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

Joyce Austin,

Petitioner,

vs. NO: 15WC 19020

Evanston School District #65,

Respondent,

17IWCC0269

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent, herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, 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 April 25, 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.

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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.

MAY 1 - 2017

DATED:
MJB/bm
o-4/24/17
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

AUSTIN, JOYCE
Employee/Petitioner

Case# **15WC019020**

EVANSTON SCHOOL DISTRICT #65
Employer/Respondent

17IWCC0269

On 4/25/2016, 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 0.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0700 GREGORIO & MARCO
SEAN C STEC
TWO N LASALLE ST SUITE 1650
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
MATTHEW P SHERIFF
10 S LASALLE ST SUITE 900
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)

Joyce Austin
Employee/Petitioner

v.

Evanston School District #65
Employer/Respondent

Case # **15** WC **19020**

Consolidated cases: _____

17IWCC0269

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George Andros**, Arbitrator of the Commission, in the city of **Chicago**, on **January 28, 2016 and February 22, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **4/17/15**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$30,000.00**; the average weekly wage was **$576.92**.

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

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$346.15** for other benefits, for a total credit of **$346.15**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$8,803.94** to **Illinois Bone and Joint Institute, $1,077.80** to **Hawthorn Surgery Center**, and **$18,267.06** to **Central States Joint Board**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner and her attorney temporary total disability benefits of **$384.61**/week for **44** weeks, commencing **April 20, 2015** through **February 22, 2016**, as provided in Section 8(b) of the Act.

Respondent shall pay to Petitioner attorneys' fees of $0, as provided in Section 16 of the Act; $0, as provided in Section 19(k) of the Act; and $0, as provided in Section 19(l) of the Act.

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.

#0001 George J. Andros
Signature of Arbitrator

April 22, 2016
Date

ICArbDec19(b)

APR 25 2016

17IWCC0269

FINDINGS OF FACT 15 WC 19020

Joyce Austin (hereinafter "Petitioner"), a child development teacher, sustained accidental injuries to her right shoulder and right knee on April 17, 2015. (R. pp. 6, 24, 27). At approximately 5:05 p.m., Petitioner exited the building where she worked for Evanston School District #65 (hereinafter "Respondent"), located at 1500 McDaniel Avenue in Evanston, Illinois at the conclusion of her work day. (R. p.17). As Petitioner exited the building, she saw a car parked in the "drop zone" at the curb of the patio area between her and the parking lot. Petitioner recognized a student from the school in the parked car and approached the car to speak with the student and the student's grandmother. (R. pp. 19-21).

When Petitioner concluded her brief conversation, she turned then walked back to the patio part of the premises thereby turning away from facing the side of the vehicle. She then proceeded ahead, up onto the patio. The building premises when the parking lot ends appears to be a type of patio area from the end of the parking area to the building proper. began to walk across the patio area around a concrete bollard and between the bollard and the exit doors of the building. (R. pp. 21-24).

The Respondent via cross examination make long inquiry as to why the middle aged teacher went from the side of the vehicle back up on the premises (off the parking area).She obviously chose or instinctively did not walk in the parking lot directly behind where the vehicle was parked to get to her own car to go home- which was parked in the other side/direction from the side of the vehicle in which the student was sitting parked in the lot. Respondent by direct questions seeks inferences that this return to the patio on the direct premises rather than walk to her car was some nefarious activity as a prelude to some effort at setting up a fall at work at the end of the day. Extensive cross examination as to that route along with the defect in the concrete of the patio was clearly directed in attacking this teachers credibility i.e. that the fall did not at all occur as described and/ or that the later photo of the area was some set up so to speak as to enact some reason for her fall. The Arbitrator makes no such inferences about the school teacher being not truthful but in fact, finds her explanation of the accident not only credible , detailed , reliable, logical and truthful.

In the case at bar, the route in either direction around the vehicle behind it or back up to the patio premises does not prove or disprove whether the accident (tripping on a defect of the employer's premises) was arising out of the course and scope of her employment under the Act. No type of deviation in her path may be inferred such that her walking back to the patio/premises, off the parking area, somehow takes her out of the course of her employment.

The Petitioner was asked about how the accident happened a number of times. After a time she returned to take a picture of the area and those were offered into evidence. The first history to a medical provider used the word sidewalk. To be perfectly clear, the worker fell on the company premises. This is not a "sidewalk" case , nor is it a "parking lot" case as we see at the Commission. It's a fall on the premises case. No deviation was proven. No lack of credibility was manifested via her testimony nor be history or recorded statement or by testimony from an employee of the school viz a viz the lack of defect in the premises where she fell.

Petitioner walked around the concrete bollard, her left foot tripped on an obstruction and she fell forward landing on the concrete with her right knee and her outstretched right hand. (R. pp. 24-27). Immediately after she fell, Petitioner's right arm went completely numb. Petitioner had never experienced symptoms like that in her right arm prior to April 17, 2015. (R. p.27).

After her fall, Petitioner stood up and walked to her car that was parked in the parking lot designated for parking for the building located at 1500 McDaniel Avenue. (R. p. 28). The parking lot was situated immediately adjacent to the patio area upon which Petitioner fell. (R. p. 19). Petitioner drove herself home, but that night the numbness in her right arm continued, especially between her right shoulder and right elbow. (R. pp. 28-29).

The day after her accident, April 18, 2015, Petitioner noticed that the symptoms in her right arm continued, so she made an appointment to see Dr. James L. Fox. (R. p. 29). The history taken by Dr. Fox states, "...injured her right shoulder yesterday, when she tripped on the sidewalk and fell forward, landing on her hand and forearm." Dr. Fox diagnosed Petitioner with an injured rotator cuff and placed her in a sling. In addition, the doctor prescribed Norco for Petitioner, and directed her to obtain an MRI of her right shoulder. (Petitioner's Exhibit #11).

On April 20, 2015, Petitioner obtained an MRI of her right shoulder. Dr. Matthew Eisenstein, a radiologist, reviewed the MRI of Petitioner's right shoulder and found a "...focal linear intrasubstance tear of the supraspinatus tendon anterolaterally. There may be subtle extensions completing the tear to full thickness." (Petitioner's Exhibit #11).

Also on April 20, 2015, Petitioner was examined by Dr. Waxman. Dr. Waxman reviewed the MRI of Petitioner's right shoulder and diagnosed her with a right shoulder injury with a possible small anterior rotator cuff tear. The doctor provided Petitioner with a light duty work restriction of no lifting with the right arm at that time. Dr. Waxman also injected Petitioner's right knee with Depo-Medrol and Lidocaine. (Petitioner's Exhibit #9, pp. 3-6). After seeing Dr. Waxman on April 20, 2015, Petitioner contacted Respondent's Human Resources department and spoke with an employee named "Lauren." Petitioner requested light duty work accommodations during that telephone conversation. No light duty work accommodation has been offered to Petitioner by Respondent from April 20, 2015, through the date of hearing. (R. pp. 34-35).

On May 4, 2015, Petitioner returned to see Dr. Waxman. The doctor diagnosed Petitioner with persistent right knee pain and recommended that she obtain an MRI of her right knee. In addition, Dr. Waxman directed Petitioner to remain off work. (Petitioner's Exhibit #9, pp. 11-13).

On May 13, 2015, Petitioner was again examined by Dr. Waxman. At that time, the doctor diagnosed Petitioner with a partial rotator cuff tear and injected Petitioner's right shoulder with Depo-Medrol and Lidocaine. Dr. Waxman also directed Petitioner to begin a physical therapy program. (Petitioner's Exhibit #9, p. 15). On May 27, 2015, Petitioner began a physical therapy program at Illinois Bone & Joint Institute. (Petitioner's Exhibit #9, pp. 26-27).

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Petitioner elected to obtain a second opinion regarding her right shoulder condition from Dr. Roger M. Chams. (R. pp. 30-31). Dr. Chams first examined Petitioner on June 9, 2015. At that time, the doctor reviewed the MRI of Petitioner's right shoulder and diagnosed her with a full thickness rotator cuff tear. Dr. Chams directed Petitioner to remain off work, continue physical therapy, and to proceed with right shoulder arthroscopy, decompression, Mumford procedure and rotator cuff repair. (Petitioner's Exhibit #9, pp. 30-34).

On June 24, 2015, Dr. Chams performed a right shoulder arthroscopic surgery with debridement of the labrum, subacromial decompression, distal clavicle resection with Mumford procedure and a rotator cuff repair for Petitioner at Hawthorn Surgery Center. (Petitioner's Exhibit #9, pp. 199-201).

On June 30, 2015, Dr. Chams evaluated Petitioner and directed her to proceed with a post-operative physical therapy program. (Petitioner's Exhibit #9, pp. 40). Petitioner began her post-operative physical therapy program at Illinois Bone & Joint Institute on July 8, 2015. (Petitioner's Exhibit #9, pp. 41-44).

On July 9, 2015, Dr. Chams examined Petitioner and directed her to continue her physical therapy program. (Petitioner's Exhibit #9, pp. 45-46). Petitioner returned to see Dr. Chams on August 6, 2015. At that time, he directed Petitioner to continue her physical therapy program, discontinue use of her sling, and released Petitioner to return to light duty work consisting of desk work only with no use of her right arm. (Petitioner's Exhibit #9, pp. 71-73).

On August 18, 2015, Petitioner was examined again by Dr. Waxman and received unrelated treatment for her left knee. (Petitioner's Exhibit #9, p. 83). On August 19, 2015, Petitioner returned to see Dr. Waxman and received an Orthovisc injection in her right knee. (Petitioner's Exhibit #9, p. 86).

On September 17, 2015, Petitioner was again examined by Dr. Chams. The doctor directed Petitioner to continue the physical therapy program for her right shoulder and to continue her light duty work restrictions. (Petitioner's Exhibit #9, pp. 106-110).

On October 29, 2015, Dr. Chams examined Petitioner again and directed her to continue her physical therapy program and to continue her light duty work restrictions. (Petitioner's Exhibit #9, pp. 140-143). On November 12, 2015, Petitioner was evaluated at Illinois Bone & Joint Institute for unrelated left foot symptoms. (Petitioner's Exhibit #9, p. 152).

On December 1, 2015, Petitioner returned to see Dr. Chams. The doctor noted that Petitioner had made significant progress with her right shoulder over the last two months and directed her to continue her physical therapy. In addition, Dr. Chams directed Petitioner to continue her light duty work restrictions. (Petitioner's Exhibit #9, pp. 164-166).

Petitioner's last appointment with Dr. Chams prior to hearing was on January 19, 2016. At that time, Dr. Chams provided Petitioner with a light duty work restriction of no overhead lifting greater than 10 pounds. In addition, Dr. Chams directed Petitioner to continue physical therapy two times per week for 8 additional weeks. (Petitioner's Exhibit #6).

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CONCLUSIONS OF LAW

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

Based upon the totality of the evidence, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of Petitioner's employment by Respondent on April 17, 2015.

The Findings of Fact, as stated above, are adopted herein. The Arbitrator notes that the facts surrounding Petitioner's fall are not in dispute. At the conclusion of her work day, Petitioner exited the building where she works for Respondent, located at 1500 McDaniel Avenue in Evanston, Illinois. (R. p. 17). As Petitioner exited the building at approximately 5:05 p.m., she saw a student from her school in the back seat of a car that was located in the "drop zone". The "drop zone" is an area of the parking lot closest to the entrance and exit to the building where students would be dropped off in the morning and picked up in the afternoon. No "sidewalk" is involved in this case whatsoever.

Petitioner crossed the company premises described a concrete patio area between the doors to the building and the "drop zone" to speak with the student and the student's grandmother, who was also in the car. Petitioner explained that becoming familiar with the students and their families is helpful for teachers to make "a connection" with students, in furtherance of helping them learn. (R. pp.19-21).

After a brief conversation, Petitioner walked between a concrete bollard and the doors to the building, intending to leave the patio area and enter Respondent's parking lot, where her car was located. As Petitioner walked across the patio, her left foot "stopped" causing her to fall forward, injuring her right knee and right shoulder. (R. pp. 21-24). While it is true that Petitioner did not know, at the time of her fall, what caused her left foot to stop, she later returned to the site of her fall and discovered a section of "heaved" concrete which caused her to trip. Petitioner specifically identified the defect in the concrete of the patio as depicted in Petitioner's Exhibits #3, #4, and #5. (R. p. 65). No groundskeeper, facilities manager, repair tradesman nor principal rebutted her description of the premises, the defect in said premises or how she would have transversed around the area.

The Petitioner herself is deemed credible and logical in her explanations about the interaction with the student, her routes to from the vehicle back to the premises out of the parking lot and the defect in the company premises (unrebutted). None of the histories or statements plus taking the photos later to document the situation show impeachment or some plot to dummy up a claim for benefits. This teacher with years of service at more than one school did emphasis the practice of documentation. Her taking pictures is no more suspicion that the claims adjuster taking a recorded statement. So, no issues of credibility exist here.

In the instant case, the Arbitrator finds that because it is undisputed that Petitioner fell on Respondent's property, and it is also undisputed that Petitioner tripped on a defect in the patio, which caused her to fall, the Petitioner has proved, by a preponderance of the evidence, that her fall was caused by a risk distinctly associated with her employment. Therefore, Petitioner has proved, by a preponderance of the evidence that her injury arose out of her employment with Respondent on April 17, 2015.

The Arbitrator further notes that the words "in the course of" relate to the time, place and circumstances under which the accident takes place - - an injury occurring within the period of employment, at a place where the employee reasonably may be in the performance of his duties, and while fulfilling those duties or doing something incidental thereto. Williams v. Country Mutual Insurance Company, 28 Ill. App. 3d 274, 277, 328 N.E.2d 117 (1975). It has been long recognized that a person is covered by the Act when going to and from work on the employer's premises. (*Id. at 277*).

In the instant case, the Arbitrator finds that Petitioner fell in the patio area directly outside the exit doors to the building where she works for Respondent. The Arbitrator also finds that the area where the Petitioner fell was on Respondent's premises. She did not fall on a sidewalk. She did not fall in a parking lot.

While Petitioner did go to not go directly to her car after seeing one of the students she recognized, the Arbitrator finds that the reason for her deviation, if that term should even be used, was to speak with a student and the student's grandmother. Petitioner specifically testified that fostering the relationship between teachers, students, and their families improved teachers' ability to do their job. Therefore, Petitioner's temporary deviation between leaving the exit doors to the child's vehicle was for Respondent's direct benefit and, at a minimum incidental to, if not actually fulfilling her duties as a teacher.

Accordingly, the Arbitrator finds that Petitioner has proved, by a preponderance of the evidence that Petitioner's accident occurred "in the course of" her employment by Respondent.

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

Based upon the totality of the evidence, the Arbitrator finds that Petitioner's current condition of ill-being, as it relates to her right shoulder and right knee, is causally related to her work injury on April 17, 2015.

The Findings of Fact and Conclusions of Law, as stated above, are adopted herein. The Arbitrator notes her unrebutted testimony that prior to April 17, 2015, Petitioner had never injured her right shoulder. In addition, prior to April 17, 2015, Petitioner had never received medical care of any kind for her right shoulder. Further, Petitioner has never missed any time from work due to right shoulder problems prior to April 17, 2015. (R. p. 9).

With respect to Petitioner's right knee, the Arbitrator notes that Petitioner had right knee surgery in 2000 and had received intermittent treatment for her right knee from her surgeon, Dr. Bryan C. Waxman since her surgery. Prior to April 17, 2015, the last time Petitioner had received medical care for her right knee was in December of 2014. (R. pp. 9-11).

The Arbitrator finds the above facts to be competent evidence that Petitioner was in good health with respect to her right shoulder and right knee prior to April 17, 2015.

In addition, the Arbitrator notes that it is undisputed that Petitioner tripped and fell on the company premises, not in the parking lot plus not on a sidewalk but patio area outside the exit doors of her workplace on April 17, 2015.

When Petitioner fell, she landed on her right knee and her outstretched right hand. Immediately after her accident, Petitioner's right arm went completely numb. Petitioner had never experienced those type of symptoms in her right shoulder prior to April 17, 2015.

The Arbitrator further notes that when Petitioner was examined by Dr. James L. Fox on April 18, 2015, the day after her fall, the doctor found abrasions just below Petitioner's right elbow and diagnosed her with a rotator cuff tear. (Petitioner's Exhibit #11). In addition, the Arbitrator notes that the MRI of Petitioner's right shoulder, which was completed on April 20, 2015, two days after Petitioner's work injury, demonstrates a torn supraspinatus tendon. (Petitioner's Exhibit #11).

Further, the Arbitrator notes that when Petitioner was examined by Dr. Waxman on April 20, 2015, the doctor noted that Petitioner complained of right knee pain and right shoulder pain. Upon examination of Petitioner, Dr. Waxman found that she exhibited tenderness over the anterior aspect of the right shoulder and biceps tendon along with pain and weakness with resisted abduction. Dr. Waxman also found medial and lateral tenderness with flexion of Petitioner's right knee. (Petitioner's Exhibit #9, p. 3).

Based on the evidence cited above, it is clear that the symptoms in Petitioner's right shoulder and right knee, as documented by Dr. Fox and Dr. Waxman began immediately following her work accident.

The Arbitrator further notes that on June 24, 2015, Dr. Roger M. Chams performed right shoulder arthroscopic surgery with debridement of the labrum, subacromial decompression, distal clavicle resection with Mumford procedure and a rotator cuff repair for Petitioner at Hawthorn Surgery Center. (Petitioner's Exhibit #9, pp. 199-201). On December 1, 2015, Dr. Chams noted that Petitioner still lacked range of motion in her right shoulder and directed her to continue her physical therapy program. (Petitioner's Exhibit #9, pp. 164-165). At the time of hearing, Petitioner was still enrolled in a post-operative physical therapy program at Illinois Bone and Joint Institute. (Petitioner's Exhibit #9).

With respect to her right knee, the Arbitrator notes that Petitioner was examined by Dr. Waxman on May 4, 2015, at which time she exhibited medial tenderness in her knee and complained of difficulty pivoting. Dr. Waxman specifically stated that Petitioner's right knee symptoms were, "...very different from her normal arthritic symptoms." (Petitioner's Exhibit #9, p. 10). Dr. Waxman performed an Orthovisc injection on Petitioner's right knee on August 19, 2015. (Petitioner's Exhibit #9, p. 86).

It is well established that proof of the state of health of the Petitioner prior to and down to the time of injury, and then change immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury. Spector Freight System, Inc. v. Industrial Commission, 93 Ill. 2d 507, 513, 445 N.E.2d 280, 67 Ill. Dec. 800 (1983). Based on this analysis, the Arbitrator finds that, in the instant case, Petitioner has established a causal connection between her current condition of ill-being, as it relates to her right shoulder and her work accident on April 17, 2015. In addition, the Arbitrator finds that Petitioner has established a causal connection between the condition of her right knee through August 19, 2015 and her work accident on April 17, 2015.

17IWCC0269

Therefore, based on the sequence of events and the lack of evidence to the contrary, the Arbitrator finds that Petitioner has proved, by a preponderance of the evidence, that her current condition of ill-being with respect to her right shoulder is causally related to her work injury on April 17, 2015.

In addition, the Arbitrator finds that Petitioner has proved, by a preponderance of the evidence, that the condition of her right knee through August 19, 2015 was causally related to her work injury on April 17, 2015.

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

Based upon the Arbitrator finds that the medical services that were provided to Petitioner were reasonable and necessary. The Arbitrator also finds that Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

The Findings of Fact and Conclusions of Law as stated above are adopted herein. The Arbitrator notes that Petitioner has offered unpaid medical bills from Illinois Bone and Joint Institute and Hawthorn Surgery Center totaling $9,881.74 into evidence. (Petitioner's Exhibit #7). The Arbitrator also notes that each of the dates of service included in Petitioner's Exhibit #7 relates to medical treatment from Dr. Waxman or Dr. Chams for Petitioner's right shoulder or right knee.

Based on the foregoing, the Arbitrator finds that Petitioner has proved, by a preponderance of the evidence, that the medical services that were provided to Petitioner from Illinois Bone and Joint Institute and Hawthorn Surgery Center were reasonable and necessary for treatment of Petitioner's condition of ill-being. In addition, the Arbitrator finds that Petitioner has proved, by a preponderance of the evidence, that Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

The Arbitrator also notes that Petitioner's husband's group health insurance carrier has paid $18,267.06 for medical treatment received by Petitioner for her right shoulder and right knee for services rendered from May 5, 2015 through January 21, 2016. (Petitioner's Exhibit #8). The Arbitrator finds that Petitioner has proved, by a preponderance of the evidence, that the medical services received by Petitioner and paid for by her husband's group health insurance carrier were reasonable and necessary treatment for Petitioner's condition of ill-being which was caused on April 17, 2015. No credit to the employer at bar is granted under section 8(j) of the Act.

Thus the Arbitrator finds as a matter of law, , the Arbitrator awards to Petitioner and her attorney the sum $18,267.06 in re-imbursement for medical payments made by her husband's group health insurance carrier. In addition, the Arbitrator awards to Petitioner the medical charges contained in Petitioner's Exhibit #7, pursuant to the Medical Fee Schedule.

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

The Arbitrator finds that Petitioner is entitled to post-operative physical therapy for her right shoulder, as prescribed by Dr. Chams.

17IWCC0269

The Findings of Fact and Conclusions of Law as stated above are adopted herein. The Arbitrator notes that Petitioner was last examined by Chams on January 19, 2016. At that time, the doctor recommended that Petitioner continue her physical therapy program two times per week for eight weeks. (Petitioner's Exhibit #6). The Arbitrator also notes that a review of Petitioner's post-operative physical therapy and treatment notes from Dr. Chams demonstrate that Petitioner has achieved significant gains in range of motion and strength, along with a decrease in pain in her right shoulder during the course of her physical therapy regimen. (Petitioner's Exhibit #9).

The Arbitrator further notes that Respondent has not offered any evidence to dispute the reasonableness and necessity of the medical care recommended by Dr. Chams.

Based upon the totality of the evidence, the Arbitrator finds that Petitioner has proved, by a preponderance of the evidence, that the physical therapy recommended by Dr. Chams is reasonable and necessary medical treatment for Petitioner's condition of ill-being. Therefore the physical therapy is ordered under this Award and the Respondent shall authorize the same in writing.

(L) What temporary benefits are in dispute?

Based upon the totality of the evidence , the Arbitrator finds as a matter of law that Petitioner was temporarily totally disabled from April 20, 2015 through the date of hearing, February 22, 2016, a period of 44 weeks, as provided in Section 8(b) of the Act.

The Findings of Fact and Conclusions of Law as stated above are adopted herein. The Arbitrator notes that Petitioner has either been directed to remain off work, or has been provided with light duty work restrictions from April 20, 2015 through the date of hearing, February 22, 2016. The Arbitrator also notes that after seeing Dr. Waxman on April 20, 2015, Petitioner contacted Respondent's Human Resources department and spoke with an employee named "Lauren." Petitioner requested light duty work accommodations during that telephone conversation. No light duty work accommodation has been offered to Petitioner by Respondent from April 20, 2015 through the date of hearing.

Based on the totality of the evidence, the Arbitrator finds that Petitioner has proved, by a preponderance of the evidence, that she was temporarily totally disabled from April 17, 2015 through February 22, 2016.

(M) Should penalties or fees be imposed upon Respondent?

The Arbitrator finds that penalties, pursuant to Sections 19(k) and 19(l) of the Act, and attorneys' fees, pursuant to Section 16 of the Act, are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Delilah Olan,

Petitioner,

vs.

NO: 14 WC 11424

Sam's Club,

17IWCC0270

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical, temporary total disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

For the reasons set forth below, the Commission reverses the Arbitrator's Decision by finding that Petitioner's right shoulder complaints (at the time of her second trial) were not causally related to the work accident that she sustained on September 12, 2013. Therefore, the Petitioner is not entitled to further medical expenses, prospective medical, or temporary total disability.

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.

17IWCC0270

The first trial of this case was held on September 12, 2014 and September 30, 2014, respectfully. The Arbitrator's Decision was subsequently filed on October 30, 2014, which awarded certain benefits to the Petitioner for her right shoulder condition. The Commission affirmed the aforementioned Decision on February 9, 2015. The second trial was held on October 15, 2015 which resulted in an Arbitrator's Decision rendered on February 9, 2016 and which is the subject of this Decision and Opinion on Review.

In the Arbitrator's first Decision filed on October 30, 2014, the Arbitrator suspended temporary total disability benefits on June 30, 2014 based upon Dr. Pierre Hoepfner's decision to release the Petitioner back to work without restrictions on June 30, 2014. As noted above, the Commission affirmed and adopted the Arbitrator's October 30, 2014 Decision in its entirety.

The Petitioner treated with Dr. Arif Saleem on multiple occasions for her right shoulder condition, including September 24, 2014. This was notably before the second of the two trial dates. At the September 24th appointment, Dr. Saleem recommended an arthroscopy procedure with a biceps tenotomy. According to the record, Dr. Saleem's prospective surgery recommendation was not submitted at the time of the first trial by the Petitioner. In addition, prospective medical treatment was not awarded to the Petitioner in the first Arbitrator's Decision.

The Law of the Case Doctrine specifies that an unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the litigation. *National Wrecking Company v. Industrial Commission*, 352 Ill. App. 3d 561, 816N.E.2d 722 (2004).

By releasing the Petitioner back to work without restrictions on June 30, 2014, Dr. Hoepfner essentially found that the Petitioner was at maximum medical improvement on June 30, 2014 and therefore not entitled to more temporary total disability benefits or prospective medical benefits after that date. Although the Commission found that the Petitioner's right shoulder condition was causally related to a work accident at the time of the first trial, the Commission suspended temporary total disability as of June 30, 2014. The Commission relied on the opinion of Dr. Hoepfner, who found no evidence of any right shoulder pathology.

The dispositive test of whether the Petitioner is entitled to temporary total disability is whether her condition has stabilized. *Mechanical Devices v. Industrial Commission*, 344 Ill. App. 3d 752, 759 (2003). By denying temporary total disability benefits after June 30, 2014, the Commission found that Petitioner had reached maximum medical improvement for her right shoulder condition on that date. Accordingly, the fact is established that Petitioner's right shoulder condition was stabilized as of June 30, 2014. To now find that the Petitioner was not at maximum medical improvement on June 30, 2014 and award additional medical benefits would be altering a fact previously litigated, decided by the Commission, and not appealed. Such a finding would be inappropriate under the law.

17IWCC0270

The Commission finds that the Petitioner waived her entitlement to petition for right shoulder surgery in the second trial as she did not timely raise the issue in her first trial when the information was available to her at the time: Dr. Saleem's recommendation for surgery was made on September 24, 2014, whereas the first trial did not end until September 30, 2014.

The Commission further finds that the Petitioner reached maximum medical improvement on June 30, 2014. As noted above, the Petitioner was released back to work without restrictions on June 30, 2014. By releasing the Petitioner back to work without restrictions, Dr. Hoepfner essentially found the Petitioner to be at maximum medical improvement on June 30, 2014 and therefore not entitled to more temporary total disability or prospective medical benefits after that date. Accordingly, the Arbitrator only awarded temporary total disability benefits until June 30, 2014 in the decision dated October 30, 2014, and the Commission affirmed that Decision in its entirety.

Based upon the totality of the evidence and the factual findings above, the Commission finds that the Petitioner is not entitled to further medical expenses, prospective medical, or temporary total disability. Therefore, we must reverse the Arbitrator's (second) Decision, filed on February 9, 2016.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision, filed on February 9, 2016, is hereby reversed. No benefits are awarded.

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.

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

DATED: MAY 1 - 2017

Kevin W. Lamborn

Michael J. Brennan

TJT/gaf
O: 2/28/17
51

DISSENT

I respectfully dissent from the majority decision and would affirm the Arbitrator's decision. The Commission affirmed the Arbitrator's first decision, finding that the Petitioner

17IWCC0270

sustained an accident arising out of and in the course of her employment on September 12, 2013 with regard to her right shoulder condition. The Petitioner was awarded temporary total disability benefits and medical expenses that were previously paid for by the Respondent.

After the Petitioner's first trial she continued to consistently treat with Dr. Saleem for her right shoulder condition until March 2015. He recommended a right shoulder arthroscopic biceps tenotomy and a debridement. As of the time of the second trial, the Petitioner continues to work light duty. She experiences symptoms in her right shoulder and continues to take prescription medication for the pain.

Dr. Saleem issued a report with regard to the Petitioner's condition on April 17, 2015. He noted that her September 30, 2013 MRI did not show evidence of a tear although she continued with persistent pain. Dr. Saleem noted that his September 24, 2014 note should read 'possible' superior labral tear after a previous SLAP repair. He opined that due to the Petitioner's ongoing biceps pain and shoulder discomfort, she would benefit from a revision arthroscopy, debridement, and a biceps tenotomy. He wrote that the Petitioner had not reached maximum medical improvement because Dr. Saleem was recommending surgery.

Dr. Saleem further noted that his medical notes should read 'possible' tear because it is a working diagnosis as the Petitioner was not responding to conservative treatment, her history and examine were suspicious for a recurrent SLAP tear, and she was being treated for ongoing biceps symptoms. He further opined that the Petitioner's right shoulder and right biceps conditions are related to an aggravation caused by her injury at work on September 12, 2013.

For the aforementioned reasons, I would affirm the Arbitrator's well-reasoned decision.

Thomas J. Tyrrell

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

OLAN, DELILAH
Employee/Petitioner

Case# **14WC011424**

SAM'S CLUB
Employer/Respondent

17IWCC0270

On 2/9/2016, 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 0.42% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0412 RIDGE & DOWNES
AMYLEE HOGAN SIMMONOVICH
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

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

17IWCC0270

STATE OF ILLINOIS)
)SS.
COUNTY OF DU PAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Delilah Olan
Employee/Petitioner

v.

Sam's Club
Employer/Respondent

Case # 14WC 011424

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Geneva**, on **October 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. [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 _____

17IWCC0270

FINDINGS

On the date of accident, **September 12, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$16,900.00**; the average weekly wage was **$325.00**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** children under 18.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of **$155.99**, as provided in Section 8(a) and subject to Section 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$319.00**/week for **12-6/7** weeks, commencing **September 24, 2014** through **December 22, 2014**, as provided in Section 8(b) of the Act.

Petitioner is awarded the prospective medical care in the form of the arthroscopic surgery of Petitioner's right shoulder that Dr. Arif Saleem of Castle Orthopaedics has recommended.

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

February 8, 2016
Date

FEB 9 - 2016

ICArbDec19(b)

STATE OF ILLINOIS)
)
COUNTY OF DUPAGE)

17IWCC0270

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

Delilah Olan,

Employee/Petitioner

v.

Sam's Club,

Employer/Respondent.

Case No.: 14 WC 11424

FINDINGS OF FACT

This matter was previously heard by Arbitrator Cronin on September 12, 2014 and September 30, 2014, pursuant to Petitioner's Motion for Emergency Hearing under Section 19(b-1) of the Act. The Arbitrator found that Petitioner's current condition of ill-being of her cervical spine "is not" causally related to the accident of September 12, 2013. The Arbitrator also found that Petitioner's current condition of ill-being of her right shoulder "is" causally related to the September 12, 2013 accident. The Arbitrator relied on the opinions of Dr. Butler. The Arbitrator awarded 4-3/7 weeks of TTD benefits from 5/30/2014 through 6/30/2014 as it related to Petitioner's right shoulder condition. The Arbitrator signed such Decision on October 29, 2014 and the Commission entered it on October 30, 2014. (P.E. 1). On February 9, 2015, the Commission affirmed and adopted the Decision of the Arbitrator.

On February 25, 2013, Dr. Saleem performed a right shoulder arthroscopic superior labral tear repair and a right shoulder arthroscopic clavicle resection on Petitioner. (P.E. 1). On May 16, 2013, Dr. Saleem found that Petitioner exhibited full active and passive range of motion of the shoulder without discomfort. The doctor asked her to gradually advance her activities and released her from his care.

On September 12, 2013, Petitioner sustained an accidental injury to her right shoulder while lifting a box at work.

Prior to the 19(b-1) hearing in September 2014, Petitioner underwent two Section 12 examinations that were admitted into evidence. Dr. Hoepfner evaluated Petitioner on June 30,

2014. Dr. Hoepfner opined that there was no causal relationship between the September 12, 2013 accident and her right shoulder condition. The Arbitrator found to the contrary.

Dr. Butler evaluated Petitioner on August 13, 2014, and opined that Petitioner's complaints are likely related to the shoulder. He further found that the condition of Petitioner's cervical spine was not related to the September 12, 2013 accident.

On September 24, 2014, before the closing of proofs of the 19(b-1) hearing, Petitioner followed up with her shoulder surgeon, Dr. Saleem. (P.E. 2). She complained of persistent popping and catching in the shoulder, as well as difficulty with any reaching, pushing, or pulling with the arm. Physical examination revealed pain at the extremes of motion, significant pain with O'Brien's testing, and biceps tenderness. Dr. Saleem's impression was right shoulder superior labral tear after previous SLAP repair. Dr. Saleem recommended right shoulder arthroscopic biceps tenotomy and debridement. Petitioner was restricted to no use of the right arm.

On October 28, 2014, Dr. McGivney performed surgery on Petitioner's cervical spine. Following that surgery, she continued to experience right shoulder and arm pain, as well as some numbness and tingling down the arm to the hand. In fact, when she was evaluated for post-operative physical therapy on November 26, 2014, the physical therapist found that she had decreased strength of the right shoulder, pain with palpation to right biceps tendon and biceps belly, and complaints of pain to the right supraspinatus tendon. (P.E. 2).

Petitioner followed up with Dr. Saleem on December 5, 2014 with complaints of continued arm pain and difficulty with any activities reaching overhead. (P.E. 2). Range of motion examination produced significant pain, and Dr. Saleem documented mild tenderness over the biceps tendon, pain with Speed's sign, and discomfort with O'Brien's testing. Dr. Saleem reviewed the prior MRI from September 30, 2013, which revealed biceps tendinopathy. Dr. Saleem's impression was right shoulder persistent biceps tendinopathy after previous SLAP repair. Dr. Saleem again recommended an arthroscopy with biceps tenotomy, but would not proceed until after completion of cervical spine rehabilitation. Petitioner was given a 10-pound restriction for the right arm.

On December 17, 2014, Dr. McGivney released Petitioner from care for her cervical spine. (P.E. 2). However, she remained on the lifting restriction for her right shoulder. Respondent was able to accommodate this restriction and put her back on the work schedule on December 23, 2014.

Petitioner next returned to Dr. Saleem on March 27, 2015. (P.E. 2). Petitioner complained that the popping and catching in her shoulder was worsening. She continued to complain of difficulty with any reaching, pushing, or pulling with the right arm. Physical examination revealed decreased range of motion, significant pain with O'Brien testing, and resisted elevation with some radiating pain down the arm as well. Dr. Saleem recommended a revision arthroscopy with biceps tenotomy, debridement of the labrum, and subacromial debridement. Such surgery would be scheduled after it is approved by the workers' compensation carrier.

