impression: This is a minimally abnormal EMG/nerve conduction study of both lower extremities consistent with:
1. Chronic moderate degree bilateral L5-S1 radiculopathy.
2. There was no electrophysiological evidence of generalized polyneuropathy, entrapment mononeuropathy, or active lumbosacral radiculopathy at any level.

1/20/12 Dr. McNally assessed:
Lumbar disc displacement,
Meralgia paresthetica.

Dr. McNally ordered a closed MRI of the lumbar spine and standing AP, lateral, flexion and extension x-rays of the lumbar spine.
Dr. McNally discussed possible decompressive surgical intervention.

Dr. McNally assessed that Petitioner "[...] was **injured at work on October 1, 2009**. He had significant neck and back pain that has fortunately improved with interventional pain management. After returning to work for one day in April 2010, he has had right buttock and thigh pain (burning, tingling and numbness) that has not improved with medications, injections or physical therapy."

Dr. McNally explained causation, "To a reasonable degree of medical and surgical certainty, the work related injury of October 1, 2009 aggravated and accelerated the pre-existing previously asymptomatic degenerative lumbar spinal conditions, caused them to become symptomatic and require treatment."

1/30/12 Respondent's choice of rehabilitation counselor at Encore Unlimited prepared a Labor Market Survey report. The Counselor Allah Masqat wrote, "Based on Mr. Gill's work history he would qualify for numerous occupations which will utilize his transferable skills as well as entry level opportunities available to persons with his background. Mr. Gill should be able to obtain alternate employment within his restrictions."

Allah Masqat listed job openings earning about $10 to $17 per hour in such categories as dispatcher, security desk clerk, delivery driver lifting up to twenty pounds, customer service, security guard, valet and parking lot attendant, call center representative, telephone sales. These jobs were within a fifty mile radius of where Petitioner lived.

2/2/12 "MRI of the lumbar spine was performed on February 2, 2012 at MRI of River North and read by Dr. Catherine Kim-Gavin.

**Lumbar MRI**

Impression:

1. Very small right foraminal disk protrusion at L3-4 that appears to approach but does not impinge the exiting right L3 nerve root within the foramen or contribute to significant spinal canal stenosis.
2. Very small central disk protrusion at L1-2 without central canal stenosis or nerve root impingement.
3. Small left paracentral annular fissure at L2-3 without focal disc herniation.
4. Facet arthrosis at L5-S1 without disk herniation or stenosis at this level.

Dr. McNally wrote, "My independent reading differs from the official radiologist report, in that there is neuroforaminal

stenosis at L4-5 and L5-S1. Sagital T2 image number 5 illustrates the foraminal narrowing at L4-5 and L5-S1 on the right compared to the normal levels above."}}

2/3/12 Dr. McNally recommended that Petitioner proceed with Lumbar surgery (Right L5-S1 Laminotomy, possible L5-S1 laminectomy).

3/21/12 Petitioner underwent lumbar surgery performed by Dr. McNally at Alexian Brothers Medical Center.

Lumbar **surgery**

Preoperative diagnoses:
1. Lumbar disk displacement.
2. Lumbar spinal stenosis.

Postoperative diagnoses:
1. Lumbar disk displacement.
2. Lumbar spinal stenosis.

Title of operation:
1. Right L5-S1 laminotomy, partial facetectomy and foraminotomy with decompression of the neural elements.
2. Fluoroscopy for use of iO-Flex rasp and associated devices from Baxano (similar to fluoroscopy for vertebroplasty or kyphoplasty).

4/26/12 Dr. McNally ordered physical therapy to evaluate and treat status post right L5-S1 laminotomy.
He refilled Petitioner's prescription for Norco.

5/10/12 **PT** Petitioner started physical therapy at A.T.I. to treat his lumbar condition and lumbar radiculopathy. He was to attend three times a week for four weeks.

Petitioner attended twenty sessions on May 10, 14, 16, 17, 23, 24, 29, 30, 31, and June 4, 7, 18, 25, 28, and July 2, 5, 17, 18, 20, 23, 25, 26 and 30, and August 1, 2, 6, 9, 10, 13, 16, and 21.

He was discharged on September 9, 2012.

8/23/12 Petitioner complained of low back and right leg pain. He

reported that he had a relapse in therapy when he strained his back doing a weightlifting exercise called 'chopping wood".
Dr. McNally continued Petitioner off work and stated his condition was related to work.
Diagnosis: Lumbar disc displacement, lumbar strain.
Dr. McNally ordered a lumbar MRI. He recommended that Petitioner continue with physical therapy, use a Medrol Deepak, take Meloxicam 15mg daily, and follow up to review MRI images.

9/12/12 **MRI** Lumbar — Petitioner underwent a lumbar spine MRI at Suburban MRI.
Impression:
New right foraminal disk protrusion at L5/S1 likely resulting in new right L5 radicular symptoms.

10/16/12 — Petitioner complained of some "catching" in his lower back.
Diagnosis: Lumbar disc displacement.
Dr. McNally referred Petitioner to Dr. Novoseletsky for interventional pain management evaluation and treatment including possible injection.

Dr. McNally ordered a restart of physical therapy to progress to work conditioning.
Petitioner was continued off work.

11/7/12 — Petitioner was examined by Dr. Dmitry Novoseletsky at Suburban Orthopaedics.

Dr. Novoseletsky noted Petitioner's **work injury**. He wrote, "Patient presents to the office with low back and right leg pain from a **work related injury**. The patient reports he was driving his truck at night into an area of road construction with a 6 inch drop-off that was not marked. When he drove over the drop-off, the bottom of his seat dropped as well, and he felt jolted back and forth. As he kept driving, his pain gradually increased until he had to pull off the road after a few hours and call 911 for an ambulance to take him to the hospital because of severe back pain radiating up to his neck."

Impression:
Low back pain with pain and paresthesias radiating to right lower extremity
Differential Diagnosis:
Lumbar radiculopathy/radiculitis
Lumbar disc displacement
Lumbar spondylosis/facet syndrome.

Petitioner was prescribed Neurontin 300mg and a lumbar support.

Dr. Novoseletsky ordered a right L2, L3, L4, L5 lumbar medial branch block.

11/19/12 Branch block — Dr. Novoseletsky administered a L2, L3, L4, L5 prognostic medial branch block, right side.

11/20/12 — Petitioner reported improvement in his symptoms after the medial branch block the day before.
Dr. Novoseletsky recommended another L2, L3, L4, L5 prognostic medial branch block, right side.

12/5/12 — Dr. Novoseletsky administered a L2, L3, L4, L5 prognostic medial branch block, right side.

12/7/12 — Dr. Novoseletsky restarted physical therapy, continued neurontin and considered Right L2, L3, L4, L5 MB Radiofrequency.

Impression: Low back pain with pain and paresthesias radiating to right lower extremity.
Differential Diagnosis:
Lumbar radiculopathy/radiculitis
Lumbar disc displacement
Lumbar spondylosislfacet syndrome.

12/18/12 — Petitioner started therapy again at A.T.I. to treat Petitioner's low back pain and lumbar condition.
He was to attend therapy two to three times a week for six weeks.

He attended twelve sessions by January 15, 2013. He attended December 18, 20, 21, 26, 31, and January 2, 4, 7, 9 and 10.

12/19/12 Dr. Novoseletsky ordered physical therapy to treat lumbar disc displacement and lumbar facet syndrome, two to three times a week for four to six weeks.

1/15/13 **MMI** Dr. Novoseletsky wrote, "Patient states he is still doing physical therapy with ATI Physical therapy. Patient states he is only having pain and numbness on the right side lower back and part of the right thigh goes numb if he is sitting down and walking for a period of time. Patient states he is back to doing regular activities at home and it rarely bothers him. Patient is retired."

Dr. Novoseletsky considered Petitioner to be at maximum medical improvement, and advised him to follow up as needed.

7/23/13 Dr. McNally continued Petitioner **off work**. He stated Petitioner was medically unable to work and that his condition was related to work. Petitioner reported some numbness in his lower back and some tingling in the right leg.

Diagnosis: Lumbar disc displacement.

Dr. McNally recommended:

1. Referal to Dr. Novoseletsky for interventional pain management evaluation and treatment.
2. Refill Meloxicam (don't take until "ok" with Dr. Novoseletsky, the time off NSAID will help determine how much it helps and will also prepare for possible injection.)
3. Restart physical therapy as directed by Dr. Novoseletsky

9/20/13 Petitioner followed up with Dr. Dmitry Novoseletsky. He was examined by Matthew Barnes, PA-C. Petitioner reported his lower back pain had gotten worse.

Impression: Low back pain with pain and paresthesias radiating to right lower extremity.
Differential Diagnosis:
Lumbar spondylosis/facet syndrome.
History lumbar laminotomy/laminectomy surgery.
Lumbar radiculopathy/radiculitis.
Lumbar disc displacement.

It was recommended that Petitioner take Norco and undergo a lumbar radiofrequency procedure.

10/2/13 ER and Hospital Admit — Petitioner presented to the emergency department of Adventist Bolingbrook Hospital with intractable back pain and lumbar radiculopathy. He was admitted to hospital and treated with Dilaudid and Valium.

X-rays — X-rays of the lumbar spine were performed.
Impression: There are mild degenerative changes with tiny anterolateral osteophytes. Vertebral body heights and disc spaces are preserved. There is no evidence for fracture or bony destructive lesion.

10/3/13 — During his stay Adventist Bolingbrook Hospital, he was seen in consultation by orthopedist Dr. Rebecca Kuo and pain specialist Dr. Nitin Malhotra.

MRI L-spine

Dr. Kuo diagnosed: Right leg radiculopathy, possible sacroiliitis.
She started a Medrol Deepak and ordered an MRI.

MRI of the lumbar spine was performed at Adventist Bolingbrook Hospital.
Impression:
1. No evidence of acute skeletal injury or destructive lesions involving the lumbar spine.
2. Mild foraminal narrowing on the right at the L5-S1 level, with synovitis of the right L5-S1 facets.

10/4/13 Discharge — Dr. Nitin Malhotra, a pain management specialist, administered an epidural steroid injection at L5-S1 and S1.

Petitioner was discharged from Adventist Bolingbrook Hospital.
Final Diagnoses:
1. Intractable back pain and lumbar radiculitis.
2. Diabetes.
3. Elevated blood pressure. No history of hypertension.

Petitioner was to follow up with his primary doctor as well as pain management.

11/24/13 Dr. McNally completed a narrative report.

narrative He addressed causation, writing, "As stated in my office notes, the work related injuries of October 1, 2009 and April 18, 2010 did not cause the degenerative changes in the patient's lumbar spine. To a reasonable degree of medical and surgical certainty, the work related injury of October 1, 2009 aggravated and accelerated the pre-existing previously asymptomatic degenerative lumbar spinal conditions, and caused them to become symptomatic and require treatment. While in physical therapy after lumbar decompressive surgery, he sustained a lumbar disc herniation."

Dr. McNally anticipated Petitioner would need **future treatment** relative to the work-related condition. He explained, "Possible treatment options would be non-operative care in the form of interventional pain management, medications and physical therapy versus operative care which could include revision decompression or revision decompression and fusion."

The surveillance footage did not change Dr. McNally's opinion. He noted that Petitioner was doing very light house hold duties on the surveillance footage. He wrote, "There is nothing on the video that is beyond the restrictions of the FCE. FCE (Functional Capacity Evaluation) was performed on December 7, 2011. Results: "The patient is capable of working a light-medium demand job. His current job requirements are at a medium demand level. He is unable to return to his current job at this time."

In order to determine permanent restrictions, Dr. McNally recommended that Petitioner undergo an updated functional capacity evaluation. He noted that the functional capacity evaluation of December 7, 2011 was performed prior to Petitioner's decompressive surgery and prior to the lumbar disc herniation sustained while in work conditioning. Dr. McNally did not think that the updated functional capacity evaluation results would be substantially different than the December 7, 2011 findings.

12/3/13

Petitioner followed up with Dr. McNally. Petitioner reported that he went to the Adventist Bolingbrook Hospital emergency department about two months earlier due to back pain.
Petitioner's medications included: Hydrocodone-Acetaminophen 2.5- 325 MG;
Meloxicam 15 MG; Neurontin 300 MG.

Diagnosis: Lumbar disc displacement.

They discussed that because Petitioner's symptoms had not improved with time, they were likely permanent and he would likely require lifelong pain management.

Recommendations:
1. Functional Capacity Evaluation (FCE) to determine permanent work restrictions.
2. Over-the-counter NSAIDs as needed.
3. Referral to Dr. John Lee, orthopaedic surgeon in Bolingbrook, IL or to Dr. Chhadia or Dr. Freedberg here at Suburban Orthopaedics for evaluation and treatment of knee
pain.
4. Follow-up to review Functional Capacity Evaluation results.

1/29/14

**FCE**
Light to Medium

Petitioner completed a functional capacity evaluation at ATI physical therapy. Petitioner demonstrated his functional capabilities at the LIGHT to MEDIUM physical demand level.

This means he is capable of occasionally lifting from chair to

floor twenty-eight pounds; bilateral above shoulder lifting twenty-eight pounds; desk to chair thirty pounds.

The therapist noted that Petitioner's employment as a Truck Driver was considered a MEDIUM Physical Demand Level (occasional lifting fifty pounds) according to the U.S. Department of Labors Dictionary of Occupational Titles. His capabilities appeared to fall below that level.

Petitioner reported difficulties with standing and sitting during his assessment. He ended all bilateral lifting components with reports of low back pain.

2/3/14
**IME**

Petitioner underwent another Section 12 examination with Dr. Zelby.
Impression:
Problem 1: Lumbosacral spondylosis.
Problem 2: History of lumbar foraminotomy.

Despite substantial evidence to the contrary, Dr. Zelby believed Petitioner could work without restrictions. He opined, "Mr. Gill remains easily qualified to safely pursue all of his usual vocational and avocational activities without restrictions."

Dr. Zelby denied that Petitioner required ongoing treatment for his spine irrespective of cause.

3/27/14

Petitioner had follow up appointment with Dr. McNally to talk about the functional capacity evaluation.

**Perm restrict per FCE**

Dr. McNally wrote, "He states he continues with discomfort in his lumbar spine. He states his pain level is 2/10 at this time. He states when sitting down he needs to extend his left knee to relief the pressure on the left side of lumbar spine. He states he has numbness and tingling in the lateral aspect of right knee. He states he continues to have discomfort at bed time. He states he is constantly waking up with pain."

Assessment: Sixty-one year old male who injured at work on

October 1, 2009. His symptoms have waxed and waned over the years. The work related injuries aggravated and accelerated the patient's pre-existing, asymptomatic right L5-S1 foraminal stenosis and caused it to become symptomatic and require treatment. He had objective EMG/NCS evidence of his L5 radiculopathy and the radiculopathy responded to decompression until he experienced a re-aggravation in physical therapy.

Dr. McNally discussed at length that because his symptoms have not improved with time, they are likely permanent and he may require lifelong pain management.

Recommendations: Permanent work restrictions per VALID functional capacity exam on January 29, 2014.

3/15/15 **Voc**

An Initial Vocational Assessment Report was prepared by vocational rehabilitation counselors Kathleen Mueller, MA, CRC, LCPC and David Patsavas, MA, CRC.

Ms. Mueller noted, "Per the results of the Functional Capacity Evaluation as well as permanent restrictions placed on Mr. Gill by his treating physician, he is unable to return to employment with ABF Freight Systems as a Truck Driver."

It was their professional opinion as Certified Rehabilitation Consultants that given Mr. Gill's current physical restrictions as well as a singular work history, that a limited Labor Market may be available to him. It was also their opinion Mr. Gill would be exposed to a significant loss of earning capacities. His potential earnings would most likely be limited to minimum wage ($8.25) to $15 per hour, with additional training.

They recommended vocational training and labor market research.

7/8/15 **Voc**

Petitioner completed employer contact sheets from July 8, 2015 to August 3, 2015 seeking positions such as patient transporter, forklift operator, Target employee, grocery clerk,

bowling alley manager, employee of roofing company.

**ON THE ISSUE OF CAUSAL CONNECTION, (F), THE ARBITRATOR FINDS THE FOLLOWING:**

There is no question that this traumatic injury caused petitioner's condition of ill being and the need for subsequent treatment. Dr. Zelby's opinion is contrary to that of every treating doctor, and is unsupported by the substantial evidence and the medical records that show a condition of good health followed by a significant traumatic injury and the need for treatment.

Based on all the opinions of the treating doctors and the obvious sequence of events, the Arbitrator therefore finds that a causal connection has been proven.

**ON THE ISSUE OF MEDICAL SERVICES, (J), THE ARBITRATOR FINDS THE FOLLOWING:**

The arbitrator finds that the respondent is liable under Section 8(a) for all medical bills incurred as stated in petitioner's exhibit x. Petitioner has requested payment for the following bills:

| Provider | Beginning | Ending | Total Charges | WC Paid | Balance |
|---|---|---|---|---|---|
| Adventist Bolingbrook Hospital | 10/2/2013 | 10/4/2013 | $17,411.31 | $0.00 | $17,411.31 |
| Alexian Brothers Medical Center | 3/21/2012 | 3/22/2012 | $50,042.00 | $0.00 | $50,042.00 |
| ATI Physical Therapy | 12/7/2011 | 1/29/2014 | $23,746.74 | $0.00 | $23,746.74 |
| Dr. John Brown | 10/28/2009 | 5/10/2010 | $1,766.00 | $0.00 | $1,766.00 |
| Dupage Pathology Associates | 7/7/2012 | 7/7/2012 | $5.00 | $0.00 | $5.00 |
| Emergency Healthcare Physicians | 10/2/2013 | 10/2/2013 | $882.00 | $0.00 | $882.00 |
| Health Benefits | 9/24/2010 | 7/14/2011 | $46,252.86 | $0.00 | $46,252.86 |
| IPM | 9/22/2010 | 11/24/2010 | $3,807.97 | $0.00 | $3,807.97 |
| I- Spine | 5/14/2010 | 7/9/2010 | $566.00 | $0.00 | $566.00 |
| IWP | 5/10/2010 | 6/17/2011 | $3,614.72 | $0.00 | $3,614.72 |
| Maximum Rehabilitation | 6/8/2011 | 2/2/2012 | $10,617.38 | $0.00 | $10,617.38 |
| Neurodiagnostic Associates | 12/28/2011 | 12/28/2011 | $2,828.00 | $0.00 | $2,828.00 |

| | | | | | |
|---|---|---|---|---|---|
| Physicians Anesthesia | 3/21/2012 | 3/21/2012 | $1,870.00 | $0.00 | $1,870.00 |
| Premier Physical Therapy | 6/14/2010 | 11/17/2010 | $7,400.09 | $0.00 | $7,400.09 |
| Prescription Partners | 10/16/2012 | 9/20/2013 | $669.08 | $0.00 | $669.08 |
| St. Margaret Mercy ER Physician | 11/21/2010 | 11/21/2010 | $448.00 | $0.00 | $448.00 |
| St. Margaret Mercy Healthcare | 11/21/2010 | 11/21/2010 | $894.92 | $0.00 | $894.92 |
| Suburban Orthopaedics | 3/25/2011 | 3/27/2014 | $26,942.00 | $0.00 | $26,942.00 |
| Synergy RX, Inc. | 8/23/2012 | 8/23/2012 | $232.31 | $0.00 | $232.31 |
| Triad Radiology | 2/11/2011 | 2/11/2011 | $424.56 | $0.00 | $424.56 |
| University of Chicago Physicians Group | 3/18/2011 | 3/18/2011 | $676.50 | $0.00 | $676.50 |
| Weiss Memorial Hospital | 3/18/2011 | 3/18/2011 | $5,065.85 | $0.00 | $5,065.85 |
| Yates Emergency Physicians | 10/1/2009 | 10/1/2009 | $608.00 | $0.00 | $608.00 |
| **Total** | | | $206,771.29 | $0.00 | $206,771.29 |

The arbitrator adopts Dr. McNally's opinion and the opinions of the other treating doctors all of whom find causation, and further finds based upon the treatment records that all treatment was reasonable and necessary to cure petitioner of his condition of ill being. (PX20).

**ON THE ISSUE OF TEMPORARY TOTAL DISABILITY AND MAINTENANCE, (L), AND VOCATIONAL REHABILITATION (O), THE ARBITRATOR FINDS THE FOLLOWING:**

A review of the medical records indicates petitioner was kept off work from 10/2/09 through 4/14/10, and 4/19/10 through 3/27/14 when he reached MMI, a period of 233 3/7 weeks, and awards this period of temporary total disability.

Further, maintenance is due for the period 3/28/14 through 9/24/15, the date proofs were closed in this matter. Respondent is ordered to pay for vocational efforts with Independent Rehab Services pursuant to the recommended plan.

**ON THE ISSUE OF PENALTIES, (M), THE ARBITRATOR FINDS THE FOLLOWING:**

The opinions of Dr. Zelby establish that there was a reasonable dispute as to ongoing causal relationship after the close of proofs in the earlier 19(b) trial. Therefore, all penalties and attorney's fees are hereby denied.

STATE OF ILLINOIS )
) SS.
COUNTY OF )
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Danielle Moore,

Petitioner,

vs.

NO: 12 WC 27263

16IWCC0492

Gilster-Mary Lee Corporation,

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 of Petitioner's disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that the Petitioner has sustained a loss of use 10% of the right arm and a loss of use of 10% of the right hand.

On October 9, 2012 Dr. Young indicated that Petitioner had minimal pain at the ulnar nerve transposition site but had a full range of motion of her arm. She was able to make a full fist and extend all her fingers past neutral. He released Petitioner with no restrictions on that date and found her at maximum medical improvement. Petitioner did return on June 7, 2013 but the Doctor had the same objective findings. He did order an EMG which was negative. (Petitioner Exhibit 1) She has not seen the Doctor since that time. (Transcript Pgs. 19-20)

Petitioner's claims that she needs a change in employment are not supported by the medical records. Her subjective complaints at the hearing were also unsupported in the medical records.

16IWCC0492

Dr. Young's impairment rating of 2% of a whole person should be given equal weight as far as the other subsections of §8.1b (b) are concerned. (Petitioner Exhibit 1)

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 44.3 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of the right arm to the extent of 10% and the loss of use to the right hand to the extent of 10%.

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 $13,200.00. 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: JUL 28 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 6/7/16
049

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**MOORE, DANIELLE**
Employee/Petitioner

Case# **12WC027263**

**GILSTER MARY-LEE CORPORATION**
Employer/Respondent

**16IWCC0492**

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

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

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

1312 BEMENT & STUBBLEFIELD
GARY BEMENT
PO BOX 23926
BELLEVILLE, IL 62223

0693 FEIRICH MAGER GREEN & RYAN
PIETER SCHMIDT
2001 W MAIN ST PO BOX 1570
CARBONDALE, IL 62903

16IWCC0492

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

**ORDER**

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of **$286.00**/week for a further period of **61.65** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **12.5% loss of a right hand and 15% loss of a right arm**.

Respondent shall pay Petitioner compensation that has accrued from **10/9/12** through **1/15/15**, 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

5/4/15
Date



MAY 1 2 2015

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 the record contains an impairment rating of 2% of the hand/wrist (median nerve) and 1% of the arm/elbow (ulnar nerve) as determined by Dr. Steven Young. 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 has reviewed Dr. Young's rating and notes that the rating was prepared 11/28/12. Because this report was prepared prior to Petitioner returning to the doctor with on going symptoms 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 the record reveals that Petitioner was employed as a stuffer at the time of the accident and that she was able to return to work in her prior capacity. Petitioner testified, and the medical records reflect that she has, however continued to experience symptoms which progressed after her return to employment. Petitioner requested Respondent to allow her to change job assignments, but the request was refused. Petitioner subsequently resigned her employment with Respondent and accepted a job with a new employer in Mt.Vernon, Illinois. Because of the ongoing symptoms she experienced upon her return to work, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 22 years old at the time of the accident. Because of her young age, 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 that the petitioner did not produce any evidence indicating that she has suffered any actual wage loss. She has, however had to change employment due to her symptoms. 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 that the medical records corroborate Petitioner's ongoing complaints of symptoms both prior to and following her surgeries. 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 right hand and 15% loss of use of the right arm pursuant to §8(e) of the Act.

STATE OF ILLINOIS )
) SS.
COUNTY OF ADAMS )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bryant Mayes,

Petitioner,

vs. NO: 14 WC 25544

State of Illinois Department of Human Services,

16IWCC0493

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 issue of the nature and extent of Petitioner's disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 17, 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.

DATED: JUL 2 8 2016
TJT:yl
o 7/26/16
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**MAYES, BRYANT**
Employee/Petitioner

Case# **14WC025544**

**SOI/DEPT HUMAN SERVICES**
Employer/Respondent

**16IWCC0493**

On 2/17/2016, 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 0.41% 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:

0400 LUIS E OLIVERO & ASSOC
DAVID W OLIVERO
1615 FOURTH SR
PERU, IL 61354

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

5002 ASSISTANT ATTORNEY GENERAL
JOSEPH P BLEWITT
500 S SECOND ST
SPRINGFIELD, IL 62706

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 62794-9108

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

FEB 17 2016

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

16IWCC0493

STATE OF ILLINOIS )
)SS.
COUNTY OF ADAMS )

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

## ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION

**BRYANT MAYES,**
Employee/Petitioner

v.

**STATE OF ILLINOIS / DEPT. HUMAN SERVICES**
Employer/Respondent

Case # 14 WC 25544

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Quincy**, on **02/03/16**. 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. ☐ Did an accident occur that arose out of and in the course of 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 **03/15/13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$46,570.16**; the average weekly wage was **$895.58**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$N/A** for TTD, **$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**

*Respondent shall pay reasonable and necessary medical services of $3,883.09 to Quincy Medical Group, as provided in Section 8(a) of the Act and pursuant to the medical fee schedule. Respondent to receive credit for all sums previously paid hereunder.*

*Respondent shall pay petitioner permanent partial disability benefits of $537.34/week for 70 weeks, because the injuries sustained caused the 14% 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.

Edward Lee — Signature of Arbitrator

2/13/16 — Date

## STATEMENT OF FACTS

Employee, Bryant Mayes' testimony

Employee, Bryant Mayes, testified that he began working for the State of Illinois in April 2007 as a security therapy aid at Rushville Treatment & Detention Center. On March 15, 2013, employee Mayes had a physical altercation with a resident, which caused him to injure his left shoulder.

Employee Mayes immediately reported his injury to his supervisor and received medical treatment to his left shoulder at the emergency room at a local hospital.

Employee Mayes testified that since he continued to experience pain in his left shoulder, he sought medical treatment from his regular physician at Quincy Medical Group. After having a cortisone injection into his left shoulder, employee Mayes had a MRI, which showed a massive full thickness tear of the left rotator cuff. Employee Mayes was then referred to Dr. Adam Derhake, an orthopedic surgeon.

Dr. Derhake recommended surgery, but warned employee Mayes that even after surgery, he still had a greater than 40% chance that his rotator cuff could re-tear.

On May 9, 2013, Dr. Derhake performed left rotator cuff repair surgery on employee Mayes. Following surgery, employee Mayes received physical therapy before returning to work on light duty in September 2013. Employee Mayes further testified that in November 2013, he was released to full duty.

Employee Mayes described that currently he experiences a number of problems with his left shoulder, such as stiffness, occasional pain, some weakness along with loss of range of motion and muscle atrophy. Employee Mayes also testified that he no longer plays golf or basketball because of the risk of re-injuring his left shoulder.

## MEDICAL EVIDENCE

Quincy Medical Group Records (PX. #1)

On March 19, 2013, employee, Bryant Mayes, presented with complaints of left shoulder pain. He was restraining an inmate on 03/15, and within 20 minutes his left shoulder

locked up. Treatment recommendation was corticosteroid injection into the left shoulder and physical therapy.

On April 2, 2013, employee Mayes returned with continuing complaints of impingement in his left shoulder. Treatment recommendation was MRI of left shoulder.

On April 10, 2013, the MRI of left shoulder showed a massive full-thickness rotator cuff tear with supraspinatus retraction near the level of the glenoid.

On May 1, 2013, Dr. Derhake, an orthopedic surgeon, advised employee Mayes that he had a large full-thickness rotator cuff tear of the entirety of the supraspinatus and infraspinatus tendons in the left shoulder. Dr. Derhake warned employee Mayes that there was a significant rate of re-rupture, upwards 40%, especially in tears of this size.

Blessing Hospital Records (PX. #4)

On May 9, 2013, Dr. Derhake admitted employee Mayes for left rotator cuff surgery and the operative report indicating the following:

PREOPERATIVE DIAGNOSIS:
1. Left shoulder massive full thickness rotator cuff tear involving entirety of the supra and infraspinatus tendons with medial retraction to the level of the glenoid.
2. Left shoulder impingement syndrome.

POSTOPERATIVE DIAGNOSIS:
1. Left shoulder massive full thickness rotator cuff tear involving entirety of the supra and infraspinatus tendons with medial retraction to the level of the glenoid.
2. Left shoulder impingement syndrome.

PROCEDURE:
1. Left shoulder arthroscopy with arthroscopic massive rotator cuff repair of entirety of supra and infraspinatus tendons.
2. Left shoulder arthroscopy with arthroscopic subacromial decompression and bursectomy.

Quincy Medical Group (PX. #1)

On August 15, 2013, Dr. Derhake examined employee Mayes' left shoulder and released him to return to light duty work with no direct inmate contact as of September 9, 2013. On November 4, 2013, Dr. Derhake released employee Mayes to full duty, but recommended a home exercise program for strengthening to prevent recurrent symptoms.

On May 5, 2014, Dr. Derhake noted that employee Mayes had done extremely well and likely reached his maximum medical improvement.

## CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of material fact in support of the following conclusions of law:

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

Employee, Bryant Mayes, submitted into evidence, medical expenses in the amount of $3,883.09 from Quincy Medical Group. The Arbitrator, after carefully considering the testimony of employee, Bryant Mayes, regarding medical treatment he received from Quincy Medical Group, as well as reviewing the medical records from Quincy Medical Group, finds that these medical expenses are reasonable and necessary and causally related to employee Mayes' work injury.

The Arbitrator orders respondent to pay the medical expenses of $3,883.09, in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule. Respondent shall receive a credit for any benefits it has already paid and shall hold petitioner harmless for any of the above expenses paid through group insurance.

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

Employee Mayes suffered a massive full thickness tear of his left rotator cuff tendons with significant retraction. According to Dr. Derhake, the treating orthopedic surgeon, even after surgery, employee Mayes still has a significant chance of re-rupturing the rotator cuff.

On December 15, 2014, employee Mayes was examined by his IME physician, Dr. Michael Watson, an orthopedic surgeon. Dr. Watson performed a physical examination which revealed that employee Mayes was still experiencing left shoulder pain, weakness and muscle atrophy. Dr. Watson noted the following:

> "There are some risks associated with having a massive rotator cuff repair. The major risk is that of a re-tear as the tissue is much weaker than the pre-injury state."

Dr. Watson used the AMA's Guide to Permanent Impairment and reported a 6% upper extremity impairment, which converts to a whole person impairment of 4%.

The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation.

Employee Mayes testified that he still experiences left shoulder pain, stiffness and weakness in the left shoulder and has noticed some muscle loss. Although he is able to perform his job duties, he has given up sports, such as golf and basketball, due to the risk of re-tearing his rotator cuff.

The Arbitrator notes that employee Mayes was 42 years old at the time of the accident. The Arbitrator further notes that evidence of disability is corroborated by the treating medical records. Based on the above facts, and the record taken as a whole, the Arbitrator finds that petitioner sustained permanent partial disability to the extent of 14% loss of a person, pursuant to §8(d)(2) of the Act.

STATE OF ILLINOIS )
) SS.
COUNTY OF )
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sara Wingerter,

Petitioner,

vs. NO: 13 WC 24756

Southern Illinois Healthcare,

16IWCC0494

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, 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 15, 2015, is hereby affirmed and adopted.

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

16IWCC0494

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: JUL 2 8 2016
TJT:yl
o 7/11/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

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

**WINGERTER, SARA**
Employee/Petitioner

Case# **13WC024756**

**SOUTHERN ILLINOIS HEALTHCARE**
Employer/Respondent

**16IWCC0494**

On 6/15/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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 THOMAS C RICH PC
6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0693 FEIRICH MAGER GREEN & RYAN
D BRIAN SMITH
2001 W MAIN ST PO BOX 1570
CARBONDALE, IL 62903

16IWCC0494

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)

**SARA WINGERTER**
Employee/Petitioner

v.

**SOUTHERN ILLINOIS HEALTHCARE**
Employer/Respondent

Case # 13 WC 24756

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Herrin**, on **1-14-15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

16IWCC0494

**FINDINGS**

On the date of accident, **11-17-12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$36,496.20**; the average weekly wage was **$701.85**.

On the date of accident, Petitioner was **32** years of age, ***married*** with **0** dependent children.

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

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

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

**ORDER**

Respondent shall pay Petitioner temporary total disability benefits of $467.90/week for 9 6/7 weeks, for Petitioner's periods of temporary total disability from 4/29/14 through 7/6/14, as provided in § 8(b) of the Act. Respondent shall have credit for any benefits already paid.

Respondent shall pay reasonable and necessary medical services of $156,210.46, as set forth in PX1, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall have credit for any benefits which have been paid and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in § 8(j) of the Act.

Respondent shall authorize and provide such further care as necessary to relieve Petitioner of the effects of injury, as provided in § 8(a) of the Act.

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

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

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

Signature of Arbitrator

6/11/15
Date

ICArbDec19(b)

JUN 15 2015

16IWCC0494

## FINDINGS OF FACT

Petitioner filed an Application For Adjustment of Claim for alleged injuries she sustained on November 17, 2012 while employed by Respondent as a registered nurse. Petitioner alleges injury to her low back. This matter proceeded to hearing on January 14, 2015 under Section 19(b) of the Act. Petitioner testified she and her certified nurse's assistant were boosting a patient in bed when the lock on the bed gave way, and the whole bed went up and swung toward her side. She testified she took the weight and twisted at the same time. Petitioner testified that following the incident she mostly felt symptoms in her low back, right above her tailbone. She testified that prior to this incident she had not been treated for low back pain other than pain related to kidney stones.

On November 18, 2012, Petitioner presented to the emergency room at Memorial Hospital of Carbondale. She was complaining of lumbar pain. (PX3) Petitioner was diagnosed with a lumbar strain. She was prescribed hydrocodone and flexeril, and instructed to follow up with her primary doctor. (PX3 at 9).

For the first two months following the accident, Petitioner was treated by Dr. Mark Austin of WorkCare, a facility owned by Respondent. Petitioner first saw Dr. Austin on November 19, 2012 (PX4 at 1-4). Petitioner complained of low back pain which at times radiated into her left buttock area. (PX4 at 2) Dr. Austin's physical exam was normal with the exception of mild left lumbar spasm on palpation and lumbar tenderness. (PX4 at 3) Dr. Austin diagnosed Petitioner with lower thoracic and lumbosacral strain, pain, and spasm, with some evidence of bilateral sacroiliitis. He prescribed Norco and Flexeril, and discussed heat, lumbar stretches, massage by family, and gave Petitioner a TENS unit. (PX4 at 4) He released her to work light duty with a 10 pound lifting restriction. (PX4 at 1)

On November 27, 2012, Petitioner returned to Dr. Austin. (PX4 at 8-11). She reported her back was still hurting and that she was not doing any better but the TENS unit and lumbar support did provide some relief. (PX4 at 8). Medication and the heat therapy also helped. *Id.* Physical examination of her lumbar spine revealed improvement in flexion, extension, side bend, and twist, but she had increased low back pain at extremes of motion. (PX4 at 10). Examination of her hips, knees, and distal lower extremities revealed full range of motion. She had a negative straight leg raise test, a negative Fabre's test and a negative Patrick's test. *Id.* Dr. Austin felt that Petitioner's thoracic findings had resolved, but that she still had lower and midline pain, left greater than right. (PX4 at 11). He also noted lumbosacral pain, tenderness, and spasm, but full range of motion. He prescribed a Medrol Dose Pack, and referred her to physical therapy. He also instructed her to continue with heat and stretches, and to continue using the TENS device and wearing lumbar support. *Id.*

Petitioner began physical therapy at Memorial Hospital of Carbondale on December 4, 2012. (PX3 at 43).

On December 13, 2012, Petitioner returned to Dr. Austin. (PX4 at 14-17). On this date Petitioner stated her back was hurting but that the four physical therapy sessions she had attended were starting to help. (PX4 at 14). Her neurological examination, including motor, sensory, and reflex examinations, was normal. *Id.* Her lumbar flexion, extension, side bend, and twist were all noted to have full range of motion, but with mild to moderate residual low back pain at the extremes of motion for right twist and floor touch flexion. (PX4 at 16). Her hips, knees, and distal lower extremities showed full range of motion on the right and left without pain. *Id.*

Dr. Austin's impression was a lumbosacral strain with continued improvements. He instructed Petitioner to complete her physical therapy sessions, to continue with her home exercise program, heat, and stretches. (PX4 at 17) Dr. Austin increased her lifting restriction to 25 pounds. (PX4 at 14).

On December 18, 2012, Petitioner returned to Dr. Austin. (PX4 at 18-21). The day before the visit she was unable to go to physical therapy due to spasms. (PX4 at 19) At hearing, Petitioner testified these symptoms appeared when she awoke with no known origin. There had been no intervening incident. Petitioner complained of pain radiating into her upper posterior thigh and she showed mild deficit on motor testing due to pain. (PX4 at 19) Patrick's testing was borderline on the left. *Id.* Dr. Austin's impression on this date was an exacerbation of Petitioner's lumbosacral strain, pain, and spasms. (PX4 at 21). He recommended Petitioner attend her three remaining physical therapy sessions, and continue with heat and stretches. *Id.*

On January 3, 2013, Petitioner returned to Dr. Austin. (PX4 at 24-27). Petitioner had completed physical therapy. (PX4 at 25). She complained of pain primarily in the left sacroiliac joint region with increased discomfort to the midline in her lumbar spine. *Id.* Petitioner complained of radiating pain from her low back to her left thigh to her knee with activities at work. *Id.* Sensory and reflex exams were normal, as was a straight leg raise test. (PX4 at 25-26). Dr. Austin stated that Petitioner had some mild improvements and some declinations of her functional range of motion following physical therapy. (PX4 at 27). He also noted findings consistent with a persistent left sacroiliitis, but also intermittent left leg radiculopathic pains, which suggested a possible disc herniation. *Id.* He recommended Petitioner continue to use the TENS device, continue bracing, heating, and home stretches, and ordered a lumbar MRI. *Id.*

On January 19, 2013, Petitioner underwent a lumbar MRI at Memorial Hospital of Carbondale. (PX3 at 68-69

On January 22, 2013, Petitioner returned to Dr. Austin. (PX4 at 32-35). He noted Petitioner's examination to be unchanged from her previous visit. (PX4 at 32). Dr. Austin reviewed the lumbar MRI and indicated it was grossly unremarkable. *Id.* He released Petitioner from his care, and referred her to a neurologist, Dr. Criste, for an evaluation. (PX4 at 35). He recommended Petitioner continue heat, stretches, and use of the TENS device. *Id.*

On March 29, 2013, Petitioner was seen by Dr. Gerston Criste, Trinity Neuroscience Institute. Petitioner described her pain on this date as low back pain radiating to her left thigh and posterior thigh. (PX5 at 1). She also reported pain radiating into both hips, as well as numbness and tingling in her left lower extremity. *Id.* Dr. Criste performed a neurological examination which showed no sensory loss and no motor weakness. Her deep tendon reflexes were all preserved and symmetric. Her balance, gait, and coordination were all intact, and her fine motor skills were normal. Dr. Criste also reviewed Petitioner's lumbar MRI, which he stated was relatively unremarkable. (PX5 at 4) Dr. Criste's plan was that Petitioner may consider a lumbar epidural steroid injection given that an extensive course of conservative measures had failed to provide significant improvement in her condition. (PX5 at 4). Dr. Criste's note stated Petitioner wanted to get a second opinion. Petitioner testified at hearing that Dr. Criste had recommended Petitioner seek a second opinion.

In any event, on June 27, 2013, Petitioner was seen for the first time by Dr. Matthew Gornet, Orthopedic Center of St. Louis. (PX6 at 1-2). Petitioner testified that Dr. Gornet was recommended to her by her attorney.

On that date, Petitioner presented with a chief complaint of low back pain central to the left buttock, left hip, and left lateral thigh pain to the knee. (PX6 at 1). She also complained of intermittent numbness and tingling in her left leg. *Id.* Dr. Gornet stated Petitioner's motor exam revealed decreased extensor hallus longis (EHL) function and ankle dorsiflexion on the left at 4/5. *Id.* Dr. Gornet also noted her deep tendon reflexes were 3+ at the knees, and 1+ at the ankles. *Id.* He mentioned that sensation was decreased to the L5 dermatome on the left. (PX6 at 2). Dr. Gornet reviewed the lumbar MRI from Memorial Hospital of Carbondale, noting that it was of poor to moderate quality he stated:

> To my viewing, this clearly shows an annular tear on the left. best seen on the T2 sagittal image #10 in both fat spin and other sequences. This is also seen on axial images #33. This is not mentioned in the report. I do not believe she has significant disc degeneration or degenerative changes....(PX6 at 2)

He felt the MRI showed an annular tear on the left at L4-5 and was of the opinion that the annular tear was the result of her work accident. *Id.* Dr. Gornet did not believe Petitioner had significant disc degeneration or degenerative changes. *Id.* Dr. Gornet recommended a transforaminal steroid injection at L4-5 left. (PX6 at 2). He continued Petitioner's light duty work restriction with a 10 pound limit and the ability to alternate between sitting and standing as needed. On July 9, 2013, Petitioner underwent a transforaminal steroid injection at L4-5 left with facet block at the same level. (PX6 at 3). The procedure did not alleviate her symptoms so when she returned Dr. Gornet recommended a repeat MRI. On August 29, 2013, Petitioner underwent a lumbar MRI at MRI Partners of Chesterfield. (PX8). The report of this MRI was prepared by Dr. David Dusek. (PX8 at 1). Dr. Dusek's impression was of L4-5 mild disc desiccation with a hyperintense signal within the left foraminal aspect that "could represent an annular tear." Dr. Dusek also observed a diffuse annular bulge and a mild left foraminal disc protrusion at L4-5 with mild left neural foraminal exit stenosis. He further noted that the hyperintense signals suspected to be an annular tear were best visualized on images #16 and 17 of the STIR sagittal sequence. *Id.*

On September 17, 2013, Petitioner underwent a discogram with x-ray interpretation at L4-5 and L5-S1 as ordered by Dr. Gornet.. (PX6 at 4) The report indicated the discogram showed a non-provocative disc at L5-S1, and a provocative disc at L4-5 with posterior left annular tear. (PX6 at 5) Following the discogram, Petitioner underwent a CT scan of her lumbar spine performed by CT Partners of Chesterfield. (PX9). The report of this CT scan was prepared by Dr. David Wu. (PX9 at 1) Dr. Wu's impression of the scan regarding L4-5 was "Intradiscal contrast extending from the nucleus pulposis through the needle tract in the left posterolateral annulus. (PX9 at 1) Dr. Gornet noted, however, that the indication of a needle tract at L4-5 was an error, as it did not correlate with the discogram results or the MRI imaging sequences. (PX6, at 6) Dr. Gornet noted that Petitioner's L4-5 annular tear was best visualized during this second MRI on T2 weighted image #16. *Id.* He recommended disc replacement surgery at L4-5, but wanted to completely exhaust conservative care. (PX6, at 6, 10) When Petitioner failed to improve with further physical therapy, she was referred for more injections with Dr. Boutwell. (PX6, PX11).

On December 20, 2013, Respondent had Petitioner examined by Dr. Michael Chabot. (RX 2) He believed Petitioner suffered from nothing more than a back strain, chronic back pain and obesity. *Id.* He did not believe that Petitioner was a surgical candidate; his only recommendations for Petitioner were that she lose

weight and exercise. (RX1, p.22-23; RX2) He believed that Petitioner was at maximum medical improvement with respect to her injury. *Id.*

Petitioner testified that her "actual exam itself where he was manipulating me" with Dr. Chabot lasted no more than five minutes. She further indicated that she brought discs containing diagnostic studies to the exam, but the doctor said that they did not provide him with the drivers, so he could not open them at the time. She took the discs with her when she left and was not told if they had made copies.

On April 29, 2014, Petitioner underwent laminotomy with a 10mm implant at L4-5. (PX7, 4/29/14) Dr. Gornet noted that Petitioner noticed a dramatic difference in her pain following the procedure, although she continued to have some left buttock and hip pain. (PX6, 5/22/14, 6/16/14) At Arbitration, Petitioner testified that her condition improved markedly following surgery. (T.16, 17) However, she is not yet able to cross her legs or ankles and has difficulty standing after sitting in a low position. (T.19) She remains under the care of Dr. Gornet with light duty restrictions and tentative plain for evaluation of her SI joint. (T.19, 20).

## CONCLUSIONS OF LAW

**Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?**
**Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?**
**Issue (K): Is Petitioner entitled to any prospective medical care?**

The Arbitrator finds Petitioner to be a credible witness. The record contains no evidence of any prior difficulties or injuries to Petitioner's lumbar spine. Petitioner testified to no prior claims or treatment for her low back, and that she has never experienced low back pain or inability to exercise because of her weight prior to her accident. (T.10, 11) Following her undisputed accident, however, Petitioner has experienced persistent lumbar and buttock pain with occasional radicular symptoms, which Dr. Gornet linked to adjacent nerve irritation related to her annular tear. (PX13) Causal connection between work duties and injured condition may be established by chain of events including a claimant's ability to perform duties before date of accident and inability to perform the same duties following date of accident. *Darling v. Indus. Comm'n of Illinois*, 176 Ill. App. 3d 186, 530 N.E.2d 1135 (1st Dist. 1988). Circumstantial evidence, especially when entirely in favor of the Petitioner, is also sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n,* 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n,* 93 Ill.2d 59, 442 N.E.2d 908 (Ill. 1982).

Petitioner also introduced the opinion of Dr. Gornet, who testified that the objective medical evidence fully substantiated the circumstantial chain of events linking condition to her employment. Both Dr. Chabot and Dr. Gornet agree that Petitioner's neurological symptoms are not germane to the issue of causal connection. (RX1, p.42, 43; PX13, p.32) The Arbitrator finds the opinion of Dr. Gornet to be more persuasive than that of Dr. Chabot. Dr. Gornet consistently opined that Petitioner's undisputed accident of November 17, 2012, was causally connected to Petitioner's annular tear and her symptoms. (PX6; PX13; PX14) His opinion is supported by Petitioner's objective diagnostic imaging studies, and the results of Petitioner's discogram as well as the success of his treatment approach for Petitioner's injury.

Respondent obtained a utilization review by a Dr. Treister regarding the diagnostic discogram which Petitioner underwent and that procedure was certified. Respondent also obtained an after the fact utilization review by Dr. Treister regarding Petitioner's surgery. This was done on September 2, 2014. While he opined the surgery performed was not reasonable or necessary, he seemed to be most concerned with the type of implant used. In light of the persistence of symptoms despite exhaustive conservative measures and the relative success of the surgery which had been performed back in April, the Arbitrator gives little weight to the opinion of Dr. Treister.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner met her burden of proof and credibly established that her current condition of ill-being is causally connected to her work accident of November 17, 2012. The Arbitrator further finds that the treatment provided to Petitioner up to the date of hearing has been both reasonable and necessary. Respondent is therefore liable for the claimed medical expenses and temporary total disability benefits. As the evidence demonstrates that Petitioner has not reached maximum medical improvement, Respondent shall provide any further medical care needed to relieve Petitioner of the effects of her injury.