Dr. Saleem authored a report dated April 17, 2015 in which he outlined his suggestions regarding right shoulder treatment. (P.E. 3). Dr. Saleem explained that Petitioner's right shoulder examination has not been within normal limits since her injury on September 12, 2013. Dr. Saleem's working diagnosis as of September 24, 2014 was right shoulder possible superior labral tear after previous SLAP repair. Dr. Saleem explained that Petitioner was not responding to conservative treatment and her history and examination was suspicious for a recurrent SLAP tear. In addition, Petitioner has been treated for ongoing biceps symptoms. Dr. Saleem explained that this was his working diagnosis despite the MR arthrogram findings as there are occasions where especially after a previous repair, the labrum is, in fact, not fully healed despite a relatively normal MR arthrography appearance. Dr. Saleem wrote that his assessment of Petitioner is based more on clinical suspicion as opposed to radiographic appearance. Dr. Saleem states, "If indeed Ms. Olan has a recurrent tear or if she is simply dealing with persistent biceps tendinopathy, I do believe her current state of being of persistent pain in her shoulder is related to an aggravation caused by an injury on September 12, 2013. As I noted above, I do believe Ms. Olan has biceps tendinopathy and indeed this is also likely aggravated by her injury on September 12, 2013."

The surgery recommended by Dr. Saleem has not been authorized by the workers' compensation carrier and Petitioner has not been sent for any additional Section 12 examinations.

Petitioner testified that she continues to perform light-duty work for Respondent that her restrictions include no lifting of over 10 pounds. She experiences a constant ache in her right shoulder/arm, more with movement. Her pain is an 8/10. She has not been symptom-free in the right shoulder/arm since the accident on September 12, 2013. Since she last testified in September 2014, her right shoulder pain has progressively worsened. She continues to take Ibuprofen and prescription pain medication (Norco) at the direction of her primary care physician.

CONCLUSIONS OF LAW

In support of his decision with regard to issue (F)"Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator finds as follows:

In the Arbitration Decision of October 29, 2014, the Arbitrator clearly wrote: "The petitioner has proven, however, that the current condition of ill-being of her right shoulder is causally related to the September 12, 2013 accident." (P.E. 1).

Although Dr. Hoepfner found that Petitioner did not injure her right shoulder on September 12, 2013 and was capable of returning to work without restrictions, the Arbitrator did not rely upon Dr. Hoepfner's opinions. Instead, the Arbitrator relied upon the opinions of Dr. Butler. It was Dr. Butler's opinion that Petitioner's complaints following the September 12, 2013 accident "are more likely related to the shoulder."

On July 31, 2014, Dr. Saleem wrote that Petitioner will see him again for her shoulder once her neck surgery is completed.

Yet on September 24, 2014, Petitioner presented to Dr. Saleem for her right shoulder. At that time, Petitioner complained of persistent popping and catching in the shoulder as well as difficulty with any reaching, pushing or pulling with the arm. She exhibited pain at the extreme range of motion. At that time, Dr. Saleem recommended consideration for an arthroscopy. He recommended a biceps tenotomy plus debridement. (P.E. 2).

In his narrative report dated April 17, 2015, Dr. Saleem wrote:

"As I noted in my narrative summary, the office notes from September 24, 2014 do say the patient has a 'superior labral tear after previous SLAP repair,' however, this should more correctly read 'Right shoulder possible superior labral tear after previous SLAP repair.' This was part of a working diagnosis plan since the patient was not responding to conservative treatment and her history and her examination was suspicious for a recurrent SLAP tear. In addition to that diagnosis, she has been treated as noted above for ongoing biceps symptoms. MR arthrogram is fairly sensitive at evaluating for labral tears, however, there are occasions where especially after previous repair the labrum in fact is not fully healed despite relatively normal MR arthrography appearance. Clearly in this situation my assessment is based more off of clinical suspicion as opposed to radiographic appearance."

The Arbitrator takes judicial notice that an MR arthrogram is a diagnostic test or tool used by a physician.

Both Dr. Butler and Dr. Saleem agree that Petitioner injured her right shoulder on September 12, 2013.

Respondent argues that the Arbitrator should adopt the opinions of Dr. Hoepfner and offered the same report into evidence that was offered at the 19(b-1) hearing. (R.E. 1). However, at the 19(b-1) hearing, the Arbitrator relied on the opinions of Dr. Butler. The Arbitrator is not persuaded by Dr. Hoepfner's opinion that Petitioner reached MMI "one year after the reported injury and treatment rendered by Dr. Saleem." (R.E. 1). After evaluating Petitioner on August 13, 2014, Dr. Butler causally related Petitioner's condition of ill-being of her right shoulder to the September 12, 2013 accident and noted that the subacromial injection does provide some support that at least some component of her pain may emanate from the subacromial space and acromioclavicular joint. (P.E. 1).

Respondent also argues that Petitioner's symptoms and complaints after June 30, 2014 are different in nature than those present shortly after the accident. Yet, on September 24, 2014, Petitioner had significant pain with O'Brien's testing and exhibited some biceps tenderness. On December 5, 2014, she had mild tenderness over the biceps tendon, pain with Speed's sign and discomfort with O'Brien's testing. On March 27, 2015, Petitioner displayed significant pain with O'Brien's testing, and pain with resisted elevation. Petitioner complained that most of the pain is deep in the shoulder. (P.E. 2).

There is no evidence of an intervening accident.

The Arbitrator notes that Petitioner has continued to have right shoulder problems after December 17, 2014, which is the date on which Dr. McGivney discharged Petitioner for her cervical spine condition.

As such, the Arbitrator finds that Petitioner has met her burden by a preponderance of the evidence that the current condition of ill-being of her right shoulder is causally related to the injury of September 12, 2013.

In support of his decision with regard to issue (J)"Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?", the Arbitrator finds as follows:

On September 24, 2014, Petitioner presented to Dr. Saleem for an evaluation of her right shoulder. Petitioner followed up with Dr. Saleem on December 5, 2014 and March 27, 2015. (P.E. 2).

The Arbitrator finds that Petitioner is entitled to a total of the unpaid medical expenses for Dr. Saleem's treatment to her right shoulder in the amount of $155.99, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

Date of Service	CPT	Charge	Fee Schedule
12/5/2014	99213	$126.00	$77.34
3/27/2015	99213	$126.00	$78.65
	TOTAL	$252.00	$155.99

In support of his decision with regard to issue (K)"Is Petitioner entitled to any prospective medical care?", the Arbitrator finds as follows:

Petitioner has met her burden of proving that her condition of ill-being of her right shoulder is causally related to the September 12, 2013 accident. Dr. Saleem has prescribed prospective medical care in the form of arthroscopic surgery. Furthermore, Dr. Saleem has explained the basis for his recommendation. Respondent argues that Dr. Saleem's opinions are not persuasive. and that Dr. Saleem suddenly became concerned about biceps pathology and recurrent SLAP tear without any change in Petitioner's objective findings. However, Dr. Saleem's assessment of a possible recurrent SLAP tear and biceps tendinopathy appears to be consistent with his clinical examination findings, such as the O'Brien's test. As such, the Arbitrator finds that Petitioner is entitled to prospective medical care in the form of right shoulder arthroscopic surgery in accordance with the prescription of her treating physician, Dr. Saleem, pursuant to Section 8(a) and subject to Section 8.2 of the Act. The Arbitrator finds that such surgery is reasonable, necessary and related to the accident of September 12, 2013.

In support of his decision with regard to issue (L)"What temporary benefits are in dispute? TTD", the Arbitrator finds as follows:

Petitioner offered evidence that she was on light-duty restrictions for her shoulder when she followed up with Dr. Saleem on September 24, 2014. Respondent did not accommodate these restrictions until December 23, 2014. Regardless of whether or not she could work in relation to her cervical spine injury, Petitioner's right shoulder condition had not stabilized.

Dr. Hoepfner previously opined that Petitioner could return to work without restrictions on June 30, 2014, and in the Arbitration Decision of October 29, 2014, this is when TTD benefits were terminated. However, there was no evidence at the time of hearing that Petitioner was under any recent right shoulder restrictions from her treating physician.

When she saw Dr. Saleem on July 31, 2014, he did not indicate that there were any restrictions at that time. (P.E. 2).

Although Dr. Hoepfner opined on June 30, 2014 that Petitioner could return to work without restrictions and Dr. Saleem did not issue restrictions on July 31, 2014, Petitioner was subsequently evaluated by Dr. Butler on August 13, 2014.

On September 24, 2014, Dr. Saleem issued light-duty restrictions. (P.E. 2, last page)

Petitioner testified that she returned to work for Respondent on December 23, 2014.

At the present time, Petitioner remains on light-duty restrictions for her right shoulder and Respondent is accommodating these restrictions. However, the Arbitrator finds that that during the period of time she was not working - - from September 24, 2014 through December 22, 2014 - - Petitioner is entitled to TTD benefits.

Brian Cronin
Arbitrator

2-8-2016
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jessica Holle,

Petitioner,

vs.

NO: 14 WC 31182

17IWCC0271

Fairwood School-Special Education District,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 24, 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.

17IWCC0271

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: MAY 1 - 2017
TJT:yl
o 4/24/17
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

HOLLE, JESSICA
Employee/Petitioner

Case# **14WC031182**

FAIRWOOD SCHOOL-SPECIAL EDUCATION DISTRICT
Employer/Respondent

17IWCC0271

On 3/24/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.44% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1747 SEIDMAN MARGULIES FAIRMAN LP
STEVEN J SEIDMAN
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

1120 BRADY CONNOLLY & MASUDA
KELLY M WIGGINS
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

17IWCC0271

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPAGE)

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

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

Jessica Holle
Employee/Petitioner

v.

Fairwood School-Special Education District
Employer/Respondent

Case # **14** WC **31182**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Wheaton**, on **February 23, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0271

FINDINGS

On the date of accident, **November 1, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$70,909.38**; the average weekly wage was **$1,699.31**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** dependent children.

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

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

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

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established that she sustained a compensable injury to her left knee on November 1, 2013 as well as a continued causal connection between her accident at work and ongoing left knee condition.

Medical Benefits

Respondent shall pay reasonable and necessary medical services provided by Hinsdale Orthopaedics, pursuant to the medical fee schedule, of $171.00 as provided in Sections 8(a) and 8.2 of the Act.

Prospective Medical Treatment

As explained in the Arbitration Decision Addendum, the Arbitrator awards the prospective medical care in the form of an arthroscopic surgery to the left knee as prescribed by Dr. Collins.

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

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

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

Signature of Arbitrator

March 22, 2016
Date

ICArbDec19(b) p. 3

MAR 24 2016

17IWCC0271

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b) & 8(a)

Jessica Holle
Employee/Petitioner

v.

Fairwood School-Special Education District
Employer/Respondent

Case # **14** WC **31182**

Consolidated cases: **N/A**

FINDINGS OF FACT

Jessica Holle (Petitioner) testified that she was employed by Fairwood School-Special Education District (Respondent) on November 1, 2013 as a Special Education Teacher. Tr. at 13-14. In this position, Petitioner taught a class of approximately six preschoolers. Tr. at 14. She explained that the physical duties required of the job were to be able to get down to their level, kneel, change diapers, generally take care of the children and teach them. *Id.* In her current job, Petitioner explained that her duties are substantially similar, but she teaches kindergarten and first grade children. Tr. at 15. Petitioner had not medical treatment or injuries to her left leg or knee before the claimed date of accident. Tr. at 14.

November 1, 2013

On November 1, 2013, Petitioner testified that she went about her normal routine and had a morning meeting. Tr. at 15. The children were seated in front of her in a semi-circle she sat on her rolling stool. *Id.* Petitioner explained that she would roll to and from each child on the rolling stool and while she was rolling from one side to the other the rolling stool got caught in a seam in the carpet which caused her to abruptly stop and twist her left knee in a funny way. Tr. at 15-16. She described that as she was pulling the rolling stool, it jarred her to a stop causing it to twist somehow and she felt a pull or a pinch. Tr. at 16.

Petitioner continued teaching for the lesson, but then noticed that it was painful as she was walking. *Id.* She also noticed quite a bit of swelling and went to see the school nurse who advised her to have it checked out. *Id.* The school nurse then drove Petitioner to Advocate Healthcare Occupational Health Services that day. Tr. at 16-17.

Medical Treatment

The medical records reflect that Petitioner went to Advocate Occupational Health on November 1, 2013. PX1. She provided the following history:

> The patient's primary problem is pain located in the left knee. She describes it as dull ache. She considers it to be moderate. It has been less than a day since the onset of the pain. The patient says that it seems to be constant. She has noticed that it is made worse by bending the knee. It is improved with rest, ice. She feels it is not improving. Her pain level is 4/10. Patient was sitting on rolling stool and stool caught on carpet seam, and left knee twisted. She kept working, applied ice for 45 minutes and notices swelling.

Id. A handwritten history from what appears to be the intake provider at Advocate Occupational Health notes that "Pt was on a rolling stool with rollers in her classroom this morning and moved to her left while on the stool which got caught and stopped on a crease in the carpet, causing her left knee to twist. Dull pain when she moves with walking. Knee started to swell within 30 minutes of injury. Pt did apply ice pack for 30 minutes." *Id.* Another handwritten note from what appears to be an Advanced Practice Nurse indicates "got caught on my seam, twisted knee – felt pinch kept work – swelling, ice 45[.]" *Id.*

Petitioner was instructed to use cold compresses, elevate her leg and take Ibuprofen 400mg every eight hours. *Id.* She was also placed on light duty work restrictions. *Id.*

On November 5, 2013, Petitioner returned to Advocate Occupational Health complaining of constant pain in her left knee at 4/10 (1-2/10 when at rest). PX1. She reported that the pain was worse with walking, and better with rest and ice. *Id.* Petitioner reported that she had been icing and elevating. *Id.* She reported using a knee sleeve, but stated that it caused her pain, and that she believed it may have been too tight. *Id.* She reported that her knee did not feel entirely stable. *Id.* On examination, Petitioner's knee was swollen and painful to palpation medially and inferiorly to the patella, with crepitus palpable beneath the patella. *Id.* Petitioner's knee exhibited limited flexion. *Id.* Her knee was painful with motion, and she experienced pain below the patella with weight-bearing. *Id.* Petitioner's diagnosis remained the same. *Id.*

Petitioner returned to Advocate Occupational Health on November 15, 2013 at which time she reported that her pain had improved slightly, but she felt an occasional popping and that "5 days ago, she kneeled on bed and turned knee which caused recurrent pain and swelling." PX1. Petitioner testified about this visit to the clinic on both direct and cross examination.

Petitioner testified that from November 1, 2013 through November 15, 2013 her knee had become very swollen and she was unable to bend the knee. Tr. at 20. She also explained that it was very painful to squat down or kneel down, so she avoided those activities. *Id.* Petitioner also explained that when she went to her third visit at Advocate Occupational Health on November 15, 2013 she reported that she had knelt down on the bed, but she did not remember saying that there was any turning on the bed. Tr. at 21. Petitioner explained that when she went to the clinic she was asked each time when she experienced the pain, because walking was not painful, it was only when bending her knee. *Id.* Petitioner testified that her knee pain did not increase or decrease since November 1, 2013 when she had this incident kneeling on the bed; rather her knee hurt when she put pressure on the kneecap. *Id.*

On cross examination, Petitioner testified that her bed is higher than normal and to get up on the bed she needs to bend her legs. Tr. at 26. When she went to get on the bed and was shifting her weight there was pain in the knee. Tr. at 26-27. Petitioner also explained that in response to the clinic provider's question regarding whether she felt any pain, she responded that she felt pain when she got up onto the bed on that particular day and as soon as she stopped kneeling, the pain was gone. Tr. at 27. Regarding the popping sensation, Petitioner testified that she has a popping sensation in her knee and experienced a lot of swelling as well as popping which decreased during physical therapy. Tr. at 26-28.

The medical records reflect that physical therapy was prescribed on November 15, 2013 and she underwent approximately nine sessions at ATI. PX1. Petitioner continued to follow up at Advocate Occupational Health through December of 2013. *Id.*

On January 23, 2014, Petitioner then sought treatment with Dr. Michael Collins at Hinsdale Orthopaedics. PX2. Petitioner testified that she was given a list of physicians that she could see at Advocate and chose him from a list. Tr. at 18. Dr. Collins took a history from Petitioner, which is consistent with the history provided at Advocate Occupational Health. PX2. Dr. Collins noted that Petitioner had never had left knee trouble like this before her accident at work. *Id.* He was concerned about a medial meniscal tear and ordered a left knee MRI. *Id.*

Petitioner underwent the recommended MRI on February 7, 2014. PX3. The interpreting radiologist found no evidence of a meniscal tear and Grade II patellofemoral and tibiofemoral chondromalacia. *Id.* Petitioner returned to Dr. Collins on March 27, 2014, but noted that Petitioner's MRI scan was compromised by motion. PX2. He scheduled a follow up in six weeks to assess any continuing symptoms and indicated that she might require a second MRI. *Id.*

On May 12, 2014, Petitioner saw Dr. Collins reporting no change since her last visit with continued clicking in the knee. *Id.* She also reported that she experienced increased catching and popping in the knee, which she indicated was also visible. *Id.* On examination, Dr. Collins noted that he could see and feel popping in the knee. *Id.* He indicated that Petitioner might have suprapatellar plica clicking and catching over the femoral condyle and recommended an arthroscopy. *Id.*

Section 12 Examination – Dr. Miller

On June 25, 2014, Petitioner submitted to a medical examination with Dr. Klaud Miller at Respondent's request. RX3. Dr. Miller examined Petitioner, reviewed various treating medical records and rendered opinions about Petitioner's condition and its relatedness, if any, to her accident at work. *Id.*

In his report, Dr. Miller indicated that Petitioner had a second injury about ten days after her accident that caused increased pain and swelling as well as initial complaints of popping in the knee. RX3. Dr. Miller also noted that Petitioner's treating orthopedic surgeon, Dr. Collins, noted that Petitioner's knee swelled immediately, which Dr. Miller found to be inconsistent with the initial records. *Id.* Dr. Miller further noted that he could not identify a loose body in Petitioner's knee, even though he looked carefully in her MRI and also noted that on physical examination Petitioner had an easily palpable 2cm mass which was moveable under the suprapatellar pouch. *Id.*

Dr. Miller opined that Petitioner's "weight bearing twisting type injury on November 10, 2013" would be a "much more likely mechanism of injury than her description of a non-weight bearing injury." RX3. He opined that Petitioner did have a loose body in the knee and that her condition would persist unless it was surgically removed. *Id.* In explaining this, Dr. Miller indicated that MRIs commonly miss loose bodies and Petitioner irrefutably had an extremely large loose body that was palpable. *Id.* Dr. Miller opined that Petitioner's left knee loose body condition was due to a distant trauma and had simply been asymptomatic. *Id.* He further opined that Petitioner's condition was not related to her accident at work and that her need for surgery was unrelated to that accident. *Id.*

AMA Guides (Sixth Edition) Impairment Rating – Dr. Cherf

On January 12, 2015, Petitioner submitted to an examination with Dr. Cherf at Respondent's request. RX4 (Dep. Ex. 2); RX5. Dr. Cherf took a history from Petitioner, examined her and reviewed various treating medical records. *Id.* He diagnosed Petitioner with a left knee plica or other soft tissue lesion with palpatory

findings. *Id.* Dr. Cherf determined that Petitioner had a lower extremity impairment rating of 0% and a whole person impairment rating of 0%. *Id.*

Deposition Testimony – Dr. Collins

On June 30, 2015, Petitioner called Dr. Collins as a witness and he gave testimony at an evidence deposition regarding Petitioner's medical treatment and his opinions. PX4. Dr. Collins is a board-certified orthopedic surgeon. PX4 at 4-5; PX4 (Dep. Ex. 1).

Dr. Collins testified that the suprapatellar plica he believed was catching on Petitioner's knee would not show up on an MRI scan. PX4 at 10-11. He opined that Petitioner's injury at work was a cause or contributing factor to Petitioner's condition in the left knee and explained that she was asymptomatic before her injury at work and she had a twisting injury which is known to cause problems in the knee followed by persistent and significant symptoms in the knee. *Id.* He also testified that he could actually feel the condition in Petitioner's knee on examination. *Id.* Dr. Collins also opined that Petitioner's need for surgery was related to the injury at work. PX4 at 13.

On cross examination, Dr. Collins testified that he did not review any of Petitioner's prior treating medical records. PX4 at 15-16. He was informed of Petitioner's report on November 15, 2013 that she had an incident while in bed at home. PX4 at 22-23. He acknowledged that it is possible that this type of incident could have caused Petitioner's condition if she did not have popping in her knee before November 15, 2013, but explained that it was not more likely to be the cause of Petitioner's knee condition compared to the twisting injury at work. PX4 at 23-24. Dr. Collins also explained that, while Petitioner's MRI scan was compromised by movement, he would not likely recommend another MRI because Petitioner's clinical findings were so significant the last time he saw her. PX4 at 17.

On re-direct examination, Dr. Collins was presented with the records of Petitioner's first two visits at Advocate Occupational Health. PX4 at 25-27. He noted that at Petitioner's second visit on November 5, 2013, they noted crepitus beneath the patella and swelling medially and inferiorly to the patella, limited flexion and pain below the patella. PX4 at 28. After reviewing those initial records, Dr. Collins testified that he believed that it was Petitioner's injury at work that caused her condition and explained that the incident at home was not a cause of her condition; he indicated that "if she had injured her knee on November 1, all kinds of things could have flared it up, and kneeling on a bed wouldn't surprise [him] that might aggravate her." PX4 at 29-30.

Deposition Testimony – Dr. Cherf

On September 22, 2015, Respondent called Dr. Cherf as a witness and he gave testimony at an evidence deposition regarding his AMA Guides impairment rating and related opinions about Petitioner's left knee condition. RX4. Dr. Cherf is a board-certified orthopedic surgeon. RX4 at 5-6; RX4 (Dep. Ex. 1).

Dr. Cherf testified that he relied on Petitioner's MRI to conclude that her chondral lesions were degenerative in nature and not from an acute pathology. RX4 at 17. He stated that the mechanism of injury at work sitting and moving the knee was unlikely to have enough force across the knee to cause those MRI findings. *Id.* Dr. Cherf also testified that AMA Guides impairment ratings are performed only when a patient has reached maximum medical improvement. RX4 at 20-22.

Dr. Cherf further explained that he read Dr. Miller's report, but disagreed with the diagnosis that Petitioner had a loose body in her left knee. *Id.*, at 17-18, 22-23. Specifically, he indicated that he did not identify a loose body in Petitioner's MRI or identify one on examination, and he noted that no treating physician or radiologist noted a loose body. *Id.*

With regard to the diagnosis of Petitioner's left knee condition, Dr. Cherf described that the plica is a soft tissue band which can get caught in the patellofemoral joint and, in Petitioner's case, caused palpable and audible mechanical symptoms when she flexed and extended her knee. RX4 at 25. He testified that while Petitioner had no radiographic findings of any problem, "[he] felt that there [were] consistent palpatory findings, meaning [he] could palpate it, [he] could see it on exam, and it showed up in the medical records, and [he] believed it. And [he believed] that it didn't exist before the injury, and [he] believed it was from the injury." *Id.*, at 25-26. Dr. Cherf further acknowledged that small plica might not show up on an MRI. *Id.*, at 26.

Deposition Testimony – Dr. Miller

On November 13, 2015, Respondent called Dr. Miller as a witness and he gave testimony at an evidence deposition regarding Petitioner's left knee condition and his opinions. RX7. Dr. Miller is a board-certified orthopedic surgeon. RX7 at 3-6; RX7 (Dep. Ex. 1).

Dr. Miller testified that there was a second incident in question occurring 10 days after the initial incident at work where Petitioner also twisted her knee. RX7 at 8. He also testified that Petitioner's MRI films showed grade two chondromalacia of the patellofemoral joint and a grade two signal posterior medial meniscus with no identifiable loose body. *Id.* However, on physical examination Dr. Miller could palpate a mass in the suprapatellar pouch that was most likely a loose body. *Id.*, at 11.

Ultimately, Dr. Miller opined that Petitioner's incident at work had nothing to do with Petitioner's left knee condition. RX7 at 11. He explained that the loose body in Petitioner's knee would take time to grow and could not have developed in a matter of weeks or months. *Id.*, at 11-12. Dr. Miller also explained that Petitioner's twisting incident at work would not cause a loose body and, while the incident at home 10 days later was much more likely to have caused a loose body, that was still unlikely. *Id.* Dr. Miller diagnosed Petitioner with a loose body and indicated that surgery was reasonable, but it was not necessary related to any injury at work. *Id.*, at 12-13.

On cross examination, Dr. Miller testified that a plica diagnosis is possible, but it was not in the right area of Petitioner's left knee. RX7 at 14. He acknowledged, however, that trauma could cause or aggravate a plica syndrome. *Id.* Dr. Miller also opined that surgery would be reasonable to treat a big loose body, and that Petitioner was at maximum medical improvement unless she has surgery. RX7 at 13, 15.

Additional Information

Regarding her current condition, Petitioner testified that her left knee still has issues. Tr. at 19. She explained that there is a popping and clicking sensation within the knee when she bends it. *Id.* Petitioner also testified that if she stands for longer periods of time she experiences a dull, achy pain to the knee, but she is able to shift weight on to the healthy knee at this time to relieve the pain. *Id.* Petitioner further testified that if she kneels down or squats down with the kids there is a loud snap in the knee. Tr. at 19-20. Petitioner testified that she wants to go back to her treating physician Dr. Collins for follow up care. Tr. at 21-22.

ISSUES AND CONCLUSIONS

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

In support of the Arbitrator's decision relating to Issue (C), whether Petitioner sustained an accident that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (LEXIS 2011). The "in the course of employment" element refers to "[i]njuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work...." *Metropolitan Water Reclamation District of Greater Chicago v. IWCC*, 407 Ill. App. 3d 1010, 1013-14 (1st Dist. 2011). Additionally, Petitioner must establish the "'arising out of' component [which] refers to the origin or cause of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Metropolitan Water Reclamation District*, 407 Ill. App. 3d at 1013-14 (*citing Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989)). A claimant must prove both elements were present (i.e., that an injury arose out of and occurred in the course of his employment) to establish that her injury is compensable. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (1st Dist. 2006).

The record establishes that Petitioner's incident at work on November 1, 2013 occurred in the course of her employment. Petitioner testified that she was engaged in her regular morning meeting with her children who were sitting in a semi-circle on the floor in front of her. As she was moving from child to child on a rolling stool, the stool got caught in a carpet seam causing an abrupt stop. Petitioner explained that she twisted her knee and felt a pull or pinch. The occupational clinic records as well as Petitioner's reports to all of the physicians are consistent with this testimony. Thus, the Arbitrator finds that Petitioner has established that she was injured in the course of her employment with Respondent on November 1, 2013. It is the "arising out of" prong on which the parties' dispute is centered. In light of the record as a whole, the Arbitrator finds that Petitioner has established that her injury arose out of her employment with Respondent on November 1, 2013. In so finding, several facts are significant.

There is no evidence that Petitioner was symptomatic in the left knee before the twisting mechanism of injury that occurred at work on November 1, 2013. Petitioner testified that she had no prior left knee condition and the medical records corroborate her reports to all examining physicians. In addition, the diagnosis made by Petitioner's treating physician, Dr. Collins, of a suprapatellar plica clicking and catching over the femoral condyle is the most plausibly supported diagnosis when assessing the record as a whole.

The only physician to diagnose Petitioner with a loose body in the knee was Respondent's Section 12 examiner Dr. Miller. Given a different set of facts, this diagnosis might be as plausible as that of Dr. Collins. However, Dr. Miller gave a qualified acknowledgment that trauma could cause or aggravate a plica syndrome, which both Dr. Collins and Dr. Cherf, Respondent's AMA impairment rating physician, diagnosed.

Dr. Miller gave contradictory and evasive testimony about the loose body that he diagnosed in Petitioner's left knee. He testified that a twisting mechanism such as that sustained by Petitioner at work could not cause a loose body, but added that Petitioner's incident at home 10 days later was much more likely to have caused one. He

then qualified the statements by adding that either scenario was unlikely. With regard to the possibility of a plica diagnosis, Dr. Miller acknowledged that it was possible, but maintained that it was not in the correct area of Petitioner's knee. Dr. Miller also minimized his description of the loose body at the time of his deposition, but ultimately confirmed that he described it as "extremely large" in his report. In light of the evidence as a whole, Dr. Miller's opinions are simply not persuasive.

Similarly, the opinion proffered by Dr. Cherf that there is no causal connection between Petitioner's incident at work and her left knee condition is unpersuasive and contradicted by his own testimony. He relied on Petitioner's MRI, which was compromised due to movement, to conclude that she did not sustain any acute pathology at the time of her incident at work. However, he gave unequivocal testimony that while Petitioner's MRI showed no radiographic evidence of any problem, "[he] felt that there [were] consistent palpatory findings, meaning [he] could palpate it, [he] could see it on exam, and it showed up in the medical records, and [he] believed it. And [he believed] that it didn't exist before the injury, and [he] believed it was from the injury." RX4 at 25-26. While Dr. Cherf maintained that Petitioner's left knee condition was unrelated to her injury at work, his diagnosis of a plica coupled with his testimony that it did not exist before her injury at work and his belief that it was "from" the injury clearly establishes the contrary conclusion.

The objective findings of the occupational health clinicians, Dr. Collins, Dr. Miller and Dr. Cherf all revealed an onset of objectively noted symptoms only after November 1, 2013. All of the physicians understood that Petitioner had no pre-existing symptoms in the left knee before her incident at work. Moreover, every physician was easily able to palpate an anomaly in the left knee during their physical examinations coupled with swelling, reproducible pain, crepitus and/or other mechanical symptoms that began only after Petitioner's incident at work.

Given all of the foregoing, the Arbitrator finds the opinions of Dr. Collins to be persuasive and representative of the most plausible explanation of Petitioner's left knee condition as it relates to the incident at work on November 1, 2013. The opinions of Dr. Miller and Dr. Cherf that Petitioner's left knee condition was not caused in whole or in part by the twisting incident at work are simply unpersuasive, and the Arbitrator assigns them no weight.

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

As explained more fully above, the Arbitrator finds that Petitioner has established that she sustained a compensable accident while working for Respondent on November 1, 2013 and relies on the opinions of Petitioner's treating physician, Dr. Collins. However, Respondent asserts that an intervening accident occurred which would sever liability.

The November 15, 2013 occupational clinic notes reflect Petitioner's report that she felt an occasional popping followed by a report that five days earlier she "kneeled on bed and turned knee which caused recurrent pain and swelling." PX1. The note does not reflect Petitioner's report of a popping sensation in the knee occurring as a result of kneeling or turning the knee on a bed, but rather as a particular incident that caused recurrent, not new, pain or symptoms.

Dr. Collins was also questioned about this reported incident at home at the time of his deposition. He had not previously reviewed Petitioner's occupational clinic records, but was provided with the records and asked about the incident at home and its relation, if any, to Petitioner's left knee condition. Dr. Collins testified that it was

understandable that such an incident would flare Petitioner's left knee condition and, in so doing, he noted that Petitioner's prior physical examination of November 5, 2013 revealed crepitus beneath the patella, swelling medially and inferiorly to the patella, limited flexion and pain below the patella.

Dr. Collins maintained his belief that Petitioner's injury at work caused her left knee symptoms, which the Arbitrator finds to be reasonable and representative of the most plausible explanation of Petitioner's left knee condition as it relates to the incident at work on November 1, 2013. He also reasonably explained how the incident at home caused a temporary exacerbation of Petitioner's left knee symptoms. Dr. Miller opined that neither incident at work or at home could cause a symptomatic loose body, which no other physician could identify. Dr. Cherf opined that the incident at work could cause a symptomatic plica syndrome, but contrarily maintained nonetheless that there was no causal connection. The Arbitrator finds that the opinions of Dr. Collins are more persuasive than those of Drs. Miller or Cherf and that Petitioner has established a continued causal connection between her left knee condition and accident at work on November 1, 2013.

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

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (citing *University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992)).

As explained more fully above, the Arbitrator finds that Petitioner has established that she sustained a compensable injury to her left knee on November 1, 2013 as well as a continued causal connection between her accident at work and ongoing left knee condition. The outstanding bill from Hinsdale Orthopaedics for $171.00 is for services related to Petitioner's left knee condition. Thus, the Arbitrator finds that Petitioner has established that this medical bill was incurred as a result of reasonable and necessary medical care to alleviate her of the effects of a causally related injury at work and awards payment of the bills pursuant to Sections 8(a) and 8.2 of the Act.

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

As explained more fully above, the Arbitrator finds that Petitioner has established that she sustained a compensable injury to her left knee on November 1, 2013 as well as a continued causal connection between her accident at work and ongoing left knee condition. In so concluding, the Arbitrator relies on the opinions of Dr. Collins who has ordered an arthroscopic surgery to address Petitioner's left knee symptoms. Both of Respondent's examiners, Dr. Miller and Dr. Cherf, agree that surgery is a reasonable course of action, albeit unrelated to any compensable injury at work. As explained in detail above, the opinions of Dr. Miller and Dr. Cherf are unpersuasive given the entirety of this record.

Accordingly, and in consideration of all of the evidence, the Arbitrator awards the recommended prospective medical care in the form of an arthroscopic surgery to the left knee as prescribed by Dr. Collins.

STATE OF ILLINOIS)
) SS.
COUNTY OF MACON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cameron Lawrence,

Petitioner,

vs.

NO: 12 WC 41437
12 WC 41432

Caterpillar, Inc.,

17IWCC0272

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to Remand Order of the Circuit Court of Macon County, Judge Robert C. Bollinger. In the September 12, 2016 Circuit Court Remand Order, Judge Bollinger reversed the Commission's Decision and Opinion on Review 15 IWCC 0996, which had affirmed and adopted Arbitrator Pulia's Decision covering both claims.

In her Decision filed with the Commission on May 26, 2015, Arbitrator Pulia found that for both claims Petitioner failed to prove he sustained repetitive accidental injuries to his bilateral upper extremities manifesting on November 1, 2012 (left upper extremity) and November 5, 2012 (right upper extremity). The Arbitrator denied Petitioner's claims. The Arbitrator gave lesser weight to Dr. Greatting's opinions, finding that Dr. Greatting did not have a detailed and accurate understanding of Petitioner's work activities, given the fact that he did not know the frequency, duration or manner in which Petitioner performed these duties. The Arbitrator gave greater weight to §12 Dr. Ellis' opinions. Dr. Ellis had received a job description from Respondent that Petitioner conceded was accurate. Evaluation Dr. Coe did not review Petitioner's job description and did not know how often Petitioner used power tools, how much they weighed or the degree of force or vibration. Based on this, the Arbitrator found Dr. Coe did

not have a detailed and accurate understanding of Petitioner's work duties and gave less weight to Dr. Coe's opinions. The Arbitrator noted that the frequency, duration and manner in which the elbows are used for each activity is required, and was not provided. Petitioner filed a timely review. In its December 31, 2015 Decision and Opinion on Review, the Commission affirmed and adopted the Decision of the Arbitrator.