**Issue (L): What temporary benefits are in dispute?**

Respondent stipulated to Petitioner's alleged period of temporary total disability from 4/29/14 through 7/6/14 (9 6/7 weeks), but disputed liability for benefits payable during that period of time based upon the issues of causation and reasonableness and necessity of medical treatment. Petitioner's condition of ill-being has been found to be causally related to her accident and the medical treatment received by Petitioner has been found to be reasonable and necessary as indicated above. The Arbitrator therefore finds Petitioner is entitled to temporary total disability benefits of $467.90/week for a period of 9 6/7 weeks for the period of 4/29/14 through 7/6/14.

STATE OF ILLINOIS )
) SS.
COUNTY OF SANGAMON )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Nation,

Petitioner,

vs.

NO: 14 WC 33711

16IWCC0495

City of Springfield,

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 issue of the nature and extent of Petitioner's disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 29, 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.

16IWCC0495

The party commencing 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: JUL 2 8 2016
TJT:yl
o 7/26/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# NOTICE OF ARBITRATOR DECISION

**NATION, ROBERT**
Employee/Petitioner

Case# **14WC033711**

**CITY OF SPRINGFIELD**
Employer/Respondent

**16IWCC0495**

On 1/29/2016, 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 0.41% 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:

2217 SHAY & ASSOCIATES
TIMOTHY M SHAY
1030 DURKIN DR
SPRINGFIELD, IL 62704

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
620 E EDWARDS
SPRINGFIELD, IL 62705

16IWCC0495

STATE OF ILLINOIS )
)SS.
COUNTY OF SANGAMON )

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

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION
### NATURE AND EXTENT ONLY

**ROBERT NATION**
Employee/Petitioner

v.

**CITY OF SPRINGFIELD**
Employer/Respondent

Case # 14 WC 033711

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 **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **SPRINGFIELD**, on **DECEMBER 16, 2015**. By stipulation, the parties agree:

On the date of accident, **AUGUST 1, 2014**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$70,267.60**, and the average weekly wage was **$1,351.30**.

At the time of injury, Petitioner was **59** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent. The parties further have stipulated the Respondent will pay reasonable, necessary and related medical expenses as outlined in Petitioner's Exhibit 11, directly to the medical providers, according to Section 8.2. Additionally, Respondent shall be given credit for those medical benefits that have been paid either directly by Respondent or under its group plan.

Respondent shall be given a credit of **$13,254.42** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$13,254.42**.

The parties waived service by certified mail of this Arbitration Decision, and any Decision by the Commission on Review, and stipulated to delivery of such decisions by electronic mail.

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

**ORDER**

Respondent shall pay Petitioner the sum of $735.37/week for a further period of 90 weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **an 18% loss of use of the person-as-a-whole.**

Respondent shall pay Petitioner compensation that has accrued from **August 1, 2014** through **December 16, 2015**, 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

**JANUARY 29, 2016**
Date

JAN 29 2016

***ROBERT NATION v. CITY OF SPRINGFIELD***

***14 WC 33711***

***FINDINGS OF FACT AND CONCLUSIONS OF LAW***

## INTRODUCTION

This matter was tried before Arbitrator Steffenson in Springfield on December 16, 2015. The issue in dispute was the nature and extent of the injury.

## FINDINGS OF FACT

The parties submitted a Request for Hearing form that was marked as Arbitrator's Exhibit 1 and admitted into evidence. That document indicated only the nature and extent of the Petitioner's injury was in dispute. It noted the Petitioner had an average weekly wage of $1,351.30, was 59 years old at the time of injury, was married and had no dependent children. The parties also agreed the Respondent had paid to the Petitioner $13,254.42 in TTD benefits. Finally, the parties stipulated to receipt of this Arbitration Decision and any subsequent Decision and Opinion on Review via e-mail. (Arbitrator's Exhibit 1).

Furthermore, the parties stipulated on the record the Respondent will pay reasonable, necessary and related medical expenses as outlined in Petitioner's Exhibit 11, directly to the medical providers, according to Section 8.2. Additionally, Respondent will be given credit for those medical benefits that either had been paid directly to the medical providers by Respondent or under its group plan.

The Petitioner testified he is right handed and suffered an injury to his left shoulder on August 1, 2014. The Petitioner was reconditioning a wire tensioner and in a confined space that limited his ability to move about. He reported the diesel engine unit of the tensioner, which was hanging from an overhead crane to allow better access to the interior of the machine, began to rotate on its own and he attempted to stop that movement with his left arm. However, as he did so, the 800 pound engine pulled on his left arm and he felt pain and a stabbing sensation in his left shoulder area. The Petitioner submitted an accident report (Petitioner's Exhibit 9) to the Respondent and continued working with his pain complaints.

However, on August 22, 2014, the Petitioner sought medical care for his left shoulder at the emergency department of St. John's Hospital in Springfield. After an examination and x-ray studies, Dr. Sam Gaines diagnosed the Petitioner as suffering from a rotator cuff injury and encouraged to see his primary care physician (PCP) for further care. (Petitioner's Exhibit 1).

Following a brief encounter where he received a referral from his PCP, Dr. Tammy Bartolomucci, the Petitioner saw Dr. Rodney Herrin, an orthopedic surgeon, at Orthopedic Center of Illinois on August 25, 2014. Dr. Herrin examined the Petitioner and reviewed his x-ray studies before recommending the Petitioner undergo an MRI study of his left shoulder. Dr. Herrin also restricted the Petitioner's use of his left upper extremity. (Petitioner's Exhibit 2). The Petitioner testified the Respondent was able to accommodate Dr. Herrin's work restrictions.

After his September 5, 2014, MRI study that found both a possible labral tear and moderate sized full thickness tear of the supraspinatus tendon (Petitioner's Exhibit 3), the Petitioner returned to Dr. Herrin on September 11, 2014, for further evaluation and treatment options. (Petitioner's Exhibit 2). Dr. Herrin reviewed the MRI study and recommended the Petitioner undergo a left shoulder arthroscopy to further evaluate and treat the Petitioner's rotator cuff area. (Petitioner's Exhibit 2).

Dr. Herrin then performed a left shoulder arthroscopy on September 26, 2014. During that procedure, he repaired the supraspinatus tendon tear and completed a subacromial decompression. (Petitioner's Exhibit 4). The Petitioner testified his left arm was placed in a sling and Dr. Herrin restricted him from any work. The Petitioner then returned to Dr. Herrin for a follow-up visit on October 6, 2014. Dr. Herrin reported the Petitioner was progressing with regard to his left shoulder pain. He encouraged the Petitioner to continue using his arm sling, to work on range of motion for his left upper extremity, and to remain off of work. (Petitioner's Exhibit 2).

During an October 27, 2014, follow-up appointment, Dr. Herrin recommended the Petitioner move forward with physical therapy for his left shoulder and instructed the Petitioner to return to work, but only if he could do so without using his left upper extremity while working. (Petitioner's Exhibit 2). The Petitioner testified that the Respondent was able to accommodate this work restriction and he returned to work in that capacity.

The Petitioner returned to Dr. Herrin on December 11, 2014. Dr. Herrin reported the Petitioner continued to participate in his therapy program and was "doing fairly well." (Petitioner's Exhibit 2). Dr. Herrin continued the Petitioner's therapy plan, work restrictions, and anticipated the Petitioner could begin "aggressive strengthening" of his left shoulder three months after his September 26, 2014, surgery date. Subsequently, on January 12, 2015, Dr. Herrin found the Petitioner to be reporting both discomfort and popping in his left shoulder. The Petitioner was to continue with therapy and "progressive strengthening of the (left) rotator cuff and scapular stabilizers, ...". (Petitioner's Exhibit 2). Dr. Herrin also revised the Petitioner's work restrictions to no lifting and no overhead work with the left arm. The Petitioner testified

he experienced symptoms similar to those when he suffered his August 1, 2014 accident, including pain, popping, and restricted motion of the left shoulder joint.

After a February 9, 2015, visit with Dr. Herrin where the Petitioner continued to note his left shoulder symptoms, he again sought care from Dr. Herrin on March 9, 2015. Dr. Herrin then ordered a new left shoulder MRI study due to the Petitioner's left shoulder pain and popping complaints. He also move the Petitioner to a full off work status. (Petitioner's Exhibit 2).

On March 24, 2015, the Petitioner underwent an MRI study of his left shoulder without contrast. The MRI report found "(g)lenohumeral and subacromial/subdeltoid effusions with synovial thickening ..." as well as partial-thickness tendon tears and labral tears. (Petitioner's Exhibit 5). Dr. Herrin reviewed the MRI scan and report on April 1, 2015, and noted his concern the findings and symptoms could point towards adhesions in the subacromial space. He recommended a second surgery to address these findings and continued the Petitioner's work restrictions. (Petitioner's Exhibit 2).

Dr. Herrin proceeded with the recommended left shoulder arthroscopy on May 1, 2015. (Petitioner's Exhibit 6). Dr. Herrin reported the Petitioner to have "considerable" adhesions in the subacromial space that he removed while also performing an anterior capsular release. Dr. Herrin also took the Petitioner off of work at the conclusion of the surgery. The Petitioner returned to Dr. Herrin for a follow-up visit on May 7, 2015. Dr. Herrin reported the Petitioner had improving range of motion with his left upper extremity and healing surgical portals. He recommended the Petitioner move forward with post-surgical therapy and modified his work restrictions to light duty work with no lifting of loads greater than five (5) pounds with the left arm. (Petitioner's Exhibit 2).

Dr. Herrin next saw the Petitioner on June 8, 2015. The Petitioner informed Dr. Herrin he was making progress with his symptoms and was not working as the Respondent could not accommodate his work restrictions. Dr. Herrin encouraged the Petitioner to continue with his home exercise program and authorized his return to full duty work on June 9, 2015. (Petitioner's Exhibit 2).

The Petitioner returned to Dr. Herrin on July 9, 2015, to report increasing discomfort in his left shoulder despite performing his regular duties at work. The Petitioner indicated pain symptoms were present when he raised his left arm overhead. Dr. Herrin noted the Petitioner likely was not a candidate for further "intervention", should continue to work his regular duties, and should return for a follow up visit in six (6) weeks. (Petitioner's Exhibit 2). Thereafter, the Petitioner returned to Dr. Herrin for further care on August 25, 2015. Dr. Herrin found the Petitioner to have "weakness and some pain when I checked the strength of the supraspinatus

clinically." (Petitioner's Exhibit 2). He also reported: "...I think it is unlikely that any additional surgical intervention in the form of a repeat rotator cuff repair will be likely to significantly improve his symptoms or his function." Dr. Herrin then placed the Petitioner at maximum medical improvement, encouraged him to continue with his home exercise program, and released him from further medical care at a full duty status. (Petitioner's Exhibit 2).

The Petitioner testified he did not wish to proceed with a third surgery on his left shoulder and had returned to full duty work with the Respondent. However, he noted his pain symptoms continue to trouble him and he lacks left arm strength with any overhead activities. Nonetheless, the Petitioner also testified he is able to obtain assistance from his fellow workers as needed but, "(a)t work, I can do it all." (Transcript at 43).

## CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

### What is the nature and extent of the injury?

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a Mechanic 1 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 also notes the Petitioner occasionally has to modify some of his job duties, but continues to perform his work for the Respondent. The Petitioner testified: "At work, I can do it all." (Transcript at 43). Because of the Petitioner's occupation, the Arbitrator therefore gives *greater* 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 of the Petitioner's age at the time of injury, 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 minimal testimony and evidence regarding Petitioner's future earnings capacity was presented at trial. 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 the Petitioner was released to return to full duty work by Dr. Herrin on August 25, 2015. Prior to that release, the Petitioner underwent two left shoulder surgeries to address a torn rotator cuff and subsequent removal of adhesions in the subacromial space of the left shoulder. The Petitioner did testify to lingering pain complaints and impaired strength and motion of his left arm when performing overhead work. However, the Petitioner testified he is able to perform all of his work duties that the he himself classified as heavy work. (Transcript at 49-50). Because of the Petitioner's treating medical records and other evidence of disability, 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 an 18% loss of use of person-as-a-whole pursuant to §8(d)2 of the Act.

Signature of Arbitrator

January 29, 2016
Date

STATE OF ILLINOIS )
) SS.
COUNTY OF PEORIA )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kim Ballard,

Petitioner,

vs. NO. 15WC 10818

16IWCC0496

Ameren IL

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 6, 2016 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 $21,000.00. 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: JUL 29 2016
SJM/sj
o-7/14/2016
44

Stephen J. Mathis

David L. Gore

Mario Basurto

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

**BALLARD, KIM**
Employee/Petitioner

Case# **15WC010818**

**16IWCC0496**

**AMEREN IL**
Employer/Respondent

On 1/6/2016, 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 0.50% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5364 PATRICK JENNETTEN LAW OFFICE
4711 N PROSPECT RD
PEORIA, IL 61616

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

# 16IWCC0496

STATE OF ILLINOIS )
)SS.
COUNTY OF PEORIA )

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

## ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION
## 19(b)

**Kim Ballard**
Employee/Petitioner
v.
**Ameren IL**
Employer/Respondent

Case # **15** WC **10818**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **October 28,2015 and Peoria on November 17, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **February 9, 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 **$86,700.52**; the average weekly wage was **$1,667.32**.

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

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

Respondent shall be given a credit of **$4,017.08** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$4,017.08**.

Respondent is entitled to a credit for all medical bills that have been paid as provided under Section 8(j) of the Act.

ORDER

Pursuant to a stipulation between the parties, the Respondent is entitled to a credit for all medical bills that have been submitted as provided in Section 8(j) of the Act. The Petitioner is entitled to reimbursement of out-of-pocket expenses paid in the amount of $1,510.94.

Respondent shall pay Petitioner temporary total disability benefits of **$1111.55**/week for **20 3/7** weeks, commencing **2/9/15** through **3/9/15**, **3/16/115**, **4/3/15** through **4/24/15**, and **7/14/15** through **10/15/15**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of **$555.78**/week for **1 1/7** weeks, commencing **3/10/15** through **3/13/15** and **3/17/15** through **3/20/15**, as provided in Section 8(a) of the Act.

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

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

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

Signature of Arbitrator

December 29, 2015
Date



JAN 6 - 2016

**FACTS:**

On February 9, 2015, Petitioner was in Orland, Florida, attending a conference on behalf of her employer. But for the industry conference, Petitioner would not have been in Orlando, Florida on February 9, 2015. Petitioner was walking into the lobby of the hotel on the evening of the start of the conference when she slipped in water by the entryway. The Petitioner remembers stepping onto a polished marble floor, when she slipped due to water on the marble. Petitioner testified the floor was very slippery, and she fell landing very hard on her left wrist. The videotape of the incident depicts the Petitioner walking into the hotel, stepping off an entry rug onto a tile floor, when she immediately slipped falling on her left side. (Px. 8).

Petitioner was taken via ambulance to Florida Hospital Celebration where she was diagnosed with a distal radius fracture of the left wrist. (Px. 6). Petitioner went to Indiana Hand Center, where she had previously treated for left wrist problems, for evaluation of her left wrist. Petitioner treated with Dr. Peck who diagnosed her with a left distal radius fracture on February 10, 2015. Dr. Peck recommended surgical repair for the Petitioner's condition. (Px. 7).

Dr. Peck performed surgery on February 12, 2015, at Indiana University Health Methodist Hospital. Surgery performed included open reduction and internal fixation of the left distal radius fracture, including placement of K-wires and an Acu-Loc standard distal radius plate. Petitioner's post-operative diagnosis remained left distal radius intra-articular fracture. (Px. 8).

Petitioner followed with Dr. Peck on March 3, 2015, where she continued to complain of left wrist pain, with range of motion limited due to moderate swelling. Petitioner was told to follow up in three weeks. Handwritten notes from March 17, 2015, from Dr. Peck reveal the Petitioner had continued pain in the wrist, as well as mild pain over the FCR and mild pain over the distal radioulnar joint (DRUJ). Petitioner's follow up on March 24, 2015, showed continuing pain. On April 14, 2015, Dr. Peck noted continued pain, including pain over the distal radial ulnar joint. Dr. Peck noted instability in the distal radial ulnar joint.

Petitioner sought a second opinion with Dr. Alex Meyers on April 6, 2015, at Reconstructive Hand to Shoulder of Indiana. Dr. Meyers noted Petitioner had surgery for a distal radiounlar stabilization procedure in 2006, with a recent injury in February of 2015. Since that time, Petitioner's distal radioulnar joint (DRUJ) had become more and more painful. Physical examination revealed pain consistent with Petitioner's DRUJ dislocation. Dr. Meyers reviewed an x-ray which revealed dorsal displacement. Dr. Meyers indicated time was needed to recover, however, multiple surgical procedures were an option including a prosthesis. Dr. Myers diagnosed a dislocation of the distal radioulnar joint. (Rx. 25).

Petitioner sought a third opinion with Dr. Timothy Dicke at OrthoIndy on April 13, 2015. Dr. Dicke took a history of Petitioner having a previous open repair of the left wrist triangular fibrocartilage/DRUJ in 2006. Petitioner had mild grade chronic pain at the ulnar wrist, with symptoms aggravated with an acute injury to the left wrist with a fall on February 9, 2015. Petitioner had surgical fixation for her left distal radius fracture, but had increased pain at the left ulnar wrist with restricted supination. Dr. Dicke reviewed x-rays of the left wrist from January of 2015 with x-rays

since her recent wrist fracture, which he felt showed a dissociation of the radioulnar joint (DRUJ) compared to previous x-rays. Dr. Dicke diagnosed distal radioulnar joint sprain and instability of the wrist. Dr. Dicke opined the distal radioulnar joint/arthrosis was exacerbated after the distal radial fracture. Dr. Dicke felt Petitioner could improve over time, however, if symptoms persisted surgery could be warranted. Petitioner had an appointment again with Dr. Dicke on May 26, 2015, with continued diagnosis of DRUJ sprain and instability of the wrist joint. Dr. Dicke recommended surgery, with Petitioner noted as a candidate for the Sheker implant based on her history, which was offered as first choice of surgical intervention in his opinion. (Px. 8).

Petitioner was referred by Dr. Peck on May 26, 2015, to Dr. Kleinman within the Indiana Hand to Shoulder Center due to continued pain in the distal radial ulnar joint (DRUJ). Dr. Peck noted the DRUJ continued to be unstable on the left side. Dr. Kleinman saw Petitioner on May 27, 2015. He noted the history of TFC repair he performed nine years earlier, with the recent history of a fall while working in February. Dr. Kleinman diagnosed significant degenerative changes of the distal radial ulnar joint, marked ulnar plus variance, with lunate evidence of ulnocarpal abutment syndrome. Dr. Kleinman recommended surgery to the left wrist with a Scheker distal radial ulnar joint arthroplasty due to her work-related incident. Dr. Kleinman wanted to schedule surgery once the workers' compensation carrier accepted liability for the work-related accident. (Px. 7).

Petitioner underwent surgery by Dr. Kleinman on July 14, 2015, for left distal radial ulnar joint instability with arthrosis, with a procedure performed with a left Scheker DRUJ arthroplasty and removal of the left distal radius hardware. (Px. 10). Petitioner testified that she was off work following the surgery through October 15, 2015 when she returned to one handed work.

Petitioner testified that she currently continues to experience pain in her left wrist, as well as difficulty lifting, and that she wants to continue to treat with Dr. Kleinman.

## CONCLUSIONS:

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

Petitioner was attending a conference in Orlando, Florida, on behalf of her employer. Petitioner was away from home attending work, therefore she was a "traveling employee" as set forth in the Act and defined by the Illinois Courts. Petitioner competently testified to her fall on a wet floor in the lobby of the hotel where she was staying, which is confirmed by the video placed into evidence. Slipping on a wet floor has been deemed an accident that arises out of and in the course of employment. The Arbitrator finds that the Petitioner sustained an accident arising out of and in the course of her employment with the Respondent.

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

The Petitioner suffered from a distal radius facture of the left wrist as a result of the fall on February 9, 2015. Her resulting medical care, including surgery with Dr. Peck and resulting therapy, were reasonable and necessary as a result of the fall.

The disputed issue raised by Respondent is whether or not the distal radial ulnar joint (DRUJ) condition is causally related to the fall. Respondent relies upon the opinions of Dr. Rotman.

Dr. Rotman refused to diagnose the Petitioner with distal radial ulnar joint disorder. Dr. Rotman refused to find a dissociation or dislocation of the distal radial ulnar joint, and Dr. Rotman noted that if Petitioner truly had a disassociated or dislocated joint then a plate and prosthesis would be appropriate (Rx. 21, p. 37). Dr. Rotman acknowledged that he had a completely different diagnosis than Dr. Dicke or Dr. Kleinman (Rx. 21, pp. 38-9). Dr. Rotman acknowledged that a fall such as that suffered by Petitioner could aggravate a condition of the distal radial ulnar joint; however, Dr. Rotman did not believe the Petitioner suffered from a condition requiring a Scheker implant in the left wrist. Dr. Rotman agreed that he reviewed the same x-rays as Dr. Dicke, however, he had a very different review of the x-rays. (Rx. 21, p. 49). Dr. Rotman agreed that a dislocation or a dissociation of the distal radial ulnar joint would be consistent with a fall, and further would give reason for a Sheker implant in the wrist. (Rx. 21, p. 50).

The Petitioner was seen by Dr. Peck who diagnosed an unstable DRUJ (Px. 7), Dr. Myers who diagnosed a dislocation of the DRUJ (Rx. 25), Dr. Dicke who diagnosed a dissociation of the DRUJ (Px. 8), and Dr. Kleinman who diagnosed significant degenerative changes of the distal radial ulnar joint (Px. 8). Dr. Rotman stands alone, despite the opinions of four treating orthopedic hand surgeons, in finding the Petitioner had no significant problem of the DRUJ requiring surgical intervention. Dr. Rotman's opinions are further diminished by the very fact the Petitioner had a wrist arthrosis procedure in the form of a Scheker implant, a procedure that Dr. Rotman did not believe was reasonable or necessary.

The Arbitrator finds the opinions of Dr. Kleinman persuasive, and adopts his opinion that the Petitioner's DRUJ condition was casually related to the fall. Dr. Rotman agreed a fall could have aggravated such a condition, but refused to acknowledge the Petitioner suffered a significant problem with the DRUJ.

The Arbitrator finds the Petitioner's condition of DRUJ problems, whether significant changes as diagnosed by Dr. Kleinman, or dissociation or dislocation as diagnosed by Dr. Myers and Dr. Dicke, are causally related to the fall. The Arbitrator declines to substitute Dr. Rotman's opinions for that of four other orthopedic hand surgeons. The subsequent medical treatment and care is determined as reasonable and necessary, including surgical intervention with a Scheker implant, to treat the DRUJ problem in the Petitioner's left wrist.

**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, and (N.), Is Respondent due any credit, the Arbitrator finds and concludes as follows:**

Petitioner has received reasonable and necessary medical treatment and care as outlined in the exhibits. Per the stipulation of the parties, the Respondent has paid all applicable medical bills under a self-insured policy of group health insurance and is entailed to a credit for those payments subject to Section 8(j) of the Act. The Arbitrator finds that the Petitioner's medical treatment and care outlined in the exhibits are reasonable and necessary as a result of the February 9, 2015, work accident. Per the stipulation of the parties, the Respondent is thus responsible for outstanding out-of-pocket expenses incurred by the Petitioner's out of pocket expenses totaling $1,510.94 as outlined in Px.13.

**In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:**

The Petitioner is continuing to treat with Dr. Kleinman, and has not reached a point of maximum medical improvement. Respondent is responsible for ongoing medical treatment and care as it relates to the Petitioner's left wrist.

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

The evidence shows the Petitioner is entitled to temporary total disability benefits from February 9, 2015 through March 9, 2015, March 16, 2015, April 3, 2015 through April 24, 2015, and July 14, 2015 through October 15, 2015, representing 20 3/7 weeks. The Petitioner is also entitled to temporary partial disability benefits from March 10, 2015, through March 13, 2015 and March 17, 2015 through March 20, 2015, with Petitioner working half days during this time period over a period of 1 1/7 weeks. Petitioner is entitled to benefits in the amount of $22,707.38 in TTD benefits and $1,270.34 in TPD benefits. Respondent is entitled to a credit of $4,017.08 in TTD benefits paid.

**In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:**

Chris Fry, claims adjuster with Corporate Claims Management, testified on behalf of the Respondent. Mr. Fry testified that he was the adjuster assigned to the Petitioner's case and that the case was initially accepted and medical treatment with Dr. Peck, including surgery, was authorized. Mr. Fry testified that the Petitioner's case was not denied until March of 2015, and that denial letters were issued after March 27, 2015. Mr. Fry testified that the Petitioner's case was denied starting at the end of March of 2015 based upon her refusal to see Dr. Moody for an examination as requested by the Respondent. The Petitioner testified that she did refuse to see Dr. Moody because when she went for her examination she was asked to sign a consent for treatment form which she refused to

do. Mr. Fry testified that the Petitioner's claim was also denied due to "numerous red flags" which were discovered during the investigation of the claim, including a suspicion that the Petitioner may have been intoxicated at the time of her injury.

While the Arbitrator specifically finds that there was no credible evidence admitted into the record from which to conclude that the Petitioner was intoxicated at the time of her injury, the Arbitrator declines to find that the Respondent's failure or refusal to pay benefits in the instant case was objectively unreasonable given the totality of the circumstances surrounding the Petitioner's accident and her course of medical treatment and the opinions of Dr. Rotman. Thus, the Arbitrator declines to award any penalties or fees in the instant matter.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Kornfeind,

Petitioner,

vs.

NO. 11WC043319

16IWCC0497

Gottlieb Memorial Hospital,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2015 is hereby affirmed and adopted.

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

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

16IWCC0497

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: JUL 29 2016
SJM/sj
o-7/7/2016
44

Stephen J. Mathis

David L. Gore

Mario Basurto

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## NOTICE OF ARBITRATOR DECISION

**KORNFEIND, CHRISTOPHER**
Employee/Petitioner

Case# **11WC043319**

**16IWCC0497**

**GOTTLIEB MEMORIAL HOSPITAL**
Employer/Respondent

On 11/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.34% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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
JORDAN BROWEN
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

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

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

STATE OF ILLINOIS )
)
COUNTY OF COOK )

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

16IWCC0497

CHRISTOPHER KORNFEIND
Employee/Petitioner

Case #11 WC 43319

v.

GOTTLIEB MEMORIAL HOSPITAL
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on July 20 and October 20, 2015. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On July 9, 2011, the respondent was operating under and subject to the provisions of the Act.

- On this date, an employee-employer relationship existed between the petitioner and respondent.

- In the year preceding the injury, the petitioner earned $25,170.65; the average weekly wage was $484.05.

- At the time of injury, the petitioner was 55 years of age, single with no children under 18.

ORDER:

- The petitioner's request for temporary total disability benefits is denied.

- The respondent shall pay the petitioner the sum of $290.43/week for a further period of five weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 1% loss of the person as a whole.

- The respondent shall pay the petitioner compensation that has accrued from July 9, 2011, through October 20, 2015, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for his lumbar spine, left hip, left shoulder and left knee through October 9, 2011, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his lumbar spine, left hip, left shoulder and left knee after October 9, 2011, and for his left elbow and teeth was not reasonable or necessary and is denied. The respondent shall pay the medical bills in accordance with the Act, the medical fee schedule or any prior adjustments or negotiated rate. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act and shall

hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

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

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

Robert E. Williams

Signature of Arbitrator

November 13, 2015

Date

NOV 13 2015

FINDINGS OF FACTS:

The petitioner, a security officer, received emergency care at the respondent's place of business on July 9, 2011, for left hip, left shoulder, left arm and back pain. He reported that he was thrown by a patient in the ER. The physician noted a full range of motion of all extremities and the petitioner was provided Vicodin for contusions and musculoskeletal strains. The petitioner saw Dr. Sarantos on August 6th and October 13th; however, the treatment notes are handwritten and are not legible. A lumbar MRI on September 3rd revealed no significant change from an MRI on October 15, 2007, no acute skeletal injury, degenerative disease and endplate changes from L3-4 through L5-S1. The petitioner worked from July 9th through the date of his termination in October 2011.

Dr. Stamelos saw the petitioner on January 23, 2012, and noted a history of severe low back pain and knee pain due to an altercation resulting in a blow to his left knee and the loss of two crowns. The petitioner started physical therapy at ATI for low back weakness and pain on March 7, 2012, and followed up with Dr. Stamelos, who kept him off work. An MRI of his left knee on December 14, 2012, revealed a peripheral medial meniscus tear and grade 1/2 patella chondromalacia. An MRI of his lumbar spine the same day revealed a diffuse bulge at L4-5 and L5-S1 causing narrowing of the foramina and a central bulge at L3-4.

At the request of the respondent, the petitioner was evaluated by Dr. Michael Kornblatt on February 20, 2013. Dr. Kornblatt opined that the petitioner's lumbar and left knee strain and contusion had resolved and warranted no specific treatment, that there were no abnormal neurologic deficits caused by his multilevel lumbar degenerative disc disease and that he had no deficits and a normal clinical physical examination of his left

knee. Dr. Kornblatt further opined that the petitioner reached maximum medical improvement approximately 8-12 weeks post-injury, that he could perform all gainful employment that a person of his age and stature would normally perform and that no additional work restrictions were necessary.

Dr. Stamelos noted at the last follow-up on February 18, 2013, that the petitioner had a negative straight leg raise test, that he was not in any distress and that he could perform restricted work activities.

Video surveillances of the petitioner on August 25 and 31, 2015, and September 1, 2015, reveal him walking normally, walking without a cane, bending down, entering a vehicle without leveraging his body weight with either arm, using a cane without reducing the stress on his left leg and swinging his left arm and cane in tandem with his right leg.

The petitioner had prior left knee problems and lumbar degenerative disc disease and surgery. The last prior lumbar MRI was on October 15, 2007, and a prior left knee MRI was on June 18, 2011.

**FINDING WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF THE EMPLOYMENT WITH THE RESPONDENT:**

Based upon the testimony and the evidence submitted, the petitioner proved that he sustained an accident on July 9, 2011, arising out of and in the course of his employment with the respondent. There is no evidence to rebut the petitioner's testimony that he fell during a scuffle with a patient.

**FINDINGS REGARDING WHETHER TIMELY NOTICE WAS GIVEN TO THE RESPONDENT:**

The petitioner notified JoAnn Naples with the respondent's Employee Health Service Department on July 15, 2011. The respondent received timely notice of the petitioner's injury.

**FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:**

Based upon the testimony and the evidence submitted, the medical care rendered the petitioner for his lumbar spine, left hip, left shoulder and left knee through October 9, 2011, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his lumbar spine, left hip, left shoulder and left knee after October 9, 2011, and for his left elbow and teeth, if any, was not reasonable or necessary and is denied.

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

Based upon the testimony and the evidence submitted, the petitioner proved that his condition of ill-being with his lumbar spine, left hip, left shoulder and left knee through October 9, 2011, was causally related to a work injury on July 9, 2011. The petitioner failed to prove that his condition of ill-being with his left elbow, mouth and teeth is causally related to a work injury and that his condition of ill being with his lumbar spine, left hip, left shoulder and left knee after October 9, 2011, is casually related to the work injury.

The petitioner had a pre-existing condition of ill-being with his lumbar spine and left knee prior to July 9, 2011. The initial medical care records revealed that the petitioner sustained contusions and strains only to his lumbar spine, left hip, left shoulder and left knee. The physician noted a full range of motion of all the petitioner's extremities. The

petitioner was specific and comprehensive with the description of his injuries and symptoms and did not indicate any injuries or symptoms with his left elbow, mouth or teeth. The petitioner continued to work, did not seek further medical care and reported improved symptoms to respondent on July 21, 2011. Also contradictory to the petitioner's testimony was his ability to continue working his regular duties for three months and the absence of any debilitating symptoms until his termination for misconduct in mid October 2011. Moreover, the surveillance videos of the petitioner belie his testimony and credibility. The opinions of Dr. Kornblatt are more consistent with the evidence and are more persuasive. The petitioner reached maximum medical improvement on October 9, 2011. The opinions of Dr. Stamelos are not supported by the evidence and are given no probative weight.

**FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:**

Based on the finding of the causal relationship of the petitioner's condition of ill-being, he failed to prove any entitlement to temporary total disability benefits. The petitioner continued to work through October 9, 2011, the date he reached maximum medical improvement. The petitioner's request for temporary total disability benefits is denied.

**FINDING REGARDING THE NATURE AND EXTENT OF INJURY:**

Contrary to his testimony, the surveillance videos reveal that the petitioner is active and not limited with routine activities. The respondent shall pay the petitioner the sum of $290.43/week for a further period of 5 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 1% loss of the person as a whole.

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

Susan L. Key,

Petitioner,

vs.

NO. 14WC 15272

16IWCC0498

State of Illinois Department of Corrections,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 21, 2016 is hereby affirmed and adopted.

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

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

16IWCC0498

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

DATED: JUL 29 2016
SJM/sj
o-7/7/2016
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

**KEY, SUSAN L**
Employee/Petitioner

Case# **14WC015272**

**SOI DEPT OF CORRECTIONS**
Employer/Respondent

**16IWCC0498**

On 1/21/2016, 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 0.37% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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
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CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JAN 21 2016

RUSTALLY A. KARGIN, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0498

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

Susan L. Key
Employee/Petitioner

v.

State of Illinois Department of Corrections
Employer/Respondent

Case # 14 WC 15272

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 William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on November 25, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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

FINDINGS

On February 24, 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 $39,714.50; the average weekly wage was $763.74.

On the date of accident, Petitioner was 57 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $0.00 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 paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical/ as identified in Petitioner's Exhibit 5 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid by Respondent 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 $509.16 per week for eight and six-sevenths (8 6/7) weeks commending November 19, 2014, through January 19, 2015, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $458.24 per week for 26.6 weeks because the injury sustained caused the 10% loss of use of the left hand and 10% loss of use of the left thumb, 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.

William R. Gallagher, Arbitrator

January 12, 2016
Date



JAN 2 1 2016

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained a repetitive trauma injury arising out of and in the course of her employment for Respondent. The Application alleged a date of accident (manifestation) of February 24, 2014, and that Petitioner sustained repetitive trauma to the "left and right hand/thumb" and that the nature of the injury was carpal tunnel syndrome and carpometacarpal joint arthritis (Petitioner's Exhibit 1). Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner testified that she began working for the Department of Human Services in 2007; but, approximately one year later, Petitioner began working for the Department of Corrections as an office clerk. In 2012, Petitioner was transferred to the Taylorville Correctional Center.

Petitioner initially worked at the Taylorville Correctional Center as a timekeeper and her job duties consisted primarily of recording/keeping the time records of 300 to 350 employees. This was recorded by hand on a cardboard timesheet record.

In February, 2013, Petitioner began working in the mailroom at Taylorville Correctional Center. Petitioner testified in detail about her job duties. Petitioner handled all of the incoming/outgoing mail for the inmates and administrative staff. There are six units with 200 inmates in each unit. Petitioner stated that she would handle an average of 200 to 300 letters per day; however, there were days in which she handled 500 to 600 letters. Petitioner would also handle an average of 15 to 20 boxes per day; however, on Mondays, there could be as many as 150 boxes. Petitioner would also handle an average of 50 manila envelopes per day.

All incoming/outgoing inmate mail was received in the mailroom unsealed and the mail was then removed from the envelope, inspected to ensure that no contraband was being sent/received and then placed back in the envelope. If an inmate received either a newspaper or magazine, it was necessary to search each one page by page to be certain that there was no contraband included. Petitioner stated that individuals would attempt to sneak forbidden items to the inmates such as money, postage, etc.

The only inmate mail that was received or sent sealed and not subject to inspection was legal mail. Even so, this mail still had to be sorted. Mail received or sent by the administrative staff was also sealed; however, this mail also had to be sorted.

Petitioner also had to inspect boxes and parcels sent to inmates. All boxes and parcels were initially x-rayed and then physically inspected. If clothing was sent to an inmate, it was necessary to thoroughly inspect each article of clothing which included turning it inside out.

Petitioner testified that all of the preceding work duties required the active use of both of her hands. Petitioner typically worked seven and one-half hours per day for five days per week.

Ron Butler testified on behalf of the Respondent at trial. Butler stated that he worked at the Taylorville Correctional Center for over 20 years and he worked with Petitioner in the mailroom

for approximately three months. Butler's testimony regarding his work in the mailroom with Petitioner was consistent with her testimony as to Petitioner's work duties.

Petitioner testified that she began to experience numbness in her left elbow and hand in December, 2013. She initially sought medical treatment on February 3, 2014, from Dr. Roger McClintock, her family physician. At that time, Petitioner was seen by Patricia Schneider, a nurse practitioner. Petitioner complained of left wrist pain that had been present for approximately three months. NP Schneider prescribed a wrist splint and referred Petitioner to Dr. Claude Fortin, for EMG/nerve conduction studies (Petitioner's Exhibit 3).

Dr. Fortin performed EMG/nerve conduction studies on February 24, 2014 (the date of manifestation alleged in the Application) which were positive for bilateral carpal tunnel syndrome, moderate on the left and mild on the right (Petitioner's Exhibit 3). Petitioner completed the First Report of Injury on February 26, 2014, which described repetitive trauma to the left hand and an accident date of February 24, 2014 (Petitioner's Exhibit 2).

Petitioner subsequently sought medical treatment from Dr. Mark Greatting, an orthopedic surgeon. On March 6, 2014, Petitioner was seen by Miriam Allen, a Nurse Practitioner in Greatting's office. At that time, Petitioner advised that she performed many repetitive activities at work including opening of mail. NP Allen opined that Petitioner had left carpal tunnel syndrome and osteoarthritis of the first carpometacarpal joint of the left hand (Petitioner's Exhibit 3).

Dr. Greatting saw Petitioner on April 17, 2014, and Petitioner informed him of her job duties in greater detail. Specifically, Petitioner advised Dr. Greatting that she opened and inspected 200 to 300 letters a day and opened, inspected and resealed 300 to 400 packages a week. Petitioner also informed Dr. Greatting that her left hand symptoms were significantly increased while she was at work. Dr. Greatting recommended Petitioner undergo a left carpal tunnel release surgical procedure. In regard to causality, Dr. Greatting opined that Petitioner's work activities could cause, aggravate or contribute to the development of carpal tunnel syndrome (Petitioner's Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. James Williams, an orthopedic surgeon, on May 7, 2014. In connection with his examination of Petitioner, Dr. Williams reviewed medical records provided to him by Respondent. Dr. Williams opined that Petitioner had left and right thumb CMC joint arthritis, left worse than right, as well as left carpal tunnel syndrome. In regard to causality, Dr. Williams opined that neither the CMC joint arthritis or left carpal tunnel syndrome were aggravated or caused by Petitioner's work activities. He attributed the conditions to Petitioner's having hypertension, being postmenopausal and having an increased body mass. He did agree that the carpal tunnel release surgery recommended by Dr. Greatting was appropriate (Respondent's Exhibit 1; Deposition Exhibit 2).

Petitioner continued to be treated by Dr. Greatting who performed surgery on November 19, 2014. The surgery consisted of a left carpal tunnel release and an injection in the left thumb carpometacarpal joint. Dr. Greatting authorized Petitioner to be off work and ordered physical therapy. Dr. Greatting subsequently authorized Petitioner to return to work without restrictions effective January 20, 2015 (Petitioner's Exhibit 3).

Dr. Williams was deposed on January 28, 2015, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Williams' testimony was consistent with his medical report and he reaffirmed the opinions contained therein. In regard to causality, Dr. Williams testified that Petitioner had a BMI of 31.3 which is obese and that Petitioner was also hypertensive and postmenopausal. He opined that these were all factors that correlated with carpal tunnel syndrome and CMC joint arthritis. He also noted that Petitioner informed him that she sewed as a hobby and this could also be an aggravating factor for the development of those conditions (Respondent's Exhibit 1; pp 11-15).

On cross-examination, Dr. Williams agreed that the risk factors that he referenced work actually "predispositions" which did not cause or aggravate carpal tunnel syndrome but were frequently found with it. He also agreed that non-occupational predispositions and occupational risk factors could act together to bring about carpal tunnel syndrome. In regard to Petitioner's sewing activity, Dr. Williams stated that his opinion that this may have been a factor was based upon that activity requiring forceful gripping and pinching (Respondent's Exhibit 1; pp 18-21).

Dr. Greatting was deposed on June 29, 2015, and his deposition testimony was received into evidence at trial. Dr. Greatting opined that Petitioner's work activities could cause carpal tunnel syndrome and aggravate carpometacarpal joint arthritis. Dr. Greatting acknowledged that Petitioner had hypertension and was postmenopausal; however, he opined that while these factors may go along with a higher incidence of carpal tunnel syndrome, that they were not causative (Petitioner's Exhibit 6; pp 14-17).

At trial, Petitioner stated that she still has some complaints of her left hand swelling and a lack of grip strength. Petitioner agreed that she was able to return to work to her regular job on January 20, 2015. However, Petitioner subsequently started another job for Respondent and began working for a clinical psychologist. Most of Petitioner's current job duties consist of data entry. Petitioner testified that this data entry also requires the active and repetitive use of both of her hands.

## Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to repetitive trauma arising out of and in the course of her employment for Respondent that manifested itself on February 24, 2014.

In support of this conclusion the Arbitrator notes the following:

Petitioner credibly testified in regard to the repetitive nature of her job duties. Further, the testimony of Respondent's witness, Ron Butler, in regard to Petitioner's job duties was consistent with Petitioner's testimony regarding same.

Dr. Greatting opined that Petitioner's job activities could cause, aggravate or contribute to the development of both carpal tunnel syndrome and carpometacarpal joint arthritis. In regard to the

other factors, Dr. Greatting opined the while these factors may go along with carpal tunnel syndrome, that they do not cause it.

While Dr. Williams opined that Petitioner had other "predispositions" for the development of carpal tunnel syndrome and CMC joint arthritis, these could work together with occupational risk factors to bring about carpal tunnel syndrome. Further, Dr. Williams agreed that Petitioner's sewing hobby may have been a factor because it required forceful gripping and pinching; however, Dr. Williams lacked any such specific information regarding the extent of Petitioner's sewing hobby.

The Arbitrator finds the opinion of Dr. Greatting to be more persuasive than that of Dr. Williams.

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

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

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of eight and six-sevnths (8 6/7) weeks commencing November 19, 2014, through January 19, 2015.

In support of this conclusion the Arbitrator notes the following:

At trial, Petitioner and Respondent stipulated that Petitioner was temporarily totally disabled for the aforestated period of time.

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

The Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the left hand and 10% loss of use of the left thumb.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner worked in Respondent's mailroom and this was a job that required a significant repetitive use of both hands for essentially all of Petitioner's work day. Petitioner subsequently

obtained another job for Respondent in which she is not required to handle or sort mail but still does a significant amount of data entry. Petitioner testified that data entry also requires the repetitive use of both hands. The Arbitrator gives this factor moderate weight.

Petitioner was 57 years of age at the time of the manifestation. Petitioner will continue to work performing hand intensive duties for the remainder of her working life. The Arbitrator gives this factor moderate weight.

There was no evidence that this injury will have any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

Petitioner sustained repetitive trauma injuries to her left hand and left thumb which ultimately required carpal tunnel release surgery and an injection in the carpometacarpal joint of the left thumb. Petitioner continues to have complaints consistent with the injury she sustained. The Arbitrator gives this factor moderate weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS )
) SS.
COUNTY WILLIAMSON )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Randall Fowler,

Petitioner,

vs.

No. 14 WC 40143

State of Illinois/IDOT,

16IWCC0499

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Arbitrator's award of prospective medical care. The Arbitrator awarded prospective medical care for the right knee recommended by Dr. Morgan, "including but not limited to supartz injections and/or any future surgery which may be required." Dr. Morgan noted that ultimately Petitioner would probably need joint reconstructive surgery. Petitioner wanted to put off the surgery for as long as he could. The latest medical records from Dr. Morgan show that he released Petitioner to return to work full duty at Petitioner's request and was maintaining his condition with Supartz injections. The Commission is of the opinion that an award of future surgery is premature. Rather, the Commission awards

the prospective medical treatment prescribed by Dr. Morgan at the time of the arbitration hearing.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 15, 2016, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $26,182.00, as set forth in Petitioner's Exhibit 1, pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide the medical treatment prescribed by Dr. Morgan at the time of the arbitration hearing.

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

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

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

Pursuant to §19(f)(1) of the Act, there shall be no right of appeal as the State of Illinois is Respondent in this matter.

DATED: JUL 29 2016
o-07/14/2016
SM/sk
44

Stephen Mathis

Mario Basurto

David L. Gore

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

**FOWLER, RANDALL**
Employee/Petitioner

Case# **14WC040143**

**IL DEPT OF TRANSPORTATION**
Employer/Respondent

16IWCC0499

On 1/15/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.47% 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:

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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 15 2016

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

16IWCC0499

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)

**Randall Fowler**
Employee/Petitioner

v.

**Illinois Dept. of Transportation**
Employer/Respondent

Case # **14** WC **40143**

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 **Herrin**, on **April 10, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

**FINDINGS**

On the date of accident, **February 27, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,764.68**; the average weekly wage was **$1,130.09**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

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

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

Respondent is entitled to a credit of **$any medical bills paid through group** under Section 8(j) of the Act.

**ORDER**

Respondent shall pay reasonable and necessary medical services of $26,182.00, as set forth in Petitioner's exhibit 1, as provided in § 8(a) and § 8.2 of the Act.

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

Respondent shall authorize and pay for the treatment recommended for Petitioner's right knee by Dr. Morgan, including but not limited to supartz injections and/or any future surgery which may be required.

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

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

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

Michael K Nowak, Arbitrator — **1/12/16** Date

ICArbDec19(b)



JAN 15 2016

## FINDINGS OF FACT

Petitioner is a highway maintainer for the Illinois Department of Transportation, and has been so employed on a full time permanent basis for approximately 4 years. The Parties stipulated that Petitioner sustained accidental injuries arising out of and in the course and scope of his employment on February 27, 2014, when while cutting and dragging brush on a State right-of-way, he sustained two incidents. The first incident occurred when he was walking up an embankment to return to his truck. His foot slipped and he fell on his kneecap. He felt some pain, but kept working. Later Petitioner was back down the embankment dragging brush that was being cut into the tree line. While doing so, his foot became entangled in some undergrowth and he fell forward and to the right twisting his right knee. He again felt immediate pain. As the day progressed, Petitioner's right knee started swelling and hurting more.

Petitioner testified that prior to this accident he had sustained no injuries, had no workers' compensation claims, and had underwent no diagnostic testing or treatment involving his right knee. Petitioner acknowledged that 9 years prior, he had a sprained ligament in his left knee, wore a brace for a couple of weeks, and the problem was resolved.

In 2011 Petitioner was hired permanently by Respondent. Prior to his permanent employment Petitioner was hired annually as full time temporary employee in the winter. He took and passed a pre-employment physical every time. Full time temporary means seasonal employees for plowing snow; however, he also patches pot holes, picks up dead animals, cuts brush and works from October until March.

Following the incident, Petitioner sought treatment from his family physician, Dr. Partridge on 3/4/14. Dr. Partridge ordered an x-ray, gave him a Medrol Dosepak, and referred him for physical therapy. He was to return in two weeks. (PX3, 3/4/14). When Petitioner returned on 3/19/14, he indicated his condition was much worse. He told Dr. Partridge, "It is so bad that he doesn't think he can stand it anymore." Dr. Partridge noted that despite his recommendation for physical therapy early on and the consistent history of the accident, physical therapy had not been started. Dr. Partridge noted crepitus, and palpable effusion. Because Dr. Partridge suspected internal derangement and Petitioner had intractable pain, he took Petitioner off work, demanded that he start therapy, and return back to see him. Petitioner returned on 4/2/14, and reported that physical therapy had helped somewhat. He noted less swelling; however, exertion caused the swelling to return. Going up and down stairs was still unstable. Dr. Partridge still suspected internal derangement and recommended an MRI. This was done on 4/16/14, and showed a complex tear of the medial meniscus posterior horn with an essentially complete vertical radial component of the tear. The radiologist also noted tricompartmental degenerative changes with full thickness cartilage loss in the patellofemoral joint medial and near full thickness loss in the medial femoral tibial compartment. There was also a significant finding of moderate to large knee joint effusion.