Petitioner appealed to the Circuit Court of Macon County and Judge Bollinger issued his Remand Order on September 12, 2016 wherein he reversed the Commission's Decision and Opinion on Review, finding that the level of detailed quantitative proof that the Commission found lacking was not required and remanded the matter to the Commission to reevaluate the evidence after correctly applying the law to the evidence. Judge Bollinger further found that the Arbitrator erred in sustaining an objection by Respondent's attorney to a hypothetical question posed by Petitioner's attorney to Dr. Coe on the issue of causation and that opinion is to be considered by the Commission.

The Commission, after reviewing the entire record on Remand, reverses the Decision of the Arbitrator finding that Petitioner sustained repetitive accidental injuries arising out of and in the course of his employment manifesting on November 1, 2012 (left upper extremity) and November 5, 2012 (right upper extremity), that a causal relationship exists between those injuries and Petitioner's condition of ill-being, that Petitioner's average weekly wage was $617.21, that Petitioner was temporarily totally disabled from November 21, 2012 (the date Petitioner was given restrictions and Respondent could not accommodate) through October 12, 2013 (the date Dr. Greatting released Petitioner to return to work effective October 13, 2013), 46-4/7 weeks at $411.48 per week, that Respondent is entitled to §8(j) credit for non-occupational disability benefits paid to Petitioner of $14,375.59, that Petitioner is entitled to medical expenses of $1,788.47 consisting of outstanding balances to providers Phoenix Physical Therapy ($1,249.00), Springfield Clinic ($345.54) and Illinois Department of Healthcare and Family Services ($193.93) and that Petitioner is permanently disabled to the extent of 15% loss of use of the right arm and 12.5% loss of use of the left arm for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 37 year old assembly and test specialist, testified he is currently employed as lead pastor for Sorento Assembly of God (Tr 9). He is right hand dominant. Petitioner was first hired by Respondent on August 8, 2011 and his title was Assembly & Test Specialist 3. He put together the differential gears that went into trucks and wheel tractor scraper machines. He put the parts on the inside and then put everything together for it to be loaded into housings that would get put on the truck (Tr 11). He assembled the gears (Tr 11). Spider gears went in the very center of the gears to rotate around (Tr 11). The gears were made of cast iron metal (Tr 11). Petitioner used both hands in performing his assembly duties with these gears (Tr 12). Petitioner

described the assembly process: there was a box on the floor that had smaller gears in it and he would have to bend over and reach in and pull smaller parts out and out them into a cart to transport (Tr 12). The smaller part weighed about 10 pounds and the larger part weighed about 15 pounds (Tr 12). Petitioner would pick up one small part at a time and put it in the cart. He would stack small parts in the cart and would put between 24 and 32 small parts into the cart. He would then push the cart over to a press. Petitioner would take the gear (small part) out of the cart, flip it over with his hands and put it into the press (Tr 13). There was a bearing assembly that went in the middle of the gear and the press would press the bearing assembly into the gear. To activate the press, Petitioner would have to hold a button at the top and depress a foot pedal at the bottom; he would have to hold the button and pedal down through the entire pressing motion (Tr 14). Petitioner then stated there were 2 buttons at the top of the press and he would have to put his palms in and squeeze to hold those into place; the press would stop if the buttons were not squeezed (Tr 14). It was kind of hard to squeeze and hold them in there the whole time (Tr 15). It took 20 seconds for the press to drop down. Once the bearing assembly was pressed into the gear, Petitioner would pick it back up out of the press by hand and flip it onto the post to put the nut in to lock the bearing assembly in place (Tr 15). He would then tighten the nut with a torque wrench (Tr 16). He would hold the torque wrench in place with his left hand and torque it with his right hand (Tr 16). Once the nut was tightened, Petitioner would flip the gear by hand onto the table and repeat that process 3 more times per each unit (Tr 16). Once he had 4 sets, there were 4 in every unit, there was a bar that looked like a "T" that went in; he would put the bar in one gear and then flip one up on top and then roll it into the next gear and flip one up on top and then lay that down (Tr 16-17). All this was done by hand (Tr 17).

Next there was a lifting device that would hook onto the T to lift it up and take it over and set it into the larger gear and housing that was on the rollover. Then he would have the top part of the housing which would be on the table; Petitioner would have to flip that, roll that over there on the table to put some pins on the inside with a little hammer gun (Tr 17). The small housing that he would flip over weighed about 75 pounds and the larger housing weighed 85 pounds or so (Tr 17). Petitioner flipped the small housing by hand, pulling it up on its side and over (Tr 18). After putting the pins in, he would flip the small housing back the other way and put bolts in it (Tr 18). He would then use the lifting device to move the small housing unit over to where the gears were just put (Tr 18). Some of the lifting device was not balanced so he pretty much always had a hand on there; he would have a hand holding onto whatever he was transporting and then the other hand running the controls of the lifting device (Tr 18). He would then run the bolts down using an air gun. To actually torque the bolts down there was an arm that came out that he would have to pull down and hold that down in place, tighten it up and then lift it up and move it to the next one, so it was a constant up and down all the way around the unit (Tr 19). The air gun that he pulled down was pretty static, other than when he would hit the end of the torque, it would twist his arm a little bit at the end (Tr 19). The arm was almost like a bicycle handle and would twist his arm around at the elbow (Tr 19-20). The other air gun vibrated some. He had the 8 or 10 bolts that were on top and then the smaller ones had 14 bolts around the sides he had to do for each of those; the larger units had 28 to 30 bolts; Petitioner was

using the air gun so it would vibrate some (Tr 20). The largest one the bolts did not go down; he just dropped them and they would sit there, so he had to use the larger hammer gun to go around each of those bolts and pushed them into place (Tr 20). Once the unit was built and he got everything tightened up, then he had to lift the unit and put it on the rack. To do so, Petitioner had to take the lifting device and push forward to hold it in place for the fully assembled unit, which he guessed was 300 or 400 pound assembled. He had to be fully extended to drop it down so it would go in the rack (Tr 21). Generally his left arm would be fully extended for the rack itself just because of the controls (Tr 21). He would do 6 to 8 full gears on a given shift (Tr 21).

Petitioner was asked if there were many gears that he put into the full gears (Tr 21). There were little spider gears and there were 4 of those in each of the larger gears (Tr 21). There were also the bearings on the outside too (Tr 22). The actual spider gear itself was made up of 4 gear sets. The smaller gears were generally referred to as spider gears because they make up the spider gear assembly, but the spider gear itself was the T with the 4 gear sets on it (Tr 22). Petitioner made 24 to 32 gears (Tr 22). There were 4 per unit, so 4 of the smaller ones per unit. He made 6 to 8 large gears per shift (Tr 22). Each spider gear had 4 smaller gears; those were the ones picked up at the start of the process (in the box on the floor) (Tr 23). So Petitioner would do 4 spider gears into each gear. Four gears go together to form one spider gear per unit (Tr 23). It was not 4 separate groups of spider gears (Tr 23). So there was really one spider gear in each unit with the 4 smaller gears comprising that; the 4 smaller gear assemblies (Tr 23). These will be called smaller gear assemblies. In a given shift Petitioner did 24 to 32 smaller gear assemblies (Tr 24). Out of those smaller gear assemblies, he made 6 to 8 larger gears (Tr 24).

Petitioner worked 40 hours a week from August 8, 2011 through November 1, 2012 (Tr 24). He would typically have a 20 minute lunch break and two 10-minute breaks per shift (Tr 24). In a typical shift, Petitioner would be assembling approximately 7 hours and 40 minutes (Tr 25). During that period of time, he spent 5 to 6 hours using his hands or arms lifting, pushing, pulling or gripping in performing his assembly duties (Tr 25).

Petitioner testified that on November 1, 2012, "When I was picking up one of the smaller gears out of the box I started getting pain in my wrist." "There was just in leaning over after I picked the gear up and stood up as I was pulling my arm out there was a pain that started in my wrist and kind of extended down towards the finger and a little bit up the forearm." (Tr 26). The gear that he had picked up weighed 15 pounds (Tr 26). Petitioner thought the pain might go away and he waited a little bit. Because this was something new and since the pain continued and was gradually getting worse, Petitioner asked his supervisor if he could go to the medical department; it was close to the first break, maybe a half hour, so he waited until after first break to go to his supervisor (Tr 27). At Respondent's medical department, Petitioner filled out an accident report and described what happened (Tr 28). Medical department personnel told him to be careful and his supervisor told him to be careful and use 2 hands for everything if possible (Tr 29). Petitioner continued working (Tr 29).

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A couple days after November 1, 2012, Petitioner noted that the pain seemed to be getting worse. He started getting some more burning and tingling in the left forearm and starting to stretch a little more up the left arm, especially with use (Tr 29). He was doing more with his right hand and arm trying to avoid some of that pain (Tr 30). He went to Respondent's medical department on November 4, 2012.

Petitioner testified that on November 5, 2012, he was picking up the smaller of the spider gears, which weighed 10 pounds (Tr 30). He stated, "And as I was lifting them up I started getting a pain in my right wrist. And when that one started it quickly went up, all the way up my arm." (Tr 30). His right arm seemed to be a lot worse than the left when the left started (Tr 30). Petitioner reported to this to his supervisor within a few minutes and reported it to Respondent's medical department (Tr 31). Petitioner was shown a document called the ergonomic evaluation, Px2, Page 9 (Tr 31). Petitioner was asked if he met with company personnel like safety and talk about his job duties and injuries (Tr 31). Petitioner replied, "They came down to have me fill out what had happened, but it was just specific to picking the gears up. It wasn't about my job in general." (Tr 31). He described to the company safety person about just picking the gears up out of the box (Tr 32).

Petitioner was asked what, if anything, did he notice about his hands and arms before November 1, 2012 (Tr 32). Petitioner stated that a week or two before, he noticed a little periodic tightness, but nothing of concern (Tr 32). He did not have any pain or anything prior to that (Tr 32). Petitioner noticed the tightness when he would get out of bed; his hands would be tight (Tr 32). On November 8, 2012, Petitioner received a letter from Respondent denying his case (Tr 33).

Petitioner went to his family doctor at Family Practice in Shelbyville on November 20, 2012 (Tr 33). He was given restrictions of no repetitive motion and a 5 pound weight lifting limit (Tr 33). Petitioner presented the note of his restrictions to Respondent on November 21, 2011and he was informed that they could not accommodate his restrictions and sent him home (Tr 34). Right then, Petitioner filled out the forms for short-term disability because his workers' compensation case was denied (Tr 34). Petitioner's doctor ordered an EMG/NCV, which was done on December 5, 2012 (Tr 34). He was then referred by Family Practice to Dr. Greatting in Springfield (Tr 34-35). On January 3, 2013, Petitioner saw Dr. Greatting and described his assembly duties to him (Tr 35). Dr. Greatting recommended surgery. On March 12, 2013, Dr. Greatting performed right elbow surgery (Tr 35). On April 3, 2013, Dr. Greatting performed left elbow surgery (Tr 35). At Respondent's request, Petitioner saw Dr. Ellis on April 15, 2013 for a §12 evaluation (Tr 36). He continued to follow-up with Dr. Greatting (Tr 36). After his surgeries, his left arm seemed pretty good and he was not having any problems with it. In the right arm, he continued to have burning, tingling and pain, so Dr. Greatting ordered another EMG/NCV (Tr 36). Following the EMG/NCV, Dr. Greatting recommended another right elbow surgery, which was done by him on July 22, 2013 (Tr 37). Petitioner attended physical therapy at Phoenix Physical Therapy three times a week. Petitioner continued to follow-up with Dr.

Greatting, who released him to return to work on October 9, 2013, effective October 13, 2013 (Tr 37). Petitioner took the return to work note to Respondent the next day and was laid off indefinitely. At his attorney's request, Petitioner saw Dr. Coe for an evaluation on November 13, 2013 (Tr 38). Between November 21, 2012 and October 12, 2013, Petitioner received disability pay (Tr 39). During that entire period of time, Petitioner was either taken off of work or provided restrictions by the doctors for his elbows (Tr 39). Petitioner had reviewed the medical bills, Px5, before this hearing (Tr 39). There is a balance due of $1,594.54 and that balance pertains to medical treatment for his elbow conditions (Tr 39). Public Aid paid $193.35. The rest of the balances were paid by Respondent's group health insurance plan (Tr 40).

Petitioner testified he performed his assembly duties on a regular and continuous basis from when he was hired August 8, 2011 through November 1, 2012 (Tr 40). During that time, Petitioner worked with Ashton Moretti for 6 months and he worked alongside him in the same area doing the same job (Tr 40). Petitioner was shown Rx4, essential job functions and requirements documentation that he had read before this hearing (Tr 41). The Rx4 document is Respondent's break down of Petitioner's job duties in assembly and is a description of his job duties (Tr 41). Petitioner was asked if he believed Rx4 to be accurate and he stated, "I mean it's an accurate description for most of them, but I think it downplays a little bit of what we did and it leaves out a couple of things in the work flow at the back that is showing." (Tr 41-42). Petitioner stated that Rx4 downplays the amount of use of the arms, lifting, carrying, pushing, pulling; it states occasional, but everything he did in assembly had to do with his arms, had to do with moving and the whole time he was working, Petitioner was doing something; he was either lifting, carrying or pushing (Tr 42). In Rx4, Respondent classified it as occasional, which is up to 25% of the day or 2 hours a day (Tr 42). Some days it might have been occasional, but arm involvement/movement would definitely be frequent; there was always some resistance, some movement and twisting (Tr 43). There was a lifting device to move some of the bigger things, but he was always lifting and moving stuff, whether it was tools or gears or whatever (Tr 43). One thing not mentioned in Rx4: there is a bearing shown in Picture 4; bearings are stored in a cabinet that started at waist height; there were some smaller ones and some really big bearings which weighed 20, 25 pounds; Petitioner would have to take those bearing out of the cabinet (Tr 44). Petitioner explained that bearings have to be heated to go on; he would have to take them out, put them in the oven at 300 degrees using gloves; once heated, the bearings were pulled out of the oven, brought over to the unit and then flipped onto the housing unit; in general the smaller bearings would just slide on; the larger bearings were a lot harder because they were much heavier and he would have to lift and try to flip them over at the same time (Tr 44). The smaller bearings weighed maybe 10 pounds (Tr 44). The larger bearings weighed closer to 25 pounds (Tr 45). A lot of times Petitioner would carry from the oven to the gear with his arms straightened out, then pull it back up and flip it over (Tr 45-46).

Petitioner testified he officially became a minister in May 2014 (Tr 46). He is the lead pastor and his duties involve preaching, visiting people and responsibilities of the church. He loves being the lead pastor (Tr 46). Petitioner currently noticed with his right arm that he still

gets periodic pain in the forearm, burning and tingling; it is not every day, but does come and go, particularly during weather changes; when this occurs it feels like he did not have surgery at all (Tr 47). His left arm is not as bad and once in a while he gets a twinge or something, but normally it is short-lived. Both arms are not as strong as they used to be and there is weakness in both (Tr 47). He takes medications during weather changes; Gabapentin left over from prescriptions by Dr. Greatting (Tr 48). Petitioner let Dr. Ellis and Dr. Coe know the problems he was having with his arms (Tr 48).

On cross-examination, Petitioner testified that the small gear comes out of the box and is flipped into the press; it flips when it comes out of the press; then he sits it on the table and flips it again onto the spider gears; so 3 to 4 flips per gear set (Tr 49). For the smaller gear set there are 24 to 32 per shift; there were 4 that went into each unit (Tr 49). Three to four flips for each one and 24 to 32 per shift (Tr 50). For the housings he would have to put the pins in, Petitioner would have to pull, lift up to roll those over, put the pins in and then lift up and roll it back; that was one per unit; so that would be 6 to 8 of those per shift; that was 75 pounds or so (Tr 51). That is it for flipping (Tr 51). Petitioner may have told Dr. Coe he would flip gears up to 30 times per shift (Tr 51). He and Dr. Coe talked about his job duties and what he did (Tr 51). If Dr. Coe asked for numbers and how many times, Petitioner would have given it (Tr 51). There were 2 bearings per gear set and 6 to 8 gear sets per night; so 12 to 16 bearings with the exception of the largest overall gear, the 240 ton (Tr 52). It was about a 10 to 15 foot walk from the oven to where he actually put the bearings onto the gear (Tr 52). Petitioner was flipping smaller gears on a bench or a table (Tr 53). There were 2 tables, each 8 feet long and waist high (Tr 53). The smaller gears sets that were 10 to 15 pounds would be just lifted up and turned over and laid down on the table (Tr 53-54). Petitioner would be bending his elbows a little bit less than 45 degrees when he would do that, the ones that he did 24 to 32 a shift (Tr 54). The smaller housings were 75 pounds (Tr 55). Petitioner used a hoist to put them onto the table and to move them from the table to the gear, but not for flipping them over (Tr 55). Those he would lift up and kind of roll over on the table (Tr 55). Petitioner would have to pull the handle on one side to lift it up and roll it over (Tr 55). Torque tools were used to drive bolts (Tr 55). There were several different torque tools. One was like a mini jackhammer; an actual hammer type tool where Petitioner would squeeze the button and it would start pounding like a rapid hammer to put bolts in on the larger ones that had 28 to 32 bolts on them (Tr 56). Petitioner would have to use this hammer type torque tool on every single bolt all the way around. Also, there were run-down air guns that would run the bolts down quickly; Petitioner would have to hold a wrench on the bottom and run the bolts down with the other hand; before he used the large torque tool (Tr 56). The larger torque tool weighed 5 to 10 pounds; it looked like a home drill, but had the bigger hammer head on it (Tr 57). The run-down air gun weighed about the same as the large torque tool (Tr 57).

Petitioner testified he was lifting these 10 to 15 pound gears out of a box on the floor (Tr 57). He would reach into the box (Tr 58). He would put one on the cart and get others;

4 on the cart and then take them over to the table (Tr 58). He would take the gears off the cart and put them on the table (Tr 58). Once he got the spider gears together, the whole large gear that had the 4 spider gears into it weighed 80, 90 pounds and he moved it with the hoist and set it down inside the larger gear assembly (Tr 58). The hoist was moved and the large gear assembly was rolled over by pushing a button (Tr 60). Then this 80-90 pound piece set would sit down inside of that and he would have another small gear that sits on top of it and then he put the housing on top and locked that down (Tr 60). The housing gets over to the rollover with the lifting device/hoist, lifted with a hook and chain (Tr 60). The smaller gear got put in by hand and Petitioner would be doing that 6 to 8 times per shift (Tr 61). There are photos at the end on Rx4 (Tr 62). Picture 4 showed the housing unit (Tr 64).

2. Petitioner's witness Ashton Moretti testified that he is a previous client of Petitioner's attorney (Tr 67). He is currently employed with Respondent and has been so for 9 years (Tr 67). At the end of 2011 and beginning of 2012, he worked in the lower power train gear assembly. He worked right next to Petitioner for about 6 months (Tr 68). He and Petitioner both did the same job (Tr 68). Mr. Moretti described the assembly process: assembled spider gears, pressed bearings into them, put them on Ts after rolling them across the table to get them all together and then put them inside of larger gears (Tr 68-69). He would manufacture from 24 to 32 smaller gears on a given shift (Tr 69). He made 6 to 8 larger gears (Tr 69). Mr. Moretti considered these assembly duties to be forceful with his hands and arms (Tr 69). He was constantly pushing, pulling, tugging on things and lifting (Tr 69). The bearings weighed 10 to 15 pounds and there would be 4 pieces on the T, so 10-15 pounds times 4, weighing 40 plus pounds (Tr 69). He would perform these assembly duties which required use of his hands or arms to lift, grip, push or pull for 5 to 6 hours per shift (Tr 70). He used torque wrenches, presses and lifting devices (Tr 70). The bearing press required both hands pushing at full force by using his foot to operate it up and down (Tr 70). This was difficult for him because he had previous surgery on his hands so he could not push the buttons (Tr 70). Mr. Moretti reviewed the essential job functions and requirements of the differential gear assembly document before this hearing (Tr 71). Generally speaking, this document described his job, but it was missing some of the pushing, pulling and strenuous stuff like lifting heavier bearings (Tr 71). He did not agree that lifting, carrying, pushing and pulling was done occasionally up to 25% of the workday, as stated in the document (Tr 71). He would say that over 4 hours per shift was spent lifting, carrying, pushing and pulling (Tr 72). He performed these duties using both hands (Tr 72).

On cross-examination, Mr. Moretti testified he worked at a work station next to Petitioner (Tr 72). He had his own bench (Tr 72-73). He also had a rollover for the larger assembly once it was out together (Tr 73). He would get gears out of a box on the floor and then use a cart to move them over to his bench where he would start assembling. He had to flip these smaller gears twice per bearing set, so anywhere from 48 to 70 times in a shift (Tr 73). The bearings were stored on the cart and were manually loaded onto the cart. There were sets of 8 in each box. A box of 8 bearings weighed 10 to 25 pounds (Tr 74). He would put housings on top of the spider gears that he had previously assembled; there were flippings of the housings and he had to

ream the housings (Tr 74). He did not think Petitioner had to as often because Mr. Moretti filled in where needed and had prior experience before Petitioner ever worked for Respondent (Tr 74). Mr. Moretti knew how to do everything there, whereas Petitioner worked primarily with the spider gears (Tr 75). He had to flip the housing over on a table, place the large ring gear, which is the outer gear, on top of it, line all the holes up and then drill through both pieces to make sure that the holes were properly aligned (Tr 75). He would then place all the bolts in the holes, put the washers and nuts on the bottom of the bolts, then using a run-down air gun, hold the nuts with a standard wrench and run down the bolts with the run-down gun (Tr 75). Then he would lay it down on the roll-over table, torque the bolts all down, then roll it over and put the spider gears in (Tr 76). The number of bolts depended on the size; the smaller had 10 bolts and larger up to 40 bolts (Tr 76). The air gun was a standard wrench gun; it just tightened the bolts before he had to torque them (Tr 76). The bolts were torqued with the overhead pull-down torque arm; that was supported by the arm, but it was heavy to pull down (Tr 76). Once he had it in place, he pushed the button and it torqued the bolt and jerked back when it was done and showed the torque on a monitor. Then he lifted and went on to the next bolt (Tr 77). His arms were fully extended while doing the torqueing (Tr 77). Flipping of the smaller gears on the bench was done with his arms fully extended (Tr 77). When he was positioning the housing in place his arms were fully extended pulling it towards him to lay it down (Tr 77). When all this was together, he had his spider gear together, the housing together and all that, he took it over to the rollover using a hoist. Once it was in the rollover, the rollover flipped it over (Tr 78). It was bolted to the rollover (Tr 78). There were 4 bolts to hold it onto the rollover and a gun was used to do that, a small standard air gun (Tr 78-79). The heaviest air guns weighed 5 to 10 pounds (Tr 79). He held the air gun up to tighten down and his elbow was up bent at 90 degrees (Tr 79). Per shift he would do 6 to 8 gear assemblies (Tr 79-80).

3. Respondent's witness Aaron McPheeters testified that he has been employed with Respondent for 7 years. His job title is manufacturing engineer for the lower power train areas (Tr 81). He held that position in 2012 as well (Tr 81). He writes the process for building the components in the lower power train area as well as the visual aids and works on quality improvement projects (Tr 82). As part of his job, he gets onto the shop floor and observes the jobs others do (Tr 82). He is on the floor almost daily (Tr 82). He has a lot of different areas under his control right now and makes sure there are no issues (Tr 83). That was true in late 2012 as well (Tr 83). In late 2012, he was just transitioning into the spider gear assembly area. He is familiar with that work station and has observed that job being done on a weekly basis at least (Tr 83). He did not observe Petitioner doing that job (Tr 84). He is familiar with the tasks that are associated with that job (Tr 84).

Mr. McPheeters participated in the creation of Rx4 (Tr 85). The first 2 pages of Rx4 contain a description of essential job functions and truly and accurately describe what is done in that job (Tr 86). Starting on Page 2 of Rx4, there are a number of photographs and descriptions that are attached to that written summary (Tr 86). The photographs accurately depict someone

doing the particular tasks associated with that job (Tr 86). Page number 1 of the exhibit under the section for pushing and pulling, the document references occasional pushing and pulling at 1 to 10 pounds with something called a GCI arm. The GCI arm is an articulated arm that is mounted to the ground holding the electric torque tool, DC electric torque tool (Tr 87). There are a couple different bolted patterns in the differential that have a very high torque value; that is what the GCI arm is used for; it is a reaction arm for the torque values; in a high torque situation, when you start to apply the torque if it was say a hand tool, it would really try to twist at you; this GCI arm holds the tool in place for you so there is no reaction on the person created (Tr 87-88). It generates enough torque that you would not be able to hold it if it were a hand tool (Tr 88). It is not very hard to move the GCI arm around at all; it is a zero balance type arm; everything is loaded to where you can move it around with not very much force (Tr 88). There is an on/off button to trigger the torque (Tr 88). There is a handle off the GCI arm to adjust it and there is a button on the side of the handle to push with your thumb (Tr 89). Twenty-one pounds of force to move the arm up and 14 pounds of force to move it down and 6 pounds of push/pull force to move the arm back and forth, up and down (Tr 89). That is an accurate description of how the GCI arm is used (Tr 89). At rest the arm fully supports itself. The GCI arm does not really vibrate. When the tool is engaged, there are 3 different brakes on the arm that lock into place and it takes all the vibration out of the tool (Tr 90).

Mr. McPheeters testified that Page 1 of Rx4 talks about 11 to 25 pound of push/pull force, the description mentions use of a clicker wrench, which is a torque tool used for achieving a certain amount of torque value (Tr 90). Where the torque values are a lot less where you do not need the GCI arm, a clicker wrench is used (Tr 91). On the gear itself there is a lock nut that has to be tightened down using a clicker wrench; Page 3, Picture 2B (Tr 91). On Page 3 of Rx4 the photographs show subassembly of the gear before it is attached, before building the whole spider gear assembly up. The assembler obtains the gears from a tub about 15 feet in front of him (Tr 91-92). Each gear weighs 15 pounds (Tr 92). The assembler takes the gear out of the box manually and lifts those by hand (Tr 92). Those are the spider gears (Tr 92). The spider gears are put in a cart or are just carried to the workbench (Tr 93). A bearing is then pressed into the spider gears using a press. Then a nut is put onto that (Tr 93). The spider gears are then assembled onto a cross with 4 gears on it (Tr 93). The individual gears are flipped onto the cross (Tr 94). Two to three total assemblies are built in a shift (Tr 94). The Commission notes that Petitioner testified 6 to 8 total assemblies are built per shift. There is a lifting device used that picks up the whole assembly and it is put into the differential housing, a drum type piece that is attached to a gear and a rollover (Tr 95). The housing is positioned into the rollover be being hoisted in. The housing is rolled on the workbench by hand (Tr 95). The housing sits on the bench and it is rolled over (Tr 96). The assembler does that one per spider assembly (Tr 96).

Mr. McPheeters testified that Rx4, Page 6, Picture 4(d) shows the assembler using 3 and 6 pound torque tools (Tr 96). There are 4 clamps that hold the ring gear assembly into the rollover and the picture shows the assembler tightening down the clamps on the rollover (Tr 96). The GCI arm is used at that station (Tr 97). A washer is held on by 4 small screws (Tr 98).

The last picture on Page 6: once the washer is bolted into that housing, the spider gear assembly is lifted from the table and set into the housing (Tr 98). Picture 5 shows the assembler putting the gold washer in the top of that housing; there is another gold washer that goes onto the other half (Tr 99). That is when the housing is rolled over (Tr 99). The assembler puts in the long bolts that hold the 2 halves of the housing together and then he lifts that up with a hoist and sits it on top of the other half where the spider gear assembly is (Tr 99). The lifting and turning of the assembly would be done using a hoist at that point (Tr 99). The bearings are 5 pounds (Tr 99). The bearings are lifted by hand from the cart which is 5 or 6 feet from the work bench (Tr 100). Petitioner was shown Rx6, photocopies of photographs (Tr 100). Rx6, Page 1 shows a box sitting on the floor which contains spider gears. The assembler reaches into that box and takes out a spider gear, which he takes to the work bench (Tr 101). There is no part of the job that has not been discussed (Tr 101).

On cross-examination, Mr. McPheeters testified that Rx6 is the ergonomic evaluation report from November 5, 2012 (Tr 102). Mr. McPheeters was not involved in that ergonomic evaluation (Tr 102). The only time Mr. McPheeters was involved was with Rx4 essential job functions and requirements report dated June 9, 2014 (Tr 102). That is when Mr. McPheeters measured and observed this area to obtain all his data (Tr 103). He did not believe there were any changes in the job station from 2012 to 2014 (Tr 103). He is not aware of any changes in the work environment during that period (Tr 103). Molly Major asked him to do this evaluation with her (Tr 104). It would surprise Mr. McPheeters if Petitioner and someone else who worked with him back in 2012 testified that 6 to 8 gear assemblies were built per shift in 2012 (Tr 104). Mr. McPheeters was not there for the entire 8-hour shift in 2014 (Tr 104). He did not see 2 to 3 gear assemblies being built per shift noted in the report (Tr 105). The assembler he saw performing the job duties was Albert Brown, a person older than Mr. McPheeters. It is possible Mr. Brown built gear assemblies slower than other individuals (Tr 106). With a 20 minute lunch break and two 10-minute breaks, an assembler assembled for 7 hours and 20 minutes (Tr 107). It is not listed in the document how many hours a day an assembler uses his hands or arms throughout the workday in a physical force fashion (Tr 107). Page 1 under Physical Demand Lifting, lifting between 1 and 25 pounds is done up to 25% of the day, 2 hours of the day performing such lifting activities (Tr 108). Up to 25% of the day or for 2 hours assemblers are required to carry up to 1 to 25 pounds (Tr 108). The same was for pushing or pulling (Tr 108).

Based on his data, it is feasible that an assembler could lift, carry, push or pull for approximately 6 hours a day (Tr 109). Page 3 indicates there are clicker wrenches used (Tr 109-110). Page 6 indicates there are 2 separate air powered torque tools used in the assembly process (Tr 110). Nowhere in the document is it indicated how much time throughout the workday these torque tools are used (Tr 110). It does say that parts and tools are used occasionally (Tr 110). Tools are used either for lifting or carrying up to 4 hours a day (Tr 111). Mr. McPheeters did not observe Petitioner performing these job duties (Tr 111). A video was not taken by him, but Molly might have (Tr 111). Under Page 2 Hand Function, an assembler has to operate knobs,

levels and cranks and some of these are hand tightened in the assembly process (Tr 112). Mr. McPheeters never actually performed these job duties himself for an 8-hour workday (Tr 113).

On re-direct examination, Mr. McPheeters testified that Molly Major is the safety representative for Respondent in Decatur (Tr 113). Regarding his surprise at the number of total gear assemblies per shift, Mr. McPheeters stated that in the current build rate today, this is one piece of the assembly that they do; with all the pieces put together, one assembler cannot do 6 complete assemblies per shift (Tr 114). Mr. McPheeters did not just observe this job on the date of the report; he observed it before and after the report was created (Tr 114). He observed the job whenever he was on the shop floor; more than 50 times over the course of the past 3 years (Tr 114-115). Mr. McPheeters observed more than one person doing this job (Tr 115). He has observed more than Albert Brown doing that job (Tr 115).

On re-cross examination, Mr. McPheeters testified that Respondent keeps documentation as to how many gears were built in November 2012 and prior to that time (Tr 116). He did not bring any of that information to this hearing (Tr 116).

4. Caterpillar company records, Px2, Rx1, indicate that an Employee Incident Report dated November 1, 2012 was completed on that date. An incident date of November 1, 2012 and time of 12:30 were noted. The following is described about the incident: "I was in my area, 83/35, and was removing a spider gear from a box on the floor when I felt a pain in my left wrist which continued." The pain was described as dull, but sharper with pressure, and tingling. There is also a Health Care Professional Incident/Injury Form dated November 1, 2012. The following Narrative was noted: "Was pulling spider gears out of box on floor. Was leaning over box lifting out gear when he felt sudden pain left wrist." Petitioner rated his pain at 1/10 at present and stated his pain increased to 5/10 when lifting. He also reported tingling left lateral wrist from his wrist to little finger. Ice was applied and a wrist support was given. On this form was also noted the date of November 7, 2012 and that ERGO was reviewed. A diagnosis of left wrist pain, non-occupational was noted. It was also noted: "Denied per Jamie S."

Petitioner was seen at Respondent's medical department on November 1, 2012 and the Progress Notes indicate he was there for follow-up of a left wrist injury. Petitioner rated his pain at 2/10 and it had gotten to 7/10. Petitioner reported little relief from Ibuprofen and he still had some tingling/pins and needles in his lateral left hand. Petitioner reported some tightness/pulling in his medial left arm from his wrist to axillary area. He was advised to use caution with lifting and using impact tools. A slip that date indicated Petitioner was to return to work at regular duty with lifting cautions.

Medical department November 4, 2012 Progress Notes indicate Petitioner was seen in follow-up for his left wrist injury. Petitioner reported his wrist did not bother him at home the last weekend and when he got to work and starting moving parts, his left wrist started aching.

Petitioner rated his pain at 3/10 and dull, throbbing pain. Petitioner reported his pain started in his left wrist and radiated up his forearm.

An Employee Incident Report dated November 5, 2012 was completed on that date. An incident date of November 5, 2012 and time of 12:40 were noted. The following is described about the incident: "I was picking up spider gears out of the box on the floor when my right wrist started hurting. The pain began intensifying and I notified my supervisor." It was noted that the pain in Petitioner's right wrist was sharp and throbbing to dull pain.

Px2, Rx1 also contain a Health Care Professional Incident/Injury Form dated November 5, 2012. The following Narrative was noted: "EE presents c/o pain right wrist. States had shooting pain in right wrist radiating through forearm, happened 4-5 times. Now states throbbing pain lateral aspect wrist and radiates to medial wrist with use. States was picking up parts weighing approx 10 pounds. States was using both hands to lift due to recent injury left wrist and per supervisor request. Jamar grips were done and pain increased with grips." On this form is also noted the date of November 7, 2012 and that ERGO was reviewed. A diagnosis of left wrist pain, non-occupational was noted. It was also noted: "Denied per Jamie S."