After the MRI, Dr. Partridge referred Petitioner to Dr. Richard Morgan, who saw him on 5/6/14. Dr. Morgan took a history of the injury, noted that Petitioner's swelling had almost resolved, but that he was still having ongoing medial compartment pain with some catching. Dr. Morgan's examination showed trace effusion, positive medial McMurray's and tenderness over the medial joint line. X-rays showed bilateral early medial compartment narrowing, and Dr. Morgan agreed that the MRI demonstrated a complex tear of the posterior horn of the medial meniscus with early degenerative changes. Dr. Morgan recommended arthroscopy and debridement with post-op viscoelastic supplementation. He stated "ultimately, he will probably need joint

reconstructive surgery but he'd like to put that off for as long as he can."(PX6 at 12) He continued Petitioner off work.

Surgery was performed on 5/21/14, and Dr. Morgan's post-operative diagnosis was a posterior horn tear of the medial meniscus, tear of the lateral meniscus, and degenerative arthritis. He performed both medial and lateral meniscectomies. Following surgery, Dr. Morgan recommended viscoelastic supplementation therapy. Petitioner had 5 injections, the last being on 7/25/14. On that date Dr. Morgan instructed Petitioner to return in 4 to 6 weeks to evaluate the benefit of the supartz series. Petitioner returned on 9/5/15, and the doctor noted that the meniscectomy in May improved Petitioner's condition, but the viscoelastic therapy did not help much. Dr. Morgan performed additional x-rays, which showed early medial compartment disease suggestive of post-meniscectomy arthrosis. He continued Petitioner on medication. Petitioner returned on 10/17/14, and had improved enough that Dr. Morgan released him to return to work light duty. As early as 10/17/14, Dr. Morgan discussed the need for a total knee replacement. A physician's report dated 11/11/14, and signed by Dr. Morgan, outlined Petitioner's restrictions.

Petitioner continued to work over the winter. Petitioner returned to Dr. Morgan on 1/16/15, and Dr. Morgan noted that he was working light duty and believed he could go back to work full time. He also rescheduled him for repeat supartz injections after the 1st of February. These were begun in March of 2015, and Petitioner has had two injections as of the date of hearing.

On 11/26/14, Respondent had Petitioner examined by Dr. Michael Nogalski pursuant to §12. Dr. Nogalski's opinion was that while Petitioner's lateral and medial and meniscus tears were related to the accident, the operative findings described by Dr. Morgan were consistent with advanced changes in the knee, which would pre-exist Petitioner's injury. (RX6 at 15-16) He also stated that the incidents on 2/27/14, neither aggravated nor accelerated Petitioner's right knee degeneration (*Id.*, at 16) He believed that the supartz injections Petitioner had been undergoing were unrelated to the accident. (*Id.*, at 16-17)

On cross-examination, Dr. Nogalski acknowledged that the objective findings in Petitioner's operative report showed cartilaginous flecks floating in and about the knee with tricompartmental chondromalacia and synovitis. (*Id.*, at 25) Dr. Nogalski acknowledged that Petitioner had no prior treatment, x-rays or MRIs to either knee before the accident. (*Id.* at 26) Dr. Nogalski testified that Petitioner stated that prior to the accident "he had some soreness in the knee prior to this time but nothing like this. And he had had stiffness as well." (*Id.*, at 32) He also acknowledged that since the accident Petitioner has continued to have symptoms in his right knee. He did not feel, however that there was a link between his current symptoms and the accident. (*Id.* at 27) Dr. Nogalski agreed that before a total knee replacement would be done, he would try viscosupplementation injections.

Petitioner's treating physician, Dr. Richard Morgan, also testified by way of deposition. (PX8). He testified that Petitioner was referred to him by his family physician, Dr. Partridge. Dr. Morgan reviewed the MRI personally, took the history of injury, and based on the history, clinical examination, intake notes, and review of the films, had arrived at a diagnosis of meniscal tears of his knee. Dr. Morgan described Petitioner's pre-existing arthritis as "not terrible but some." (*Id.*, at 7)

Dr. Morgan also described Petitioner intraoperative findings as:

> Intraoperatively – let me get to that. His – first of all, his arthroscopy was done May 21st of 2014 here at SIOC. On exam – intraoperative exam on entry to the knee he had a myriad of cartilaginous flecks floating about in the knee. He had hemorrhagic synovitis of the knee. He had tricompartmental chondromalacia of the knee. The medial meniscus demonstrated a radial tear of the posterior horn of the medial meniscus. The lateral meniscus also demonstrated chondromalacia, and he also had a small radial tear of the third of the lateral meniscus. The ACL/PCL complex was normal. (*Id.* at 8-9)

Dr. Morgan indicated that he had examined Petitioner's uninjured left knee as well as the right. The left knee showed some early degenerative arthritis, but he had no symptoms. On his right knee, however, Dr. Morgan believed that the need for surgery, the cartilaginous injections and follow-up visits along with physical therapy were related to the accident. (*Id.*, at 10) Dr. Morgan testified that "my prognosis is that I think for a period of time, hopefully for a few years, we can maintain him on viscoelastic therapy and mitigate his symptoms with that. But in time my prognosis is that he'll probably need a knee replacement." (*Id.* at 10-11)

Dr. Morgan also indicated the accident aggravated Petitioner's pre-existing degenerative changes in his right knee. He stated "Yes, I think they did. The meniscus is a guardian of the femoral condyle. I think it's irrefutable he had some early degenerative changes at the time of his accident, although asymptomatic, just like his left knee is at this point. But without the protective meniscus in place the chondromalacia is going to get worse in the medial femoral condyle because it's unprotected." (*Id.* at 11) Assuming that Petitioner has no other incidents, Dr. Morgan believed that any future knee replacement would be related to the incident at work. (*Id.*, at 11-12)

## CONCLUSIONS

**Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?**
**Issue (K): Is Petitioner entitled to any prospective medical care?**
**Issue (O): Has Petitioner reached maximum medical improvement?**

Respondent agrees that the right knee meniscal tears are causally related to the undisputed work accident. Respondent also does not dispute past medical care, which has been related to addressing the meniscus. The central dispute as to causal connection is whether Petitioner's current arthritic condition is causally related to the accident, and whether Petitioner is entitled to prospective medical care for same.

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.*, 902 N.E.2d 1269, 1273 (5d Dist. 2009). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

Accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003). [Emphasis original]. "Petitioner need only show that some act or phase of the employment was a

causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 723 N.E.2d 846 (3d Dist. 2000). Employers are to take their employees as they find them. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *A.C. & S. v. Indus. Comm'n*, 710 N.E.2d 837 (1st Dist. 1999) citing *General Electric Co. v. Indus. Comm'n*, 433 N.E.2d 671, 672 (Ill. 1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); *see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

The Supreme Court's decision in *Sisbro, Inc.* highlighted that even though a workers' compensation claimant has a preexisting condition which may make him or her more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003). The Supreme Court specifically held that where a work-related injury is shown to be an *actual* causal factor in bringing about an employee's disabling condition, recovery should *not* be denied simply because a normal daily activity *could have* brought on claimant's disabling condition. *Id.* at 674-75, 76-77.

It has also been determined that causal connection between work duties and the condition of ill-being may be established by the chain of events, including a claimant's ability to perform duties before the date of accident and inability to perform those duties following the date of accident. *Darling v. Indus. Comm'n of Illinois*, 176 Ill. App. 3d 186, 530 N.E.2d 1135 (1st Dist. 1988). Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n,* 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n,* 93 Ill.2d 59, 442 N.E.2d 908 (Ill. 1982).

The record demonstrates that Petitioner was not under any care for his right knee prior to the accident. Following the accident, however, Petitioner had an immediate onset of pain, and has had persistent complaints since. The Arbitrator finds it significant that Petitioner's left knee, which was not injured in his accidents, but shows evidence of degeneration, is entirely asymptomatic. Petitioner's right knee findings following the accident revealed marked evidence of acute injury, including flecks of cartilage and swelling. Given the totality of the evidence, the Arbitrator finds that Petitioner sustained trauma to his knee sufficient to aggravate his underlying arthritis in this undisputed accident. Further, the Arbitrator finds the testimony and opinions of Dr. Morgan more persuasive than those of Dr. Nogalski. 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 undisputed accidents that occurred on 2/27/14.

As of the date of hearing Petitioner was to follow up with Dr. Morgan for treatment of his knee condition. The Arbitrator finds that Petitioner has not reached maximum medical improvement.

There is no real dispute between the parties as to Petitioner's need for ongoing care for his right knee condition. Rather, the dispute was whether or not the condition is causally related to the accident. Dr. Nogalski did not dispute that Petitioner requires care for his condition. Respondent shall pay reasonable and necessary medical services of $26,182.00, as set forth in Petitioner's exhibit 1, as provided in § 8(a) and § 8.2 of the Act. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this

credit, as provided in § 8(j) of the Act. Respondent shall further authorize and pay for the treatment recommended for Petitioner's right knee, including but not limited to supartz injections and/or any future surgery which may be required.

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Pevril,
Petitioner,
vs.
John H Stroger Jr Hospital,
Respondent,

NO: 09WC52079

16IWCC0500

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 5, 2015, is hereby affirmed and adopted.

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

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

The party commencing 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: JUL 29 2016
MJB/bm
o-7/26/16
052

Michael J. Brennan

Kevin W. Lamborn

David Gore

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## NOTICE OF ARBITRATOR DECISION

**PEVRIL, ROBERT**
Employee/Petitioner

Case# **09WC052079**

**JOHN H STROGER JR HOSPITAL OF COOK COUNTY**
Employer/Respondent

**16IWCC0500**

On 11/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.28% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0533 ROSS TYRRELL LTD
111 W WASHINGTON ST
SUITE 1120
CHICAGO, IL 60602

0132 STATES ATTORNEY OF COOK COUNTY
STEPHEN L GARCIA
500 RICHARD J DALEY CENTER
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
## REVISED ARBITRATION DECISION BASED ON COMMISSION REMAND ORDER

**Robert Pevril**
Employee/Petitioner

v.

**John H. Stroger, Jr. Hospital of Cook County**
Employer/Respondent

Case # **09** WC **52079**

Consolidated cases: **D/N/A**

**16IWCC0500**

An *Application for Adjustment 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 **12/04/2012**. The Arbitrator previously issued a decision in this case on December 27, 2012, with the Commission affirming and adopting the decision on December 11, 2013. Petitioner filed a Circuit Court review thereafter, with the Circuit Court reversing the Commission and remanding. On May 28, 2015, the Commission reversed its previous decision and remanded the case to the Arbitrator with directions. The Arbitrator has taken no additional evidence, noting the Commission's finding as to the adequacy of the existing arbitration record. The Arbitrator adopts the Commission's implied findings as to credibility and accident and makes additional findings as directed by the Commission. Those findings are attached hereto.

**DISPUTED ISSUES**

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 [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 _____

16IWCC0500

**FINDINGS**

On **10/22/2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of the claimed accident *was* given to Respondent. Arb Exh 1.

In the year preceding the injury, Petitioner earned $**61,127.56**; the average weekly wage was $**1,175.23**.

On the date of the claimed accident, Petitioner was **39** years of age, ***married*** with **1** dependent child.

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 adopts the Commission's implied findings that Petitioner was credible and sustained an accident arising out of and in the course of his employment on October 22, 2009.

The Arbitrator finds that the accident resulted in a temporary aggravation of a significant, pre-existing spinal condition of ill-being, with that aggravation resolving as of April 17, 2010. The Arbitrator finds that Petitioner was temporarily totally disabled from October 23, 2009 through April 17, 2010, a period of 25 2/7weeks, and awards temporary total disability benefits at the rate of $783.48 per week during that period. The Arbitrator further awards any claimed medical expenses for treatment rendered from October 22, 2009 through April 17, 2010 (PX 1), subject to the fee schedule. The Arbitrator awards no permanency benefits.

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

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

Molly C Mason

Signature of Arbitrator

11/5/15
Date



NOV 5 - 2015

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Pevril,

Petitioner,

vs.

No. 09 WC 52079

John H. Stroger, Jr. Hospital of Cook County,

Respondent.

16IWCC0500

ARBITRATOR'S REVISED DECISION ON REMAND FROM COMMISSION

**Procedural History**

The Arbitrator originally heard this case on December 4, 2012. At that hearing, the parties placed the following issues in dispute: accident, causal connection, medical services, temporary total disability and nature and extent of the injury. Petitioner testified as did his former co-worker, Raeesa Ali. Petitioner called Ali to testify on his behalf. No witnesses testified on behalf of Respondent.

On December 27, 2012, the Arbitrator issued a decision finding that Petitioner was not credible and failed to prove a compensable work accident. The Arbitrator found the remaining disputed issues to be moot and denied compensation.

Petitioner filed a Petition for Review. The Commission heard oral arguments on December 5, 2013. On December 11, 2013, the Commission issued a Decision and Opinion on Review affirming and adopting the Decision of the Arbitrator.

Petitioner filed a Circuit Court review thereafter. On September 30, 2014, the Circuit Court issued an order finding that the Commission's decision was against the manifest weight of the evidence. The Circuit Court reversed the Commission and remanded the case, utilizing the following language:

> "The Arbitrator's decision finding Plaintiff's [sic] testimony not credible and that Plaintiff [sic] failed to prove a compensable work accident occurred, is against the manifest weight of the evidence. The Arbitrator did not address the remaining issues as she found them moot. The Board [sic] affirmed and adopted the Arbitrator's decision. Therefore, the Court reverses the Board's [sic] decision and remands it for further determination of the remaining issues."

On May 28, 2015, the Commission issued a Decision and Opinion on Remand, reversing its previous decision and "remand[ing] the matter back to the Arbitrator to address all outstanding issues regarding Petitioner's claim." The Commission noted that, while the Arbitrator "did not address certain issues in her decision due to her finding of no accident . . . evidence was taken at arbitration regarding the issues of accident, causal connection, temporary total disability benefits, medical expenses and permanent disability benefits." The Commission found the existing arbitration record "sufficient to

address any and all outstanding issues" but "nonetheless . . . remand[ed] the matter back to the Arbitrator as ordered by the Circuit Court."

The Arbitrator respectfully disagrees with the Commission's interpretation of the Circuit Court's directive. The Circuit Court did not order the Commission to send the case back to the Arbitrator. The Circuit Court remanded the case for further determination of the remaining issues. If the existing arbitration record is sufficient to resolve those issues, as the Commission concedes, it should be the Commission that resolves them. To simply "reverse" and send the case back to an arbitrator who found the claimant not credible as to accident and other matters, with directions to make new findings based on the existing record, undermines the arbitrator's role in the decision-making process. For the Arbitrator, everything in this case hinged on whether Petitioner's account of his pre-accident state of health and the mechanics of his claimed accident was to be believed. Petitioner's account as to the former was undermined by his own medical records and his account as to the latter was undermined by the credible testimony of his own witness.

The Arbitrator interprets the Commission's "reversal" as meaning that it has found Petitioner to be credible and to have proved a compensable lifting-related accident of October 22, 2009, based on the Circuit Court's reasoning and decision. The Arbitrator adopts those implied findings. The Arbitrator further finds that the accident resulted in a temporary aggravation of a significantly disabling pre-existing spinal condition for which Petitioner was actively treating (with Dr. Candido) as of the accident, with that aggravation ending as of April 17, 2010, the date on which Dr. Melnick noted that Petitioner reported having made a "dry run" at working (for some employer other than Respondent) and requested a formal release to work with no restrictions. Dr. Melnick complied with this request. PX 4, pp. 53-54. The Arbitrator views the need for the treatment that occurred after April 17, 2010 as stemming from the pre-accident thoracic spine condition and/or the post-accident fall of June 23, 2010 and lifting incident of October 23, 2010.

In so finding, the Arbitrator relies on the following: 1) the pre-accident records, which show that Petitioner was regularly taking Hydrocodone and undergoing active treatment for spinal and radicular pain, with that treatment including medical branch blocks administered on October 6, 2009, about two weeks before the accident; 2) the radiographic studies performed at Advocate Lutheran General Hospital on October 23, 2009, which showed no disruption of the previous fusion and no new structural injury, according to both the radiologist, Dr. Geremia, and orthopedist, Dr. Spencer (PX 3); and 3) Dr. Melnick's December 6, 2009 characterization of the work accident as "an acute episode of mid-back pain on top of a picture of chronic radicular thoracic pain" (PX 3, p. 30). On December 29, 2009, Dr. Davis interpreted another study as showing an annular tear that "might be new" but he did not believe this tear was the cause of Petitioner's symptoms. The Arbitrator assigns no weight to the causation-related opinions of Petitioner's examiner, Dr. Chmell, since the doctor based those opinions on the assumption that Petitioner's pain syndrome was "under control" and Petitioner was "doing well" before the work accident. PX 7. That assumption is belied by the pre-accident records (PX 5) and Petitioner's admission that the treatment Dr. Candido provided before the work accident resulted only in "so-so" relief of his chronic pain.

In accordance with the foregoing, the Arbitrator finds that Petitioner was temporarily totally disabled from October 23, 2009 through April 17, 2010, a period of 25 2/7 weeks, and that Petitioner is entitled to the claimed medical expenses in PX 1 relating to the treatment rendered from October 22, 2009 through April 17, 2010, subject to the fee schedule. A print-out in PX 1 makes clear that some or

all of these expenses were paid by Blue Cross Blue Shield, Petitioner's wife's group carrier. Respondent did not claim, and is not entitled to, Section 8(j) credit for any such payments.

Having previously found that the accident caused only a temporary aggravation that resolved, the Arbitrator declines to award any permanency benefits.

STATE OF ILLINOIS )
) SS.
COUNTY OF )
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Angela Czyzewski,

Petitioner,

vs.

NO: 14WC 17324
14WC 17343

Norman Sleezer Youth Home,

Respondent,

16IWCC0501

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the petitioner & 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 December 7, 2015, is hereby affirmed and adopted.

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

16IWCC0501

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

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

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

DATED: JUL 29 2016
MJB/bm
o-7/26/16

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

**CZYZEWSKI, ANGELA**
Employee/Petitioner

Case# **14WC017343**

14WC017324

**NORMAN C SLEEZER YOUTH HOME**
Employer/Respondent

16IWCC0501

On 12/7/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.41% 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:

4071 FRANCINE B WHITE & ASSOC LLC
321 W STATE ST
SUITE 801
ROCKFORD, IL 61101

0560 WIEDNER & McALUFFIE LTD
PATRICK MORRIS
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS )
)SS.
COUNTY OF WINNEBAGO )

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

# ILLINOIS WORKERS' COMPENSATION COMMISSION
## ARBITRATION DECISION
## 19(b)

**Angela Czyzewski**
Employee/Petitioner

v.

**Norman C. Sleezer Youth Home**
Employer/Respondent

Case # 14 WC 17343

Consolidated cases: 14 WC 17324

16IWCC0501

An *Application for Adjustment 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 cities of **Rockford on 9/23/15 and by agreement in Woodstock on 10/9/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

**FINDINGS** 16IWCC0501

On the dates of accident **8/5/13** and **4/11/14** 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 **$24,412.44**; the average weekly wage was **$469.47**.

On the date of accident, Petitioner was years of age, ***single*** 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 **$11,759.09** for TTD, **$272.31** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$12,031.40**.

Respondent is entitled to a credit of **$594.27** under Section 8(j) of the Act.

**ORDER**

Respondent shall pay for reasonable and necessary medical services totaling **$463.00** to Rockford Health Physicians & **$176.00** to Rockford Radiology , as provided in Section 8(a) & 8.2 of the Act.

Respondent shall be given a credit of **$594.27** 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 in writing and pay for under section 8 of the Act, the surgical procedure prescribed by Dr. Scott Trenhaile of Rockford Orthopedics along with all pre and post surgery exams and follow up therapy as ordered by said doctor. Respondent shall pay any maintenance due during said surgical time off.

It is hereby ordered that temporary total disability is denied herein as follows:
TTD benefits from 12/11/14 – 12/21/14 and 1/2/15 – 9/23/15 are denied.

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

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

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

#01 George J. Andros

Signature of Arbitrator

DEC 7 – 2015

Date December 4, 2015

16IWCC0501

## STATEMENT OF FACTS 14 WC 17324 & 14 WC 17343

Petitioner testified on September 23, 2015 that before August 5, 2013, her first accident and injury to her right shoulder, she had never had any accidents or injuries to that right upper extremity and had never had any treatment. Petitioner further testified that since the last accident and injury of April 11, 2014 she has had no new accidents or injuries to that right shoulder.

Petitioner treated with orthopedic surgeon, Dr. Trenhaile, from Rockford Orthopedic Associates and began treatment with him on July 31, 2014. (Petitioner's Exhibit No. 7). Dr. Trenhaile, when he first examined her on July 31, 2014, ordered an MRI arthrogram of the right shoulder with contrast.

This was performed on August 14, 2014 and found at Petitioner's Exhibit No. 3. The MRI arthrogram of August 14, 2014, under the impression, indicated that there were paralabral cysts with labral tear and strong consideration should be given to arthroscopy for definitive evaluation especially if clinical symptoms and/or shoulder instability suggest this diagnosis. Further impression was that there was AC joint arthritis and secondary chronic subacromial impingement on the rotator cuff. (Petitioner's Exhibit No. 3). Dr. Trenhaile, following that arthrogram MRI, made a recommendation that the Petitioner undergo a right shoulder diagnostic arthroscopy distal clavicle excision subacromial decompression and labral repair vs. debridement.

Dr. Trenhaile testified at his deposition on May 27, 2015 that based upon the last office visit with Petitioner of December11, 2014, that she has basically now chronic impingement, symptomatic AC joint and concern for a labral tear with instability of the shoulder. Dr. Trenhaile went on to testify that the incident that the Petitioner described to him as occurring at work when she was injured in April 2014 was the cause of these problems with her right shoulder. Dr. Trenhaile testified that he had not seen the Petitioner since December 11, 2014 because he was waiting for authorization for her to have the surgical procedure that he has recommended. Further, that this surgical procedure is due to the work accident of April 11, 2014. Dr. Trenhaile further testified that Petitioner had not been back to see him because the next appointment would be for the pre-op and to schedule the surgery. (Page 26-29 Dr. Trenhaile's Evidence Deposition Petitioner's Exhibit No. 8)

Dr. Trenhaile also testified that he had reviewed Dr. Bare's IME report of October 27, 2014 examination of the Petitioner. Dr. Trenhaile testified at page 23 of his deposition that he did not agree that the Petitioner has a frozen shoulder, and testified that specifically people with frozen shoulder have limitation of motion in all planes, but classically the one that they have limitations the most is external rotation with the arm at the side. Dr. Trenhaile went on to state that if you look at his note on December 11, 2014 external rotation is 0 degrees, abduction was 80 degrees which is essentially fully and complete. Dr. Trenhaile continued to testify it is impossible to have a frozen shoulder if you have that much external rotation. Dr. Trenhaile went on to testify at page 24 that throughout all three of the office visits he had with the Petitioner and examining her right shoulder, she had a full range of motion in all planes.

Dr. Trenhaile went on the testify at page 25 that he had given the Petitioner restrictions when he last saw her on December 11, 2014, that was to do no work around clients, left arm work only and to avoid repetitive motion. (Page 25, Dr. Trenhaile's evidence deposition, Petitioner's Exhibit No. 8)

Dr. Trenhaile further testified at page 25 of his deposition that he had gotten phone calls from Ms. Czyzewski after the last office visit of December 11, 2014 where she was complaining of increased pain in the shoulder and discomfort and that at the current time waiting for the authorization so she could have the surgery that he had recommended.

Dr. Bare, who examined the Petitioner at the request of the Respondent on October 27, 2014, testified that Petitioner's actual diagnosis is a frozen shoulder and that she should have physical therapy and did not require surgery. He also felt that the Petitioner should have restrictions, but gave her a weight limit of 20 pounds, but no overhead lifting or repetitive lifting. Dr. Bare testified that Petitioner was cooperative when he examined her. His background is noted as well. However, the Arbitrator is charged with finding by a preponderance of the evidence which facts are to be adopted.