Petitioner was seen at Respondent's medical department on November 5, 2012 and the Progress Notes indicate he was there for follow-up for left wrist pain. Petitioner rated his pain at 3/10 and in the lateral aspect of his left wrist. At times he had shooting pain into his left forearm. Petitioner reported that at times he gets some tingling in the lateral aspect of right hand in little finger. There were also separate Progress Notes dated November 5, 2012 that state Petitioner presented for pain in his right wrist, which he rated at 4-5/10. Petitioner reported that at times the pain shot up his right arm. He had pain in the lateral aspect of his right wrist and some discomfort in his forearm at times. Petitioner reported he had not much relief with Ibuprofen. Over-the-counter Aleve was given. In an Addendum it was noted that Petitioner reported some tingling and cold sensation on the lateral side of his right hand and little finger. Petitioner reported he had this sensation 4-5 times a day lasting 5-10 minutes in duration. Petitioner reported he had the tingling sensation usually when at rest.

Px2, Rx1 also contains an Ergonomic Report dated November 5, 2012. The following Employee Statement was noted: "Pulling spider gears out of the box and my left wrist started to hurt. I gave it about an hour to see if it was temporary and then notified my supervisor and went to medical." The Commission notes there is only Page 1 to this document.

Medical department November 6, 2012 Progress Notes indicate Petitioner complained of pain with picking-up a part last week. Petitioner reported pain on the outside of the left wrist. The pain was shooting, constant and an annoyance. Petitioner reported that he was off the previous weekend and had returned to work Sunday and was working with triggering pain. It was noted that the medical department recommended using a soft brace, heat and ice. His pain was 2/10. It was noted that Petitioner was a repetitive motion assembler with Respondent for 15

months. It was also noted that there was no known history of injury. On examination, Petitioner had good active and passive range of motion, his neurovascular was intact, Jamar grips were on record and there was negative Tinel's and negative Phalen's. It was noted that Petitioner's left wrist pain was improving, etiology unknown. An ergonomic report was requested. It was noted that the situations needed investigation.

In other Progress Notes dated November 6, 2012, it was noted that Petitioner was there for heat treatment. Petitioner reported his pain on the right was 5/10 and 3/10 on the left. It was noted, "States at one time on shop floor doing job had arms extended, slightly above shoulder height with wrist in neutral position and states decreased pain with arms in that position. All other times pain constant." Tennis elbow straps were given. A slip that date indicated Petitioner may return to work at regular duty.

Px2, Rx1 also contains a letter to Petitioner dated November 8, 2012 from Workers' Compensation Claims Adjuster Jamie Schimmelpfenning. In her letter, Ms. Schimmelpfenning denied Petitioner's claim.

In a slip dated November 12, 2012, it was noted that Petitioner was to return to work at regular duty with cautions.

5. The medical records from Family Healthcare Center, Px1, indicate Petitioner was seen on November 20, 2012 by Hannah Doyle PA-C for a chief complaint of wrist pain. Petitioner reported, "My wrists started hurting at work X 3 weeks." Petitioner reported his right wrist pain was worse than his left wrist pain. His pain was described as burning and radiating up the posterior arm, along with numbness and tingling. Petitioner rated his pain at 5/10 and worsening. The following history was noted: "Pt's occupation is an assembler at Caterpillar so he is forced to twist, grip, and hold impact gun (vibrating instrument) that he holds for approx. 1 min. Pt states he is unable to finish working due to the pain at times; has to wait 5-10 minutes before restarting work. He can also wake up through the night and have numbness in his 3rd through 5th digits up the medial aspect of his arms. His medical team at his job told him to do heat treatment, wear wrist braces 24 hours daily, and take Ibuprofen around the clock." On examination of the right elbow, there was no erythema, edema, ecchymosis or bony deformities; palpation revealed tenderness; palpation revealed pain described as medial epicondyle (ulnar nerve); normal range of motion. Examination of the left elbow was the same as the right elbow. On examination of the right wrist, there was no erythema, edema, ecchymosis or bony deformities; palpation revealed no tenderness and no warmth; normal range of motion; Phalen's test was positive indicating carpal tunnel syndrome; Tinel's test was positive indicating carpal tunnel syndrome. Examination of the left wrist was the same as the right wrist. Ms. Doyle's assessment was numbness of fingers of both hands. Ms. Doyle noted that she explained to Petitioner that his clinical history and physical examinations indicated both carpal tunnel syndrome and cubital tunnel syndrome. Ms. Doyle ordered EMG/NCV testing and prescribed Medrol Dosepak. Petitioner was to continue to alternate taking Tylenol and Ibuprofen as needed

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and continue wearing wrist braces. Ms. Doyle gave restrictions of no repetitive movements of his hands, including no twisting, gripping and using air tools and no lifting over 5 pounds.

Medical department November 20, 2012 Progress Notes indicate Petitioner presented there with restrictions from his primary care physician. It was noted that Tony Pagliaro was spoken with and that Petitioner's restrictions could not be accommodated. It was noted that Petitioner was advised to contact Human Resources regarding disability paperwork. (Px2).

6. Petitioner was seen at Family Healthcare Center on November 30, 2012 by Ms. Doyle. Petitioner reported pain in his bilateral wrists and around the elbows. He rated his pain at 10/10. The pain was stabbing, burning and aching and interfered with daily activities of household chores and sleeping. Petitioner reported the pain was constantly varying from 2-10/10 and was worst when resting after performing any range of motion. Petitioner reported he gave the work restrictions to his boss and was told they were unable to accommodate the work restrictions and therefore, he had not worked since last seen on November 20, 2012. Ms. Doyle noted that an EMG/NCV was scheduled for December 5, 2012. The examinations were the same. It was noted that short-term disability paperwork was filled out. Ms. Doyle ordered Vicodin. (Px1).

7. A December 4, 2012 Disability/Workers Compensation Leave of Absence Memo noted that Petitioner's last day worked was November 20, 2012. It was noted that the action of November 20, 2012 was short term disability at reduced pay. It was indicated that this was a new leave with a leave effective date of November 21, 2012. The first benefit date was noted as November 28, 2012. A return to work was noted as expected on January 2, 2013. (Px2).

8. An EMG/NCV was performed on December 5, 2012 and the results showed bilateral moderately severe cubital tunnel syndrome, more so on the left side, with no evidence of superimposed significant carpal tunnel syndrome, cervical radiculopathy, plexopathy or disease at the muscle level. (Px3).

On December 10, 2012, Ms. Doyle noted that the EMG/NCV results. Her assessment was bilateral cubital tunnel syndrome. She noted that Petitioner requested a referral to Dr. Greatting at Springfield Clinic, which was given. (Px1).

9. According to the medical records from Springfield Clinic, Px3, a Patient History was taken on December 20, 2012 that Petitioner was to see Dr. Greatting on January 3, 2013. It was noted that the main reason to be seen was for bilateral cubital tunnel syndrome. It was noted that Petitioner reported, "My job is assembly so there is constant use of my arms."

Petitioner saw Dr. Greatting on January 3, 2013 for a new patient evaluation. Petitioner reported bilateral arm complaints. Petitioner reported he had bilateral hand complaints with pain, numbness and tingling developed over time. Dr. Greatting noted Petitioner's job as an assembler for 1½ years manufacturing differential gears. No specific injury or trauma was

noted. Dr. Greatting noted the following history, "At work he would lift parts out of boxes on floors. The parts would weigh as much as 16 pounds. He would work with multiple parts per night. He would grab one of these with each arm. He would put them in a press. He would have to pull the press down with both arms. He would then have to flip the parts over and tighten nuts on the parts with air-driven impact guns. Once they were assembled, he would have to push and hold them to seat them correctly in another piece of equipment. He would have to do this twice in each unit. He would then have to flip the housing unit over and set it down. These would weigh as much as 75 pounds. Sometimes they were smaller. The symptoms began in his arms about 15 months after working there." Petitioner complained of numbness and tingling beginning in the forearm and would radiate to the smaller finger. The Commission notes that this is different than what he reported before, beginning in the wrist and up the forearm. Dr. Greatting noted Petitioner did have some chronic neck and shoulder complaints. Dr. Greatting noted Petitioner's treatment to this date and noted the EMG/NCV results. Petitioner reported slight improvement since being off work from November 20, 2012. Dr. Greatting noted, "He described, while doing his work activities, that he was doing a lot of repetitive flexion, extension activities with his elbows as well as wrists and hands, and from his description of his work activities, there was also a fair amount of forceful repetitive gripping, pushing, pulling activities as well as some degree of exposure to vibration using the air-driven impact wrenches."

On examination, Dr. Greatting found full range of elbows, forearms, wrists and hands bilaterally; positive Tinel's and positive elbow flexion test at both cubital tunnels with the symptoms radiating in the ulnar nerve distribution; negative Tinel's over the ulnar nerve at the wrists bilaterally; negative Tinel's and Phalen's, compression tests over the carpal tunnels bilaterally. Dr. Greatting assessed cubital tunnel syndrome. Dr. Greatting opined that based on his history, Petitioner's work activities have caused, contributed to or aggravated his symptoms significantly. Dr. Greatting recommended cubital tunnel releases and Petitioner wanted to proceed.

10. According to the March 12, 2013 Operative Report, Dr. Greatting noted a pre-operative diagnosis of right cubital tunnel syndrome. Dr. Greatting performed a release of the ulnar nerve at the right cubital tunnel. Petitioner followed-up with Dr. Greatting on March 26, 2013 and reported his numbness distally was improved. Petitioner reported that in the past few days, he had increased pain in the right posterior elbow and forearm areas. Dr. Greatting's impression was post-surgical pain, which would improve with time. Petitioner was to slowly increase activities with his right arm as tolerated.

The April 3, 2013 Operative Report noted Dr. Greatting gave a pre-operative diagnosis of left cubital tunnel syndrome. Dr. Greatting performed a release of the ulnar nerve at the left cubital tunnel. Petitioner followed-up with Dr. Greatting on April 17, 2013 and the sutures were removed. Petitioner reported the numbness was improved. On examination of the left upper extremity, Dr. Greatting found good range of motion of the elbow, forearm, wrist and hand as well as good strength. In the right arm, Petitioner complained of some persistent pain on the

posteromedial elbow area and pain radiating down the forearm with numbness and tingling in the ring and small fingers. Petitioner reported that numbness and tingling was more frequent than prior to the surgery, it was not constant, but it bothered him at night. On examination of the right upper extremity, Dr. Greatting found full elbow range of motion; there was no subluxation of the ulnar nerve at the elbow when flexing; positive Tinel's over the ulnar nerve and good strength. Dr. Greatting prescribed medications. Petitioner was to remain on light duty. (Px3).

11. At Respondent's request, Petitioner saw Dr. Ellis on April 25, 2013 for a §12 evaluation. In his April 30, 2013 report, Rx2, DepEx2, Dr. Ellis reviewed Petitioner's medical records and Respondent's incident reports. Dr. Ellis also reviewed the ergonomic evaluation dated November 5, 2012. Petitioner reported he had worked for Respondent for 1½ years prior to the onset of left wrist pain at the very end of October 2012. He described ulnar-sided left wrist pain which ultimately radiated up the ulnar forearm towards the elbow. He then had the onset of similar symptoms on the right side. Petitioner described intermittent use of an impact wrench, which he used 4-5 times per shift. That was in concert with other activities such as heavy lifting and manipulation of tools and parts. Petitioner reported that he currently had significant relief post left cubital tunnel release. Petitioner reported he still had significant symptoms in his right forearm and hand, but no longer had significant wrist pain.

Dr. Ellis opined Petitioner's left cubital tunnel syndrome was not related to the incident of November 1, 2012. Dr. Ellis found no evidence of prolonged use of hand-held vibratory tools or highly repetitive flexion and extension activities coupled with forceful grasping which would be related to the development of cubital tunnel syndrome. Dr. Ellis opined that Petitioner's cubital tunnel syndrome was idiopathic in nature. Dr. Ellis opined the same for Petitioner's right wrist. Dr. Ellis opined that Petitioner may require some limited occupational therapy. Dr. Ellis opined Petitioner can return to work at his regular duties.

12. On May 16, 2013, Petitioner reported to Dr. Greatting that his left upper extremity was doing great. He was still having pain in his right upper extremity. His right arm numbness was resolved. Neurontin only helped for a few weeks. His left arm numbness and tingling was resolved. He was having burning pain in his right forearm down to his ring and small fingers and right hand weakness. On examination, Dr. Greatting found full range of motion of the right elbow, forearm, wrist and hand; good strength; positive Tinel's over the ulnar nerve at the right elbow. Dr. Greatting noted Petitioner can use his left arm unrestricted. Dr. Greatting gave right restrictions of no lifting more than 5 pounds and no repetitive elbow flexion/extension activities. Dr. Greatting ordered a new EMG/NCV for the right upper extremity.

Dr. Greatting noted on June 6, 2013 that Petitioner underwent a right upper extremity EMG/NCV which showed mild swelling in the ulnar nerve across the elbow. On examination, Dr. Greatting found markedly positive Tinel's over the right cubital tunnel and a positive elbow flexion test. Dr. Greatting noted that there may be some mild subluxation of the ulnar nerve when Petitioner fully flexes his elbow. Dr. Greatting recommended an anterior submuscular

transposition of the right ulnar nerve and noted Petitioner wanted to proceed. Dr. Greatting prescribed medications. (Px3).

13. According to Springfield Clinic medical records, Px4, in his July 19, 2013 Operative Report, Dr. Greatting noted a pre-operative diagnosis of recurrent right cubital tunnel syndrome. Dr. Greatting performed an anterior submuscular transposition of the right ulnar nerve.

14. In his July 23, 2013 deposition, Rx2, Dr. Ellis testified he is a board certified plastic surgeon. Dr. Ellis recited from his report, noted above. Dr. Ellis opined that there has never really been a successful linkage of cubital tunnel syndrome to occupational activities, unlike carpal tunnel syndrome (Dp 11). A weak link that does exist is prolonged handheld vibratory tool use such as a jackhammer (Dp 11). Elbow flexion of a forceful nature would have to be over 90 degrees or more (Dp 13).

On cross-examination, Dr. Ellis agreed that it is important to know the positioning of the elbows while performing the job duties for determining causation for cubital tunnel syndrome, as well as force or pressure exerted with the elbows flexed and vibration (Dp 22-23). Dr. Ellis noted that the ergonomic evaluation does not mention air guns used by Petitioner (Dp 24). It was Dr. Ellis' impression that Petitioner used his hands all day working (Dp 31).

15. On August 13, 2013, Dr. Greatting prescribed physical therapy with Phoenix Physical Therapy. When Petitioner saw Dr. Greatting on October 9, 2013, he reported his right arm was doing much better. Petitioner reported his numbness was resolved. Dr. Greatting released Petitioner to return to work without restrictions effective October 13, 2013. (Px4).

16. At the request of his attorney, Petitioner saw Dr. Coe on November 13, 2013 for an evaluation. In his report of that date, Px6, DepEx2, Dr. Coe noted Petitioner's job at Respondent. Dr. Coe noted that he pulled spider gears, each weighing 10 to 15 pounds, out of boxes on the floor. He reached down, gripped and pulled up spider gears. Petitioner reported that the upper arm movements required significant force and were performed 30 times per shift. Petitioner reported that as he worked he began to experience pain along the outer border of his left wrist and he reported this on November 1, 2012. With continuing to work, Petitioner developed right wrist pain and reported same on November 5, 2012. Dr. Coe noted Petitioner's treatment and EMG/NCV results. Dr. Coe noted Petitioner saw Dr. Ellis on April 25, 2013 for a §12 evaluation. Petitioner denied any history of diabetes, thyroid disease, collagen or vascular disease. Dr. Coe noted there was no history of intensive hand activities at home. Petitioner complained of pain at the elbow scar sites with forceful gripping or throwing movements and some popping and tightness in both elbows with repeated flexion and extension. Petitioner complained of occasional numbness and tingling extending into 4th and 5th fingers of each hand with pressure at the elbow scar sites and occasional bilateral wrist discomfort.

On examination, Dr. Coe found Petitioner's elbow scars were not tender to palpation nor hypersensitive to light touch; Tinel's signs were equivocal at the elbows with localized tingling only; elbow flexion tests were negative bilaterally; there was full range of motion bilaterally; sensation was slightly decreased on the right hypothenar eminence versus the left; strength was 5/5; Phalen's and Tinel's were negative at wrists. Dr. Coe opined Petitioner suffered repetitive strain injuries to his bilateral upper extremities in his work as an assembler at Respondent. Dr. Coe opined that the repetitive strain injuries were a factor causing the development of bilateral cubital tunnel syndrome, ulnar nerve entrapment at the elbow region. Dr. Coe opined that following the right cubital tunnel surgery, Petitioner developed post-operative scarring and underwent surgery on July 19, 2013 for exploration, release of adhesions and ulnar nerve transposition. Dr. Coe opined a causal relationship exists between the repetitive strain injuries Petitioner sustained at work and his current bilateral upper extremity symptoms and state of impairment. Dr. Coe opined causal connection for permanent partial disability to both arms. Dr. Coe opined Petitioner had reached maximum medical improvement. Dr. Coe opined Petitioner's impairment as per AMA Guidelines of 1% right upper extremity and 1% left upper extremity.

17. Dr. Ellis performed a medical records review. In his June 27, 2014 report, Rx3, Dr. Ellis reviewed additional records since his April 30, 2013 report. Dr. Ellis also reviewed Essential Job Functions & Requirements report. Dr. Ellis made no change of his opinions.

18. In his July 14, 2014 deposition, Px6, Dr. Coe testified he is board certified in occupational medicine and is certified in AMA impairment ratings. Dr. Coe recited from his report, which is noted above. Dr. Coe opined that the history Petitioner provided to Dr. Greatting is consistent with the history Petitioner provided to him (Dp 15). Dr. Coe opined that Petitioner's current complaints were consistent with the nature of his condition and the surgeries he underwent (Dp 22). Dr. Coe opined that there was a causal relationship between the work activities Petitioner described, the gear assembly work at Respondent, and his condition of bilateral cubital tunnel syndrome for which he had undergone the surgeries (Dp 28).

Dr. Coe was asked the following hypothetical: "Q. I'd like you to keep in mind again the history you received from Mr. Lawrence, the medical records you reviewed, findings of your examination. Please assume hypothetically that he began working at Caterpillar on or about August 8, 2011 in the assembly position. Please assume his job duties were consistent with the ergonomic evaluation you recited, the history noted in Dr. Greatting's records, the history in the Caterpillar records, and also what he provided to you, which included pulling out and working with spider gears, which included the use of both hands and arms as well as impact guns, air guns, and wrenches throughout his workday performed these assembly duties. Please assume he developed left hand and arm symptomology on or about November 1, 2012 and thereafter developed right hand and arm symptomology several days later. Keeping in mind all of this information, do you have an opinion as to whether the Caterpillar job duties contributed to the ulnar nerve diagnoses and surgeries that you discussed today?" (Dp 28-29). Respondent's

attorney objected stating, "And I'll object to the hypothetical foundation for the hypothetical facts as stated subject to the objection." (Dp 29). The Arbitrator sustained Respondent's objection. The Commission notes that Judge Bollinger found that the Arbitrator erred in sustaining the objection as all the facts assumed in the hypothetical question were supported by evidence in the record. Dr. Coe answered the hypothetical question by stating, "So my answer is I do. Based on the information in the hypothetical case that you presented to me, it is my opinion that there is a causal relationship between these work activities the hypothetical individual was performing and the reported symptoms, clinical examination findings, diagnostic test findings, and the surgeries were carried out including the doctor's observations of the ulnar nerves at the time of surgery." (Dp 30). Dr. Coe was asked what is it about Petitioner's job duties that contributed to nerve entrapment (Dp 31). Dr. Coe opined that repetitive flexion and extension at the elbow is a mechanical force that can irritate, pull, push and torque the ulnar nerves as they pass over the medial epicondyle in the elbow (Dp 31-32).

On cross-examination, Dr. Coe testified that there was no atrophy at Petitioner's forearms (Dp 37). Dr. Coe agreed that there were no deficits in the use or function of his arms (Dp 37). Dr. Coe saw no need for further medical care or restrictions (Dp 38). What Petitioner indicated to him was the provocative activity at work was picking up the gears out of a box and manipulating them (Dp 40). Petitioner indicated he did this 30 times per shift, 4 times per hour (Dp 40). Dr. Coe did not gain an understanding from Petitioner as to the amount or extent of elbow flexion and extension that was involved in pulling the gears out of the boxes (Dp 41). Dr. Coe had no information as to the range of motion required when the gears were on the table (Dp 42-43). Dr. Coe has never seen in the literature regarding the degree of flexion and extension required to cause or aggravate an ulnar neuropathy at the elbow (Dp 43). There is general discussion that repeated flexion and extension at the elbow is a risk factor for ulnar nerve injury and inflammation (Dp 43). Dr. Coe opined that the greater the range of motion, the greater the risk to the ulnar nerve (Dp 43). Petitioner did not report use of power tools caused him a problem to him, but he did to Dr. Greatting (Dp 44).

19. Respondent submitted a document entitled "Essential Job Functions & Requirements" for Assembly and Test Specialist with Differential Gear Assembly that was completed by Molly Major in Safety, Manufacturing Engineer Aaron McPheeters, Group Manager Tony Pagliaro and Assembly and Test Specialist 3 Elbert Brown. This document was admitted into evidence as Rx4. The procedure for collecting data consisted of observation of the job being performed, discussion with processor, group manager and an employee performing the tasks and referenced global parts for part weights. Hours per day on this job were 8 with 2 – 10 minute breaks and a 20 minute lunch. Days per week on this job were 5. All tasks were performed while standing on level ground. The work area was approximately 20' x 30'. Parts and tools weighing 1-10 pounds and 11-25 pounds were occasionally lifted and carried less than 25% of the time. Pushing/pulling of 1-10 pounds was done occasionally using a GCI Arm less than 25% of the time; shown in attached Picture 4e. Pushing/pulling of 11-25 pounds was done occasionally using a GCI Arm (Picture 4e) less than 25% of the time. A clicker wrench (70NM, 23" long)

was used. Bending was done occasionally at waist level to retrieve parts out of a tub less than 25% of the time. Reaching at/below shoulder level was done less than 25% of the time and the GCI handles were adjustable and manipulated at chest height. Operation of knobs, levels and cranks was done less than 25% of the time; 2 bar knobs were hand tightened in the assembly process, hand tightened. Turning of wrenches, valves and handles was done less than 25% of the time; 1 clicker wrench was used in the assembly portion (Picture 2b). The press was used less than 25% of the time and manipulated with a foot pedal; either foot could activate the pedal and minimal force was required when pressing down on the foot pedal (Picture 1). The employee worked with extreme heat less than 25% of the time; 2 bearings were put into an oven for between 18-22 minutes and then placed into the assembly; personal protective equipment was provided and consisted of safety glasses, gloves, bump cap, steel toe shoes, hearing protection and oven gloves when handling bearings.

Picture 1 showed an employee using a foot actuated press to press a retainer into a bearing. His arms were extended straight out. The bearing weight was 5 pounds, the retainer weight was 1.5 pounds and frequency was 4 x/differential (8x/shift). Picture 2a showed an employee assembling a spider gear plus a bearing and retained; total weight manually lifted was 21.9 pounds. It is noted that the employee assembles 4 spider gears onto a spider differential. The spider gear weighed 15.4 pounds, the bearing plus retainer weighed 6.5 pounds and the spider differential weighed 18.99 pounds. The table height was 34" from the floor. Picture 2b showed an employee using a 70NM clicker wrench during this assembly and 26 pounds of pull force was required during this task; tool weighed 5 pounds and arms were extended during this task and at approximately 37" from the floor in height. Picture 2c showed a spider gear assembly and spider differential. Picture 2d showed 4 spider gear assemblies added to a differential. Picture 2e showed a completed assembly being lifted with a device and overhead crane. Picture 3a showed bearings and retainers stored in a stationary parts cart. Picture 4a showed a Flange ½ assembly, which was delivered to the line. Picture 4b showed the employee using the lifting device to move the Flange ½ from the delivery point to the rollover. Picture 4c showed the automatic part rollover, which was activated by a single push button. Rollover sits at 36" from the floor. Picture 4d showed 3 pound and 6 pound air powered torque tools used to secure the Flange ½ into the rollover. Picture 4e showed the employee using a GCI arm to torque 14 bolts. Both of his arms were straight out from his body with the elbows at between a 45 degree and a 90 degree angle. It was noted that the GCI arm required 21 pounds total of upward force, 14 pounds total downward force and 6 pounds of push/pull force. Two other photographs showed the employee placing bolts into the assembly and using a hand-held tool. Three photographs were part of Picture 5 and showed the employee using different tools on the assembled gears. The last 2 photographs that were part of Picture 5 showed the entire assembled gears, top and bottom.

20. Respondent submitted Petitioner's wage records and these were admitted into evidence as Rx5. The Commission noted that on the Request for Hearing form, the parties stipulated that Petitioner's average weekly wage was $617.21.

21. Respondent submitted an Ergonomic Evaluation and this was admitted into evidence as Rx6. This Evaluation indicated Petitioner reported an incident date of November 1, 2012 with complaints of his left wrist. In his Employee Statement, Petitioner wrote what happened, "Pulling spider gears out of the box and my left wrist started to hurt. I gave it an hour to see if it was temporary and then notified my supervisor and went to medical." Under Job Element Descriptions and Photos, there was a photograph of a bin box that is 54" tall. There was also a photograph of spider gears inside the box. Under task, the description noted, "1. Retrieve part from the parts bin. Bin is 54" from floor to top of bin. Carry part about 15 ft. 2. Place part on table.' Under posture it is noted, "See picture for dimensions." Under force it is noted, "For tasks 1-2: Parts weights range from 10-16 lbs." Under frequency it is noted, "1. Lift and carry 4 pieces to the table per shift."

22. Petitioner submitted medical bills and these were admitted into evidence as Px5. The medical bills show outstanding balances to providers Phoenix Physical Therapy for $1,249.00, Springfield Clinic for $345.54 and Illinois Department of Healthcare and Family Services for $193.93. The total of outstanding medical expenses is $1,788.47.

After reviewing the entire record on Remand, the Commission reverses the Decision of the Arbitrator finding that Petitioner sustained repetitive accidental injuries arising out of and in the course of his employment manifesting on November 1, 2012 for his left upper extremity and November 5, 2012 for his right upper extremity and that a causal relationship exists between those injuries and Petitioner's condition of ill-being. The Commission finds that the preponderance of credible evidence supports a finding of accident. Petitioner's testimony regarding the nature of the job and the job duties was corroborated by Mr. Moretti, his co-worker who performed the same job, as well as Respondent's witness Mr. McPheeters. The only "discrepancy", which the Arbitrator took issue with, was the number of gears assemblers completed per shift. Petitioner and Mr. Moretti testified to completing 6-8 per shift, while Mr. McPheeters testified to 2-3 being completed per shift. However, what must be noted is that Mr. McPheeters testified to transitioning into the gear assembly station in late 2012 and Respondent provided no other evidence to support Mr. McPheeters' contention that only 2-3 gears were being assembled per shift. According to Mr. McPheeters, Respondent did have records of the gear production at that time, yet no such data was offered. Notwithstanding, Mr. McPheeters corroborated Petitioner and Mr. Moretti's description that Petitioner would lift, carry, push and pull with his arms for 6 hours per shift while performing his assembly duties.

Additionally, the medical evidence supports a finding of causal connection to Petitioner's condition of ill-being. Petitioner provided a consistent history of accident and description of his job duties to Dr. Greatting, his treating surgeon, and Dr. Coe, Petitioner's evaluator. Dr. Greatting noted that Petitioner's job duties included lifting parts weighing up to 16 pounds out of boxes with each arm, placing the parts in a press, pulling the press down with both arms, flipping

the parts over and tightening nuts on such parts with air-driven impact guns. Dr. Greatting also noted that Petitioner experienced exposure to vibration using an air-driven impact wrench. Dr. Greatting opined that based on his history, Petitioner's work activities caused, contributed to or aggravated his bilateral cubital tunnel syndrome symptoms significantly. Dr. Coe opined a causal relationship exists between the repetitive strain injuries Petitioner sustained at work and his current bilateral upper extremity symptoms and state of impairment. Dr. Coe had all of the information of Petitioner's job duties, the medical records, Respondent's ergonomic evaluation, Respondent's medical department records, §12 Dr. Ellis' report and Petitioner's description of his job duties. Dr. Coe stated that "repetitive flexion and extension at the elbow is a mechanical force that can irritate, pull, push and torque the ulnar nerves as they pass over the medial epicondyle in the elbow." Dr. Coe opined that the job duties Petitioner performed are the type of activities that are recognized in his field of occupational medicine as being factors causing nerve entrapments in the upper extremities.

Dr. Ellis, the §12 evaluator, opined that Petitioner's condition was not work related, as he believed that cubital tunnel syndrome had never been linked to occupational activities, other than prolonged handheld vibratory tool use. Dr. Ellis stated that he has never seen cubital tunnel syndrome which was occupational in nature, except from the constant use of jackhammers. Dr. Ellis, however, did not have an accurate understanding of Petitioner's job duties. Dr. Ellis admitted that he did not know which tools Petitioner used at work, the duration of use of such tools, nor the vibration or kickback of said tools. Dr. Ellis never referenced assembly activities in his report, did not know which hand Petitioner used the impact wrenches or air guns in, never referenced Petitioner's elbow movements or the amount of gripping necessary or mentioned the specific tools used or the weight of the parts used in the assembly. In sum, in contrast to the Arbitrator's contention, Dr. Ellis seemingly had less information to form the basis of an opinion than Dr. Greatting or Dr. Coe. The Arbitrator's reliance on Dr. Ellis' opinion in finding against causal connection is misplaced. The Commission gives greater weight to the opinions of Dr. Greatting and Dr. Coe.

Based on the parties' stipulation on the Request for Hearing form, the Commission finds that Petitioner's average weekly wage was $617.21. The Commission finds that Petitioner was temporarily totally disabled from November 21, 2012, the date Petitioner was given restrictions and Respondent could not accommodate, through October 12, 2013, the date Dr. Greatting released Petitioner to return to work effective October 13, 2013, a period of 46-4/7 weeks at $411.48 per week. The Commission finds that Respondent is entitled to §8(j) credit for non-occupational disability benefits paid to Petitioner of $14,375.59, based on the parties' stipulation on the Request for Hearing form. The Commission finds Petitioner is entitled to medical expenses of $1,788.47 consisting of outstanding balances to providers Phoenix Physical Therapy ($1,249.00), Springfield Clinic ($345.54) and Illinois Department of Healthcare and Family Services ($193.93).

Regarding nature and extent of Petitioner's permanent partial disability, pursuant to §8.1b of the Act, the Commission shall base its determination on the following factors:

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

With regard to subsection (i) of §8.1b(b), the Commission notes that in Dr. Coe's November 13, 2013 evaluation report, Px6, DepEx2, he concluded that Petitioner's impairment is 1% right upper extremity and 1% left upper extremity. With regard to subsection (ii) of §8.1b(b), Petitioner was employed as an assembly and test specialist with Respondent and was released to return to work without restrictions effective October 13, 2013, but was subsequently laid off indefiinitely. He officially became a minister in May 2014 and is currently employed as lead pastor for Sorento Assembly of God. With regard to subsection (iii) of §8.1b(b), Petitioner was 37 year old at the time of his injury. The Commission considers Petitioner to be a younger individual and concludes he will likely have to live and work for a longer period of time than an older individual with the same injuries. With regard to subsection (iv) of §8.1b(b), the Commission notes that Petitioner's future earning capacity is unknown as there was no evidence presented as to what his current earnings are as a lead pastor. The Commission gives no weight to Petitioner's future earning capacity. With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by medical records, the Commission notes that an EMG/NCV performed on December 5, 2012 showed bilateral moderately severe cubital tunnel syndrome, more so on the left side. Dr. Greatting performed a release of the ulnar nerve at the right cubital tunnel on March 12, 2013. Dr. Greatting performed a release of the ulnar nerve at the left cubital tunnel on April 3, 2013. Dr. Greatting performed an anterior submuscular transposition of the right ulnar nerve on July 19, 2013. On August 13, 2013, Dr. Greatting prescribed physical therapy with Phoenix Physical Therapy. When Petitioner saw Dr. Greatting on October 9, 2013, he reported his right arm was doing much better and his numbness was resolved. Dr. Greatting released Petitioner to return to work without restrictions effective October 13, 2013. (Px4). Based on the above factors and the record taken as a whole, the Commission finds that Petitioner sustained permanent partial disability to the extent of 15% loss of use of the right arm and 12.5% loss of use of the left arm pursuant to §8(e) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $411.48 per week for a period of 46-4/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,788.47 for reasonable, necessary and related medical expenses under §8(a) of the Act, subject to the Medical Fee Schedule under §8.2 of the Act.

17IWCC0272

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $370.33 per week for a period of 37.95 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent loss of use of the right arm to the extent of 15%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $370.33 per week for a period of 31.63 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent loss of use of the left arm to the extent of 12.5%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. The Commission notes that Respondent paid $14,375.59 for non-occupational disability benefits and is entitled to §8(j)(2) credit in that amount.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $32,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 1 - 2017
LEC/maw
r01/05/17
43

David L. Gore

Stephen J. Mathis

SPECIAL CONCURRING OPINION

This case was scheduled for discussion on January 5, 2017 before a three-member panel of the Commission including members Mario Basurto, Stephen J. Mathis and David L. Gore, at which time discussion was held regarding the Remand Order of the Circuit Court. Subsequent to this discussion and prior to the departure of Mario Basurto on March 3, 2017, a majority of the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued prior to Commissioner Basurto's departure.

17IWCC0272

Although I was not a member of the panel in question at the time discussion was held regarding the Remand Order of the Circuit Court and I did not participate in the agreement reached by the majority in this case, I have reviewed the Decision worksheet showing how Commissioner Basurto voted in this case, as well as the provisions of the Supreme Court in *Zeigler v. Industrial Commission*, 51 Ill.2d 137, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

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

Susana Alvarado,

Petitioner,

vs. NO: 12WC 32667

Most Valuable Personnel,

Respondent,

17IWCC0273

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 benefits, temporary benefits, 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. Indus. Comm'n, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

That this Commission's Decision and Opinion on Review pertains to the above-referenced claim number, 12 WC 32667, ONLY. It is noted that Petitioner filed a companion claim, No. 12 WC 32668, which had been consolidated with 12 WC 32667 for purposes of trial. However, no Petition for Review for said companion claim, 12 WC 32668, was filed by either party. Thus, the Arbitrator's Decision in 12 WC 32668 is deemed final.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 5, 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. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 2 - 2017

DATED:
MJB/pm
O-4/24/2017
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

ALVARADO, SUSANA
Employee/Petitioner

Case# **12WC032667**

12WC032668

MOST VALUABLE PERSONNEL
Employer/Respondent

17IWCC0273

On 10/5/2015, 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 0.10% 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
MICHAEL ROM
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

4944 KOREY COTTER HEATHER RICHARDSO
NICK TATRP
20 S CLARK ST SUITE 500
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
CORRECTED ARBITRATION DECISION
19(b)

Susana Alvarado
Employee/Petitioner

v.

Most Valuable Personnel
Employer/Respondent

Case # **12** WC **32667**

Consolidated cases: **12 WC 32668**

17IWCC0273

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **February 17, 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, **June 4, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of 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 **$9,100.00**; the average weekly wage was **$175.00**.

On the date of accident, Petitioner was **56** 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 **$3,850.12** for TTD, **$2,707.66** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$6,557.78**.

ORDER

Respondent shall pay any outstanding balance for the medical bills as evidenced in Px5, Px6, Px7, Px 9, Px10, Px11, and Px12, as they were reasonable and related to Petitioner's compensable work accidents. Respondent is hereby ordered to pay any balance to said medical bills pursuant to the medical fee schedule or by prior agreement, whichever is less, pursuant to Section 8.2 of the Illinois Workers' Compensation Act and the Illinois Medical Fee Schedule.

Respondent shall authorize and pay for the reasonable and necessary costs of the right knee replacement as recommended by Dr. Giannoulias.

It is apparent from the medical records that much of the lost time in this case overlaps between Petitioner's right knee injury of June 4, 2012 (12 WC 032667) and her left hand/arm injury of August 24, 2012 (12 WC 032668). As such, the findings in regards to lost time apply to both cases and are due and owing as one sum covering both cases. Respondent shall pay the Petitioner temporary total disability benefits of $175.00 a week for 103 2/7 weeks, commencing September 4, 2012 through August 4, 2013, January 25, 2014 through February 24, 2014 and February 26,2014 through February 17, 2015 as provided in Section 8(b) of the Act. Respondent shall pay temporary partial disability from August 6, 2013 through October 4, 2013.

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

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

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

Deborah L. Simpson
Signature of Arbitrator

Oct 2, 2015
Date

ICArbDec19(b)

OCT 5 - 2015

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Susana Alvarado,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 12 WC 32667**
	)	
Most Valuable Personnel,	)	**Consolidated with:**
	)	**12 WC 32668**
Respondent.	)	
	)	

17IWCC0273

CORRECTED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on June 4, 2012, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree that on that date, the Petitioner sustained accidental injuries that arose out of and in the course of the employment and that the Petitioner gave the Respondent notice of the accident which is the subject matter of the dispute within the time limits stated in the Act. They further agree that in the year preceding the injuries, the Petitioner earned $9,100.00, and that her average weekly wage was $175.00.

At issue in this hearing is as follows: (1) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (2) Were the medical services that were provided to the Petitioner reasonable and necessary and has the Respondent paid all appropriate charges for all reasonable and necessary medical services; (3) Is the Petitioner entitled to prospective medical care; and (4) Is Petitioner entitled to TTD or TPD.

The Petitioner does not speak English. The Petitioner testified with the assistance of Noel Cortez, a certified interpreter, who has been qualified and permitted to serve as an interpreter before the IWCC since 2004. After being duly qualified and accepted by both parties as an interpreter he served as an interpreter for the Petitioner.

The Petitioner has injuries to two different body parts from two separate accidents. The cases have been consolidated for hearing. There is one transcript for both cases and one set of exhibits, however due to the fact that there are two injuries with different issues there will be two separate opinions. Per the statements of the parties, case 12 WC 32668 is related to the injury to her left arm and presents the issue of compensation for her lost time only. The first case, 12 WC 32667, presents issues regarding prospective care for her right knee, unpaid medical bills and lost time.

STATEMENT OF FACTS

The Petitioner reads and writes in Spanish. She attended school in Mexico, completing the sixth grade. She worked for the Respondent in 2012 and was working on June 4, 2012 when she was injured at the Bakery that Respondent had sent her to work at. According to Petitioner her job included putting bread on trays and sweeping. She stated that she had been working there about eight months at the time of her injury.

Respondent is a temporary labor service that provides employees to its clients on a temporary basis. Petitioner was a temporary laborer who was sent to work by Respondent at a company called Gold Standard Bakery (hereinafter the "Bakery"). Petitioner is right hand dominant. (Px 1).

On June 4, 2012, Petitioner was working at the Bakery and was sweeping when she slipped in grease and fell onto her right knee. According to her testimony, Petitioner stated that she had never previously injured her right knee. Petitioner subsequently began working light duty for Respondent at their Workforce Cicero branch office performing light office work. (Rx3).

On July 6, 2012, Petitioner began physical therapy with Advanced Occupational Medicine Specialists. (Px2). At that time, Petitioner was noted to have decreased muscle strength, tenderness to palpation, gait and postural deviation, and decreased functional mobility. It was recommended that Petitioner undergo physical therapy three times per week for two weeks. *Id.*

On July 25, 2012, Petitioner underwent an MRI of the right knee. (Px3). According to the reviewing radiologist, the MRI revealed a medial meniscus tear, grade I MCL sprain, Grade IV chondromalacia patella and small to moderate suprapatellar joint effusion. *Id.* Petitioner was referred to Dr. Christos Giannoulias for an orthopedic evaluation of her right knee. *Id.*

On August 14, 2012, Petitioner saw Dr. Giannoulias for a consultation regarding her right knee. (Px 3). On physical examination, Dr. Giannoulias noted tenderness over the medial joint line, pain with circumduction, some pain with flexion and extension, range of motion from 0 to 120 degrees, and negative Lachman and Posterior Drawer tests. Dr. Giannoulias opined that "most of the symptoms are coming from medical meniscus," and administered a cortisone injection. *Id.* Dr. Giannoulias further opined that should the symptoms persist, Petitioner may be a candidate for arthroscopic surgery. *Id.*

According to her August 22, 2012 physical therapy note, Petitioner reported marked improvement following her cortisone injection. *Id.*

On August 24, 2012, while working at her light duty job, sweeping, Petitioner tripped over a cable and fell onto her left arm. (case number 12 WC 32668) That same day, Petitioner was seen at Advanced Occupational Medicine Specialists where she underwent an x-ray of her left wrist. (Px2). According to the x-ray, Petitioner suffered a displaced distal radius fracture as

well as a left ulnar styloid fracture. *Id.* Petitioner was referred to Dr. Srdjian Ostric of Midwest PRS.

On September 4, 2012, Petitioner underwent a limited open reduction and internal fixation of the Colles fracture, one-piece extra-articular fracture. (Px1). According to Dr. Ostric, Petitioner's post-operative diagnosis was "[h]ighly impacted Colles fracture." *Id.* The surgery involved the placement of pins in the affected area. *Id.* Following the surgery, Dr. Ostric recommended Petitioner undergo physical therapy and was ordered to remain off of work until further notice. *Id.*

On October 18, 2012, Dr. Ostric removed the pins from Petitioner's left wrist. *Id.*

On November 27, 2012 Petitioner underwent a right knee arthroscopic partial medial meniscectomy and right knee multiple compartment synovectomy with Dr. Giannoulias. (Px3). Petitioner's post-operative diagnosis was right knee root horn medial meniscus tear, right knee grade II chondromalacia of the medial femoral condyle and right knee extensive multiple compartment synovitis. *Id.* Following surgery, Dr. Giannoulias recommended that Petitioner continue physical therapy to improve function and range of motion. *Id.*

Petitioner saw Dr. Ostric on January 10, 2013. (Px1). Dr. Ostric performed an x-ray on Petitioner's wrist to check the progress of her healing. *Id.* Following the x-ray, Dr. Ostric recommended that Petitioner undergo manipulation under anesthesia and tenolysis. *Id.* This surgical procedure was performed on January 23, 2013. *Id.* Petitioner was returned to physical therapy following this surgery. *Id.*

On February 5, 2013, Petitioner returned to Dr. Giannoulias for a follow up appointment for her right knee. (Px3). Dr. Giannoulias noted that Petitioner had improved and was within ten degrees of full flexion and extension and that there was quadriceps atrophy. *Id.* Dr. Giannoulias opined that he did not feel that any issues were going on with her meniscus. He wrote that Petitioner understood that she may have some soreness in the knee secondary to arthritic changes. *Id.*

Petitioner returned to Dr. Giannoulias on March 5, 2013 and Dr. Giannoulias administered another cortisone injection. *Id.* Dr. Giannoulias, noted that he explained to the Petitioner that with the degenerative changes in her knee, she may have some ongoing issues on a regular basis. *Id.*

Petitioner saw Dr. Giannoulias again on April 9, 2013. *Id.* Dr. Giannoulias noted that Petitioner had a history of osteoarthritis and administered a Hyalgan injection. *Id.* Dr. Giannoulias noted that another Hyalgen injection would need to be administered, and should the injections fail, Petitioner was a candidate for a total knee replacement. *Id.*

The second Hyalgen injection was administered on April 23, 2013 and a third one was administered on May 7, 2013. *Id.*

On May 14, 2013, at the request of Dr. Ostric, Petitioner underwent an EMG of her left arm to better understand Petitioner's ongoing pain complaints. (Px1). According to the EMG report, the test was consistent with a moderate to severe left median mononeuropathy of the wrist, which correlated with moderate to severe carpal tunnel syndrome. *Id.* Based on this, Dr. Ostric recommended that Petitioner undergo a left open carpal tunnel release. *Id.* This surgery was performed on May 31, 2013. *Id.*

On May 14, 2013, at the request of Respondent, Petitioner saw Dr. Douglas Evans of Loyola University Medical Center. (Rx1). Dr. Evans considered Petitioner to be morbidly obese at the time of his evaluation. *Id.* Based on his evaluation and review of Petitioner's records, Dr. Evans diagnosed Petitioner with having moderate to severe arthritis of the right knee and status post arthroscopy with partial meniscectomy and synovectomy. *Id.* Dr. Evans further opined that Petitioner had pre-existing arthritis in her knee, but also had symptomology referable to her medial meniscus. *Id.* Dr. Evans believed that her June 4, 2012 fall may have aggravated her right knee arthritis, as well as resulted in the tear to her medial meniscus. *Id.* Dr. Evans recommended that Petitioner cease physical therapy and undergo a trial of hyaluronic injections. *Id.* Dr. Evans further opined that Petitioner was capable of working with restrictions of no lifting greater than twenty pounds and no kneeling, squatting, crawling or climbing. *Id.* He further recommended that following the hyaluronic injections, Petitioner should undergo a functional capacity evaluation. *Id.*

On June 4, 2013, Petitioner returned to Dr. Giannoulias. (Px3). According to Dr. Giannoulias, Petitioner did not receive substantial pain relief from her Hyalgen injections. *Id.* Dr. Giannoulias noted that Petitioner had a history of arthritis. *Id.* Dr. Giannoulias diagnosed Petitioner with knee arthrosis and recommended a total knee replacement. *Id.* This was Petitioner's last visit with Dr. Giannoulias.

Petitioner returned to see Dr. Ostric on July 11, 2013. (Px1). Dr. Ostric noted marked improvement in Petitioner's left hand and recommended that Petitioner return to light duty work. *Id.* Petitioner returned to light duty work on August 5, 2013. Rx3. Petitioner next saw Dr. Ostric on August 8, 2013. (Px1). At that visit, Dr. Ostric recommended that Petitioner undergo a functional capacity evaluation (hereinafter "FCE"). *Id.*

On September 19, 2013, Petitioner underwent an FCE at Advanced Occupational Medicine Specialists. (Rx4). According to the FCE report, Petitioner's target job was that of "Bakery Worker" and the physical demand level according to the Dictionary of Occupational Titles is "Medium". *Id.* During the examination, Petitioner was reported to have given near full effort, however her effort levels fell below target on three of five effort measurements throughout the test. *Id.* Further, the examiner noted that "considerable question should be drawn to the reliability and accuracy of Ms. Alvarado's reports of pain and disability." *Id.* The examiner noted that Petitioner complained of 6 to 7 out of 10 pain, which is noted as "*Severely Disabling Pain* indicating that one needs to lie down, cannot talk, and/or has pain related tearfulness." *Id.* Despite this alleged disabling pain, Petitioner was able to complete all activities asked of her and did not demonstrate any of the observable signs of physical discomfort as previously mentioned. *Id.* Further, Petitioner reported inappropriate pain throughout multiple placebo tests, indicating symptom magnification. *Id.* According to the report, Petitioner was

capable of performing the physical demands of her pre-injury job, with the exception of standing and walking, which the examiner was unable to fully assess due to time constraints, yet she was able to complete these physical demands at the levels required to meet her target job without difficulty. *Id.* According to the report, Petitioner was capable of the following: sitting up to a third of the day, lifting 15 pounds on a frequent basis, carrying 15 pounds on a frequent basis, pushing 15 pounds on a frequent basis, pulling 15 pounds on a frequent basis, balancing on an occasional basis, stooping on an occasional basis, twisting/spiral rotation on an occasional basis, low-level work on an occasional basis, prolonged neck positioning on an occasional basis, reaching forward on an occasional basis, fingering on an occasional basis, pinching on an occasional basis, talking on an occasional basis, hearing on an occasional basis, near acuity vision on an occasional basis and depth perception on an occasional basis. *Id.* The report defined "frequent" as "1/3 to 2/3" of a day and "occasional" as "up to 1/3" of the day. *Id.*

On February 18, 2014, at Respondent's request, Petitioner saw Dr. Evans for a second time. (Rx2). Following his physical examination and review of records, Dr. Evans concluded that Petitioner's ongoing symptoms clearly referred to her arthritis. *Id.* Dr. Evans noted that x-rays beginning with the x-ray taken on the day of the accident clearly showed that this arthritis was pre-existing to her work accident. *Id.* According to Dr. Evans, he agreed with Dr. Giannoulias that Petitioner needed to undergo a total knee arthroplasty. *Id.* Dr. Evans, however, noted that given the level of arthritis present on the day of Petitioner's accident, Petitioner would have required the total knee arthroplasty regardless of her accident. *Id.* Dr. Evans opined that any aggravation of the pre-existing arthritis that she may have experienced following the accident should have resolved by that time. *Id.* Dr. Evans continued, "I do not feel that the need for a total knee replacement is referable to her work-related incident." *Id.* Dr. Evans believed Petitioner to be at maximum medical improvement with respect to her work accident. *Id.* Dr. Evans noted that Petitioner should return to work with restrictions of no kneeling, squatting, crawling or climbing and would limit her lifting to 30 pounds on an occasional basis. *Id.* These restrictions were to be permanent for her unless she underwent a total knee arthroplasty. *Id.*

On January 6, 2015, Dr. Giannoulias wrote a narrative response to Dr. Evans February 18, 2014 report. (Px4). Dr. Giannoulias indicated in his narrative that he was writing this letter in response to a letter from Petitioner's attorney, Mr. Rom, dated December 29, 2014. *Id.* Dr. Giannoulias had not seen Petitioner since June 4, 2013 and did not see her again in conjunction with the drafting of this narrative. *Id.* According to Dr. Giannoulias' narrative, Dr. Giannoulias believed that Petitioner's work accident aggravated Petitioner's pre-existing chondromalacia, and that after the surgery that he performed, Petitioner "started to degenerate the medial compartment more significantly," basing this on x-rays taken by Dr. Evans. *Id.* Dr. Giannoulias concluded that he believed that the work injury "aggravated her course" and necessitated treatment much sooner than she would have needed if it were not for this injury. *Id.* Dr. Giannoulias continued that he believed that Petitioner does need a total knee replacement, "[a]s this appears she continues to have symptoms dating back to June 4, 2013." *Id.*

Immediately following her work accident, Petitioner began working light duty for Respondent. (Rx3). According to Petitioner's wage records, Petitioner began working light duty on June 5, 2012 and continued to work light duty through September 3, 2012. *Id.* Petitioner then

returned to light duty work on August 5, 2013 and continued to work through January 24, 2014. *Id.* Petitioner subsequently returned to light duty for one day on February 25, 2014. *Id.*

According to testimony by Respondent's representative, Bill Gonzalez, on or around February 25, 2014, Respondent received Dr. Evans' second report and, based on Petitioner's FCE and Dr. Evans' stated restrictions, determined that Petitioner was capable of returning to her pre-injury job. On February 25, 2014, Mr. Gonzalez emailed staff members, including Esmerelda Gutierrez, of Respondent's Workforce Cicero location, where Petitioner was working light duty and informed those staff members that Petitioner was to be placed at her regular job. (Rx6). On February 26, 2014, Ms. Gutierrez responded to Mr. Gonzalez noting that Petitioner had reported to her light duty job assignment at Workforce Cicero and was told to report to Respondent's MVP Cicero location so that she could be re-assigned to the Bakery. *Id.* Mr. Gonzalez testified that Petitioner never reported to MVP Cicero for assignment. According to Mr. Gonzalez's testimony, Petitioner's job at the Bakery is still available to her, however, she continues to refuse the assignment.

CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987).

The burden of proving disablement and the right to temporary total disability benefits lies with the Petitioner who must show this entitlement by a preponderance of the evidence. *J.M. Jones Co. v. Industrial Commission,*71 Ill.2d 368, 375 N.E.2d 1306 (1978)

Longstanding Illinois law mandates a claimant must show that the injury is due to a cause connected to the employment to establish it arose out of employment. *Elliot v. Industrial Commission*, 153 Ill. App. 3d 238, 242 (1987).

The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission*, 44 Ill. 2d 214 (1969).

Employment need only remain a cause, not the sole cause or even the principal cause, of a claimant's condition. *Rotberg v. Industrial Comm'n,* 361 Ill.App.3d 673, 682, 297 Ill.Dec. 568, 838 N.E.2d 55 (2005).

For treatment of an employee's workplace injury to be compensable under workers' compensation laws, Petitioner must establish the treatment is necessitated by the work injury and not some other cause or condition. *Hansel & Gretel Day Care Center v Industrial Commission,* (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244.

In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill being is causally related to the injury, the Arbitrator makes the following conclusions of law:

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro v. Industrial Commission*, 207 Ill.2d 193, 203 (2003). "The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.* The Court in *Sisbro* further opined that a separate causal connection analysis must occur for cases that deal with Petitioners with pre-existing conditions. *Id.* at 204-205.

The Court stated, "[i]t has long been recognized that, in preexisting condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *Id.* The Court further noted that, "[w]hether a claimant's disability is attributable solely to a degenerative process of the preexisting condition or to an aggravation or acceleration of a preexisting condition because of an accident is a factual determination to be decided by the Industrial Commission." *Id.* at 205.

Both Petitioner's treating physician, Dr. Christos Giannoulias, and the Section 12 medical examiner, Dr. Douglas Evans, agree that all medical treatment through February 18, 2014 was reasonable and necessary. In addition, both doctors agree that Petitioner is in need of a total right knee replacement. Dr. Evans, after his second examination felt that the need for a total knee replacement is a result of a pre-existing arthritic condition. (Rx 2). However in his first report dated May 14, 2013, he indicated, after examination and review of medical treatment records that the fall on June 4, 2012 did result in her current symptoms and treatment by aggravating her arthritis and possibly causing the medial meniscus tear. (Rx 1 pg.3, 2nd paragraph.)

Petitioner's treating physician, Dr. Christos Giannoulias states his opinion as follows:

In regards to my opinion as far as causation, I do feel that her work injuries certainly aggravated her preexisting chondromalacia and after surgery, she started to degenerate the medial compartment more significantly as I have reviewed a medical report from Dr. Evans on May 14, 2014, which reveals weight bearing x-rays that revealed moderate-to-sever osteoarthritis as this is substantially different from her x-rays that she had performed after the accident in June 2012. So at the very least the work injury certainly aggravated her course and I believe that necessitated treatment much sooner than she would have needed if it were not for this injury. I do not feel that she would have required a total knee replacement in two to three years after her date of injury if she did not have the slip and fall on to her knee. She also denied any significant problems with her knee prior to this injury further strengthening the opinion of causation and aggravation. (Px 4).

The Arbitrator finds Petitioner to be credible. Based on Petitioner's testimony and the medical records submitted at trial, including those of the Section 12 medical examiner, the

Arbitrator adopts the findings and medical opinions of the treating physician, Dr. Christos Giannoulias, and finds that Petitioner's undisputed right knee injury of June 4, 2012 has resulted in the need for arthroscopic surgery and the recommended total knee replacement, as outlined by Dr. Giannoulias on January 6, 2015.

In support of the Arbitrator's decision with regard to whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid for all appropriate charges for all reasonable and necessary medical services, the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that the medical bills as evidenced in Px5, Px6, Px7, Px10, Px11, and Px12, were reasonable and related to Petitioner's compensable work accidents. Therefore, Respondent is hereby ordered to pay any balance to said medical bills to the extent that they are outstanding and to the extent that they comply with Section 8.2 of the Illinois Workers' Compensation Act and the Illinois Medical Fee Schedule.

With regard to the medical bills offered into evidence as Px8, the Arbitrator finds that Petitioner failed to carry her burden with respect to the compensability of the medical bills from Theratech Equipment as Petitioner did not produce any supporting medical records whatsoever to support the reasonableness and necessity of the medical care that is evidenced by the bills. Further, the bills themselves do not indicate what the medical equipment was for, nor do they indicate what doctor, if any, ordered the medical equipment. Having failed to carry her burden with respect to the bills found in Px8, the Arbitrator hereby denies compensation for the medical bills found in Px8.

With regard to the medical bills offered into evidence as Px9, the Arbitrator notes that these bills are related to Petitioner's independent medical examinations with Dr. Evans whom Petitioner saw at the request of the Respondent. Therefore, compensation for those medical bills found in Px9 is allowed.

With regard to the medical bill offered into evidence as Px13, Petitioner identified this exhibit as evidence of out of pocket expenses for a prescription. Nowhere in the exhibit is any payment noted, nor by whom any payment was made, nor was any testimony provided with respect to payment for this bill. Therefore, the Arbitrator concludes that Petitioner failed to carry her burden with respect to the medical bill found in Px13. Compensation for that bill is hereby denied.

In support of the Arbitrator's decision with regard to whether Petitioner is entitled to prospective medical, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein. Based upon the foregoing discussion, The Arbitrator finds that the treatment received by Petitioner to date was reasonable and necessary, and related to her work injury. The Arbitrator further finds that Petitioner is entitled to prospective medical care for her

knee; that being the total right knee replacement recommended by Dr. Giannoulias. Respondent shall authorize and pay for the medical treatment recommended by Dr. Giannoulias.

In support of the Arbitrator's decision with regard to the amount due for temporary total disability and/ or temporary partial disability, the Arbitrator makes the following conclusions of law:

It is apparent from the medical records that much of the lost time in this case overlaps between Petitioner's right knee injury of June 4, 2012 (12 WC 032667) and her left hand/arm injury of August 24, 2012 (12 WC 032668). As such, the findings in regards to lost time apply to both cases and are due and owing as one sum covering both cases.

The parties agree that Petitioner was off work from September 3, 2012 to August 5, 2013, a period stipulated to by the Respondent. Respondent further claims that Petitioner was entitled to temporary partial disability from June 5, 2012 through September 2, 2012 and August 6, 2013 through January 24, 2014. In addition, to the above, Petitioner alleges that temporary total disability benefits are due from June 5, 2012 through June 11, 2012, August 24, 2012 to the agreed date of September 3, 2012 and October 5, 2013 through the date of Arbitration, February 17, 2015.

In regards to the right knee claim, it appears that Petitioner was placed on light duty from June 11, 2012 through the date of her left hand injury on August 24, 2012. At that point Petitioner was off work completely due to her left hand injury. After her left knee scope on November 27, 2012, Petitioner was off work for both claims until being released on June 4, 2013 by Dr. Christos Giannoulias for a sitting type of job only, including a restriction of not being able to do prolonged standing, walking, squatting or kneeling. (Px 4.) Respondent failed to offer work within these restrictions or approve the recommended total right knee replacement. Dr. Douglas Evans the Section 12 examiner also placed a permanent restriction of no kneeling, squatting, crawling or climbing until the Petitioner has knee replacement surgery, as well as a limit on lifting of 30 pounds occasionally. (Rx 2)

The alleged job offer made by Respondent does not meet either doctor's restrictions and instead indicates that the only restriction is not to lift over 30 pounds. (Rx 6) The job offer does not appear to honor the doctors' restriction of no kneeling, squatting, crawling or climbing.

In regards to Petitioner's left hand, Petitioner's restrictions were outlined in the FCE dated September 19, 2013. The FCE indicates that Petitioner's target job has been identified as Medium, consisting of lifting, carrying, pushing or pulling forces of 20-50 pounds for up to one-third of the hours worked daily. (FCE, pg.7) Assuming the maximum weight the job calls for lifting is 30 pounds, it is unclear whether this description is within the restrictions of the FCE since time allocations were not mentioned.

The job offer made by Respondent does not meet the restrictions as outlined by Petitioner's treating physician Dr. Giannoulias for the knee or the FCE in regards to the hand. Having adopted Dr. Giannoulias opinions on casual connection and the need for future medical care, the Arbitrator further adopts his opinion concerning Petitioner's restrictions.

The Arbitrator finds that Respondent shall pay petitioner temporary total disability benefits of $175.00 per week for 121 5/7 weeks for the periods June 5, 2012 through June 11, 2012, August 24, 2012 through August 5, 2013, and October 5, 2013 through February 17, 2015, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the Petitioner. Petitioner also claimed temporary partial disability (TPD) for the period August 6, 2013 through October 4, 2013. Petitioner testified that she returned to light duty part-time work for this period of time. It is impossible to determine the exact dates from the evidence, and neither Petitioner nor Respondent supplied evidence of the exact dates or amounts paid during the TPD periods.

Respondent's witness, the Director of Safety & Workers' Compensation, Bill Gonzalez, testified concerning payments made to Petitioner in the "Check History Report". (Rx 3). Mr. Gonzales could not explain certain entries such as the double entry made on September 7, 2012. He did testify that payments made under "WC Tax" represented TPD payments and "WC non tax" represented TTD payments. It is not clear how the time or money was allocated when there was both TTD and TPD paid in the same week. The totals on page 17 of that document do not match with the credit claimed by Respondent. Respondent will be given credit for what was claimed on the stipulation sheet and agreed to by Petitioner that being $3,850.12 in TTD and $2,707.66 in TPD.

ORDER OF THE ARBITRATOR

Respondent shall pay the Petitioner temporary total disability benefits of $175.00 a week for 103 2/7 weeks, commencing September 4, 2012 through August 4, 2013, January 25, 2014 through February 24, 2014 and February 26,2014 through February 17, 2015 as provided in Section 8(b) of the Act. Respondent shall pay temporary partial disability from August 6, 2013 through October 4, 2013.

Respondent shall pay any outstanding balance for the medical bills as evidenced in Px5, Px6, Px7, Px 9, Px10, Px11, and Px12, as they were reasonable and related to Petitioner's compensable work accidents. Respondent is hereby ordered to pay any balance to said medical bills pursuant to the medical fee schedule or by prior agreement, whichever is less, pursuant to Section 8.2 of the Illinois Workers' Compensation Act and the Illinois Medical Fee Schedule.

Respondent shall authorize and pay for the reasonable and necessary costs of the right knee replacement as recommended by Dr. Giannoulias.

Deborah L. Simpson — Signature of Arbitrator

Oct. 2, 2015 — Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt with Supporting Conclusions	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with correction	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Edwards,

Petitioner,

vs.

NO: 12 WC 13794

17IWCC0274

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses and nature and extent of permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. In further support of the Decision, the Commission finds as follows:

Petitioner sustained an injury to his head resulting in diagnoses of a scalp contusion and headaches. RX2. As detailed in the arbitration decision, neither Dr. Jawidzik nor Dr. Herba provides a causation opinion relative to Petitioner's headaches and his work accident. Regarding the diagnoses of cervical sprain/strain and radiculopathy provided by Drs. Albert and Marsiglia of Michigan Avenue Associates and the resulting treatment, the Commission affords no weight to such opinions. Such opinions are predicated on an inaccurate history provided by Petitioner of persistent cervical pain since the accident. The medical records are void of any ongoing complaints voiced by Petitioner regarding his cervical spine or neck other than a single mention of slight stiffness in the neck which Petitioner associated to his headaches. PX3. Prior to the visit of April 4, 2013 at Michigan Avenue Associates, Petitioner failed to obtain any medical treatment following his MRI of January 24, 2014, a gap of approximately fifteen months. An

expert's opinion is only as valid as the facts upon which it is based. *Gross v. Illinois Workers' Compensation Commission*, 2011 IL App (4th) 100615WC. Given the numerous inconsistencies between Petitioner's testimony at trial and the histories provided by Petitioner to his medical providers, the Commission finds Petitioner not credible. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 19, 2015 is hereby affirmed and adopted with the above noted supporting conclusions.

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 2 - 2017
LEC/maw
o04/12/17
43

L. Elizabeth Coppoletti

Joshua D. Luskin

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

EDWARDS, DANIEL
Employee/Petitioner

Case# **12WC013794**

17IWCC0274

CITY OF CHICAGO
Employer/Respondent

On 11/19/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.33% 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:

2731 SALVATO & O'TOOLE
DAVID FROYLAN
53 W JACKSON BLVD SUITE 1750
CHICAGO, IL 60604

0010 CITY OF CHICAGO
STEPHANIE LIPMAN
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

17IWCC0274

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

Daniel Edwards
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **12 WC 13794**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **September 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. ☐ 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 17IWCC0274

On **January 3, 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 **January 3, 2012** injury, Petitioner earned **$73,216.00**; the average weekly wage was **$1,408.00.**

On the date of the **January 3, 2012** 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 **$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's claim for benefits is denied, as the claimed injuries are not causally related to the work incident of January 3, 2012.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the 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 — **11-16-2015** Date

NOV 19 2015

Daniel Edwards v. City of Chicago
12 WC 13794

FINDINGS OF FACT:

The parties stipulate that the City of Chicago (hereinafter referred to as "Respondent") was operating under the Illinois Workers' Compensation Act on January 3, 2012. On said date Daniel Edwards (hereinafter referred to as "Petitioner") claims accidental injuries that arose out of and in the course of his employment with the Respondent. On this date, he was working in the Department of Streets and Sanitation as a sanitation laborer. He was 46 years of age on this date.

Parties proceeded to hearing on September 10, 2014, with disputed issues as to accident, causation of the injuries, and nature and extent of the injuries, and medical bills. No TTD was claimed for this alleged incident.

Petitioner testified that on January 3, 2012, he was working for the Bureau of Electricity for the City of Chicago. On this date, he testified that a "small, compact, but very heavy" transformer in a box hit the top of his head when he went to retrieve a part on a shelf at work. (Tr. 8-10). This incident was unwitnessed.

Petitioner reported to Mercy Works that day, where he told Mercy Works he was "cleaning cabinets" when a small box with a transformer fell and hit the top left side of his head. (Rx 2, p.1). Mercy Works diagnosed Petitioner with (1) scalp contusion; and (2) post-traumatic headaches. (Rx 2, p.2).

At trial, Petitioner testified that he had head and neck pain when he reported to Mercy Hospital (Tr. 13-14). The medical records from Mercy Hospital (Petitioner's Exhibit 2) and Mercy Works (Respondent's Exhibit 2) do not reflect any neck complaints. A CT scan was taken on January 3, 2012 for the purposes of posttraumatic headaches. (Px 2, p. 25).

Petitioner followed up the next day with Mercy Works on January 4, 2012, where he was discharged full duty. (Rx 2, p. 2). Approximately two weeks later, on January 17, 2012, Petitioner went to Mercy Works where he requested to see a neurologist of his choice. (Rx 2, p. 3). On January 18, 2012, Petitioner saw Dr. Laura Jawidzik of Rush University Medical Center as his choice of treater. (Rx 1). Petitioner presented with complaints of headaches. (Rx 1, p.5). Dr. Jawidzik's medical notes state "this is a 50-year-old male with history of migraines and hypertension who presents to neurology clinic complaining of head pain for the past month following a minor head trauma." Petitioner told Dr. Jawidzik that he has had a long history of migraines since high school. (Px 3, p. 6).

The Rush Medical records further document, "At this point the pain in his head seems to come and go but sometimes can last for up to 1 day." (Rx 1, p.8). Petitioner's treater Dr. Jawidzik found, "A CT scan of the head is unrevealing as to the cause of the headache. It seems unlikely to me that the headache is caused by the box that struck his head. The trauma sounds quite minor and the pain did not start until 2 days following the incident. Additionally, the pain comes and goes." (Rx 1, p. 9).

Dr. Jawidzik further continued, "More importantly the CT scan of his head does show chronic lacunar infarctions in the basal ganglia and the posterior limb of the internal capsule…I suspect

most likely that these lacunar infarcts are secondary to his hypertension and his cocaine use as well as his history of smoking." Rx 1, p.9). Dr. Jawidzik wrote the following in her January 17, 2012 medical notes:

> "I have discussed with him a great deal the importance of quitting smoking and stop using cocaine. In addition I think he needs [to][sic] better control his blood pressure. The patient is quite resistant to discussions about quitting smoking and cocaine. He feels that his smoking and cocaine use are 'moderate.'" (Rx 1, p.9).

At trial, Petitioner denied drug use, and testified the last time he consumed cocaine was "30 years ago probably." (Tr. 16).

The Rush Medical records also reflect that Dr. Jawidzik called Petitioner to discuss the MRI results of January 24, 2012. She again advised Petitioner to quit smoking, quit cocaine, and keep his blood pressure under control. Dr. Jawidzik also advised that "no cause for the pain on the top of his head was found." (Rx 1, p. 40).

The next time Petitioner treated was approximately 15 months later, on April 4, 2013. (Px 5). At this time, he complained of head and neck pain. He saw Dr. Herba at Michigan Avenue Medical Associates, who he informed that he has had migraines in the past. (Px 5). Dr. Herba diagnosed Petitioner with a cervical strain/sprain and head pain (Px 5). On May 20, 2013, Dr. Herba wrote in his medical records,

> "This patient is seen in follow up. He has concern about his head pain at the point where he was struck by a box at work. However, he has multiple foci of white matter changes of the brain on his MRI of the head and it is unlikely, however, that these are due to the head trauma which he incurred." (Px 5).

Dr. Herba continued his recommendation of physical therapy for Petitioner. (Id.). At the arbitration hearing, Petitioner denied that Dr. Jawidzik told him that she suspected his complaints of headaches were caused by his prior cocaine use. (Tr. 29). He further denied his treater told him she believed it was unlikely his headaches were caused by the box striking him. (Tr. 29).

At the hearing, Petitioner further denied that that he was a smoker, and did not recall that Dr. Jawidzik told him his headaches could be caused by his hypertension and his smoking. (Tr. 29-30). Upon further cross-examination, Petitioner testified he quit smoking "probably about 4 years ago." (Tr. 30). Petitioner admitted the incident occurred approximately 3 ½ years ago. (Tr. 30). Petitioner disagreed with Dr. Jawidzik's medical records regarding his statement that his "cocaine use was moderate" at the time of the incident. (Tr. 31).