Based upon the totality of the evidence including inter alia the testimony of the Petitioner, based upon a careful review of the medical records submitted, Petitioner's Exhibit No. 5, 6, 7 and the testimony of both Dr. Trenhaile and Dr. Bare , Exhibit 8, and Respondent's Exhibit No. 4, the Arbitrator finds that Petitioner did sustain injury to her right shoulder while working for Respondent. Further, based upon Dr. Trenhaile's testimony Petitioner requires surgery to the right shoulder and that surgery as recommended by Dr. Trenhaile, should be authorized by the Respondent.

The Arbitrator in this this particular case gives the far greater weight to the medical opinions to those of Dr. Scott Trenhaile of Rockford Orthopedic Associates. Those opinions are adopted herein as the finding of medical facts in the case at bar. The opinion of Dr. Bare is not adopted. In particular his opinion regarding a "frozen" shoulder is dismissed.

The Arbitrator has studied and taken the opinions of the initial doctors' opinions into account but rely on the board certified specialist at Rockford Orthopedics as the key opinion in the case. The recordation or lack thereof of phone calls at the monolith of Rockford Orthopedics during ongoing workers compensation issues is a red herring so to speak with no probative value. This is especially true on a case denied by an insurance carrier at a certain point.

The testimony of Ms. Cara Williams is adopted regarding the availability to work. Thus, that testimony is adopted and stands as a basis for denying additional temporary total disability than that already paid to date.

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The medical bills in the Award are awarded for the related medical treatment shown in the record including 463.00 for Rockford Health Physicians and 176.00 to Rockford Radiology. Further, payment under section 8 is ordered for any balance to Dr. Trenhaile.

Temporary Total Disability plus Temporary Partial Disability are found proper as paid and as quantified in the Award.

The Arbitrator orders the prospective medical treatment including diagnostic arthroscopy by Dr. Scott Trenhaile of Rockford Orthopedics along with pre and post arthroscopy office evaluation , pre tests and post treatment and follow up, as needed. Further maintenance benefits during any prescribed lost time is ordered as well.

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

Illinois Workers' Compensation Commission,
Insurance Compliance Division,

Petitioner,

vs.

NO: 14 INC 103

Karolinka Winiarska, Ind.;
Danuta Winiarska, Ind. & d/b/a
Karolinka Maintenance,

16IWCC0502

Respondent.

DECISION AND OPINION RE: INSURANCE COMPLIANCE

Petitioner, the Illinois Workers' Compensation Commission, Insurance Compliance Division, brings this action, by and through the Office of the Illinois Attorney General, against Karolinka Maintenance, Danuta Winiarska, Individually and d/b/a Karolinka Maintenance, and Karolinka Winiarska, Individually, alleging violations of Section 4(a) of the Illinois Workers' Compensation Act (hereinafter "Act"). Proper and timely notice was given to all parties.

Insurance Non-Compliance Hearings were held before Commissioner Michael J. Brennan on May 18, 2015, July 15, 2015, and October 8, 2015 in Chicago, Illinois. The Commission, after considering the record in its entirety and the applicable law, finds Respondent, Karolinka Maintenance and Danuta Winiarska, Individually and d/b/a Karolinka Maintenance, willfully and knowingly violated Section 4(a) of the Act during the periods of May 20, 2005 to March 17, 2009; May 20, 2009 to November 11, 2009; May 21, 2010 to September 20, 2011; November 25, 2011 to May 30, 2013; and August 9, 2013 to April 17, 2014. As a result, the Respondent is found to be liable for its non-compliance with the Act and shall pay a penalty of $1,608,000.00 pursuant to Section 4(d) of the Act.

Documentary and testimonial evidence was taken on these occasions, with both the Insurance Compliance Division of the Illinois Workers Compensation Commission and the Respondents calling witnesses and submitting documents. The following is a recapitulation of the evidence adduced at hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:



1. A website created for Karolinka Maintenance indicates that it is a Chicago cleaning service specializing in commercial and residential cleaning. (PX13) According to the website, "Karolinka Maintenance can facilitate budgeting, scope management, project scheduling, project management, administration, supervision and quality control management. We are the only Chicago cleaning service to be Green Clean Certified because green cleaning is better for your health, better for our staff and better for the environment." Its cleaners are listed as trained, certified, uniformed, insured and bonded. According to the website, Karolinka Maintenance offers standard cleaning services, party cleaning, seasonal deep cleaning, post construction or renovation cleaning, floor care, window washing, power washing, carpet cleaning, and asthma and allergy relief cleaning. The website also indicates that Karolinka Maintenance "screens, trains and certifies each staff member."

2. On November 1, 2009, Karolinka Maintenance entered into an Agreement for Janitorial Maintenance Services (hereinafter "Agreement") with Beata Wasilewska (hereinafter "Wasilewska"). (PX5) According to the Agreement, the purpose of engaging Wasilewska was in order for her to "provide janitorial maintenance services at the direction of management of Karolinka for clients of Karolinka." The Agreement references Exhibit A as setting forth the "responsibilities required to be performed under this Agreement," however, no Exhibit A is attached to the Agreement in evidence. The Agreement explains that Karolinka Maintenance "may, with or without cause, earlier terminate this Agreement....Karolinka may also terminate this Agreement immediately upon written notice to Contractor in the event Contractor breaches any of its obligations hereunder." Under the terms of the Agreement, Karolinka Maintenance was to pay Wasilewska in accordance with Exhibit A, which as previously noted is not in evidence, and after Wasilewska submitted an invoice detailing the work she did. The Agreement includes a non-compete clause which prohibited Wasilewska from working for anyone else as a cleaner while working for Karolinka Maintenance and for a year after the termination of the Agreement. In the event that Karolinka Maintenance divested itself of its ownership interest, it may "sever and assign that portion of this Agreement which relates to the divested division to the acquiring party."

3. The Agreement (PX5) also states that Wasilewska and Karolinka Maintenance "agree that they are independent contractors, and neither has the authority to bind or make any commitment on behalf of the other, nor are any of either party's employees entitled to any employment rights or benefits of the other party." Finally, "[t]his Agreement together with any Attachments, Exhibits and Schedules constitute the entire agreement between Karolinka and Contractor and supersede all prior written or oral understandings. Each Attachment, Exhibit and Schedule, shall be considered incorporated into this Agreement. This Agreement and said Attachments, Exhibits and Schedules may only be amended, supplemented, modified or cancelled by a duly executed written instrument." The Agreement was signed and initialed by Wasilewska and Mark Ciotuszynski (hereinafter "Mark") as VP of Operations on behalf of Karolinka Maintenance.

4. Mark, also known as Mark Marko and Mark Ciot, testified that he has no official title but is authorized to speak to customers on behalf of Karolinka Maintenance. (7/15/15-T.77)

Mark explained that he translates for Karolinka Maintenance's owner Danuta Winiarska (hereinafter "Danuta"). (7/15/14-T.77) He further testified that he is involved in the business and that he received information concerning the business from Danuta. (7/15/15-T.125) Mark testified that he is "like an administrator." (7/15/15-T.126) Mark also testified that Danuta decides which facilities will be cleaned by Karolinka Maintenance. (7/15/15-T.78)

5. Both Mark and Danuta testified that they would meet with prospective clients (businesses) to set up cleaning services. (7/15/15-T.39,41,78,94-95) Once a job is accepted by Karolinka Maintenance, it is assigned to a cleaner, such as Wasilewska. (7/15/15-T.40-41)

6. According to Mark, Danuta would relay to the cleaner what time to meet with the client to discuss the work to be done. (7/15/15-T.95) Danuta testified that the business owner would show the cleaner where the cleaning supplies are located and explain what he/she wanted the cleaner to do. (7/15/15-T.73)

7. Wasilewska testified, through an interpreter. She stated that she worked for Karolinka Maintenance cleaning taverns and restaurants. (5/19/15-T.21-22) Wasilewska testified that she met with Danuta and Mark and they told her they would call her if they had work for her. (5/19/15-T.23-24) Wasilewska testified that she dealt mainly with Mark while working for Karolinka Maintenance. (5/19/15-T.22) Mark would call Wasilewska to tell her about an assignment and then they would meet at the location. (5/19/15-T.74) Mark would always tell her what needed to be cleaned and gave her alarm codes for entry into the building, if necessary. (5/19/15-T.30-31) Wasilewska testified that if the assignment was "more than I could take and too much of garbage" then she could refuse the assignment. (5/19/15-T.75) She also refused assignments in bad neighborhoods at night. (5/19/15-T.75) Sometimes the restaurant manager was there when she first saw an assignment with Mark, but Mark did all the talking. (5/19/15-T.75-76) Wasilewska testified that sometimes Danuta and Mark would show up at the assigned job. (5/19/15-T.30)

8. Wasilewska testified that she could clean the restaurants in any order she wanted. (5/19/15-T.79) Wasilewska testified that she was paid by the job. (5/19/15-T.89) She was told before each job how much it would pay. (5/19/15-T.90) Wasilewska testified that she cannot speak, read or write English. (5/19/15-T.42,43) "Mark could speak and write English and he would give me all the papers." (5/19/15-T.42)

9. Wasilewska would use the cleaning supplies at the location and if something was missing or needed, she would call the owner of the location. (5/19.15-T.33-34) Wasilewska did not take anything with her to each job. (5/19/15-T.35) Wasilewska worked for Karolinka Maintenance for about a year and half and was paid by Karolinka. (5/19/15-T.35)

10. On March 13, 2013, Wasilewska was driving from one cleaning assignment to another, when she was in an automobile accident. (5/19/15-T.45-47) Wasilewska suffered a neck injury as a result of the accident. (5/19/15-T.50) Wasilewska testified that she called Mark or Danuta to tell them about the accident and that she would be unable to go to her next assignment. (5/19/15-T.50-51)

11. On March 15, 2013, Wasilewska signed a Release of Claims (hereinafter "Release"). (PX6) Danuta and Mark also signed the Release as witnesses. The Release indicates that Wasilewska released Karolinka Maintenance "from any and all possible claims resulting from my motor vehicle accident on March 13, 2013, the receipt and sufficiency of which consideration is acknowledged." According to the Release, Wasilewska was to be paid compensation for her release of claims regarding the accident, but the Release does not state the amount of compensation. Wasilewska testified that she signed the contract after she was told by Mark that it was a continuation of the Agreement. (5/19/15-T.52-53)

12. Wasilewska worked for two days after signing the Release then quit when she filed a workers' compensation claim regarding the March 13, 2013 accident. (5/19/15-T.71-72) Wasilewska testified that Danuta called Wasilewska and told her that she would bring her final pay check and collect work keys from her. (5/19/15-T.99)

13. On April 19, 2013, Mark wrote to attorney George Chepov, Wasilewska's attorney, regarding Wasilewska's workers' compensation claim. (PX9) In the letter, Mark indicated that Mr. Chepov was to cease and desist from making any claims against Karolinka Maintenance regarding Wasilewska's March 13, 2013 accident. The letter further stated that if "any claim is filed we will seek full enforcement with the appropriate agencies including the ARDC and others....This is an issue where your office either files the needed claims against the insurance companies or files claims against the other drivers personally, Not our firm." Mark signed the letter as Karolinka Maintenance's Managing Partner. At hearing, Mark denied being a partner or manager of Karolinka Maintenance. (7/15/15-T.87) Mark further testified that the letter was drafted by Danuta. (7/15/15-T.88)

14. Frank Capuzi (hereinafter "Capuzi"), Chief Investigator at the Commission's Insurance Compliance Division, testified that in April of 2014 he received a call from an attorney regarding Karolinka Maintenance and an injured worker from Karolinka Maintenance. (10/8/15-T.9-10) Capuzi also became aware of an Injured Workers' Benefit Fund case against Karolinka Maintenance. (10/9/15-T.10) At that point, Capuzi started an investigation into Karolinka Maintenance and found that at the time of the alleged accident Karolinka Maintenance did not have workers' compensation insurance. (10/8/15-T.10-11) Capuzi also found that Mark was the general manager and a silent partner in Karolinka Maintenance. (10/8/15-T.12-13) According to Capuzzi, whenever they communicated, Mark represented himself as manager of Karolinka Maintenance. (10/8/15-T.13)

15. During his investigation, Capuzi determined that Karolinka Maintenance is a cleaning service for homes and businesses. (10/8/15-T.21) During his investigation, Capuzi requested and received records from the Illinois Department of Revenue (PX10) showing that no corporation income and replacement tax return had been filed for Karolinka Maintenance from 2005 through 2014. (10/8/15-T.27) Capuzi also requested records from the Illinois Secretary of State (PX11) and received records indicating that Karolinka Maintenance is not incorporated. (10/8/15-T.28,30) Additionally, Capuzi received records indicating that Karolinka Maintenance is not self-insured in Illinois (PX12). (10/8/15-T.30-31)

16. Capuzi found, from its website, that Karolinka Maintenance's cleaners had to wear uniforms; "some designated Karolinka Maintenance shirt, I believe it was." (10/8/15-

T.53) At the conclusion of his investigation, Capuzi concluded that Karolinka Maintenance operated without workers' compensation insurance for 3,216 days, for a total fine of $1,608,000 ($500 a day). (10/8/15-T.32-33) Capuzi also determined that Karolinka Maintenance saved $40,840.00 in premiums by not having workers' compensation insurance for 3,216 days. (10/8/15-T.33-34) On cross-examination, Capuzi denied that Mark had expressed that Karolinka Maintenance was operating not as an employer, but as an independent contractor. (10/8/15-T.45)

17. On April 17, 2014, a Notice of Non-Compliance was sent to Karolinka Maintenance and Danuta. (PX1) The notice lists the dates of non-compliance as May 20, 2005 through March 17, 2009, May 20, 2009 through November 11, 2009, May 21, 2010 through September 20, 2011, November 25, 2011 through May 30, 2013, and August 9, 2013 through April 17, 2014. (PX1) That same day, a Notice to Employer of Insurance Compliance Informal Conference was also sent to Karolinka Maintenance and Danuta. (PX2) The informal conference was scheduled for May 28, 2014.

18. Capuzi testified that after receiving the Notice of Non-Compliance, Karolinka Maintenance took out a workers' compensation insurance policy. (10/8/15-T.15) In October/November of 2014, Capuzi spoke to attorney Ralph Berke who notified him that he had taken over Karolinka Maintenance's insurance non-compliance case. (10/8/15-T.19-20)

19. Capuzi testified that attorney William Knee appeared on behalf of Karolinka Maintenance for the informal conference on May 28, 2014. (10/8/15-T.18)

20. On August 25, 2014, A Settlement Contract Lump Sum Petition and Order (hereinafter "Settlement") between Wasilewska and Karolinka Maintenance for $2,500.00 was approved by Arbitrator Hegarty. (PX7) Wasilewska was not paid pursuant to the settlement agreement until June 2015, when the Commissioner made inquiry. (7/15/15-T.90,92) Mark testified that there was a delay in payment because they were waiting for Danuta's counsel to notify her that the Settlement had been approved. (7/15/15-T.106-107)

21. On February 9, 2015, the National Council on Compensation Insurance (hereinafter "NCCI") issued a certificate showing its search of its database which established that Karolinka Maintenance failed to file proof of workers' compensation insurance from July 20, 2005 through March 17, 2009, May 8, 2009 through June 4, 2009, October 20, 2009 through November 11, 2009, May 22, 2010 through September 20, 2011, November 25, 2011 through May 30, 2013, August 10, 2013 through May 27, 2014, and December 29, 2014 to "present." (PX3) The NCCI policy search-proof of coverage inquiry showed that Karolinka Inc. failed to renew its workers' compensation insurance on March 13, 2012, March 13, 2013 and March 13, 2014, and that Karolinka Maintenance cancelled its policies on March 18, 2009, June 5, 2009, November 12, 2009, September 21, 2011 and May 31, 2013. (PX4) The search also shows cancellations of insurance due to non-payment on May 7, 2009, October 19, 2009, January 7, 2010, May 21, 2010, November 24, 2011, and August 9, 2013.

22. On November 21, 2014, the Illinois Secretary of State's Office issued a letter indicating that Karolinka Maintenance had no record of corporation on file. (PX11) Furthermore, the office certified that that at no time had a corporation, domestic or foreign, entitled

Karolinka Maintenance, ever been incorporated or licensed to transact business in Illinois. Also on this day, the Illinois Office of Self-Insurance Administration certified that there is no record indicating that a certificate of approval was issued to Karolinka Maintenance for self-insurance. (PX12)

23. On November 26, 2014, the Illinois Department of Revenue issued a letter certifying that no Illinois corporation income and replacement tax return was filed for Karolinka Maintenance from 2005 through 2014. (PX10)

24. Hearings were held before Commissioner Brennan on May 19, 2015, July 15, 2015 and October 8, 2015.

25. During the October 8, 2015 hearing, Daniel Capron, an attorney, was called upon to testify in the Respondents' behalf. Mr. Capron was called as an expert witness by the Respondents. Mr. Capron has previously been engaged to testify as an expert witness in the field of workers' compensation and holds himself out as an expert in workers' compensation law and practice. (10/8/15-T.65) He testified that he "wrote a chapter in a book on Independent Contractor Status. It was a book that compiled the different approaches to Independent Contractor Status in all 50 states, and I authored the chapter on Illinois." (10/8/15-T.62-63) Mr. Capron testified that the book is an authoritative treatise on the subject. (10/8/15-T.63)

26. According to Mr. Capron, the factors used to determine if a worker is an employee or an independent contractor are "somewhat fluid and fact intensive, varying from case to case....the single most important factor which all the courts have recognized as paramount, is the right to control the worker." (10/8/15-T.69-70)

27. At the October 8, 2015 hearing, Mark was recalled as a witness and testified that he is the business manager for Karolinka Maintenance. (10/8/15-T.87) Mark testified that Karolinka Maintenance never operated under the website set up for the business nor did it provide the services listed on the website. (10/8/15-T.88) However, on re-cross-examination, Mark testified that he created the website in 2009. (10/8/15-T.102) Mark also recalled Karolinka Maintenance cancelling its workers' compensation insurance after 2009. (10/8/15-T.106-107) Mark later clarified that he called the insurance companies and asked questions, but then did not pay the premiums. (10/8/15-T.110-111)

First, the Commission addresses the parties to this action. The Respondent's in this case are Karolinka Maintenance; Karolinka Winiarksa, individually; and Danuta Winiarska, Individually and doing business as Karolinka Maintenance. There is, however, no indication that Karolinka Winiarska is in any way involved in the running of or a part of Karolinka Maintenance. In fact, Danuta testified that Karolinka Winiarska is her oldest daughter and has nothing to do with the business. (7/15/15-T.57) That testimony was not rebutted. As such, the Commission hereby dismisses Karolinka Winiarska as a party in this case.

Next, the Commission addresses Respondent's claim that the cleaners who worked for Karolinka Maintenance did so as independent contractors and not as employees of Karolinka Maintenance.

The Commission notes that the November 1, 2009 Agreement for Janitorial Maintenance states that Wasilewska and Karolinka Maintenance "agree that they are independent contractors,

and neither has the authority to bind or make any commitment on behalf of the other, nor are any of either party's employees entitled to any employment rights or benefits of the other party." However, the Commission further notes that the Agreement also states that the purpose of engaging Wasilewska "is to provide janitorial maintenance services at the direction of management of Karolinka for clients of Karolinka." (PX5) The Agreement further explains that Karolinka Maintenance "may, with or without cause, earlier terminate this Agreement....Karolinka may also terminate this Agreement immediately upon written notice to Contractor in the event Contractor breaches any of its obligations hereunder."

The Agreement also includes a non-compete clause which prohibited Wasilewska from working for anyone else as a cleaner while working for Karolinka Maintenance and for a year after the termination of the Agreement. It explains that in the event that Karolinka Maintenance divests itself of its ownership interest, it may "sever and assign that portion of this Agreement which relates to the divested division to the acquiring party."

As previously noted, the Agreement references Exhibit A as setting forth the "responsibilities required to be performed under this Agreement," yet no Exhibit A is attached to the Agreement in evidence, and was never produced. Furthermore, Karolinka Maintenance was to pay Wasilewska in accordance with Exhibit A after Wasilewska submitted an invoice detailing the work she did. Finally, the Commission notes that "[t]his Agreement together with any Attachments, Exhibits and Schedules constitute the entire agreement between Karolinka and Contractor and **supersede all prior written or oral understandings**. Each Attachment, Exhibit and Schedule, shall be considered incorporated into this Agreement. This Agreement and said Attachments, Exhibits and Schedules **may only be amended, supplemented, modified or cancelled by a duly executed written instrument**." (emphasis added)

The Commission finds after a review of the entire Agreement that despite the one sentence in the Agreement stating that the relationship between Wasilewska and Karolinka Maintenance is that of an independent contractor, the rest of the Agreement indicates an employee/employer relationship. By the Agreement, Wasilewska was to provide janitorial services "at the direction of management of Karolinka for clients of Karolinka." (PX5) Per the agreement, Karolinka Maintenance had the right to terminate Wasilewska, without cause, and/or if Wasilewska breached her obligations under the Agreement. Wasilewska did not have the same rights under the Agreement. And, in the event of the sale of Karolinka Maintenance, it had the right to assign the Agreement to the new owners. Furthermore, how Wasilewska was to be paid was dictated by Karolinka Maintenance in accordance with Exhibit A and after Wasilewska submitted an invoice detailing the work she did.

Instructive is the courts explanation in *Ware v. Industrial Commission*, 318 Ill. App. 3d 1117, 1122 (2000), in which it explained that:

> "[n]o rigid rule of law exists regarding whether a worker is an employee or an independent contractor. *Area Transportation Co. v. Industrial Comm'n, 123 Ill. App. 3d 1096, 1099 (1984).* Rather, courts have articulated a number of factors to consider in making this determination. The single most important factor is whether the purported employer has a right to control the actions of the employee. *Bauer vs. Industrial Comm'n, 51 Ill.2d 169, 172 (1972).* Also of great significance is the nature of the work performed by the alleged employee in relation to the general

> business of the employer. *Ragler Motor Sales vs. Industrial Comm'n, 93 Ill.2d 66, 71 (1982); Peesel v. Industrial Comm'n, 224 Ill. App. 3d 711, 716 (1992).* Additional factors to consider are the method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities, and whether income tax has been withheld. *Wenholdt v. Industrial Comm'n, 95 Ill.2d 76, 80-81 (1983).* Finally, a factor of lesser weight is the label the parties place upon their relationship. *Earley, 197 Ill. App. 3d at 317.* The term 'employee,' for purposes of the Act, should be broadly construed. *Chicago Housing Authority v. Industrial Comm'n, 240 Ill. App. 3d 820, 822 (1992).*

The Commission finds that the Agreement, in light of *Ware*, establishes that Karolinka Maintenance had clear control of Wasilewska's actions, making the reference in the Agreement to an independent contract relationship a fabricated label.

Despite Mark and Danuta's claims to the contrary, the Agreement establishes that Karolinka Maintenance had full control over Wasilewska's duties and how she performed them. In addition, the Agreement clearly states that the Agreement "may only be amended, supplemented, modified or cancelled by a duly executed written instrument." (PX5) Such an instrument does not exist therefore the Agreement is the sole contract upon which the Commission must rely.

That the Agreement set the employee/employer relationship between Wasilewska and Karolinka is further supported by Wasilewska's testimony. At hearing, Wasilewska testified that Mark would call her and tell her about an assignment and then they would meet at the location that she was to clean. (5/19/15-T.74) Wasilewska testified that Mark would always tell her what needed to be cleaned and gave her alarm codes for the building, if necessary. (5/19/15-T.30-31) Wasilewska testified that at times the manager of the business that she was to clean was present when she first saw an assignment with Mark, but that Mark did all the talking. (5/19/15-T.75-76) Wasilewska explained that both Danuta and Mark were her boss. (5/19/15-T.31-33) In fact, Mark contradicted his initial denials of having a supervisory position at Karolinka Maintenance when he later admitted to being a business manager. (7/15/15-T.87;10/8/15-T.87)

Mark and Danuta offered testimony at hearing in which they denied ever having employees or any control over their workers. However, not only does the Agreement contradict their testimony, Karolinka Maintenance's website does so as well.

Mark admitted that he created the website for Karolinka in 2009, during re-cross-examination on October 8, 2015. (10/8/15-T.102) The website indicates that Karolinka Maintenance is a Chicago cleaning service specializing in commercial and residential cleaning. (PX13) "Karolinka Maintenance can facilitate budgeting, scope management, project scheduling, project management, administration, supervision and quality control management. We are the only Chicago cleaning service to be Green Clean Certified because green cleaning is better for your health, better for our staff and better for the environment." Karolinka Maintenance's cleaners are listed as trained, certified, uniformed, insured and bonded. According to the website, Karolinka Maintenance offers standard cleaning services, party cleaning, seasonal deep cleaning, post construction or renovation cleaning, floor care, window washing, power washing, carpet cleaning, and asthma and allergy relief cleaning. The website also indicates that Karolinka Maintenance "screens, trains and certifies each staff member."

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The Commission notes that while Danuta and, initially, Mark denied having anything to do with the creation of the website, the contact information listed on the website are the address for Karolinka Maintenance, as confirmed by Danuta, and Mark's cell phone number, as confirmed by both Danuta and Mark. (7/15/15-pgs.30,97,109) Furthermore, Mark admitted that prospective customers have gotten his cell phone number from the website. (7/15/15-T.97,109) Therefore, the Commission finds that Danuta and Mark were using Karolinka Maintenance's website for business purposes and that the website had not been abandoned as claimed by Danuta and Mark.

Based upon the Agreement, Karolinka Maintenance's website, Wasilewska's testimony, and Danuta and Mark's testimony, the Commission finds that Karolinka Maintenance employed cleaners and controlled how they performed their jobs, as well as retained the right to discharge and, as indicated on the website, "screens, trains and certifies each staff member." As such, pursuant to *Ware*, Wasilewska and Karolinka Maintenance had an employee/employer relationship under the Act.

Section 4(a)(3) of the Act states that all employers with an employee who comes within the provisions of Section 3 of the Act, and any other employer who shall elect coverage under Section 2 of the Act, must provide workers' compensation insurance for the protection of its employees. 820 ILCS 305/4(a)(3) (2013). The evidence provided in this case demonstrates that Karolinka Maintenance was subject to the Automatic Coverage provision of Section 3 of the Act. Mark testified that Karolinka Maintenance offers power washing and carpet cleaning services, which requires the use of electric power washing machinery, electric carpet extractors and electric vacuums. (7/15/15-pgs. 97-98,100) Mark's testimony regarding the work done by Karolinka Maintenance is supported by the website, which lists these as services provided by Karolinka Maintenance. (PX13) Wasilewska and Danuta also testified that the cleaners used electric vacuum cleaners. (5/19/15-pg.60; 7/15/15-pg.36) Such use of electric and power driven equipment falls under Section 3(15) of the Act, which applies the Act and the requirement for workers' compensation insurance to any business in which electric, gasoline or other power driven equipment are used. 820 ILCS 305/3(15) (2013).

The Commission further notes that Wasilewska and Danuta testified that the cleaners would use bleach, Windex, and floor and toilet cleaners. (5/19/15-pg.58; 7/15/14-pg.37) The Commission finds the use of these products falls under Section 3(7) of the Act, which applies to businesses that use injurious or inflammable vapors or liquids. 820 ILCS 305/3(7) (2013).

Finally, Danuta and Mark testified that from 2009 to present Karolinka Maintenance has operated with from two to six or seven cleaners (employees) at any given time. (7/15/15-pgs.45,96) Because Karolinka Maintenance's cleaners drove to provide their services, the Commission finds that it also falls under Section 3(3) of the Act, which covers businesses with more than two employees who distribute commodities by motor vehicle. 820 ILCS 305/3(3) (2013).

Respondent also argues that the Act is vague regarding who is required to secure workers' compensation insurance. Specifically, Respondent argued that Section 4(d) of the Act is impermissibly vague. Section 4(d) of the Act states, in pertinent part:

> "Any individual employer, corporate officer or director of a corporate employer, partner of an employer partnership, or

> member of an employer limited liability company who knowingly fails to provide coverage as required by paragraph (a) of this Section is guilty of a Class 4 felony. This provision shall not apply to any corporate officer or director of any publicly-owned corporation. Each day's violation constitutes a separate offense. The State's Attorney of the county in which the violation occurred, or the Attorney General, shall bring such actions in the name of the People of the State of Illinois, or may, in addition to other remedies provided in this Section, bring an action for an injunction to restrain the violation or to enjoin the operation of any such employer.
>
> Any individual employer, corporate officer or director of a corporate employer, partner of an employer partnership, or member of an employer limited liability company who negligently fails to provide coverage as required by paragraph (a) of this Section is guilty of a Class A misdemeanor. This provision shall not apply to any corporate officer or director of any publicly-owned corporation. Each day's violation constitutes a separate offense. The State's Attorney of the county in which the violation occurred, or the Attorney General, shall bring such actions in the name of the People of the State of Illinois.
>
> The criminal penalties in this subsection (d) shall not apply where there exists a good faith dispute as to the existence of an employment relationship. Evidence of good faith shall include, but not be limited to, compliance with the definition of employee as used by the Internal Revenue Service." 820 ILCS 305/4(d) 2013.

While the Commission might have found that Respondent's reliance on the one line in the Agreement claiming that Wasilewska was an independent contractor questionable, it can also say that Danuta and Mark acted in bad faith.

Additionally, Section 4(d) further states:

> "Upon a finding by the Commission, after reasonable notice and hearing, of the knowing and willful failure or refusal of an employer to comply with any of the provisions of paragraph (a) of this Section, the failure or refusal of an employer, service or adjustment company, or an insurance carrier to comply with any order of the Illinois Workers' Compensation Commission pursuant to paragraph (c) of this Section disqualifying him or her to operate as a self insurer and requiring him or her to insure his or her liability, or the knowing and willful failure of an employer to comply with a citation issued by an investigator with the Illinois Workers' Compensation Commission Insurance Compliance Division, the Commission may assess a civil penalty of up to $500 per day for each day of such failure or refusal after the effective date of this amendatory Act of 1989. The minimum penalty under this Section shall be the sum of $10,000. Each day of such failure or refusal shall constitute a separate offense. The Commission

> may assess the civil penalty personally and individually against the corporate officers and directors of a corporate employer, the partners of an employer partnership, and the members of an employer limited liability company, after a finding of a knowing and willful refusal or failure of each such named corporate officer, director, partner, or member to comply with this Section. The liability for the assessed penalty shall be against the named employer first, and if the named employer fails or refuses to pay the penalty to the Commission within 30 days after the final order of the Commission, then the named corporate officers, directors, partners, or members who have been found to have knowingly and willfully refused or failed to comply with this Section shall be liable for the unpaid penalty or any unpaid portion of the penalty. Upon investigation by the insurance non-compliance unit of the Commission the Attorney General shall have the authority to prosecute all proceedings to enforce the civil and administrative provisions of this Section before the Commission. The Commission shall promulgate procedural rules for enforcing this Section." 820 ILCS 305/4(d) (2013).

Based on the plain language of this Section, it is clear that the failure to attain workers' compensation insurance for its workers is a violation of the Act and subject to the imposition of penalties against the employer. There is nothing vague about the Section and its requirements.

Mr. Capron's assertions that lay people and attorneys, who do not regularly practice before the Commission, find the distinction between an employer/employee relationship and an independent contractor relationship difficult are wholly unsupported and pure speculation. Though the Commission recognizes Mr. Capron's status as an expert on workers' compensation matters, his testimony regarding the issue of employer/employee is not persuasive.

The Commission is confident in its ability to decide the issue of employer / employee vs. independent contractor relationships. It is abundantly clear to the Commission that based on the Agreement, Karolinka's website and the testimony presented at hearing, Karolinka Maintenance falls under the Act and, as such, is required to obtain workers' compensation insurance. There is little doubt that the principals at Karolinka Maintenance believed likewise as they purchased workers' compensation insurance on multiple occasions. Unfortunately, they also allowed it to lapse.

The Commission notes that the February 9, 2015, NCCI report shows that Karolinka Maintenance failed to file proof of workers' compensation insurance from July 20, 2005 through March 17, 2009, May 8, 2009 through June 4, 2009, October 20, 2009 through November 11, 2009, May 22, 2010 through September 20, 2011, November 25, 2011 through May 30, 2013, August 10, 2013 through May 27, 2014, and December 29, 2014 to "present." (PX3) Furthermore, the NCCI policy search-proof of coverage inquiry showed that Karolinka Inc. failed to renew its workers' compensation insurance on March 13, 2012, March 13, 2013 and March 13, 2014, and that Karolinka Maintenance cancelled its policies on March 18, 2009, June 5, 2009, November 12, 2009, September 21, 2011 and May 31, 2013. (PX4) Finally, the search also shows cancellations of insurance **due to non-payment** on May 7, 2009, October 19, 2009, January 7, 2010, May 21, 2010, November 24, 2011, and August 9, 2013.

16IWCC0502

For years Karolinka Maintenance has obtained, cancelled and, at times, allowed its workers' compensation insurance to lapse due to non-payment. This back and forth shows not only that Karolinka Maintenance was aware of its obligation to obtain workers' compensation insurance, but also that it chose to be non-compliant throughout. As such, Respondent's claims that any violation of the Act's requirement to obtain workers' compensation insurance was not knowing and willful are implausible, if not impossible.

Based upon the totality of the evidence, the Commission finds that the evidence establishes that Respondents knew of their obligation but simply refused to comply with the insurance requirement under the Act. The Commission further finds that Danuta Winiarska, Ind. & d/b/a Karolinka Maintenance, was required to obtain and maintain workers' compensation insurance under Section 4(a) of the Act and failed to do so. Finally, the Commission finds that based on Capuzi's investigation Karolinka Maintenance and Danuta failed to provide workers' compensation insurance to its employees for a total of 3,216 days. (10/8/15-pg.32) Therefore, pursuant to the clear instructions provided under Section 4(d) of the Act, the Commission hereby assesses a penalty of $500 a day for each day of non-compliance, totaling $1,608,000.00.

As a final observation, at the beginning of its analysis of this case, the Commission noted that Karolinka Winiarska was erroneously named as a Respondent in this claim. However, the Commission also believes that Mark Ciotuszynski, a/k/a Mark Marko and Mark Ciot, was erroneously omitted as a Respondent in this claim. The record is rife with evidence establishing Mark as a partner and/or co-owner of Karolinka Maintenance. It is not, however, within the province of the Commission to name the parties in these actions.

IT IS THEREFORE ORDERED BY THE COMMISSION that Karolinka Winiarska is hereby removed as a party to this action and any claim against her under the provisions of Section 4(d) of the Act, in this matter only, is hereby dismissed.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent, Danuta Winiarska, Ind. & d/b/a Karolinka Maintenance shall pay $1,608,000.00 in penalties pursuant to Section 4(d) of the Act.

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: JUL 28 2016
MJB/ell
Disc.-06/21/16
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

STATE OF ILLINOIS )
) SS.
COUNTY OF URBANA )

| | |
|---|---|
| ☐ 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

Ruston Morecraft,
Petitioner,

vs.

First Baptist Church of Oblong,
Respondent.

NO: 13 WC 35271

16IWCC0503

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Lindsay finding Petitioner sustained an accidental injury arising out of and in the course of his employment on April 14, 2013. As a result Petitioner was entitled to $28,355.23 in medical expenses under Section 8(a) of the Illinois Workers' Compensation Act and permanently lost 17.5% of the use of his right leg under Section 8(e) of the Act. The issues on Review are whether Petitioner sustained an accidental injury arising out of and in the course of his employment on April 14, 2013, whether a causal relationship exists between the alleged April 14, 2013 work accident and Petitioner's present condition of ill-being, and if so, the extent of Petitioner's temporary total disability and the nature and extent of Petitioner's permanent disability. The Commission, after reviewing the entire record, reverses the Arbitrator and finds Petitioner failed to prove he sustained an accidental injury arising out of his employment on April 14, 2013.

FINDING OF FACTS AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner testified he is a pastor. He normally comes in about 2-3 hours before a service and makes a sweep of the church to make sure none of the lights are on that do not need to be on and the heating units are turned on. He attempts to conserve resources and he

does not think it is necessary to have lights on in an area where the people are not going to gather.

2. On April 14, 2013, approximately 30-45 minutes before other people arrived, he noticed a light was on at the end of the hall that spanned from the entrance to the auditorium. He typically turns off lights that are not being used so that others are not entering in that area. He went to turn the light off that is located next to an outside entrance. There is a mat there where people wipe their feet. The carpeted mat with the one inch rubber edge is located on the carpet in the hallway. On that day he was standing on the mat that did not move when he reached to turn off the light. He was wearing tennis shoes at the time, which he assumed would give him a little more opportunity to grab than his dress shoes would have had. After he turned off the light, he turned/pivoted to go back; he did not pick up his foot. At that time, he experienced a really sharp pain in his right knee. He tried to take another step but he was not able to take one. He stood in the hallway until the first person arrived. He hollered to the couple and they brought him an office chair. He sat down in the chair and wheeled himself to the fellowship hall where he taught. After teaching, he wheeled the chair out to a van where he was loaded in and taken to the hospital. He believes he was probably carrying a Bible and study course book in his hand as he moved toward the fellowship hall to turn off the light. He did not stop to drop these items off.

3. On April 14, 2013, Petitioner was seen at Union Hospital. It was noted that Petitioner presented with a sudden onset of pain, swelling, redness and stiffness in his right knee. He reported that for the past two weeks he had right knee pain. Today, while at church, he put pressure down on right knee and he felt immediate pain. He reported that he had been sitting at a desk for several hours prior to standing up. When he stood up his right knee felt stiff. The patient also stated that he started walking down the hall and when he turned, he suddenly felt a severe pain in his right knee. A right knee CT was ordered. The emergency doctor noted that degenerative changes and joint effusion were present. He diagnosed Petitioner with right knee pain. He ordered an immobilizer and prescribed Norco.

4. On April 17, 2013, Petitioner was seen by Dr. McDonald at CMH Bone and Joint. Dr. McDonald noted that the patient reports that he experienced severe pain after turning off a light at his church. He is unable to recall whether his knee buckled or twisted. His right knee x-ray showed patellofemoral spurring. The radiologist indicated that there was probable joint effusion. Dr. McDonald diagnosed Petitioner with right knee pain, effusion and a loose body versus an osteochondral lesion. On April 18, 2013, Petitioner followed up with Dr. McDonald who diagnosed him with a right knee tibia eminence fracture. Dr. McDonald prescribed a crutch, pain medication, heat and ice and he referred Petitioner for a MRI.

5. The April 19, 2013 right knee MRI showed a complex tear of the anterior and posterior horns of the medial meniscus with small medial tibia plateau bone contusion anteriorly, along with Hyaline cartilage degenerative changes of the patellofemoral joint, particularly along the medial pole.

6. The Accident Medical Claim Form for GTL, report of injury and statement of the attending physician all indicated that when the Petitioner turned to turn off lights he experienced severe pain in his right knee.

7. On May 6, 2013, Petitioner follow up with Dr. McDonald who indicated that Petitioner's x-rays showed a tibia eminence fracture and his MRI shows a medial meniscal tear. Dr. McDonald indicated that as a result of these scans Petitioner may benefit from a knee injection and may also need arthroscopic knee surgery. On June 3, 2013, Petitioner was given the injection and he was told to follow up in three weeks.

8. On July 1, 2013, Dr. McDonald noted that Petitioner is approximately eleven weeks removed from his tibia eminence fracture on the ipsilateral knee. Dr. McDonald recommended that Petitioner undergo arthroscopic knee surgery and on July 22, 2013 Petitioner informed the doctor that he wished to proceed with surgery.

9. On August 12, 2013, a recorded statement was taken from Petitioner by Respondent's insurance representative. During the statement, Petitioner acknowledged that he is the pastor for the church and that the only other employee is a part-time custodian. He indicated that on April 14, 2013 he was the only person in the church. He went to turning off lights that had been left on Sunday morning. While he walked in the building, he turned hall lights on. He noted that there was one light that was left on that did not need to be left on. So, he went to turn that light off. At the time he reached for the light switch, he probably could have taken an extra step, but he felt like he was close enough. When he turned the light switch off, he pivoted to go the other direction and something happened to his knee. At the time this happened he was standing on carpet, which was in good condition. He does not remember doing anything different than he normally does except that he may have stepped instead of pivoted. Petitioner testified that he was not carrying anything at the time. He did not feel any slippage in his knee. Rather, his knee got hot and when he reached down he could tell it was large.

10. On the November 15, 2013 Orthopedic Institute Intake form, Petitioner stated that the pain in his knee just occurred when he turned to flip a light switch. On February 6, 2014, Dr. Miller from the Orthopedic Institute indicated that Petitioner reported back in April of 2013 Petitioner was pivoting on his leg when he felt a pop and ended up in emergency room. Dr. Miller diagnosed Petitioner with a chronic medial meniscal tear, mild degenerative osteoarthritis, predominantly of his patellofemoral joint and suspected in the medial compartment as well He noted that Petitioner had had his left knee scoped in

1990. Dr. Miller prescribed physical therapy, medication and he instructed Petitioner to follow up in three to four weeks.

11. On April 7, 2012, Petitioner was seen at Primary Care Group for a pre-operative evaluation. It was noted that Petitioner is morbidly obese. He weighs 328 pounds and is 73" in height. His body mass index 43.27 kg.

12. On April 15, 2014. Petitioner underwent surgery. The post-surgical diagnosis was right knee arthroscopy with partial medial meniscectomy and findings of grade II chondral changes in the medial femoral condyle and patella.

13. On May 30, 2014 Petitioner followed up with Dr. Miller who indicated that Petitioner is doing really well with his knee. He has very little difficulty at this time. He has a little twinge occasionally when he moves his knee in a certain way. He is basically back to doing everything he was doing previously. The only issue is he still has a little bit of swelling in the joint. On examination he could not really even tell if there is any swelling. Petitioner's range of motion was essentially full. There was no instability. The patella tracks well. There is no crepitus noted and no tenderness over the medial joint line. Petitioner said this is the first time he has been able to straighten his knee out in years. Petitioner was advised to continue to perform exercises. He was told they would perform a recheck in 3-4 weeks if he is having difficulties. Otherwise, he may call and cancel.

14. Petitioner's September 5, 2013 through April 9, 2015 records from the Primary Care Group indicated that while Petitioner received medical treatment for various conditions there is no mention of any right knee treatments.

15. At the August 13, 2015 Arbitration hearing, Petitioner testified that currently he can stand and preach, but if he is standing too long his right knee starts to ache. He reported that when he travels over three hours, he has to stop and adjust his right knee. He testified that sleeping is uncomfortable and he has to sleep with a pillow under his right knee. As a preventative measure, he takes an Ibuprofen within an hour of waking. He takes another one as needed and he takes one before he gets to bed. He can walk up two steps before he has to walk up each step individually. He feels unstable walking up the stairs and he always uses the railing. He used to take the stairs more and now he does not take them very often. He was not able perform physical labor during a mission project in East St. Louis last summer and was not able to go on mission trips. He now stays put behind the pulpit and does not walk down the aisles to be closer to the members.

Upon reviewing the facts in this case, the Commission finds that while Petitioner was in the course of his employment, Petitioner failed to prove he sustained an accidental injury arising out of his employment on April 14, 2013. More specifically, the Commission finds that Petitioner was not subjected to hazard in his work place nor to a

risk of injury to a greater degree than a member of the general public. While Petitioner testified at the Arbitration hearing that he may have been carrying something at the time of the incident, the earlier recorded statement shows that Petitioner denied carrying anything at the time. Petitioner testified that the mat he was standing on at the time he turned off the lights did not move and the carpet was in good condition. Additionally, Petitioner testified that he was wearing tennis shoes that would allow him to have a better grip on the surface than had he been wearing dress shoes. Furthermore, there is no evidence that Petitioner was subjected to risk more frequently than members of the public. The hallway area was frequented by Petitioner as well as members of the congregation alike. The hall had been used earlier that morning and was located near the fellowship auditorium that was being used for bible study shortly thereafter. The mat on which Petitioner was standing on at the time of the incident was located near a public door used for ingress/egress of members of the congregation. There was no evidence submitted to show the frequency in which Petitioner traversed the hall in turning off lights or that he performed this tasks on a more frequent basis than he would at a different local such as his home. Lastly, the Commission finds that the mere act of turning is an activity of everyday life and without more it creates no greater risk than that to which the general public is equally exposed. At the time of the incident, there is no indication that Petitioner was rushing, that he was, for sure, carrying anything or that he was attempting to maneuver around another person or object. Petitioner testified that he could have probably taken an extra step when he turned off the light but instead he rotated, pivoted and did not pick up his foot. Petitioner's medical records indicate that he had prior surgery on his opposite knee and his pre-operative assessment indicated that he was morbidly obese. While the Commission takes the Petitioner as they find them, it cannot overlook the fact that Petitioner is morbidly obese and his knees were taxed by his great weigh. Furthermore, Petitioner had undergone a prior left knee scope which may have made him more vulnerable to injury in terms of his right knee; Petitioner reported to the Union Hospital personnel that in the two weeks prior to the April 14, 2013 incident he had been experiencing right knee pain and immediately prior to the April 14, 2013 incident he stood up after having been seated at a desk for several hours and noted that his knee felt stiff. Based on the evidence, the Commission believes Petitioner sustained an idiopathic injury that as personal to Petitioner and was not related to his work.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove he sustained an accidental injury arising out of his employment on April 14, 2013 his claim for compensation is hereby denied.

16IWCC0503

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

DATED: JUL 29 2016

MB/jm

O: 6/9/16

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Mario Basurto

David L. Gore

Stephen Mathis

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Russell Thomas,
Petitioner,

vs.

No. 14 WC 33501
15 WC 09210

Southern Illinois University - Carbondale,
Respondent.

16IWCC0504

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, and medical expenses both incurred and prospective, modifies the Decision of the Arbitrator as stated below. The Commission 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 consistent with this decision, pursuant to *Thomas v. Industrial Commission*, 78 111.2d 327 (1980).

After considering the entire record, the Commission reverses the Decision of the Arbitrator as to his finding that Petitioner sustained a second accident. The Arbitrator found that Petitioner sustained an accident on June 13, 2014, when he slipped while on the job and injured his left knee. The Arbitrator found that Petitioner sustained a second accident on February 27, 2015, whereby his left knee was re-injured when, while exiting police headquarters, his left foot missed a 3-inch concrete step and he landed on his heel with unexpected force. He did not fall. The Arbitrator awarded temporary total disability benefits up through the May 13, 2015 hearing date as well as reimbursement for medical expenses incurred and prospective treatment under Section 8(a).

The Commission views the evidence differently. The Commission finds that Petitioner sustained a work-related injury on June 13, 2014 and reached maximum medical improvement on March 17, 2015. Petitioner did not prove a second accident with respect to the February 27, 2015 incident. As Petitioner reached maximum medical improvement by March 17, 2015 from his single compensable accident, Respondent is not liable for medical treatment incurred after that date. The Commission finds that Petitioner's period of entitlement to temporary total disability benefits to be from August 23, 2014 (day of commencement) through March 16, 2015.

**FACTS**

On June 13, 2014, Petitioner, a 54-year-old public safety officer, was dispatched to investigate the source of a possibly toxic substance in a creek on the campus of Southern Illinois University. While there, he slipped on the creek bank and hurt his left knee. (Tr.40-41)[1]. This slip was witnessed by at least one other employee of Respondent. (RX 3). Petitioner allegedly had immediate pain and swelling in his left knee. (Tr.43). He was placed off work as of August 23, 2014. On January 6, 2015, he received arthroscopy for a torn meniscus and afterwards was recovering well. (PX 4). This was Petitioner's second left knee arthroscopy; his first was done in November 2009. (PX 4).

On February 25, 2015, Petitioner's surgeon, Dr. George Paletta reported:

> "Overall, he is doing much, much better. He states his knee is significantly better than prior to surgery. He notes improvement in his muscle tone. He feels like therapy has been very beneficial. He feels like he is regaining strength.... Clearly the surgery has been highly effective in relieving his meniscal symptoms."