Petitioner admitted on cross examination that prior to May 2013, he had not treated for or complained of neck pain. (Tr. 32). Petitioner could not remember if Dr. Herba asked about his history of smoking or drug use or if he had told Dr. Herba about it or not. (Tr. 33).

Petitioner retired from the City of Chicago in January 2015. (Tr. 33). He testified he is not on any prescription medication for his head and has no current doctor's appointments scheduled for his headaches. (Tr. 34).

Petitioner did not testify to any injuries beyond headaches and neck pain which he understood was related to his head. (Tr. 34-35). The last time Petitioner saw a doctor for his claimed condition was in 2013. (Tr. 35).

Petitioner submitted bills into evidence which he claims are related from Michigan Avenue Medical Associates, Archer Open MRI (DOS April 11, 13), and Premier Physical Therapy. Treatment at all of these facilities began in April 2013, which was fifteen months from his last doctor's visit in February 2012. (Px 5,6, &7).

Petitioner's medical records from Premier Physical Therapy further show treatment to unclaimed body parts, including the right shoulder. Respondent denies liability for these claimed bills.

CONCLUSIONS OF LAW:

An injury is compensable under the Illinois Workers' Compensation Act only if it arises out of and in the course of employment. *Panagos v. Industrial Commission, 177 Ill.App.3d 12, 524 N.E.2d 1018 (1988)* The burden is upon the party seeking an award to prove by the preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Commission, 115 Ill.2d 524, 505 N.E.2d 1026 (1987)* The burden is also upon the employee to prove that his injuries are causally related to the employment. *New Guard v. Industrial Commission, 58 Ill.2d 164, 317 N.E.2d 524 (1974)* Critical to the determination of the aforementioned is the petitioner's credibility.

In the current case, the Petitioner's credibility was questionable regarding the medical history in his records and his testimony at trial. Thus, this Arbitrator relies on the medical records admitted in evidence.

Regarding (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? And Regarding (F) Is Petitioner's current condition of ill-being causally related to the injury?

Based on the Mercy Works records, it appears an accident did occur on the date of incident. However, this arbitrator notes that the medical records differ for how the accident occurred between the records and Petitioner's testimony at trial. The medical records from Mercy Works from the January 3, 2012, state Petitioner was "cleaning" cabinets, where as in his testimony, Petitioner testified he was looking for a part on the shelf.

Regarding causation, Petitioner's complaints of permanency at trial only involved headaches, which he believed extended into neck pain. He only testified to ongoing complaints in the form of headaches.

The medical records from both treaters Dr. Jawidzik and Dr. Herba deny a causal link to the work incident and Petitioner's ongoing headache complaints. Dr. Jawidzik found the cause of the headaches to be secondary to his hypertension and his cocaine use as well as his history of smoking.

Further, after this visit with Dr. Jawidzik, Petitioner did not seek any treatment for his claimed injuries for 15 months when he treated with Dr. Herba. Dr. Herba found that although Petitioner was concerned his head pain was caused by the box hitting his head, Petitioner has "multiple foci of white matter changes of the brain on his MRI of the head and it is unlikely, however, that these are due to the head trauma which he incurred."

Given lack of causation provided by two treaters of the Petitioner, in addition to the large gap in treatment between his initial visit with Dr. Jawidzik and his treatment with Dr. Herba and subsequent MRI and physical therapy, the Petitioner has failed to meet his burden that the injuries are causally related to the work incident of January 3, 2012.

Regarding (L) What is the nature and extent of the injury? Regarding (J) Were the medical services that were provided reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Because no causation is present, the request for permanency is denied. Furthermore, the request for medical bills is also denied as the treatment is unrelated to the work incident of January 2, 2012.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy S. Cray,

Petitioner,

vs.

NO: 14 WC 28650

17IWCC0275

Illinois State Police,

Respondent.

DECISION AND OPINION ON REVIEW

Respondent appeals the Decision of Arbitrator McCarthy finding that as a result of repetitive trauma accidental injuries arising out of and in the course of his employment manifesting on April 16, 2014, Petitioner was temporarily totally disabled from September 7, 2014 to September 13, 2014 and from October 7, 2013 to October 13, 2014, a period of 1-5/7 weeks at $1,002.65 per week, that he was entitled to reasonable and necessary medical expenses consisting of services provided by Dr. Gelber of $1,910.00, by Dr. Greatting of $11,792.00 and ordered Respondent to also reimburse Petitioner $6.47 for prescribed medications, that Respondent is to have §8(j) credit for medical expenses paid by group health insurance and that Petitioner is permanently partially disabled to the extent of 10% loss of use of his right hand and 10% loss of use of his left hand, a total period of 38 weeks. The issues on Review are whether Petitioner sustained repetitive trauma accidental injuries arising out of and in the course of his employment manifesting on April 16, 2014, whether a causal relationship exists between those injuries and Petitioner's current condition of ill-being and if so, the extent of temporary total disability, the amount of medical expenses and the nature and extent of permanent disability. The Commission, after reviewing the entire record, reverses the Decision of the Arbitrator finding that Petitioner failed to prove he sustained repetitive trauma accidental injuries arising out of and in the course of his employment manifesting on April 16, 2014 and failed to prove a causal relationship exists and denies Petitioner's claim for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 46 year old budget analyst, testified he has been employed with Respondent for 16 going on 17 years (Tr 8-9). He is responsible for the day-to-day overseeing of expenses, personal service projections, operating expenses, submitting legislation for the budget to the legislature, a lot of duties of head count tracking, reports that have to go to the Governor's Office for Management and Budget and monthly, quarterly and yearly tracking of all expenses (Tr 9). This entails a lot of keying into the computer (Tr 9). Petitioner's entire work day is basically spent on the keyboard or adding machine (Tr 10). He uses a 10-key adding machine (Tr 10).

Petitioner works in Respondent's Budget Office. When he started at the Budget Office, there was one chief and seven staff (Tr 10). That number steadily declined to where there are now one chief and two staff (Tr 10). Over time, the two staff members are probably doing more than the seven staff used to do (Tr 10). There are a lot more requirements by the legislature and the Governor's Office at this point (Tr 10).

Several years ago, Petitioner noticed that his hands would start tingling and hurting and what not when he was typing or on the adding machine (Tr 11). When this occurred, most of the time he just kind of shook his hands out to his side or just tried to stretch them a little bit (Tr 11). The tingling and pain would go away temporarily until he kept typing again and then it would start back up (Tr 11).

Eventually, Petitioner sought medical treatment (Tr 11). There were activities outside of work that caused problems with his hands (Tr 11). Petitioner would notice things while he was driving, but if he held his hand up on the steering wheel too long, his hands would start tingling and he would have to switch hands (Tr 12). He also noticed it when he would do some cooking just holding the spatula or stuff (Tr 12). When that happened to him, he would just stop for a minute (Tr 12).

At work, Petitioner has two computer screens that he works with (Tr 12). He estimated that during his workday he spends probably 6 of his 7½ hours typing and using the computer mouse (Tr 12). He would also include the 10-key adding machine in that estimate (Tr 12-13). Based upon how his desk is set up, his hands are in an up position when typing (Tr 13). Petitioner demonstrated, but this was not described. He would rest his wrist on a pad, a little foam thing in the bottom of the keyboard (Tr 13). Over the past several years his workload has increased (Tr 13).

Petitioner treated with Dr. Greatting, who performed surgery. The first surgery was done in September 2014 on a Monday. He went back to work the following Monday, so he was off work for a week (Tr 14). His second surgery was in October 2014 on a Monday. He went back to work the following Monday, so he was off work for a week (Tr 14). Petitioner did not receive

any TTD benefits while he was off work (Tr 14). Petitioner believes all his medical bills have been paid, but he is not positive with everything at the clinic (Tr 14). He submitted all his medical bills through his regular health insurance. The clinic handled submitting everything to both workers' compensation insurance and group health insurance (Tr 14-15).

Since his surgeries, Petitioner has noticed that he does not have the strength in his hands that he used to have (Tr 15). Petitioner stated, "I just, just holding on to things; one thing is like with silverware it's just kind of – after holding onto it mainly I notice it when I am cutting food." (Tr 15). At work it is not too bad. He can go quite a while before his hands start getting tired and start tingling (Tr 15). He stated, "It's gotten a lot better." (Tr 15). Petitioner kind of understood the difference between gross manipulation and fine manipulation (Tr 15). Gross manipulation is holding a cup in his hand (Tr 15-16). For fine manipulation, if he were to hold a briefcase between his fingers, the briefcase would probably hit the floor; he can hold it for a little while (Tr 16). He has lost a substantial amount of his grip (Tr 16). Petitioner has a motorcycle, but does not drive it very much, not nearly as much as he would like to (Tr 16). He cuts his grass with a riding mower (Tr 16). He does some cooking (Tr 17).

On cross-examination, Petitioner testified that over the years, the Governor's Office has put additional duties on reporting and finance related head counting (Tr 17). Some of this happened during the Blagojevich administration, some from the consolidations, things that were done during the Quinn administration, other items were added on (Tr 17). Petitioner described what a typical work day is for him, starting at 8:30 a.m. and ending at 5:00 p.m.: "When I get there I check the E-mail from anything that happened overnight. At this point in time it's very different than a normal year just with not having a budget in place; but it's a matter of checking any expenditures that anybody wants to purchase, they have to verify that the money is there or not there in this case; working with the cost centers to make sure that they are spending within their limits; verifying payrolls that are run overnight. At this time of year get questions from Legislators that have to be answered and researched." (Tr 18). Most of his bookkeeping is in Excel worksheets and he tries to verify that everything is on there (Tr 18). He also confirms with the Comptroller's system and also with a software program internally that tracks expenses and appropriations (Tr 18-19). Basically, Petitioner would get an E-mail asking him to verify it, then he would open his Excel sheet and look for it (Tr 19). The other way is for him to get online with the Comptroller to verify that and then with the software system is another one he has to sign onto to verify and either come over E-mail or paper (Tr 19).

Petitioner testified that for payroll he mainly gets a computer run each night of what is run verifying that and making sure nothing is bouncing at the Comptroller. It is pretty much the same process (Tr 19). Research for questions raised by Legislators consist a lot of doing internal research of historical records. Petitioner has file cabinets going back 30 or 40 years of stuff (Tr 20). It depends on what the question is. It could relate to the fleet stance everywhere to what was the head count back in 1980. Unfortunately, there is no rhyme or reason what they are going to ask (Tr 20). Petitioner would then have to go to get some books, wherever they are at or try to find the answer on his computer where he has historical data and then submit that back to the

legislators (Tr 20). Petitioner wishes he could take his two 15-minute breaks during the workday and could not tell the last time he took a break at work (Tr 20). Petitioner was asked and answered the following: "Q. So it sounds like your tasks vary as you have to go from one thing to another as it comes in; you don't really get to focus on one thing at a time? A. No, not really. It's a lot of – I mean all my expenditures are coming through and I try to do them at one point and run through what I have, and then I will switch to the next topic and work on that depending on what takes priority." (Tr 21). When doing expenditures, it is reading through them finding the explanation of why it has to be spent this year compared to not being spent until next year (Tr 21). It is a matter of getting on the computer and verifying that they actually have money left to spend (Tr 21). That is a good portion of what he does at work (Tr 21-22). He is doing more scanning of documents he has typed up (Tr 22). He prints it out, then scans it and sends it somewhere (Tr 22-23).

For probably several years, Petitioner has been putting up with the tingling and the pain. It was where he could shake it out. The pain was waking him up at night (Tr 23). When he could not take it anymore, Petitioner went to Dr. Greatting (Tr 23). At that point he was having problems holding silverware and the other problems he described (Tr 23). It was a couple months after each procedure where Petitioner noticed a difference (Tr 23). The tingling went away pretty quickly after each surgery and the pain eased up after a couple months (Tr 23-24). Petitioner just does not have the strength in his hands anymore (Tr 24). Before the surgery, he would try to pick something up with his fingertips and hold it for about 15 seconds, then he could not do it anymore (Tr 24). They would start tingling and he would have to put it down because it hurt too much. Now Petitioner can probably hold something for 30 or 45 seconds before he has to switch hands; he just does not have the strength (Tr 24).

On re-direct examination, Petitioner testified he verifies money on the computer (Tr 25). Petitioner is typing things in to check the records, either through the Comptroller's website or through a software package or just in Excel workbooks that he uses (Tr 25). For the cost center, Petitioner is keying things in to look something up, with the sole exception of the paperwork where he does not use a computer and it is in a file drawer (Tr 25-26). The majority of the payroll search is done by key entry into the computer (Tr 26). The real hectic portion of the year runs from about November through February when they have to put together what is called an ISL, which is about a 600 page document that is submitted to the legislature. All 600 pages of the ISL are keyed in by hand, every number, paragraph, whatever (Tr 26). The ISL is done so that the legislature can pass the budget (Tr 27).

On re-cross examination, Petitioner testified that regarding research, depending on which system he is going into, Petitioner has to sign on with an ID and password. He puts in appropriation numbers, cost center numbers and sometimes typing in vendor names (Tr 27). Petitioner was asked and answered the following: "Q. You are not writing like paragraphs of information, be more of using like control F or answering like the short questions? A. Yeah, it's – a lot of it is number orientated. You are trying to research – an appropriate number is about a, like a 16 digit number and that's – you are typing that in each screen you are looking at trying to

figure something out. Q. And then on each one you are going through the paperwork, then typing back and forth? A. Yes." (Tr 27-28).

2. According to the medical records from Springfield Clinic, Px3, Petitioner saw Dr. Greatting on April 16, 2014 and complained of bilateral hand pain, numbness, tingling and stiffness. He reported difficulty with gripping and driving. Petitioner also reported that his right index finger from a previous trigger finger release had problems with locking and stiffness in the morning. No EMG had been done. Petitioner had a past medical history of Dr. Greatting performing right index finger trigger finger release on October 15, 2013. Dr. Greatting noted Petitioner was complaining of increasing numbness and tingling in his hands and it bothered him frequently at night and with various activities during the day. Petitioner complained of some stiffness in his hands in the morning, right greater than left, which will lasted about 30 minutes. On examination, Dr. Greatting found pretty good motion of his elbows, forearms, wrists and hands. There was some mild tenderness in his wrists, positive Tinel's, Phalen's and compression tests over both carpal tunnels and no thenar atrophy or weakness. Dr. Greatting ordered an EMG/NCV to evaluate the carpal tunnel and recommended arthritis panel due to complaints of stiffness. Petitioner's right hand was x-rayed and he was to follow-up after the EMG/NCV.

3. Springfield Clinic medical records, Px2, show Dr. Gelber performed an EMG/NCV on May 2, 2014. Dr. Gelber commented that the nerve conduction studies of the upper extremities was remarkable for significant prolonged median sensory and motor distal latencies bilaterally. It was Dr. Gelber's impression that this was an abnormal EMG/NCV of the upper extremities suggestive of the following: 1) moderately-severe bilateral carpal tunnel syndrome; 2) no evidence of ulnar neuropathy or of radial neuropathy; 3) no evidence of peripheral neuropathy, brachial plexopathy or cervical radiculopathy.

Petitioner followed-up with Dr. Greatting on May 8, 2014. Dr. Greatting noted the EMG/NCV results. His examination was unchanged. Dr. Greatting's assessment was carpal tunnel syndrome. Options were discussed and Petitioner decided to proceed with right carpal tunnel release surgery, followed by left carpal tunnel release surgery four weeks later. Petitioner was to return for the right side surgery. (Px3).

4. In the Supervisor's Report of Injury or Illness dated April 24, 2014, Rx1, Petitioner's previous job title was listed as accountant supervisor for 9 years. His current title was budget analyst for 2.5 years. No accident was noted as occurring. Description of Accident/Incident was noted as: "Tim had a doctor's appointment on 4/16/14. The doctor advised possible carpal tunnel."

5. In his Operative Report dated September 9, 2014, Dr. Greatting noted his pre-operative diagnosis of right carpal tunnel syndrome. Dr. Greatting performed a right carpal tunnel release. On September 12, 2014, Dr. Greatting noted there was no change in history or examination. Dr. Greatting noted on September 24, 2014 that the right side incisions were well healed and

the sutures were removed. Petitioner reported the numbness was already markedly improved. Theraputty was provided with instructions for use. Scar massage instructions were also given. He was to return for the left carpal tunnel release. In his October 7, 2014 Operative Report, Dr. Greatting noted a pre-operative diagnosis of left carpal tunnel syndrome. Dr. Greatting performed a left carpal tunnel release. Petitioner reported to Dr. Greatting on October 21, 2014 that the numbness in both hands was markedly improved. The incision was well healed and the sutures were removed. Petitioner was given normal post-operative instructions and he would be seen back as needed. (Px3).

6. At Respondent's request, Petitioner saw Dr. Williams on January 14, 2015 for a §12 evaluation. In his March 23, 2015 report, Rx3, DepEx2, Dr. Williams noted that Petitioner was a 47 year old right hand dominant male who has worked as a Public Administrator 1 with the Illinois State Police. He has worked in the budget office with a date of hire of 1999. Petitioner is still working without restrictions. He worked as an accountant for 2 years and did the same job tasks. Petitioner reported he would do work on a computer with Excel and with Lotus. He used a 10-key calculator. He did spreadsheets on Excel and created Word documents. He took care of ledger books. He did taxing, copying, filing, stapling with his right hand, un-stapling with his right hand. He used a mouse with his right hand. He did the 10-key calculator with his right hand. He was an account supervisor, which he then did for the next 10 years. Petitioner reported that for the last 2½ to 3 years, he has been a public service administrator, essentially doing the same job tasks as he always has. He works from 8:30 a.m. to 5:00 p.m. Monday through Friday with a 1-hour lunch and two 15-minute breaks. He had no previous workers' compensation claims. Dr. Williams noted a past medical history of two trigger finger releases in the right thumb and index fingers. Petitioner's current symptoms before surgery were on the right. He rated his pain at rest on the right at a 4/10 and on the left 5/10, prior to surgery. With activity, on the right he rated pain at 8-9/10 and on the left rated pain at 10+/10. There was numbness and tingling on both sides and nighttime awakening on both sides. There was weakness on both sides and he would drop things both on the right and left. Petitioner reported that presently he had 0/10 pain on either side and at rest. With activity, pain on the right and left was rated at 1-2/10, for which he took Aleve as needed. There was currently no numbness or tingling on the right or left and no nighttime awakening. Petitioner reported he still had some weakness, which is less than what it was, but still has some present and denied dropping anything on either side.

On request, Petitioner drew his workstation for Dr. Williams. Petitioner drew a U-shaped desk and he sits near the apex of the U. He has two flat-panel monitors. He has a mouse pad to the right-hand side of the keyboard. He has a wrist paid for the keyboard. His chair rises and lowers, has armrests, wheels and a back support. He has a 10-key calculator to the right of his keyboard and of his mouse. He has a phone with no headset or headrest or shoulder support. He has a printer to the right-hand side, as well as files and binders in back of him, where he would sit, as well as an in-box to the left-hand side of his main working area. Dr. Williams noted, "He denied resting his wrists and/or elbows on the edge of the table while typing, as well as denied having his wrists in extreme flexion or extension while doing either of those activities."

Dr. Williams further noted Petitioner is 5'11' and weighs 290 pounds. Petitioner reported his problem first occurred on April 16, 2014. It is worse with his hand bent back. Petitioner denied any history of diabetes, hypertension or thyroid dysfunction. He denied tobacco or alcohol use. He is currently still working regular duty as a budget analyst. Petitioner reported he has had a Honda Shadow motorcycle for 5 years, but stated he rarely rides a motorcycle. His motorcycle has 5,000 miles total, so less than 1,000 miles a year. He denied hunting. Petitioner reported he returned to work on November 4, 2014 with a full duty release.

Dr. Williams noted that the First Report of Injury is dated April 17, 2014 with a date of injury of April 16, 2014. The First Report states, "Has been having pain for years and went to get it checked out. Repetitive motion over a period of years..." The First Report further stated, "...it finally got so bad that he had to go to a Dr." The First Report also noted Petitioner's condition was carpal tunnel syndrome, cumulative trauma, and that he was treating with Dr. Greatting.

Dr. Williams noted that he also reviewed the Employee's Notice of Injury, which noted medical attention was sought with Dr. Greatting. The date of injury was April 16, 2014 and was reported to Carol Rakers at 9:00 a.m. on that date. It was noted that this was due to repetitive motion of typing and 10-key punching. It was noted that Petitioner reported severe pain, numbness and lack of strength in both hands. It was noted that there were no witnesses to the injury and Petitioner had not submitted a previous claim. Petitioner signed this document on April 21, 2014.

Dr. Williams noted a Supervisor's Report of Injury or Illness prepared by Carol Rakers on April 24, 2014. No accident was noted. It was noted, "Tim had a doctor's appointment on 4/16/14. The doctor advised possible carpal tunnel."

Dr. Williams noted that he had reviewed Dr. Greatting's records and noted same. Dr. Williams reviewed Petitioner's job description with him and Petitioner found no significant discrepancies and agreed it was consistent with the job duties he performed. On examination, Dr. Williams found Petitioner is 5'11" tall and weighs 290 pounds, which placed his body mass index at over 40 into an obese Category 3, and opined this puts him at into a significantly increased risk for peripheral neuropathy. There was no atrophy within the thenar or hypothenar eminence of his hand, well-healed surgical scars non-tender to palpation, no hypersensitivity to light touch, full range of motion, bell-shaped curve on grip testing with a Jamar dynamometer from position #1 to position #5 bilaterally with a negative rapid exchange, indicating a good effort is given. There was negative Tinel's, negative Phalen's and negative median nerve compression test at the carpal tunnel on the right and left, negative Tinel's at the cubital tunnel, negative elbow flexion test with positive ulnar subluxation bilaterally. There was no CMC joint tenderness, no crepitus, no grinding and good radial pulses with a normal Allen's test.

Dr. Williams opined that P did indeed suffer from bilateral CTS and had undergone bilateral surgical releases. Dr. Williams opined, "I do not believe his work duties in any way

caused and/or aggravated his condition of bilateral carpal tunnel syndrome. I believe his problem was most likely idiopathic in nature and unrelated to his work activities. His work activities did not involve any vibration or any impact on his hands. He did not complain of any problems with the ergonomic nature of his workstation." Dr. Williams found no symptom magnification or malingering. Dr. Williams opined Petitioner's treatment had been reasonable and necessary. Dr. Williams opined Petitioner had reached maximum medical improvement and noted that he had been working full duty and opined he can continue to do so.

7. Petitioner followed-up with Dr. Greatting on March 30, 2015. Dr. Greatting opined that Petitioner had good resolution of the numbness and tingling in his hands. Petitioner reported he felt some weakness in his hands. Petitioner was there to discuss whether his bilateral carpal tunnel syndrome was related to his work activities or not. Dr. Greatting noted Petitioner was currently 47 years old and right hand dominant. He did not smoke. Petitioner had no outside interests or hobbies which he did on a frequent or regular basis. Dr. Greatting noted, "He has no diabetes mellitus or other medical conditions which would predispose him to developing carpal tunnel syndrome, except for some mild obesity. He works as a budget analyst for the Illinois State Police. He has done this job for 15 years. When he first started working there he said there were 7 employees in the area where he did his work. He says now there are 2 employees doing the same amount of work. He describes basically keyboarding, using a mouse or a 10-key pad the great majority of his time at work. He does very little writing. He does do some filing. He says while doing his work activities prior to the carpal tunnel releases he would frequently have to stop and shake his hands to get rid of the numbness and tingling. He did also note that if he had a week off for vacation or a long weekend his symptoms would significantly improve, and then when he would return to work his symptoms would again worsen. He stated today that if he took a week off, by the end of that week he would not be waking up at night with numbness and tingling and his symptoms would be much less frequent during the day."

On examination, Dr. Greatting found the incisions well healed, negative Tinel's over both carpal tunnels and good strength of his abductor pollicis brevis. Dr. Greatting noted, "I discussed with him today that there is no medical literature or evidence that suggests that carpal tunnel syndrome can be directly caused by keyboarding type of activities or use of a mouse. I did tell him today that based on his history I do feel that the work activities that he described to me were a significant aggravating factor or factor which accelerated the development of his symptoms to the point where he required surgical treatment." Petitioner was released from Dr. Greatting's care and was to be seen as needed. (Px3).

8. In his January 12, 2016 deposition, Px7, Dr. Greatting testified he is a board certified orthopedic surgeon. Dr. Greatting recited from his records, already in above. Dr. Greatting noted the laboratory tests were normal and so Petitioner had no arthritic process. Hand x-rays were normal and unremarkable (Dp 10). Dr. Greatting testified he did not really discuss with Petitioner his work activities until March 30, 2015 (Dp 13). Dr. Greatting noted his March 30, 2015 office notes, already in above. Dr. Greatting testified the term flexion with respect to the wrist means bending the wrist downward and extension is bending the wrist upward (Dp 13).

Dr. Greatting opined that the more flexion or extension, the more pressure in the carpal tunnel (Dp 14). Dr. Greatting opined that typing activities or any activities manipulating the fingers increases the movement of the tendons and things that are also in the carpal tunnel (Dp 14). Repeated hand movements can cause the membrane surrounding the tendons to swell, which is called tenosynovitis (Dp 14). The more flexion or extension, the greater the amount of pressure (Dp 14). Dr. Greatting opined, "I don't think his work activities caused his carpal tunnel, no." (Dp 15). Dr. Greatting opined, "I think based on the history he provided to me and his past medical history as well as his history of no frequent or regular outside interest or hobbies that his work activities did aggravate or accelerate the symptoms of his carpal tunnel." (Dp 15). Dr. Greatting had been practicing since 1991 and he has performed numerous carpal tunnel surgeries (Dp 15). Dr. Greatting testified idiopathic means you do not know the cause of something (Dp 16). Dr. Greatting was not aware of any other conditions of Petitioner that would cause carpal tunnel syndrome (Dp 16). Dr. Greatting noted Petitioner did not have diabetes or any other medical condition which would cause him to develop carpal tunnel syndrome. He did not smoke. Petitioner was slightly obese, which can make you a little more likely to have carpal tunnel syndrome, but he had no other conditions or issues that he was aware of (Dp 16). Dr. Greatting opined diabetes can cause changes in the nerve and in the tissues in the carpal tunnel. Dr. Greatting acknowledged diabetes can cause carpal tunnel syndrome to develop (Dp 16).

On cross-examination, Dr. Greatting noted Petitioner's body mass index was basically 41 or 42 and that would be mild obesity (Dp 17). Mild obesity would begin at 30 body mass index (Dp 17). Dr. Greatting did not know how much higher the body mass index would have to go for it not to be mild (Dp 17). Dr. Greatting's opinion about Petitioner being aggravated or accelerated is almost entirely based on his history of symptoms increasing while doing his work activities and being significantly better if he had any sustained periods of time away from work (Dp 18). Dr. Greatting did not specifically ask Petitioner if there was anything that caused him to become symptomatic outside of work (Dp 18). At no point in time did Dr. Greatting talk to Petitioner about things that caused him to be symptomatic outside of work (Dp 18). Dr. Greatting opined that Petitioner would likely have had symptoms away from work also (Dp 19). Dr. Greatting opined that riding a motorcycle could cause symptoms of carpal tunnel syndrome if someone has that diagnosed (Dp 19). Dr. Greatting explained that it could either be positioning of the hands as far as the way the wrists are flexed or extended or it also could be some degree of vibration exposure from the motorcycle itself (Dp 19). If you bring the wrist back to neutral, the pressure goes lower basically (Tr 20). Dr. Greatting did not think there was a defined time for how long somebody would need to be flexed, like keyboarding, to cause carpal tunnel syndrome to become aggravated (Dp 20). Carpal tunnel syndrome is not something that happens immediately and different people have different tolerances to activities, so it is probably something that happens over a cumulative of months or years for people to become symptomatic (Dp 21). At the March 30, 2015 visit, Petitioner's pain scale was 0 to 10 at rest (Dp 21). Dr. Greatting opined that keyboarding does not cause carpal tunnel syndrome (Dp 21).

9. In his January 28, 2016 deposition, Rx3, Dr. Williams testified he is a board certified orthopedic surgeon. Dr. Williams recited from his report, already in above. With Respondent, Petitioner was an accountant for 2 years, then an account supervisor for 10 years and then a Public Service Administrator for the last 2½ to 3 years. Dr. Williams opined Petitioner was morbidly obese, not mildly obese (Dp 13).

On cross-examination, Dr. Williams agreed with Dr. Greatting's diagnosis of bilateral carpal tunnel syndrome. Dr. Williams agreed that Petitioner's treatment was reasonable and necessary. Dr. Williams opined that placing pressure over the carpal tunnel can cause carpal tunnel syndrome if a non-ergonomic nature of the work station is present. Dr. Williams described that flexion is bending of the wrist; if the palm is to the floor, flexion is bending the wrist towards the floor. Extension, if the palm is toward the floor, it would be elevating the wrist toward the ceiling (Dp 16). Dr. Williams opined that if a person is using his hands in a flexed position, that can aggravate the carpal tunnel if it is for a prolonged period of time (Dp 16). Six to seven hours would be considered a prolonged period of time if it is constant (Dp 16-17). Dr. Williams is familiar with Dr. Gelberman's study which showed that flexion of the wrist over 30 degrees can triple or quadruple the pressure on the carpal tunnel, if the wrist was maintained in that position for a prolonged period of time (Dp 17). This would also apply if the wrist was held in an extension (Dp 17). Obesity is one element in the propensity to develop carpal tunnel syndrome and that does not mean that a person will develop carpal tunnel syndrome (Dp 18).

10. Petitioner's attorney submitted the following into evidence and the Arbitrator admitted same: Px1: Application for Adjustment of Claim; Px4: Medical Bill from Dr. Gelber for EMG/NCV for $1,910.00; Px5: Medical Bills from Dr. Greatting totaling $11,792.00; Px6: Walgreens pharmacy co-payment on September 9, 2014 for $6.47. Respondent's attorney submitted the following into evidence and the Arbitrator admitted same: Rx2: Wage Statement. The Commission notes that average weekly wage was not at issue on review.

Based on the record as a whole, the Commission reverses the Decision of the Arbitrator finding that Petitioner failed to prove he sustained repetitive trauma accidental injuries arising out of and in the course of his employment manifesting on April 16, 2014 and failed to prove a causal relationship exists. The Commission denies Petitioner's claim.

The Commission notes that Petitioner's typing of words was sporadic. He did not testify that he was doing constant typing, such as narrative reports, except for the 600 page document produced between November and February. Petitioner did not testify whether he alone produced this document and did not testify as to what portion of it he did or if he produced the whole document. The vast majority of Petitioner's work was doing number crunching, which would not be constant or stressing as much on his wrists as typing narratives would be. Petitioner also testified that his hands are in an up position when typing and he would rest his wrist on a little foam pad in the bottom of the keyboard. Therefore, Petitioner's wrists would be slightly above a neutral position.

17IWCC0275

Treating physician Dr. Greatting opined, "I discussed with him today that there is no medical literature or evidence that suggests that carpal tunnel syndrome can be directly caused by keyboarding type of activities or use of a mouse. I did tell him today that based on his history I do feel that the work activities that he described to me were a significant aggravating factor or factor which accelerated the development of his symptoms to the point where he required surgical treatment." §12 Dr. Williams opined that Petitioner's obesity put him at into a significantly increased risk for peripheral neuropathy. §12 Dr. Williams opined, "I do not believe his work duties in any way caused and/or aggravated his condition of bilateral carpal tunnel syndrome. I believe his problem was most likely idiopathic in nature and unrelated to his work activities. His work activities did not involve any vibration or any impact on his hands. He did not complain of any problems with the ergonomic nature of his workstation." The Commission gives greater weight to the opinions of §12 Dr. Williams as he was most familiar with Petitioner's workstation and the way he typed.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove that he sustained repetitive trauma accidental injuries arising out of and in the course of his employment manifesting on April 16, 2014 and failed to prove a causal relationship exists, his claim for compensation and medical expenses is hereby denied.

DATED: MAY 2 - 2017
KWL/maw
o03/09/17
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Kevin W. Lamborn

Stephen J. Mathis

David L. Gore

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Pena, Petitioner,	)	17IWCC0276
vs.	)	No. 12 WC 20451
Superior Health Linens, Respondent.	)	

DECISION AND OPINION OF REVIEW

This matter comes before the Illinois Workers' Compensation Commission on the motion of the Petitioner to Review the Arbitration Decision filed on March 30, 2016, and received on March 30, 2016, Denying the Petitioner's Motion to Reinstate the Case, which was dismissed for want of prosecution on July 7, 2015. (A copy of the order was not attached to the motion). The Petitioner's Motion to Review was set for hearing before the Commission on April 27, 2017. The Respondent was present by counsel, the Petitioner failed to appear.

The Commission, having reviewed the record of the proceedings before the Arbitrator on March 30, 2016, in the City of Wheaton, County of Du Page, the pleadings that were filed by the parties and the Commission file, being fully apprised of the circumstances and the applicable law, hereby affirms and adopts the oral decision of the Arbitrator denying the motion to reinstate made and entered on March 30, 2016, in the presence of the Attorneys for the respective parties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the oral Decision of the Arbitrator of March 30, 2016, is hereby affirmed and adopted.

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

DATED: MAY 2 - 2017
O4/27/17
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

David L. Gore

David L. Gore

Stephen J. Mathis

Stephen J. Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey Hayes,
Petitioner,

vs.

Elmhurst Fire Department,
Respondent.

17IWCC0277

NO: 15 WC 15204

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 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.

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

DATED: MAY 2 - 2017
o4/27/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

17IWCC0277

HAYES, JEFFREY
Employee/Petitioner

Case# **15WC015204**

ELMHURST FIRE DEPARTMENT
Employer/Respondent

On 9/6/2016, 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 0.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0412 RIDGE & DOWNS
TIMOTHY R LEA
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

0445 RODDY LAW LTD
RICHARD S ZENZ
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
NATURE AND EXTENT ONLY

Jeffrey Hayes
Employee/Petitioner

v.

Elmhurst Fire Department
Employer/Respondent

Case # **15** WC **15204**

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **July 25, 2016**. By stipulation, the parties agree:

On the date of accident, **January 10, 2015**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**114,400.00**, and the average weekly wage was $**2,200.00**.

At the time of injury, Petitioner was **48** 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 $**23,962.26** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**23,962.26**.

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 **37.5** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **the permanent partial loss of use of the whole person to the extent of 7.5% thereof.**

Respondent shall pay Petitioner compensation that has accrued from **7/15/15** through **present**, and shall pay the remainder of the award, if any, in weekly payments. All compensation has accrued.

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

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

Signature of Arbitrator

9/1/16
Date

SEP - 6 2016

Jeffrey Hayes v. Elmhurst Fire Department, 15 WC 15204
Attachment to Corrected Arbitration Decision Nature and Extent Only

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jeffrey Hayes is a Lieutenant on the Elmhurst Fire Department. He suffered an injury on January 10, 2015 when he fell on ice while answering a call. He came under the care of Dr. Guido Marra who diagnosed a rotator cuff rupture. On February 16, 2016, the Petitioner underwent surgery at Northwestern Memorial Hospital. The postoperative diagnosis was a left subscapularis rupture and a left biceps tendon subluxation. After a course of therapy, the Petitioner was released to full duty by Dr. Marra and returned to his full duties as a Lieutenant on the Elmhurst Fire Department. The petitioner's testimony related only that he has returned to full duty and that he occasionally gets night pain if he lies on the left shoulder .He occasionally gets numbness. To this day he remains at full duty and his job as a Lieutenant primarily involves supervision of firefighters, even at the scene of a fire.

With regard to the issue of permanent partial disability the Arbitrator notes that pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. Applying this standard to this claim, the Arbitrator notes the following.

i) Neither party presented an impairment rating. Therefore, the Arbitrator does not take that matter into consideration.
ii) The Petitioner is a firefighter who primarily acts in a supervisory capacity but has been released to full duty and continues to work at that level. The Arbitrator places great weight on this factor.
iii) The Petitioner is currently 49 years of age but continues in the performance of his full duties. There is no medical evidence to indicate that he will be unable to continue at that level. The Arbitrator places some weight on this factor.
iv) No evidence was presented that demonstrates that the Petitioner has any loss of earning capacity and therefore, the Arbitrator places no weight on this factor.
v) With regard to the issue of disability in the medical records and his testimony at trial, the Arbitrator notes that the petitioner has minimal complaints of pain. He did not testify to any significant limitations of his activities either in the workplace or outside of his employment. He exercises at least three days per week. In finding the Petitioner at MMI, Dr. Marra noted that Hayes was doing well, had a pain level of zero and was taking no pain medication. He had full range of motion and all testing of the left upper extremity revealed no problems or complaints. The following tests were negative: Neer, Hawkins, Painful Arc, AC joint tenderness, Crossover test, Posterior capsular Contracture, O'Brien's test, Relocation test and Speed's test. There were no positive findings. The Arbitrator places considerable weight on this factor.

Based upon these factors from Section 8.1b, the Arbitrator concludes that the Petitioner has suffered the permanent partial loss of use of the whole person to the extent of 7.5% thereof.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

17IWCC0278

Timothy Skorepa,
Petitioner,
vs.

NO: 10 WC 36348

Berwyn Park District and
Berwyn Police Department,
Respondents.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 10, 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.

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

DATED: MAY 2 - 2017
o4/27/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0278

SKOREPA, TIMOTHY
Employee/Petitioner

Case# **10WC036348**

BERWYN PARK DISTRICT AND BERWYN POLICE DEPARTMENT
Employer/Respondent

On 5/10/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2356 FOHRMAN, DONALD W & ASSOC
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60610

2988 CUDA LAW OFFICES
ANTHONY CUDA
6325 W NORTH AVE SUITE 204
OAK PARK, IL 60302

0075 POWER & CRONIN LTD
RORY McCANN
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

17IWCC0278

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

TIMOTHY SKOREPA
Employee/Petitioner

Case # **10** WC **36348**

v.

BERWYN PARK DISTRICT and Berwyn Police Department
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **2/24/16 and 4/27/16**. 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 _____

17IWCC0278

FINDINGS

On **8/21/2010**, 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 **$9,100.00**; the average weekly wage was **$175.00**.

On the date of accident, Petitioner was **31** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$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

Medical benefits
Respondent Berwyn Park District shall pay reasonable and necessary medical services of $39,347.30, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability
Respondent Berwyn Park District shall pay Petitioner temporary total disability benefits of $175.00/week for 29-1/7 weeks, commencing 8/22/10 through 3/13/11, as provided in Section 8(b) of the Act.

Permanent Partial Disability: Schedule injury
Respondent Berwyn Park District shall pay Petitioner permanent partial disability benefits of $175.00/week for 43 weeks, because the injuries sustained caused the 20% loss of the Left Leg, as provided in Section 8(e) of the Act

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

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

David A. Kane
Signature of Arbitrator

May 10, 2016
Date

MAY 10 2016

Attachment to Arbitrator Decision

IWCC# 10 WC 36348

FINDINGS OF FACT

Petitioner was hired in 2001 as an auxiliary police officer with the Berwyn Police Department. His primary duties involved assisting police department in parking, traffic and parades. Petitioner was authorized to carry a weapon, but the weapon was his own and not provided by the police department. He was permitted to stop and detain, but the arrest would normally have to be made by a full time officer. Petitioner usually worked once or twice per month with the department. In January of 2005, he achieved certification as a part-time officer with the State of Illinois. The job provided him some additional authority, but essentially he performed the same job duties.

In 2005, petitioner acquired a second job as a patrolman with the Berwyn Park District. The Park District was aware of petitioner's job with the police department and, in fact, all of the hired patrol officers were on the either Berwyn Auxiliary Police or part-time police officers.(Park Ex.1) Petitioner's job duties involved him patrolling the various Park District sites. The Park District had its own patrol cars that were marked and contained a siren. The patrol car was equipped with a radio that dispatched through the police department and had its separate channel for park district matters. Petitioner wore his police uniform in the performance of his job with the Park District. Petitioner also was equipped with a police radio. As a Park District patrolman, he was considered to be on a detail and could be called in by the police department if it required additional personnel.

On August 21, 2010, petitioner was clocked in with the Berwyn Park District. Close to the end of shift, he was traveling northbound on Oak Park Avenue, headed to Mraz Park. On his police radio, he overheard the radio message of police officer who reported that that a traffic stop had driven off. He then heard the police officer report that it was only a traffic stop and that pursuit was terminated. Moments later while petitioner was at an intersection, the same automobile came into the intersection and spun out in front of him stopping a few feet in front of his vehicle. Petitioner stated that he activated his emergency lights and immediately exited his vehicle. Petitioner stayed behind his vehicle and gave a command to the driver to stop the vehicle and put his hands up. Petitioner was about to draw his weapon, when the vehicle backed up and struck him in his left leg and took off.

Petitioner was transported to by the Berwyn Fire Department to MacNeal Hospital. Petitioner provided a consistent history of the incident and reported left knee pain and minimal discomfort of his right arm. (PX4) Petitioner was referred to Michael Hejna, M.D of Orthopedic Associates of Riverside for follow-up.

Petitioner was seen by Dr. Hejna on August 25, 2010. Dr. Hejna examined petitioner and recommended an MRI of the left knee. He also indicated that petitioner was to remain off of work. The MRI was performed on October 5, 2010. Dr. Hejna reviewed the MRI on October 13, 2010 and determined that the MRI reflected a large contusion and edema in the proximal tibia and a possible small non-displace fracture. He also found a meniscal tear on the lateral side. (PX2) Dr. Hejna recommended physical therapy and surgery. Surgery was performed on November 11, 2010.

Surgery consisted of a partial medial meniscectomy and debridement. (PX2)

Petitioner underwent a post-operative care and as of January 5, 2011, he denied paid of the knee. Dr. Hejna suggested an additional four to six weeks of recuperation and released him from care. Petitioner required no further care thereafter. Dr. Hejna provided petitioner a return to work slip on March 8, 2011 that permitted him to return to work full duty on March 14, 2011. (PX2)

The Park District presented Sgt. Jeff Janda as a witness. Sgt. Janda was the Executive Director of the Park District and was also an Auxiliary Officer with the Berwyn Police Department. Sgt. Janda confirmed his knowledge of petitioner's other job as a police officer. He confirmed that petitioner as a park district patrol officer did not have the power to make an arrest. On the day of injury, Sgt. Janda had no knowledge if the police department paid petitioner's wages for that day and he never made any requests for them to do so.

Sgt. Chris Anisi testified on behalf of the police department. He stated that he was the officer that pulled the driver over. He testified that the car drove off as he approached the vehicle on foot. He began to pursue the vehicle when it started to drive the wrong way down a one-way street. At that time he called off any pursuit on the radio due to public safety. Sgt. Anisi testified that petitioner should not have exited his vehicle after the driver spun out in front him.

CONCLUSIONS OF LAW

In support of the Arbitrator's Decision relating to *(B) Was there an employer –employee relationship? and (C) Did an accident occur that arose of out of the course of employment?*

This matter presents a unique issue in which at the time of injury petitioner, an auxiliary police officer with the Berwyn Police Department was working in his second job as a patrol officer with the Berwyn Park District. The testimony reflects that there is a significant cross-over between the two jobs in that the Park District Police force employs exclusively Berwyn Auxiliary Police Officers and part-time officers, the petitioner wears his Berwyn Police Department uniform and carries his police radio while performing his Park District duties.

When the incident occurred that caused injury, petitioner was on the clock in his capacity as Berwyn Park District Police Officer. He was traveling from one park to another in his patrol car. While driving, he heard over the police band of a violator who drove away from a traffic stop. Petitioner did not act on the call, but moments later he was confronted by the violator when he spun out in front of him at an intersection. Petitioner reacted by putting on his lights of vehicle and exited his car.

The Berwyn Park District argues that since the incident did not occur on Park District property and involved an assailant involved in traffic violation, petitioner was not acting in his capacity as Park District Patrolman. The Berwyn Police Department takes the view that petitioner was not on the clock as police officer and was not authorized to make a traffic stop of the violator.

The Arbitrator finds that the petitioner at the time of the incident was acting in the course of his employment as Berwyn Park District Patrol Officer and, thus an employee and employer existed between the two. An employer-employee relationship did not exist between petitioner and the Berwyn Police Department on August 21, 2010.

The Arbitrator further finds that the incident that caused petitioner's injury arose out of the course of employment as Berwyn Park District Patrolman. Petitioner did not intentionally pursue the traffic violator while on patrol. Rather, he unexpectedly was confronted by the violator when he spun out in front of his vehicle at an intersection. As a civil servant in a marked patrol car, petitioner's actions in trying to stop the violator were reasonable in light of the possible danger before him and the general public. Additionally, given that the Berwyn Park District purposely hired Berwyn Police Officers as patrol officers, it is foreseeable that there might be similar situations in which they might have to act in response to a crime or violation that might not necessarily be on Park District property.

In support of the Arbitrator's Decision relating to *(J) has respondent paid all appropriate charges for reasonable and necessary medical services?*

Petitioner presented the bills of MacNeal Hospital, Orthopaedic Associates of Riverside and WSA Anesthesia totaling $39,347.30. (PX1) The bills presented correspond to reasonable and necessary medical care to treat the diagnosed partial medial meniscus tear. Consequently, the

Arbitrator awards petitioner the medical bills submitted subject to the Illinois Medical Fee Schedule.

In support of the Arbitrator's Decision relating to *(K) what temporary total disability benefits are due?*

Petitioner sustained a significant injury to his left knee from the accident. Petitioner was disabled from his employment of both of his job positions at Berwyn Police Department and Berwyn Park District as of August 22, 2010 through March 13, 2011,the date he was released by the treating physician, Michael Hejna, M.D. (PX2, p.20)

The Arbitrator directs the respondent, Berwyn Park District, to pay petitioner TTD benefits equal to 29-1/7 weeks at the TTD rate of $175.00 per week.

In support of the Arbitrator's Decision relating to *(L) what is the nature and extent of the injury?*

Petitioner sustained a partial meniscus tear which was repaired by arthroscopic surgery. He underwent rehabilitative care and was eventually released back to work on March 14, 2011. Since then he has not required any further medical care with regard to his knee. Petitioner testified that he still has some discomfort and stiffness about the knee. Petitioner is currently employed as a full time police officer with the Summit Police Department.

The Arbitrator notes that petitioner's injury occurred prior to the 2011 reforms. Based on petitioner's resulting condition, the Arbitrator awards petitioner 20% loss of use of the left leg and directs the Berwyn Park District to pay petitioner 43 weeks of permanent partial disability benefits at the rate of $175.00 per week.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Karen Oakley,
Petitioner,

vs. NO: 14 WC 11103

Commonwealth Express.
Respondent.

17IWCC0279

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 relationship to the injury, temporary disability, causal connection and prospective medical treatment and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In so affirming, however, the Commission modifies the Arbitrator's order and the last sentence in the future medical treatment section (Section K of the rider), so that instead of reading "Respondent shall authorize" it reads instead "Respondent is ordered, subject to the limits of Sections 8(a) and 8.2 of the Act, to pay for" to ensure there is no conflict with the Appellate Court's decision in *Hollywood Casino-Aurora, Inc., v. Workers' Compensation Commission*, 2012 IL App (2d) 110426WC; 967 N.E.2d 848 (2nd Dist. 2012).

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).

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.

17IWCC0279

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as noted above, the Decision of the Arbitrator filed June 2, 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 removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 3 - 2017

Joshua D. Luskin

o-04/05/17
jdl-jl
68

Charles J. DeVriendt

L. Elizabeth Coppoletti

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

OAKLEY, KAREN
Employee/Petitioner

Case# 14WC011103

COMMONWEALTH EXPRESS
Employer/Respondent

17IWCC0279

On 6/2/2016, 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 0.47% 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:

0752 ALLEMAN LAW FIRM PC
JOHN D ALLEMAN
310 E MAIN ST
CARBONDALE, IL 62901

0693 FEIRICH MAGER GREEN & RYAN
R JAMES GIACONE
2001 W MAIN ST
CARBONDALE, IL 62903

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)/8(a)

KAREN OAKLEY
Employee/Petitioner

v.

COMMONWEALTH EXPRESS
Employer/Respondent

Case # 14 WC 11103

Consolidated cases: _____

17IWCC0279

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Herrin**, on **March 8, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 13, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$9,316.78**; the average weekly wage was **$980.85**.

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

It is unknown if Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services; the parties have reserved the issue of medical expenses by stipulation.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$2,796.05** for other benefits, for a total credit of **$2,796.05**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$653.90** per week for **41-5/7** weeks, commencing **May 22, 2015 through March 8, 2016**, as provided in Section 8(b) of the Act.

Respondent shall be given credit for **$2,796.05** for permanency benefits paid in advance.

Respondent shall authorize the partial right knee replacement surgery recommended by Dr. Jones, 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

May 31, 2016
Date

ICArbDec19(b)

JUN 2 – 2016

STATEMENT OF FACTS

The Petitioner worked for Respondent as a truck driver. Part of her job was to do pre and post drive truck inspections. On 3/13/14 she was checking fluids in the engine compartment and trying to remove a lid from one of the fluid containers. Both she and her co-driver had to climb up to the engine compartment in order to do so. When the co-driver removed the lid, the fluid started spraying, and she fell. The Petitioner could not recall how she fell. She testified: "What I remember is coming backwards, and I was on the ground, I'm assuming I hit dominantly on my right leg down." She had immediate pain in the front and middle of the right knee, and her co-driver helped her up and back into the truck. She testified she had no prior right knee problems, injuries or treatment.

On cross examination, the Petitioner testified further regarding the accident: "we went backwards and I didn't fall backwards. I fell -- you know, almost like we stepped off, but you step, fall back -- that's guessing, you know, basically I just remember on my back, but I didn't fall on my back. . . . It was -- I landed on both feet and ended upped backwards." She did not land directly on the right knee, but rather fell backwards, landed on her feet and then fell back. She agreed that she reported hitting the back of her head as well, but she did not seek treatment for that.

She initially sought treatment at the Heartland Regional M.C. ER on 3/13/14. (Px1; Rx3). The report notes the Petitioner sustained a right knee injury at work when she fell from the engine compartment of a truck and was pushed off by a co-worker and landed on the ground. It also notes that she hit her head. Petitioner complained of 10 out of 10 right knee pain, noting no prior similar symptoms. She underwent right knee x-rays, which were negative, and she was given a knee immobilizer. She followed up with Dr. Davis, her primary care provider, on 3/17/14. (Px2; Rx4). The report notes her husband that works with her accidentally hit her while antifreeze exploded and they both fell from a truck to the ground. Petitioner indicated she twisted her right knee and had increased pain with weightbearing. The report states: "No prior h/o injury to her R knee. She is not sure really how she landed, but think she initially landed on her feet." The diagnosis was knee strain/pain with a possible meniscus tear, and she was taken off work. After trying unsuccessful physical therapy and obtaining an MRI, she was referred to Dr. Barr at Southern Illinois Orthopedics.

The 4/17/14 MRI showed no evidence of meniscal tear but intrasubstance degeneration along the medial meniscus, marked patellar chondrosis, patellar / quadriceps tendinosis with patella Alta, scarring related chronic sprains of the medial and lateral patellar retinacula, a popliteal cyst, tibial collateral ligament bursitis and possible patellar tendon lateral femoral condyle friction syndrome. The Novacare PT records appear to indicate some level of pain sensitivity and guarding on the Petitioner's part. (Px5).

Dr. Barr's initial 4/25/14 report notes that the Petitioner fell off her truck to the ground and had immediate onset of right knee pain. Her current complaints were anterior pain, medially behind the patella or at the anteromedial or anterolateral joint line. He reviewed the prior x-ray and MRI. His diagnosis was a right knee strain with patellofemoral syndrome and probable underlying chondromalacia. He recommended therapy with a new brace and sedentary work with no driving. After attempting injections and further therapy, and noting that a Section 12 examiner recommended arthroscopic evaluation, Dr. Barr performed surgery on 10/9/14. Presurgical diagnosis was patellofemoral syndrome and possible loose body, and post-surgical diagnoses were lateral meniscus tear and chondromalcia of the patella (grade 3) and medial and lateral tibia (grade 2). Surgery involved an approximate 10% debridement of lateral meniscus and debridement of the areas of chondromalacia. A lateral retinacular release was also performed to try to decompress the patellofemoral area to try to reduce pain. (Px4).

The Petitioner was released to sedentary duty on 10/27/14. Despite surgery, another injection and post-surgical therapy, she continued to have pain and swelling, as well as feelings of weakness, warmth and numbness. On 3/20/15, Dr. Barr reported that Petitioner had the same problems despite all of his treatment, noting "all of her symptoms are very subjective." On 5/19/15, Dr. Barr opined that her persistent pain was most likely related to her chondromalacia and the early stages of arthritis aggravated by the work accident. He indicated there was nothing more he could do for her, and released her at maximum medical improvement with indefinite restrictions on climbing and ladders pending a Section 12 examination, so she returned to Dr. Davis on 8/19/15. (Px4). Dr. Davis noted she complained of pain that was worse than before surgery, and referred her to Dr. Jones. Dr. Davis also recommended she avoid any right knee activity and that she use a cane. Specific work restrictions were issued. (Px2).

The Petitioner testified that she woke up one day with excruciating shooting pain through the knee and had to go to the ER, with no precipitating event. The 7/12/15 records of this visit are consistent with this testimony. (Px3). A 10/13/15 right knee MRI with contrast noted intact menisci (with fraying/blunting of the previously operated lateral meniscus) and cruciate and collateral ligaments, with patellofemoral and medial compartment chondromalacia. (Px8). Following examination and the updated MRI, Dr. Jones recommended a partial knee replacement surgery. Depending on how much damage was in the knee, its possible she could need a total knee replacement.

Petitioner testified that her TTD benefits were terminated as of 5/21/15, and that her knee condition hasn't changed since that time. The Petitioner testified that she limps, has problems with stairs and climbing due to pain and weakness, so she would not be able to drive her truck. She also testified she would have difficulty using the truck pedals with her right leg. She testified that she had completed and passed her pre-accident CDL license physical examinations, but believes she would fail it if she performed one currently. She testified that she has had no accidents or injuries involving the right knee since the date of the work accident.

The Petitioner did not recall reporting to her physical therapist in April 2015 that she fell while moving and had increased knee pain, or having a knee contusion, indicating that she has not fallen since the work accident. On redirect, the Petitioner indicated that her knee gives out and she can, and has, fallen as a result.

Dr. Jones, a board certified orthopedic surgeon, testified via deposition on 2/3/16. (Px6). He testified that when he first saw the Petitioner on 9/17/15, she had already undergone therapy and injections, as well as arthroscopic surgery with post-surgical therapy and an injection, and she continued to have symptoms. He held her off work and ordered an MRI arthrogram to see if there were any tears in the right knee. He testified that the 10/13/15 films showed chondromalacia, i.e. arthritis, as well as post-op changes in the lateral compartment. Based on mainly anterior complaints from Petitioner, he also obtained sunrise view x-rays to evaluate the patellofemoral joint, and the films showed bone on bone arthritis in that joint, while the remaining arthritis was not bad. Petitioner had already tried multiple treatments, both conservative and surgical, and still had symptoms and didn't want another injection. Dr. Jones opined that her only other options were to live with it or to undergo a partial knee replacement, or to try pain medications, like narcotics, which can end up resulting in other issues. (Px6).

Dr. Jones testified that chondromalacia is degenerative, and it can exist without symptoms. According to the Petitioner, she had no right knee problems prior to the 3/13/14 accident. He further testified that chondromalacia can become symptomatic on its own or with a trauma. Given the symptom onset, he opined that the 3/13/14 accident aggravated the Petitioner's arthritic condition. He noted that the recommended surgery was essentially elective and that he would prefer not to do it at Petitioner's relatively young age, but that Petitioner has indicated that she cannot tolerate the current pain. (Px6).

On cross exam, Dr. Jones testified that the accident aggravated Petitioner's condition to become symptomatic, but did not worsen the existing chondromalacia pathology itself. He agreed he didn't know the exact mechanism of Petitioner's injury, other than falling off a truck, but that either a direct blow to the knee or a twisting type injury could have aggravated the patellofemoral arthritis. He noted that a twisting injury would likely also cause a meniscal tear, and that the Petitioner did have a lateral meniscus tear. He opined that a direct blow to the knee subsequent to the accident could have aggravated the condition as well, but that any determination of whether such an incident ended the causation from the original accident was unclear because he didn't know what her ongoing condition was just prior to such fall. He testified there was no way to tell which trauma was the cause in such a situation. (Px6).

Respondent's Section 12 examiner, Dr. Nogalski, also testified via deposition, on 2/3/16. (Px7; Rx1). A board certified orthopedic surgeon, he testified that the Petitioner indicates she fell off a truck, but could not say exactly how she fell, other than it was more on the right leg than the left, and that she had extreme pain. His review of the 4/16/14 MRI films indicated nothing acute. He also noted that 10/13/15 MRI showed normal bone marrow signal. He testified that where someone complains of joint pain, especially due to an arthritis / cartilage issue, there would typically be reactive bone marrow edema seen, noting "its an important objective finding" with regard to trauma and sources of pain. Thus, he did not believe that the films validated the subjective complaints of pain. (Px7; Rx1).

Dr. Nogalski opined that the Petitioner had right knee pain status post-arthroscopy with chondromalacia symptoms, but that her complaints appeared to be out of proportion than what would be expected given the exam and diagnostic testing. As to causation, he testified: "I do not believe that the sum total of her symptoms and current condition are related to the claimed injury of 3/13/14." (p. 15). He didn't believe the Petitioner's right knee condition was aggravated or accelerated by the accident or the post-accident treatment. He opined that when he saw Petitioner on 10/19/15 she was at maximum medical improvement (MMI) as to any injury from 3/13/14, and that there was no objective medical support to restrict her work duties. As to the partial knee replacement recommendation, Dr. Nogalski felt that the risks of such a procedure outweighed the potential rewards. (Px7; Rx1).

On cross examination, Dr. Nogalski testified that while it was difficult to determine based on the Petitioner's stated history and the documentation of her treating physicians, it was reasonable to think she had a right knee strain as a result of the 3/13/14 accident, possibly a meniscal tear. Asked if he had any objective evidence that Petitioner had right knee pain and complaints before 3/13/14, Dr. Nogalski opined that there was, based on the preexisting degenerative disease and his statement that "degenerative conditions typically have symptoms in one shape or form." He could not say what type of symptoms would occur in this situation, or how often. He later agreed that people can have degenerative conditions without pain, and that they could have the degenerative conditions and not seek treatment. However, as to whether such underlying condition could become painful with a trauma, he testified that: "In the specifics of this matter and absent any objective evidence that would reasonably lead me to believe that, I would not agree with that." He also did not feel that the sunrise view x-rays were of diagnostic quality or ability to be able to determine if the Petitioner had bone on bone arthritis, "especially in a matter that's under fairly intense litigation". (pp. 22-23). (Px7; Rx1).

Given his opinion that Petitioner's symptoms were out of proportion for her objective condition, he could not say what structure was causing her pain. He noted that Dr. Barr's operative report did not indicate bone on bone chondromalacia. He had recommended a functional capacity exam (FCE) in order to assess the validity of her complaints, and recommended that be done before she attempted to return to full duty work. (Px7; Rx1).

CONCLUSIONS OF LAW

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

The Arbitrator finds that the Petitioner has sustained her burden of proof that her current and ongoing right knee condition is causally related to the 3/13/14 work accident where she fell from the engine compartment area of her truck.

It is clear that at the time of the accident, the Petitioner had preexisting degenerative disease in her knee, particularly, it would appear, in the patellofemoral joint. Despite this, there is no evidence in the record to point to which would indicate that the Petitioner had any right knee pain, much less any significant right knee pain, prior to 3/13/14. While she could not clearly describe the exact mechanism of injury, she provided a fair representation of it, in terms of falling from a height and having immediate right knee pain, and all of the evidence points to the fact that severe symptoms occurred at that time and have been continuous since.

The Arbitrator acknowledges that there are indications in this case, particularly in the therapy records, which indicate that the Petitioner may not have a very high pain tolerance. In the Arbitrator's reading of the evidence in this case, it appears that the therapists both prior and subsequent to Petitioner's arthroscopic surgery, Dr. Barr and Dr. Nogalski all appear to question the Petitioner's symptom levels to one degree or another. At the same time, there are ongoing objective signs of problems as well, both in terms of the MRI findings, as well as things like swelling. The Arbitrator also notes that there really has been no significant period of time since the accident where the Petitioner has been pain free. Both Dr. Barr and Dr. Jones have opined that the Petitioner's arthritic knee condition was aggravated by the accident, and the Arbitrator finds their opinions supported by evidence and persuasive.

The Arbitrator also acknowledges the fact that the Petitioner's 4/6/15 physical therapy report notes she had been moving over the weekend, her knee buckled and she "has fallen". (Rx2; Px3). Despite the Petitioner's denial of stating this, the Arbitrator does not believe this constituted an intervening injury, and even if it had, it appears that the fall would have been due to the buckling of the knee, which is related to the original accident anyway. Further, the therapy records which predate the 4/6/15 note, which was the 33rd visit, indicate significant ongoing right knee symptoms.

Given all of the above, the Arbitrator believes the Petitioner has carried her burden with regard to the ongoing causal relationship of her right knee condition to the 3/13/14 accident.

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

With regard to the issue of medical expenses, the parties stipulated that this issue would be reserved, and no evidence was presented by either party with regard to incurred medical expenses.

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

The Arbitrator notes that this issue is difficult. Essentially, the knee replacement surgery is an elective procedure dictated by the question of whether a surgical candidate can withstand their ongoing pain level of not. There is no emergent need for such surgery. However, where the pain dictates, such surgery is clearly reasonable and necessary under the Act.

There are varying opinions in this case, which are further complicated by the fact that the Petitioner appears to have a low pain tolerance. Dr. Jones obviously has prescribed the surgery, noting his determination is that Petitioner has bone on bone degeneration in the patellofemoral joint. While Dr. Nogalski testified that he believed the risks of the partial knee replacement outweigh any potential rewards. This is based on his determination that there is no proof that the Petitioner's chondromalacia is that severe, as well as his opinion that she has excessive pain complaints. However, the Arbitrator notes that while he opined that the Petitioner likely had pain prior to the accident, given the degeneration, there simply is no evidence of such prior problems in the records, and the Petitioner consistently reported no prior symptoms to her physicians.

Ultimately, the Arbitrator believes that the evidence supports the fact that the Petitioner has significant enough objective evidence of issues in the patellofemoral joint that some treatment is reasonable. It also appears that there is little more that any surgeon can offer her beyond having the recommended surgery or living with the pain with medication control. The Arbitrator believes the Petitioner has a low pain tolerance, but he also cannot put himself into the Petitioner's place to say how much pain there actually is. The Arbitrator finds that the Petitioner has sustained the burden of proof that the partial knee replacement surgery is reasonable and necessary within the meaning of Section 8(a) of the Act. However, the Arbitrator would urge the Petitioner to have an honest discussion with Dr. Jones about her pain levels and the opinions of Dr. Nogalski before she undergoes such a significant surgery at her relatively young age. Again, the surgery would be based on her ability to handle the pain she has, and no one can determine that level better than herself. If she chooses to undergo the surgery, the Respondent shall authorize same.

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 evidence indicates that the Respondent terminated TTD benefits as of 5/21/15. The evidence further reflects that the Petitioner has been off work of on light duty status since that time. The Arbitrator finds that the Petitioner is entitled to TTD from day after the termination of benefits, 5/22/15, through the date of hearing, 3/8/16, a total of 41-5/7 weeks.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

The parties have stipulated that the Respondent is entitled to a credit of $2,796.05 based on a previous advance of permanent partial disability benefits.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Julia Williams,
Petitioner,

vs. NO: 13 WC 10224

State of Illinois,
Department of Transportation,
Respondent.

17IWCC0280

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal relationship to the injury, temporary disability, notice, medical expenses and prospective medical treatment, Petitioner's objection to Section 12 exam and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 1, 2016 is hereby affirmed and adopted.

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: MAY 3 – 2017

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

o-04/05/17
jdl/wj
68

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

WILLIAMS, JULIA
Employee/Petitioner

Case# **13WC010224**

15WC032023

IL DEPT OF TRANSPORTATION
Employer/Respondent

17IWCC0280

On 7/18/2016, 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 0.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0438 BROWN & CROUPPEN
KERRY O'SULLIVAN
211 N BROADWAY
ST LOUIS, MO 63102

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 MANAGEMENT
WORKERS' COMPENSATION MANGER
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SPRINGFIELD, IL 62794-9208

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

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

JUL 18 2016

ARNOLD A. NARDIA, 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
CORRECTED ARBITRATION DECISION
19(b)

Julia Williams
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # 13 WC 10224

Consolidated cases: 15 WC 32023

17IWCC0280

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, on **November 19, 2015.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0280

FINDINGS

On the date of accident, **11/29/12**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$31,020.08**; the average weekly wage was **$596.59**.

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

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

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

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

ORDER

Because Petitioner failed to meet her burden of establishing that she sustained an accident which arose out of and in the course of her employment with Respondent on 11/29/12 and that her current condition of ill-being is causally related to the accident, benefits in case number 13 WC 10224 are denied. Benefits are, however awarded in case number 15 WC 32023.

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

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

7/13/16
Date

ICArbDec19(b)

FINDINGS OF FACT

Julia Williams is presently 41 years of age. She has been employed by Respondent since August 1, 2011. Petitioner testified that from August 1, 2011 through December 31, 2011, she worked in the materials lab testing soil and aggregate samples. From January 1, 2012 through March 1, 2012 she worked in a computer programming position. From April 2012 through December 31, 2012, she worked back in the materials lab testing samples. From December 31, 2012 through January 1, 2015, Petitioner rotated in and out of several departments. From January 3, 2015 through the time of trial, she has been a Roads and Bridges Technician, which is a permanent placement requiring computer programming work in a sedentary capacity.

Petitioner testified that her work in the lab required her to mark a bag of soil brought in from the field. The bags of soil weighed from ten to forty pounds. She poured the bags of soil into a splitter machine and then the soil would fall down each side of the splitter so she could weigh each side. She would pour an entire bag of soil into the splitter at a time. If the two samples the splitter created were vastly different weights, then the sample had to be re-poured back into the splitter. She estimated that she had to pour each bag of soil or aggregate into the splitter three times in order for the two newly created samples to be of even weight. She also took samples of soil and poured them onto a tray to put them in the oven to bake the moisture out in order to determine the dry weight, which was a process called "dry vac". The dry vac process allowed her to weigh a forty pound bag and determine the field weight and dry weight. Once she used the splitter then she would dry vac the soil samples. Petitioner also used sieves to perform a gradation process whereby she would pour samples of soil into sieves to then weigh them. Each sieve weighs about three pounds and the soil samples poured into the sieves weighed approximately four to five pounds. To complete one gradation, Petitioner took the ten to twenty pound sample and moved it from waist to chest level to pour it into the sieves, then the sieves went into a shaker and when they came out she had to begin again at the top. Per each gradation test, Petitioner would lift the ten to twenty pound sample four to five times. Respondent's Exhibit 10 shows that one hundred ninety seven gradations were completed between March 15, 2012 and December 31, 2012. Petitioner also performed a "soaking process" which required her to take a twenty pound bag of soil, place it in a container and cover it with water to remove sediment from the rock. She also performed plasticity tests by adding and removing water from the samples to determine how much moisture the samples contained. The bags of soil weighed from ten to thirty pounds and the bags of aggregate weighed up to forty pounds. Petitioner also performed proctor tests. The proctor tests required her to take the aggregate or soil, pour it into a drum to add water and find the liquid limit. Petitioner testified that she spent eight hours of her work day during April of 2012 through December 31, 2012 performing lab testing.

Petitioner testified that most of her work involved lifting thirty to forty pound bags from the floor to a height of about forty inches to pour the bags into the splitter. However, she also lifted 30-40 pound sample bags from floor to up at or above shoulder level to pour samples into the sieves to perform gradations. The sieves could sit on the floor, but she put the sieves on top of a rolling cart about the same height as a desk, so that she would not have to lift the heavy weight of all the sieves up from the floor level.

While working in the lab from April 2012 through December 2012, Petitioner began to notice pains shooting down her left arm. When she did lifting in the lab, she would experience shooting pains down her left arm and occasionally her left hand would turn blue.

Petitioner saw her family physician, Dr. Climaco, on September 19, 2012 with complaints of gradual onset of left shoulder pain. Dr. Climaco ordered an MRI of the left shoulder.

Petitioner then sought out the care of Dr. Aaron Chamberlain at Washington University. She saw Dr. Chamberlain on October 29, 2012, discussed her symptoms and her job duties and Dr. Chamberlain ordered a left shoulder MRI that same day. The left shoulder MRI was normal. Dr. Chamberlain noted that she had left shoulder pain for approximately one year but that same had worsened over the last three months while lifting. Dr. Chamberlain ordered physical therapy.

On November 29, 2012, Petitioner spoke with her supervisor, Amor Phil Ditter, about lifting in the lab and the shooting pains down her left arm. Phil suggested that she call the workers compensation number listed on a poster on the wall, so she did. Respondent's Exhibit 2 is a First Report of Injury reflecting that Petitioner called the State of Illinois CareSys line to report her work injury with an accident date of October 29, 2012.

Petitioner underwent physical therapy from October 29, 2012 through December 24, 2012 with no improvement. Dr. Chamberlain continued to treat Petitioner with a series of injections and an EMG. On January 28, 2013 he recommended diagnostic arthroscopy. Petitioner continued to be seen by Dr. Chamberlain through September 16, 2013 when he recommended that she be seen by a physiatrist.