(PX 4). The doctor recommended a couple of additional weeks of physical therapy to optimize strengthening. Dr. Paletta also issued a work status report indicating that Petitioner could return to work with certain restrictions effective that day, February 25, 2015. In that work status report, Dr. Paletta also indicated that he expected Petitioner to be at maximum medical improvement effective March 17, 2015, at which point Petitioner could return to full duty. Dr. Paletta indicated that Petitioner would need no further treatment after that date, and therefore the doctor made no further appointments. (PX 4).

Two days later, according to Petitioner, on February 27, 2015, his heretofore easy recovery was completely derailed by the second alleged accident. According to Petitioner, he re-injured his knee when he missed a 3-inch step and landed hard on his left heel as he was leaving police headquarters with tears in his eyes. Petitioner had been in the office of Chief of Police Benjamin Newman that morning; Chief Newman had arranged this meeting to discuss Petitioner's impending return to work. During this meeting, Petitioner and Chief Newman got into an argument involving, among other topics, improprieties surrounding Petitioner's recent attempts at a film acting career. In

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[1] Citations to pages in the hearing transcript will take the form "Tr. __." Citations to the Petitioner's Exhibits and Respondent's Exhibits will take the form "PX –" and "RX –", respectively.

particular, Chief Newman chastised Petitioner for posting a photograph of himself in his police uniform on the internet site for his acting résumé. Petitioner apparently had tried to start this acting career while he was out on his medical leave. The discussion became heated, and, eventually, Chief Newman had to call another officer to escort Petitioner out of the building. (Tr. 25-30, 47-52). Petitioner described what happened as he exited the building:

> "I opened the door, and when I went to step out, I missed a little bitty step, because I haven't been down there that much lately, and there's a little step, as you can see. I missed that. When I did, I hit my heel on the sidewalk, and my knee buckled. At that time I called [Petitioner's attorney]. And I was crying at that point."

(Tr. 52). Petitioner was offended by the Chief's treatment of him, claiming at hearing that he was "very upset, never been done like this ever." (Tr. 52).

Five days later, on March 4, 2015, Petitioner made an unscheduled visit to Dr. Paletta. Dr. Paletta wrote:

> "When [Petitioner] was last seen he was doing quite well and had noted significant overall improvement. A recommendation was made to continue some physical therapy and leave him on restrictions ...until approximately March 17th when he was scheduled to return to full duty.... Unfortunately, he comes in today with increasing complaints of left knee pain following a new injury. On 2/27/15 he was having a meeting with his chief. Apparently the meeting got somewhat confrontational as Mr. Thomas felt that the chief was inquiring about personal issues beyond the scope of work related issues. He states that he was leaving the office he was being escorted out and he missed the first step out the back exit. He states he started to fall but 'didn't go all the way down."

(PX 4). An MRI arthrogram was ordered. Dr. Paletta found it "suggestive but inconclusive" of a recurrent meniscus tear. Dr. Paletta administered an intraarticular injection to treat Petitioner's reported renewed knee pain. According to an office note of May 6, 2015, Petitioner indicated that the injection provided about two weeks' worth of "pretty good" pain relief, but the pain had returned. At that point, Dr. Paletta expressed some perplexity, writing:

> "I explained to Mr. Thomas that this represents a difficult situation. He was doing extremely well after surgery until a re-injury. The MRI scan is suggestive but inconclusive with regard to a recurrent meniscus tear... Options at this point are to consider a second injection, try an unloader brace, or consider arthroscopy and recurrent debridement. Arthroscopy would confirm whether in fact there is a recurrent meniscus tear there... His preference is to consider repeat arthroscopy...I discussed with him the surgical procedure. He is obviously familiar with arthroscopy."

(RX 4).

16IWCC0504

The Section 19(b) hearing took place one week later, on May 13, 2015. At hearing, Petitioner offered, for the first time, that he also slipped on wet leaves (but caught himself before falling all the way down) in Respondent's parking lot after leaving police headquarters on the day of the second claimed accident. (Tr.53). He explained that he had not revealed this alleged slip in the parking lot at any time before the hearing because, "That wasn't the primary issue." He stated, "When I walked out the door, that's when it [the knee] buckled. That's when it started hurting, right then." (Tr. 67).

## DISCUSSION

The Commission finds that Petitioner carried his burden of proving an accident on June 13, 2014, when he slipped on the creek bank. However, contrary to the Arbitrator's determination, the Commission finds that Petitioner reached maximum medical improvement by March 17, 2015, based on the work status report of Dr. Paletta. As the doctor's records noted consistently, Petitioner's recovery post-arthroscopy was progressing well, even "extremely well"; thus Dr. Paletta scheduled Petitioner to return to full duty on March 17, 2015. Dr. Paletta indicated that Petitioner would need no further treatment after that date.

The Commission finds that, with respect to the incident of February 27, 2015, Petitioner has not proven that an "accident" occurred or that a compensable injury followed therefrom. As mentioned above, Petitioner was on the premises that day because Chief Newman had arranged a meeting with him to discuss Petitioner's return to work. Upsetting things were said during this meeting, and Petitioner left the building in an emotionally agitated state. Minutes after leaving the Chief's office, in Petitioner's account, he re-injured his knee when he "missed a little bitty step" outside the building and hit the heel of his left foot with unexpected force. This is the mechanism of injury whereby Petitioner's smooth recovery was purportedly disrupted to the point where he extended his medical leave and now professes a desire for further treatment including a second surgery. Considering the implausibility of the mechanism of injury, Dr. Paletta's documentation of Petitioner's post-surgery progress, and Petitioner's odd testimony during hearing about the slip on wet leaves in Respondent's parking lot, the Commission finds Petitioner's account regarding this second "accident" lacking in credibility.

Further, Petitioner has not demonstrated that his injury "arose out of" his employment. For an injury to "arise out of" one's employment, as required by the Act, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58 (1989).

Petitioner cannot demonstrate that his claimed re-injury was the result of a risk so connected to his employment. In his review brief, he argues that, had he not had tears in his eyes while leaving police headquarters, he would have been more attentive to where he was stepping. He characterized his tears as a "work-related distraction" that constituted an increased risk of injury. This argument is not compelling. Petitioner's facts here bear no resemblance to those staircase fall cases where a compensable accident was found. Petitioner does not claim that he was hurrying, carrying anything in his hands, performing any particular assigned duty, had to traverse these steps many times a day, or anything of that nature.

Nor did he present any evidence that these steps were defective, icy, cluttered with debris, or the like. Petitioner did not even trip or fall. A photograph of the steps shows that the first step was shorter than the second step. (PX 9, RX 11). Petitioner alludes in his review brief to a defect in these steps, stating that they comprise an "irregular landing on Respondent's premises" and that he "did not believe [the steps] to be up to code." This argument as well is not compelling.

In conclusion, the Commission finds that Petitioner suffered a compensable accident on June 13, 2014 and reached maximum medical improvement as of March 17, 2015. He is entitled to temporary total disability benefits commencing August 23, 2014 through March 16, 2015 (or 29 weeks and 3 days). The Petitioner is entitled to medical expenses relating to his left knee through March 16, 2015.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 25, 2015, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 782.35 per week for the period commencing August 23, 2014 through March 16, 2015, that being the period of temporary total incapacity for work under § 8(b); Respondent shall be given credit for all amounts paid as temporary total disability payments to date.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses incurred through March 16, 2015, under § 8(a) of the Act and subject to the medical fee schedule.

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.

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

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: JUL 29 2016

Joshua D. Luskin

Charles J. DeVriendt

o-06/07/16
jdl/ac
68

Ruth W. White

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

**THOMAS, RUSSELL**
Employee/Petitioner

Case# **14WC033501**

15WC009210

**SOUTHERN ILLINOIS UNIVERSITY OF CARBONDALE**
Employer/Respondent

16IWCC0504

On 6/25/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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 THOMAS C RICH PC
#6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

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

JUN 25 2015

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

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

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

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# ARBITRATION DECISION
## 19(b)

**Russell Thomas**
Employee/Petitioner

v.

**Southern Illinois University of Carbondale**
Employer/Respondent

Case # **14** WC **33501**

Consolidated cases: **15 WC 09210**

16IWCC0504

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **May 13, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

**DISPUTED ISSUES**

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 _____

16IWCC0504

**FINDINGS**

On the date of accident, **June 13, 2014 and February 27, 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 **$61,023.28**; the average weekly wage was **$1,173.52**.

On the date of accident, Petitioner was **54** 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 **$21,386.44** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$see memorandum**.

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

**ORDER**

Respondent shall pay reasonable and necessary medical services outlined in Petitioner's group exhibit, as provided in § 8(a) 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 § 8(j) of the Act.

Respondent shall authorize and pay for the treatment recommended by Dr. Paletta, including but not limited to surgery.

Respondent shall pay Petitioner temporary total disability benefits of $782.35/week for a further period of 8 2/7 weeks, commencing 3/16/15 through 5/13/15, as provided in § 8(b) of the Act. See attached Decision for findings regarding credit.

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

6/19/15
Date

ICArbDec19(b)

JUN 25 2015

STATE OF ILLINOIS )
) SS
COUNTY OF WILLIAMSON )

**ILLINOIS WORKERS' COMPENSATION COMMISSION**
**ARBITRATION DECISION**

RUSSELL THOMAS
Employee/Petitioner

**16IWCC0504**

v.

Case # 14 WC 33501
15 WC 09210

SOUTHERN ILLINOIS UNIVERSITY OF CARBONDALE
Employer/Respondent

**MEMORANDUM OF DECISION OF ARBITRATOR**

**FINDINGS OF FACT**

At the time of his accidental injuries, Petitioner was a Public Safety Officer. (T.39, 40). He has been employed with Respondent for over 22 years. (T.40). Since 2009, Petitioner's official title was Emergency Preparedness Resource Officer and Crime Prevention Unit Coordinator. (T.40). On June 13, 2014, Petitioner had just finished a presentation at the student center when he received a call to investigate a green substance and a dead fish in Powless Creek, which ran through the middle of campus. (T.40, 41). Petitioner testified that after he found the source of the complaint and attempted to return to campus, the creek bank gave way, causing him to fall. (T.40, 41). Petitioner testified that he grabbed ahold of a tree in attempt to break his fall; but the tree limb broke, he injured his knee, and he could hardly walk. (T.40, 41). Petitioner testified that he previously injured his left knee in 2009, but he was working full-duty with no restrictions at the time of his June 13th 2014 accident. (T.42). Petitioner reported immediate swelling following the accident and showed his knee to Lt. Ron House. (T.43, 61).

Petitioner called Lieutenant John Allen, who was present on behalf of Respondent. (T.15). Lt. Allen testified that he knew nothing about Petitioner's June 13th 2014 accident and was on vacation in Florida when the accident occurred. (T.17). Petitioner also called Benjamin Newman, Chief of Police and Director of Public Safety. (T.24, 25). He also testified that he had no independent knowledge of the accident on June 13, 2014.

Petitioner reported his injury to Dr. Dale Blaise on July 7, 2014, who noted Petitioner had an immediate onset of pain and swelling which was persistent at the time of the visit. (PX3, 7/7/14). Dr. Blaise administered a Kenalog injection and prescribed a brace. *Id.* Petitioner returned on August 18, 2014, with no improvement in his symptoms. (PX3, 8/18/14). Dr. Blaise prescribed Norco and referred Petitioner for an MRI. *Id.* On August 22, 2014, Dr. Blaise noted

that Petitioner continued to have knee pain, swelling, and difficulty getting out of his car and engaging in activity. (PX3, 8/22/14). Dr. Blaise believed that Petitioner suffered a recurrent tear or sprain of his medial meniscus. *Id.*

On that same day, August 22, 2014, Petitioner completed a Notice of Injury with Respondent (T.68), and he attempted to continue working until he could no longer do so:

> Q: . . . And you were working full duty from the time of June 13th, 2014, until the time you filled that out?
>
> A: Yes. I just couldn't take it anymore. Trying to get in and out of the squad car was really hurting it when I torqued it. When you step out of the car with this leg, when you go like that, it hurts like crazy, and it starts hurting and starts swelling up again. There was just no way out of it. This leg is the one I go out of the door with. I just couldn't do it. (T.69).

Dr. Blaise referred Petitioner for orthopedic specialist for evaluation. (PX3, 9/4/14).

Petitioner saw Dr. George Paletta on September 15, 2014. (PX4, 9/15/14). Dr. Paletta took the following history of the injury, consistent with Petitioner's testimony:

> . . . There was apparently concern about toxic chemicals spilling into a creek on the campus. They were investigating the potential source of these toxic chemicals. They were walking along a creek bed. Unfortunately Mr. Thomas started to slip and states he dropped down about four feet off the edge of the creek bed. He tried to catch himself on a tree branch and suffered an injury to the left knee. He describes impact with some twisting and probable hyperextension of the knee. He states the knee swelled quickly and he had pain. . . . *Id.*

Dr. Paletta noted Petitioner's history of knee injury in 2009. *Id.* He stated, however, that Petitioner "made a full recovery and was back to full duty without any residual problems." *Id.* Petitioner had no pain or swelling in the left knee in the weeks preceding the June 13th 2014 injury. *Id.* Petitioner's physical examination showed medial joint line tenderness and positive meniscal rotary signs. *Id.* His review of Petitioner's MRI revealed joint effusion and a recurrent tear of the medial meniscus with complex tearing of the posterior horn of the mid-body. *Id.* Dr. Paletta also observed underlying pre-existing arthritis that was previously asymptomatic. *Id.* Dr. Paletta recommended surgery. *Id.*

Respondent had Petitioner examined by Dr. August Ritter on October 28, 2014. (RX10). Dr. Ritter stated that he *did* believe that Petitioner's current condition was related to his reported work injury, that Petitioner *did* require further reasonable and necessary treatment, and that Petitioner would be able to work with restrictions. *Id.*

Dr. Paletta performed arthroscopy with subtotal medial meniscectomy, debridement, and chondroplasty of the patella, trochlea and medial femoral condyle on Petitioner's left knee on January 6, 2015. (PX6). Dr. Paletta noted on February 25, 2015, that Petitioner did well postoperatively with surgery, and Petitioner was to be released at maximum medical improvement on March 17, 2015. (PX4, 2/25/15).

Petitioner was called to meet with Chief Newman at Respondent's facility on February 27, 2015, to discuss his return to work and a promotion when a difference arose concerning what Petitioner was allowed to do outside of work while he was under restrictions, and ultimately Chief Newman asked Petitioner to leave. (T.25, 26, 28-30, 48). Lt. Allen testified that on February 27, 2015, he was called down to the Office of the Chief of Police and asked to escort Petitioner out of the building. (T.17). Petitioner and Chief Newman both testified that the difference arose from him using his uniform to audition for and/or play a role as an actor. (T.28-30, 44, 45). While Chief Newman denied including anything in Petitioner's personnel file about their conversations prior to the meeting, this was clearly not true as the file contained a memorandum marked, "TO: PERSONNEL FILE [Return] FROM: CHIEF BENJAMIN NEWMAN." (T.34; RX9).

Petitioner testified that his return to work with restrictions was never discussed with Chief Newman, because Chief Newman wished to discuss Petitioner's divorce and the Chief was upset about Petitioner stage/film acting and potentially retiring before 5 more years elapsed. (T.49, 50). Chief Newman testified that he heard of Petitioner's acting audition through a sergeant who advised him that Petitioner's ex-wife "called and complained about him acting on the side." (T.26). Petitioner testified that his wife advised him that she would contact the police department, and that she was going to "use the police department to force [him] to sign the divorce papers." (T.50). Petitioner testified that he auditioned to be an actor and was not paid any compensation for auditioning. (T.45). He further testified that the auditions were done on Saturday rather than through the typical work-week for which Respondent was paying him compensation. (T.45). Petitioner testified that he neither did anything strenuous nor anything outside of the restrictions placed on his left knee. (T.45). Petitioner candidly testified to playing a role as a governor in one student film for about 2 hours on a Saturday in Chicago. (T.53, 54). He testified that this was the only instance in which he travelled. (T.65). He testified without rebuttal that he was not paid for his role, and the only activity he was engaged in was sitting at a table. (T.54, 65).

After the meeting concluded, Petitioner was chastised; and Petitioner testified that he was very upset and teary eyed after being *escorted* from the building. (T.52). As he was leaving the building, he missed the first step and his left knee buckled. (T.52). Petitioner testified that the landing is abnormal and has a short top step which he did not believe to be to code. (T.55). Lt. Allen testified that Petitioner walked in front of him on the way out; and as Petitioner walked through the door and out of the building, he turned and started back to his office. (T.19). Lt. Allen testified that he stayed on the inside landing as Petitioner walked out of the back door of

the office building and did not see what happened to Petitioner after he walked outside. (T.19, 20, 22, 23). He testified that the area where the incident occurred is still Respondent's property. (T.22). Lt. Allen also testified that Petitioner is a good employee. (T.16, 17).

Petitioner testified that he experienced an increase in left knee pain after his left leg buckled and reported same to Dr. Paletta during an unscheduled visit on March 4, 2015. (T.56; PX4, 3/4/15). Dr. Paletta took a history of the incident consistent with Petitioner's testimony, and noted physical examination findings of limited extension and flexion secondary to pain along with increased tenderness along the medial joint line. (PX3, 3/4/15). Given Petitioner's increased complaints and his physical examination findings, Dr. Paletta recommended a new MRI scan and took Petitioner off work. *Id.* Petitioner's MRI of March 26, 2015, demonstrated evidence consistent with a recurrent meniscus tear. (PX5, 4/2/15; PX7). Dr. Paletta recommended an injection with Dr. Blake, which was performed on April 9, 2015, but did not provide lasting relief or improvement in Petitioner's symptoms. (PX5, 5/6/15). Petitioner's physical examination remained positive for medial joint line tenderness. *Id.* Dr. Paletta recommended repeat arthroscopy.

Petitioner testified that he is currently unable to mow his lawn due to weakness in his knee, and that he is back to using his cane. (T.57-59, 65, 66). He wishes to have the additional surgery recommended by Dr. Paletta. (T.57).

## CONCLUSION

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

An injury is compensable under the Act only if the claimant proves by a preponderance of the evidence that his injury arose out of and in the course of his employment. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill.2d 193, 203, 797 N.E.2d 665 (2003). For purposes of an injury being compensable under the Workers' Compensation Act, an injury is said to arise out of one's employment if 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 injury. S.H.A. 820 ILCS 305/1 et seq. *Bassgar, Inc. v. Illinois Workers' Comp. Comm'n*, 917 N.E.2d 579 (3d Dist. 2009). "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (Ill. 1989).

Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, 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' Comp. Comm'n*, 2011 IL App (2d) 100418WC, 956 N.E.2d 543 (2d Dist. 2011).

**14 WC 33501**

The Arbitrator finds that Petitioner is a credible witness. Petitioner's account of his injuries on June 13, 2014, is unrebutted and consistent throughout the record. Petitioner was clearly acting in the course and scope of his employment in answering a call to investigate an incident as requested by his employer when his injury occurred. The Arbitrator therefore finds that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on June 13, 2014.

**15 WC 09210**

The Arbitrator finds that Petitioner's account of his second injury on February 27, 2015, is unrebutted as well. Lt. Allen testified that he could not see what occurred beyond the door. Petitioner's medical records further indicate that Petitioner sustained an aggravation or recurrent tear of his medial meniscus on account of this injury. Thus, the incident clearly occurred.

With regard to whether the incident arose out of and in the course of his employment with Respondent, the Arbitrator notes that Petitioner was instructed to return to the premises by his employer to discuss his return to work. Thus, Petitioner arrived at the premises not of his own volition, but at the will of his employer to discuss employment related matters. Thus, it can be said that Petitioner "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. supra.*

Additionally, Petitioner testified that the area where Petitioner fell was an irregular landing on Respondent's premises and presented photographic evidence of same. (PX9). The Supreme Court in *Caterpillar Tractor Co v. Indus. Comm'n*, 541 N.E.2d 665 (1989) noted that "liability has been imposed" when "the injury occurred either as a direct result of a hazardous condition on the employer's premises, or arose from some risk connected with, or incidental to, the employment." *Caterpillar*, 541 N.E.2d 665 at 669. The Arbitrator further notes that Petitioner was also subjected to a qualitative increase by virtue of the fact that the confrontational tone and/or nature of his work-related dispute with his employer, and the fact that he was being escorted out of the building as if he had committed some wrong, upset him, caused tearing and distracted from watching his step. Work-related distractions also constitute an increased risk of injury. *See e.g. Randy Kram v. SOI/Vienna Corr. Ctr.*, 15 I.W.C.C. 0286 (2015) (wherein claimant was found to have sustained compensable knee injuries as a result of his attention being diverted from where and how he stepped from a landing by inmates breaking formation.

Consequently, the Arbitrator finds that Petitioner also sustained accidental injuries that arose out of and in the course of his employment with Respondent on February 27, 2015.

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

**14 WC 33501 & 15 WC 09210**

Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003). [Emphasis original]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 723 N.E.2d 846 (3d Dist. 2000). Employers are to take their employees as they find them. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *A.C. & S. v. Indus. Comm'n*, 710 N.E.2d 837 (1st Dist. 1999) citing *General Electric Co. v. Indus. Comm'n*, 433 N.E.2d 671, 672 (Ill. 1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); *see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

The Supreme Court's decision in *Sisbro, Inc.* highlighted that even though a workers' compensation claimant has a preexisting condition which may make him or her more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003). Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (Ill. 1982).

The uncontroverted evidence shows that Petitioner was working full duty and required no treatment prior to his initial accidental injury. Respondent's own examiner, Dr. August Ritter, opined that Petitioner's need for his first surgery was causally related to his accident on June 13, 2014. (RX10). Hence, Respondent has no good faith basis for disputing causal connection with regard to Petitioner's first claim. There is no other cause for Petitioner's condition of ill-being in the record. Petitioner clearly sustained two compensable injuries which arose out of and in the course of his employment with Respondent. Petitioner was doing well, until his condition was aggravated by his second compensable accident on February 27, 2015, after which he promptly returned to Dr. Paletta. (PX4, 3/4/15). The Arbitrator thus finds that there is an unbroken causal chain between Petitioner's work accidents and his current condition of ill-being.

Petitioner has met his burden of proof on the issue of causal connection.

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

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

Upon a claimant's establishment of a causal nexus between injury and illness, employers are responsible for the employees' medical care reasonably required in order to diagnose, relieve, or cure the effects of the claimant's injury. *Plantation Mfg. Co. v. Indus. Comm'n,* 294 Ill.App.3d 705, 691 N.E.2d 13 (2000); *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill.App.3d 527, 758 N.E.2d 18 (1st Dist. 2001).

The Arbitrator finds that all of Petitioner's medical care has been reasonable and necessary. Petitioner, however, has clearly not reached maximum medical improvement from his second injury. On his visit with Dr. Paletta on May 6, 2015, Petitioner's physical examination remained positive for medial joint line tenderness, and Dr. Paletta recommended repeat arthroscopy. (PX5, 5/6/15).

Based upon the above findings as to causal connection, Respondent shall pay the medical expenses contained in Petitioner's group exhibit. Respondent shall also authorize and pay for the treatment recommended by Dr. Paletta, including but not limited to surgery. Respondent shall have credit for any medical expenses paid, but shall indemnify and hold Petitioner harmless from any claims pertaining to the payment of medical expenses for which it is receiving this credit, pursuant to § 8(j) of the Act.

**Issue (L): What temporary benefits are in dispute? (TTD)**

The Parties agreed that Petitioner was paid benefits to March 16, 2015. (T.13). However, Petitioner continues to be off work. (PX5, 5/6/15). Respondent thus continues to be liable for temporary total disability benefits. Additionally, Respondent is only entitled to credit for $26,826.78 of the benefits which it paid through March 16, 2015, which is the net amount paid to Petitioner. Respondent shall therefore pay temporary total disability benefits of 782.35/week for a further period of 8 2/7 weeks for Petitioner's period of temporary total incapacity from March 16, 2015, through May 13, 2015, the date of the hearing.