Petitioner did not want to undergo diagnostic arthroscopy with Dr. Chamberlain, so she returned to her primary care physician, Dr. Climaco, who referred her to Dr. Thom for pain management. Petitioner saw Dr. Thom, a pain management specialist at Associated Physicians where she received physical therapy and an injection. Dr. Thom's physician assistant, asked that another physician, Dr. Davie, evaluate Petitioner. Together, the physician's assistant and Dr. Davie diagnosed thoracic outlet syndrome and ultimately referred her to Dr. Thompson.

Dr. Thompson saw Petitioner on November 14, 2013 and opined that an MRI of her cervical spine was normal. He reviewed the EMG on December 18, 2013 and felt that was normal also. Dr. Thompson provided a series of injections and when those failed ordered surgery. Petitioner underwent left supraclavicular thoracic outlet decompression including anterior and middle scalenectomy, brachial plexus neurolysis, resection of cervical rib and resection of first rib with left pectoralis minor tenotomy with Dr. Thompson on August 8, 2014. Dr. Thompson ordered Petitioner off work post operatively through November 1, 2014.

Petitioner continues to receive treatment from Dr. Thompson and her next appointment is scheduled in March 2016.

Petitioner testified that prior to surgery she had pain running down her left arm to her left hand, her left hand would turn blue, she could not lift her arm overhead for more than five seconds or she would have pain everywhere, she had severe neck pain with swelling, she had swollen trapezius muscle on the left side. Since the surgery, she has tightness in her chest and has trouble lifting anything heavy. She has residual numbness

and tingling in her left chest area. She cannot play with her 9 year old twins the way she used to. Cold weather bothers her left trapezius area and chest.

Petitioner candidly testified that she had some complaints with regard to her left shoulder for which she sought treatment in 2011 with her primary physician, Dr. Climaco. She testified that she had complaints of pain when it was cold outside or if she had a fan blowing on her shoulder in church. She testified that she was diagnosed with arthritis in the left shoulder. Petitioner testified that the pain that began during work in 2012 was different in that she was experiencing shooting pains down her arm. The pain in 2012 started at her chin and covered her entire left trapezius and chest and went down her arm into her left hand with hand discoloration.

Amor Phil Ditter testified on behalf of Respondent. Mr. Ditter has been the materials lab supervisor for nine years and worked in the lab for eighteen years. Mr. Ditter was Petitioner's direct supervisor. Mr. Ditter testified that Petitioner's job duties are varied and that if there was a day they were caught up then she would not have done any lifting. Mr. Ditter testified that if there was a lift of over forty pounds then the employee is supposed to request assistance. Mr. Ditter testified that Petitioner would lift a lot at chest level, but would only lift anything about chest level on rare occasions. Mr. Ditter identified Respondent's Exhibit 10 which was an email stating that Petitioner's job required "lifting cylinders weighing thirty to thirty-five pounds zero to ten times per day, lifting bags of aggregate forty pounds zero to ten times per day, lifting bags of asphalt forty-five to fifty pounds zero to ten times per day, sampling of miscellaneous materials one to forty-five pounds zero to ten times per day." Mr. Ditter also identified an email between himself and another employee which states that between March 15, 2012 and December 31, 2012 his lab performed on aggregates: one-hundred-ninety-seven gradations, twenty-five proctors, one specific gravity test and twelve plasticity indices. Within this same time frame his lab performed soil tests as follows: two-hundred-seventy-four moistures, fifty-four classifications, two gradations and twenty-one proctors. By contrast, during the entire year of 2011 thirty-five gradations were done, in the year of 2013 seventy gradations were done, and in the year of 2014 forty-six gradations were done. So more than two and a half times the number of gradations were completed on aggregates between March and December of 2012 than were completed during the entire year of 2014. In fact, more gradations were done during March through December of 2012 than during the entire years of 2011, 2013 and 2014 combined.

Mr. Ditter testified that all the proctor tests required splitting four bags of sample. The gradations, moisture and proctor tests all required lifting and splitting of the samples. Mr. Ditter testified that Petitioner would have also worked on cylinders. She would have broken cylinders on a daily basis. Cylinders weigh twenty-eight pounds and require splitting and lifting zero to ten times just to do one sample. To split a gradation he uses two forty pound bags of material which both get lifted and poured into the splitter. Typically, two forty pound bags were initially lifted, then split to mix three to five times per sample, once the two forty pound bags were split, there were then forty pounds on each side plus the weight of the pan. So, after mixing was finished half of the sample was taken out and put back in the bag which then had to be lifted and moved back to another test or it may need to be split again. The same samples are not used for the different tests. Mr. Ditter testified that it takes about eight lifts of up to forty pounds to complete a gradation. Mr. Ditter also testified that the job description in Respondent's Exhibit 10 was for a typical day in a typical year. Then he added that 2012 was not a typical year because they were very busy with aggregates, probably the busiest year they have had in his

eighteen years there. Mr. Ditter testified that Petitioner did not do much computer work with him. Most of her time was spent working on the samples.

Dr. Charles Carroll performed a record review at Respondent's request. Dr. Carroll opined in his August 2, 2015 report that Petitioner's diagnosis is unresolved neurogenic thoracic outlet syndrome. He opined that Petitioner's work duties did not cause or aggravate her condition. Dr. Carroll testified that he reviewed emails setting forth Petitioner's job duties and opined that her lifting at work was not chronic in nature and did not involve lifting forty pounds or more above chest level. Dr. Carroll opined that work above chest level involving sixty pounds or fifty pounds on a chronic basis which is 33-66% of the time can cause thoracic outlet syndrome. Dr. Carroll testified that the position and the weight play a role. Dr. Carroll testified that about 5% of his practice involves treating thoracic outlet syndrome. He does not perform the type of surgery that Petitioner underwent and conceded that he does not have the diagnostic or surgical experience that Dr. Thompson has in thoracic outlet syndrome. He has not authored any articles or books on the condition.

When given the same written job description that Dr. Thompson had, Dr. Carroll testified that the work could be a causative factor in the development of thoracic outlet syndrome. Dr. Carroll also testified that lifting fifty to sixty pounds above chest level 33-66% of the time as a causative factor in the development of thoracic outlet syndrome is simply a guideline and that those weights and frequencies could vary by individual.

Dr. Thompson, Petitioner's treating surgeon, provided deposition testimony as well. Dr. Thompson testified that he relied in part on a job description that was provided by Petitioner's counsel which is as follows and is set forth as Respondent's Ex 1 to the deposition transcript:

> She worked as an Engineer Technician 1 and she worked in a testing lab. She normally worked 40 hours per week. However, from June through August of 2012, she worked anywhere from 40 to 50 hours per week. Four to five times per day, she would lift 30-50 bags of rock or soil from the floor, to a counter; to document the bag, then she would pour the contents into a slitter to divide and weigh the contents. Sometimes this weighing procedure had to be performed three times per bag in order to ensure that weight was equal. Her job duties also consisted of lifting 6-7 bags, weighing 30 to 50 pound per bags, 2-3 times per day, 5 days per week to various testing stations. She would then remove rock or soil from the bags and pour it into pans. She would also move the pans, weighing approximately 5 pounds, approximately 3 times each to different testing stations. These bags were filled with aggregate (rock), or sand, field soil, or rip-rap (which are really large rocks such as those seen on the side of highways). These materials were brought in from the field and broken down for various testing to determine stability as a base for building upon them.

Dr. Thompson also relied on his conversations with Petitioner regarding her job duties. Dr. Thompson opined that Petitioner's job duties caused her thoracic outlet syndrome. Dr. Thompson is a board certified vascular surgeon who specializes in the treatment of thoracic outlet syndrome. Dr. Thompson leads the Thoracic Outlet Syndrome Center at Washington University. Dr. Thompson was the co-editor of a textbook

entitled *Thoracic Outlet Syndrome*. He has published many peer reviewed medical journals and manuscripts regarding this condition.

CONCLUSIONS

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner filed two applications for adjustment of claim. 13 WC 10224 alleges an accident date of 11/29/12. 15 WC 32023 alleges an accident date of 10/29/12.

The Illinois Supreme Court in *Peoria County Belwood Nursing Home vs. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987) held that the Workers Compensation Act would be best served by allowing compensation where the injury was caused by the performance of the job and developed gradually over a period of time, without requiring complete dysfunction.

The Illinois Supreme Court provided further guidance in *Durand v. Illinois Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (2006). In *Durand*, the employee first developed problems with her hands in October of 1997. She first sought medical help in August of 2000 and filed a workers compensation claim in January of 2001. The Supreme Court held that the manifestation date was not until the employee had been advised by her doctor of the medical condition and its causal relationship to work. In *Durand*, The Supreme Court clarified that a repetitive motion injury does not manifest until either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Id.*, at 929. The Supreme Court in Durand stated further that "We decline to penalize an employee who worked diligently through progressive pain until it affected her ability to work and require medical treatment." *Id.*, at 930. The Supreme Court in Durand also noted that because repetitive trauma conditions are progressive, the medical treatment, severity of the injury and how it affects the employee's performance are relevant in determining when a reasonable person would have plainly recognized the injury and its relation to work.

Dr. Thompson opined that Petitioner's thoracic outlet syndrome was caused by her work duties. Dr. Thompson has specialized in thoracic outlet surgery and manages the Thoracic Outlet Syndrome Center at Washington University, whereas Dr. Carroll treats this condition in only 5% of his practice. By Dr. Carroll's own admission, he has less expertise with regard to thoracic outlet syndrome than Dr. Thompson. Dr. Thompson had an accurate description of the Petitioner's job duties. Moreover, Dr. Carroll acknowledged that lifting can cause thoracic outlet syndrome and the weights and positions of the lifting would vary according to individual body habitus. The Arbitrator found the testimony and opinions of Dr. Thompson more persuasive in this case.

Petitioner saw Dr. Chamberlain on October 29, 2012. His notes of that date reflect that they discussed her history of pain worsening at work while lifting. Petitioner plainly recognized her injury and its relation to her work as reflected by the history contained in her treatment record of this date.

Petitioner credibly testified that she engaged in a conversation with her supervisor, Amor Phil Ditter on November 29, 2012 and advised him of her condition and its relationship to her work. He encouraged her to call the phone number listed on a poster to report the claim to the State of Illinois. The Employer's First Report of Injury confirms that on November 29, 2012, Petitioner reported her October 29, 2012 injury to the State of Illinois.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner met her burden of establishing that she sustained an accident which arose out of and in the course of her employment with Respondent and that her current condition of ill-being, which required surgical intervention by Dr. Thompson, is causally related to the accident. The Arbitrator further finds that October 29, 2012 is an appropriate manifestation date for Petitioner's injury and that the notice provided to Respondent on November 29, 2012 is proper notice under 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?

Petitioner's medical care has been reasonable and necessary to date. Both Dr. Thompson and Dr. Carroll agree that Petitioner has thoracic outlet syndrome and that her medical treatment has been reasonable and necessary to date.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Respondent shall pay reasonable and necessary medical services of $$43,267.28, as set forth in PX 10, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (L): What temporary benefits are in dispute?

Petitioner was ordered off of work by Dr. Thompson from the date of her surgery 8/8/14 through 11/1/14.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Respondent shall pay Petitioner temporary total disability benefits of $397.69/week for 12 2/7 weeks, commencing 8/8/14 through 11/1/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit for temporary total disability benefits that have been paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Norman Carli,
Petitioner,

vs. NO: 10 WC 43951

17IWCC0281

Village of Franklin Park,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 5, 2015 is hereby affirmed and adopted.

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

17IWCC0281

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.

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

DATED: MAY 3 - 2017

Joshua D. Luskin

o-04/12/17
jdl/wj
68

Charles J. DeVriendt

Deborah L. Simpson

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

CARLI, NORMAN
Employee/Petitioner

Case# **10WC043951**

VILLAGE OF FRANKLIN PARK
Employer/Respondent

17IWCC0281

On 10/5/2015, 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 0.10% 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:

1377 PARENTE & NOREM PC
DAVID A IAMMARTINO
221 N LASALLE ST 27TH FL
CHICAGO, IL 60601

0507 RUSIN & MACIOROWSKI LTD
DANIEL R EGAN
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
ARBITRATION DECISION
19(b)

Norman Carli
Employee/Petitioner

v.

Village of Franklin Park
Employer/Respondent

Case # **10** WC **43951**

Consolidated cases: _____

17IWCC0281

An *Application for Adjustment 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 **July 14 and August 4, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, **September 10, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident to his cervical spine 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 relating to his cervical spine ***is not*** causally related to the accident. (Petitioner did suffer a work injury to his right shoulder and right biceps. Said injury is not at issue in this 19B proceeding)

In the year preceding the injury, Petitioner earned **$79,976.00**; the average weekly wage was **$1,538.00**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of **$4,101.33** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$4,101.33**.

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

ORDER

Petitioner's claim for TTD benefits is denied. Petitioner failed to prove the condition in his cervical spine is causally related to his claimed work injury of September 10, 2010.

Petitioner's request for penalties is declined.

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 — Date: 10/5/15

ICArbDec19(b)

OCT 5 - 2015

PROCEDURAL HISTORY

This matter was tried before Arbitrator Steffen on July 14, 2015 and concluded on August 4, 2014 as a 19B petition. Petitioner is a Franklin Park police officer who filed an Application for Adjustment of Claim on November 15, 2010 for a September 10, 2010 date of accident. Petitioner alleges that he injured his right shoulder as well as his cervical spine. The 19B hearing before Arbitrator Steffen seeks TTD benefits from 12/1/14 through 7/14/15 (32 2/7 weeks); said benefits arising from the injury and treatment relating to the cervical spine. In addition, both parties seek resolution regarding the causal connection and liability for medical treatment relating to the cervical spine issue. It appears that the right shoulder injury and the benefits stemming from this injury are not in dispute. **The following opinion addresses the issues in dispute relating to the cervical spine only. (AX1) Petitioner has not filed an 8a petition nor does he currently seek prospective medical treatment. Issues related to the right shoulder injury are not addressed.**

FACTUAL HISTORY

Petitioner, Norman Carli, testified that on September 10, 2010 he was employed by Respondent as a police officer. (Transcript, hereinafter "T." p. 15) As of that date, Petitioner testified he had worked for Respondent as a police officer for approximately 20 years. (T. p. 15)

Petitioner testified that pursuant to his duties as a police officer, he and his partner were attempting to arrest a subject. Petitioner testified that there was a struggle which resulted in his partner and the suspect falling.(R 14-15) Petitioner states that he tried to break this fall and was injured as he bore the weight of these two individuals upon his shoulder. (T. p. 16)

Shortly after the incident, Petitioner felt pain and numbness to his right shoulder and arm and hand. (T. p. 18) An accident report was prepared and documents the

accident and the injury. (Rx 2) Petitioner alleges that the injury was to his right shoulder area. (Rx 2)

Petitioner was treated for his injuries initially at Advanced Occupational Medicine for treatment. (T. p. 18; Rx 8) The medical records indicate a diagnosed of right shoulder pain and right biceps strain.

Petitioner returned to work but was placed on modified duty during treatment. Petitioner continued to treat for his shoulder and bicep and underwent an MRI to the right shoulder and physical therapy.

Petitioner's pain symptoms continued and he was referred to an orthopedic specialist, Dr. Nassos. (T. p. 19; Rx 9) He was examined by Dr. Nassos on October 8, 2010. (Rx 9) Petitioner was specifically asked whether he had any neck pain or radicular pain, which he denied. Respondent's Exhibit 9 included a typewritten report for a Date of Service of October 8, 2010 which included a paragraph entitled "History of Present Illness". The last sentence in the doctors notes states "He denied any neck pain or radicular pain" (Rx 9) Dr. Nassos diagnosed Petitioner as having a partial thickness supraspinatus tear and a superior labral tear. Dr. Nessus recommended surgery.

Surgery took place on October 29, 2010, and consisted of a superior labral repair and subacromial decompression without acromioplasty. (Rx 9) After surgery, Petitioner remained under Dr. Nassos' care (Rx 9) and returned to Advanced Occupational Medicine for physical therapy (Rx 8). On January 5, 2011, Petitioner complained to Dr. Nassos of numbness radiating in the biceps region and radiating around the right shoulder. (Rx 9) On this date the cervical spine was specifically examined. Dr. Nassos noted a painless range of motion in flexion and extension of the cervical spine. Spurling sign was negative bilaterally. There was no tenderness to palpation throughout the cervical spine. In addition, an EMG/NCV test was ordered. (Rx 9)

The EMG/NCV test was performed on February 14, 2011 by Dr. Laluya. (Rx 9) Prior to administration of this test, Dr. Laluya performed a physical exam. Of note, Dr. Laluya noted the cervical spine range of motion to be normal. Spurling test was negative. According to Dr. Laluya the EMG/NCV revealed no electrodiagnostic evidence of an acute cervical radiculopathy, brachial plexopathy or peripheral

neuropathy to explain his symptoms; Dr. Laluya felt that Petitioner may have sustained a mild traction injury to the brachial plexus that was not identifiable at that time. (Rx 9)

Shortly thereafter, Petitioner switched his care to Dr. Guido Marra, then at Loyola. (T. p. 46; Px 4) Petitioner first saw Dr. Marra on April 14, 2014. Petitioner complained of ongoing pain after his first surgery. Dr. Marra recommended Petitioner undergo additional right shoulder surgery.

Dr. Marra performed surgery to the right shoulder on May 16, 2011. (Px 4) Surgery consisted of arthroscopic decompression, debridement and AC Joint Resection. (Px 4) Petitioner continued to treat with Dr. Marra until May 31, 2012. (Px 4)

At Respondent's request, Petitioner underwent an independent medical exam on August 29, 2012 by Dr. Paul Papierski. (Rx 7) On this date, Petitioner reported no complaints to his head and neck to Dr. Papierski. (Rx 7) There is no indication in Dr. Papierski's report that Petitioner had any cervical involvement in his condition. Dr. Papierski found that the superior labral tear of the right shoulder was causally related to the work accident. (Rx 7) Dr. Papier ski agreed and acknowledged that the medical treatment and surgery that Petitioner has undergone and found that he did not require any further treatment. His medical report notes that the Petitioner had returned back to unrestricted duty at this time. (RX7)

Petitioner testified that he was referred to Dr. Rinella. On September 13, 2012, Petitioner presented himself to Dr. Rainelle (Pox 2, Ex. 2) Petitioner complained of neck pain to Dr. Rainelle and stated that the pain stemmed from his claimed accident of September 10, 2012.

Dr. Rainella testified in this matter. (Px 2) Dr. Rinella acknowledged that he had none of Petitioner's prior records from Advanced Occupational Medicine, Dr. Ghanayem, Dr. Nasso and Dr. Marra to review. (Px 2, pp. 16-21) Dr. Rinella noted that in the records he did review, Petitioner had not made any complaints regarding his cervical spine to his prior providers. (Px 2, pp. 21, line 23) He also indicated that Petitioner told him he had been having neck pain for over two years, since 2010. (Px 2, pp. 25, lines 11-18) Dr. Rinella also indicated that Petitioner had related to him indirectly that Dr. Marra had told him that his ongoing arm pain may be the result of his cervical spine issue. (Px 2, pp. 27, lines 7-11) Dr. Rinella opined that Petitioner

required cervical spine surgery based on his ongoing, subjective complaints, his MRI results and his two year history of two years. (Px 2, pp. 27 lines 3-11) Dr. Rinella performed the cervical spine fusion surgery for Petitioner.

At Respondent's request Petitioner was examined by Dr. Alexander Ghanayem on September 15, 2014. (Rx 6) Dr. Ghanayem concluded that Petitioner

> ...has subjective complaints of pain in the neck and the shoulder girdle region absent any objective physical exam findings to point to a cervical spine etiology. His pattern of symptoms is not consistent with someone that needs cervical spine surgery, particularly in the recommended levels of C5-6 and C6-7. Putting this another way, radiographics findings, the operative intervention, his subjective complaints, and his objective physical exam findings represent a significant mismatch, thereby making surgery not appropriate at any level....Relative to the cervical spine, I do not believe he sustained either an injury or an aggravation, given the mismatches as outlined above. (Rx 6)

Petitioner filed his Application for Adjustment of Claim on November 15, 2010, claiming injuries to his right shoulder. (Rx 3)

ANALYSIS/FINDINGS

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

The Petitioner bears the burden of proving all the elements of his claim in order to recover benefits under the Illinois Workers' Compensation Act. *Illinois Bell Telephone co. v. Industrial Commission*, 265 Ill.App.3d 681 (1994). This includes proving that an accident occurred and that a claimant's state of ill-being is causally related to the alleged work accident. *Martinez v. Industrial Commission*, 242 Ill.App.3d (1993). To prove a causal connection the Petitioner need not prove that his work injury was the sole, primary cause of his injury as long as it was a causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Indus. Comm'n*, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967).

In fact, recovery under Illinois law may be had even in preexisting condition cases, where an employee can show that a work-related accidental injury aggravated or accelerated the preexisting disease. *Sisbro. Inc. v. Indus. Comm'n,*

207 Ill. 2d 193, 204-206, 797 N.E.2d 665 278 Ill.Dec. 70, (2003); citing *Caterpillar Tractor Co. v. Indus. Comm'n*, 92 Ill. 2d 30, 36-37, 65 Ill. Dec. 6, 440 N.E.2d 861 (1982); *Caradco Window & Door v. Indus. Comm'n*, 86 Ill. 2d 92, 99, 56 Ill. Dec. 1, 427 N.E.2d 81 (1981); *Azzarelli Construction Co. v. Indus. Comm'n*, 84 Ill. 2d 262, 266, 49 Ill. Dec. 702, 418 N.E.2d 722 (1981); *Fitrro v. Indus. Comm'n*, 377 Ill. 532, 537, 37 N.E.2d 161 (1941). Whether a claimant's disability is attributable solely to a degenerative process of the preexisting condition or to an aggravation or acceleration of a preexisting condition because of an accident is a factual determination to be decided by the Industrial Commission. *Roberts v. Indus. Comm'n*, 93 Ill. 2d 532, 538, 67 Ill. Dec. 836, 445 N.E.2d 316 (1983); *Caterpillar Tractor Co. v. Indus. Comm'n*, 92 Ill. 2d at 36-37; *Caradco Window & Door v. Indus. Comm'n*, 86 Ill. 2d 92, 99, 56 Ill. Dec. 1, 427 N.E.2d 81 (1981).

In applying the reasoning of the above caselaw, the Arbitrator finds that the Petitioner has failed to meet his burden to show that his cervical spine condition is related to his work accident of September 10, 2010. In making this finding the Arbitrator finds that the opinion of Dr. Ghanayem is more credible then the findings of Dr. Rinella. The greatest hurdle to Petitioner's case is that he treated with competent, qualified physicians for two years, underwent surgical procedures for his right shoulder and yet, never mentioned his cervical issues to any of them. It is noted that neither his pain complaints nor medical tests led any of his treating physicians to suspect any cervical problems for over two years. Petitioner's claim that he consistently complained of pain in his "right shoulder area" which included his neck, is not sufficient to overcome this deficit" in light of the MRI films and lack of other objective findings.

The medical records reflect that Petitioner's cervical spine region was evaluated both in the form of physical exam and in the form of diagnostic testing during this two year period of time, all with negative results. The Arbitrator is not persuaded by the testimony of Dr. Rinella as he acknowledged that he had none of Petitioner's prior records from Advanced Occupational Medicine, Dr. Ghanayem, Dr. Nasso and Dr. Marra to review. (Px 2, pp. 16-21) The Arbitrator finds this to be a glaring defect in light of the fact that Petitioner had been treated for his work injury for the prior two years. Dr. Rinella also noted that in the records he did review that Petitioner had not made any complaints regarding his cervical spine to his prior providers. (Px 2, pp. 21, line 23) He also indicated that Petitioner told him he had been having neck pain for over two years, since 2010. (Px 2, pp. 25, lines 11-18) The Arbitrator notes that Dr. Rinella did not attempt to resolve or explain this inconsistency. Dr. Rinella also indicated that Petitioner had related to him indirectly that Dr. Marra had told him that his ongoing arm pain may be the result of his cervical spine issue. (Px 2, pp. 27, lines 7-11) Dr. Rinella did not examine Dr. Marra's reports regarding this crucial point. Although, Dr. Rinella opined that Petitioner required cervical spine surgery based on his ongoing, subjective complaints, his MRI results and his two year history of two years, the Arbitrator finds his opinion to be less persuasive then Dr. Ghanayem.

In comparison, Dr. Ghanayem's conclusion that there was no injury to the cervical spine on September 10, 2010 is consistent with the records of Advanced Occupational Medicine (Rx 8), Dr. Nassos (Rx 9), Petitioner's Application for Adjustment of Claim (Rx 3) and Petitioner's own description of injury to his right shoulder (Rx 2). Lacking any persuasive proof that Petitioner registered any cervical complaints with any of his medical treaters, the Arbitrator finds that Petitioner's cervical

issues are not related to his work accident of 2010. In so finding, the Arbitrator notes significant inconsistencies between Petitioner's testimony and the medical records, and gaps in time between Petitioner's injury and cervical treatment.

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

As explained above, Petitioner failed to establish a causal connection between her claimed current condition of ill-being and her work injury. Thus, the issues of whether Petitioner's medical services were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services is rendered moot. Thus, Petitioner's claim for payment of any outstanding medical bills related to Petitioner's cervical spine treatment is denied.

L. What temporary benefits are in dispute?

Based upon the Arbitrator's finding concerning causal relationship, these issues are moot.

M. Should penalties or fees be imposed upon Respondent?

Based upon the Arbitrator's finding concerning causal relationship, this issue is also moot. The Respondent reliance on the opinion of Dr. Ghanayem was proper. Penalties are respectfully declined

STATE OF ILLINOIS)
) SS.
COUNTY OF)
KANKAKEE

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nicolasa Gaytan,
Petitioner,

vs.

NO: 14 WC 41248

Flanders Precisionaire
Respondent.

17IWCC0282

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal relationship to the injury, medical expenses, temporary disability, prospective medical expenses, and penalties and attorney's fees, and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In so affirming, the Commission does correct one error in the Arbitrator's Decision. In the first paragraph of the rider, the Arbitrator transposed the dates of loss with the case numbers on their respective Applications for Adjustment of Claim: the November 20, 2014 accident was actually the focus of case number 15 WC 10152, and the December 1, 2014 accident was asserted in 14 WC 41248, rather than vice-versa. The Commission corrects these accordingly.

All other facts, reasoning, and conclusions of the Arbitrator are affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as stated above, the Decisions of the Arbitrator filed January 7, 2016 are hereby affirmed and adopted.

17IWCC0282

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

DATED: MAY 3 - 2017

Joshua D. Luskin

o-04/12/17
jdl-mp
68

Charles J. DeVriendt

L. Elizabeth Coppoletti

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

GAYTAN, NICOLASA
Employee/Petitioner

Case# **14WC041248**
15WC010152

FLANDERS PRECISIONAIRE
Employer/Respondent

17IWCC0282

On 1/7/2016, 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

0286 SMITH AMUNDSEN LLC
LESLIE JOHNSON
150 N MICHIGAN AVE SUITE 330
CHICAGO, IL 60602

17IWCC0282

FINDINGS

On the dates of accident, **11/20/14 & 12/1/14**, 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 **11/20/14**, Petitioner *did* sustain an accident that arose out of and in the course of employment.

On **12/1/14**, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

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

Petitioner's current condition of ill-being *is not* causally related to the 11/20/14 accident.

In the year preceding the injury, Petitioner earned **$18,220.80**; the average weekly wage was **$354.00**.

On the date of accident, Petitioner was **42** years of age, *married* with **3** dependent children.

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

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

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

ORDER

Petitioner failed to prove that she sustained an accident arising out of and in the course of her employment on December 1, 2014. Therefore her claim for benefits related to that accident is denied.

Petitioner failed to prove that her current condition of ill-being is related to her November 20, 2014 accident. Therefore her claim for benefits related to that accident 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

1/7/16
Date

JAN 7 - 2016

Petitioner arrived 15 to 20 minutes later at the Presence St. Mary Hospital Clinicon November 24, 2014. She walked into the clinic with Sanchez. Sanchez informed Petitioner that the Petitioner would be paid the hours she missed from work for that day only. Sanchez then went with Petitioner to see a doctor in the clinic and translated from Spanish to English the questions and answers between the doctor and the Petitioner. Petitioner testified that she was told by the doctor to make another appointment and Sanchez asked Petitioner if December 1, 2014 at 3:30 pm was ok. Petitioner agreed to this next appointment and then left the clinic to return home. Petitioner was also given restrictions on her return to work. Petitioner was able to return to work through December 1, 2014.

On December 1, 2014, Petitioner went to work and punched in at her usual time. Petitioner testified that she worked that day until she was told by Juana Medina that it was almost time for her appointment. Petitioner testified that she went to an office to meet with Sanchez to tell Sanchez that she was ready to go to her appointment. Sanchez gave Petitioner a ride to Petitioner's car, which was parked further away in the company lot. Petitioner testified that after she got to her car, Petitioner was told by Sanchez to follow her. Petitioner then proceeded to follow Sanchez out onto the road. On route to the Presence St. Mary Clinic, Petitioner's vehicle was struck by a truck.

Petitioner was subsequently taken by ambulance to Riverside Medical Center, where she underwent extensive medical treatment for factures to her legs, her right arm, head injuries and internal organ damage. She underwent multiple surgeries, followed by physical therapy. All of Petitioner's medical treatment was put through her husband's group health insurance. She has not been released to return to work as of the date of the last arbitration hearing and continues to receive medical treatment. Petitioner has complaints of pain, mostly in her right leg and foot, and also has problems with her memory.

On cross examination, Petitioner testified that she did not speak with Amy Hiser of human resources about her left elbow injury. Petitioner denied that Amy Hiser was ever present when Petitioner discussed her left elbow accident with Sanchez. Petitioner further testified that she knew how to get to the Presence St. Mary clinic because she had treated there for a prior eye injury, and that Sanchez was going with her to the appointment because Petitioner did not have anyone else who could translate for her on December 1, 2014.

Nayeli Sanchez testified that on November 20, 2014, she worked for Respondent as a Human Resources Associate. Part of her job involved translating for Spanish speaking employees, translating accident reports and transporting injured employees. On November 24, 2014, Sanchez first spoke with Petitioner about her November 20, 2014 elbow injury. Sanchez would also call medical providers to set up appointments for injured employees, but she did not recall whether she called Presence St. Mary Clinic for Petitioner's visit on November 24, 2014. Sanchez explained that the Respondent's policy regarding where an injured employee can receive medical treatment is to ask the injured employee if there is a medical provider they would like to see. Sanchez confirmed that she did not have the authority to deny an employee's choice of medical provider, nor did she tell employees that they have to go to any particular medical provider. Sanchez indicated as an example that a typical medical provider chosen by Respondent's injured employees is Riverside Medical Center.

Sanchez confirmed that on November 24, 2014, she drove Petitioner in Sanchez's car to her appointment at Presence St. Mary Clinic, where she provided Spanish to English translation between the Petitioner and the clinic's staff. When told by the doctor that Petitioner was to have a follow up appointment,

17IWCC0282

vehicle accident on her way to a follow-up medical appointment related to her November 20, 2014 work injury, constitutes an accident arising out of and in the course of her employment with the Respondent. The Arbitrator notes that the Illinois Supreme Court addressed this precise issue in the case of Lucious Lee v Industrial Commission (Tootsie Roll), 167 Ill 2nd 77, Supreme Court of Illinois (1995). In that case, the Supreme Court affirmed the denial of a claim made by an employee who was injured while travelling to a follow-up medical appointment. In support of their decision, the Supreme Court concluded that the claimant was not: 1) acting at the direction of his employer in going to an employer-approved clinic; 2) performing an act incidental to an assigned duty of his employment; or 3) acting pursuant to his duty of employment. The Court in Lucious Lee concluded that the claimant's subsequent injuries sustained while attending a follow-up medical appointment did not arise out of and in the course of that claimant's employment.

In the present case, the evidence is clear that the Petitioner was free to choose her medical provider and was not directed to go the employer-approved clinic of Presence St. Mary Hospital. Petitioner's attendance at the follow-up medical visit on December 1, 2014 was also not an act incidental to an assigned duty of her employment with Respondent. Finally, Petitioner was under no duty, statutory or otherwise to attend her follow-up appointment at the Presence St. Mary Clinic on December 1, 2014. The testimony of all of Respondent's witnesses are not rebutted with regard to the fact that the Respondent exerted no control or direction of Petitioner's medical care. The fact that the Respondent provided Petitioner with a translator for her medical appointments do not change the fact that the Petitioner was free to go to any medical provider and was free to attend follow up appointments knowing that she would not be paid to attend those follow up visits. There was no evidence presented that Petitioner was under any obligation or duty to attend her follow medical appointment or that such attendance was incidental to any of her duties with Respondent. In light of this evidence and the governing case law, the Arbitrator concludes that the Petitioner's motor vehicle accident on December 1, 2014 was not an accident arising out of and in the course of Petitioner's employment with Respondent.

2. Regarding the issue of causation, the Arbitrator finds that the Petitioner's current condition of ill being is not causally related to her alleged work related accident. Other than an initial diagnosis of an elbow contusion, there was no further evidence to show the Petitioner continued to suffer any disability to her elbow. Furthermore, having found that the Petitioner's December 1, 2014 incident was not an accident covered under the Act, the Arbitrator further finds that December 1, 2014 incident was an intervening incident, breaking any causation between Petitioner's November 20, 2014 compensable accident and her current condition of ill-being.

3. Based on the Arbitrator's findings with respect to the issues of accident and causation, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
KANKAKEE

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nicolasa Gaytan,
Petitioner,

vs. NO: 15 WC 10152

Flanders Precisionaire
Respondent.

17IWCC0283

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal relationship to the injury, medical expenses, temporary disability, prospective medical expenses, and penalties and attorney's fees, and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof.

In so affirming, the Commission does correct one error in the Arbitrator's Decision. In the first paragraph of the rider, the Arbitrator transposed the dates of loss with the case numbers on their respective Applications for Adjustment of Claim: the November 20, 2014 accident was actually the focus of case number 15 WC 10152, and the December 1, 2014 accident was asserted in 14 WC 41248, rather than vice-versa. The Commission corrects these accordingly.

All other facts, reasoning, and conclusions of the Arbitrator are affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as stated above, the Decisions of the Arbitrator filed January 7, 2016 are hereby affirmed and adopted.

17IWCC0283

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

DATED: MAY 3 - 2017

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

o-04/12/17
jdl-mp
68

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

GAYTAN, NICOLASA
Employee/Petitioner

Case# **15WC010152**

14WC041248

FLANDERS PRECISIONAIRE
Employer/Respondent

17IWCC0283

On 1/7/2016, 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

0286 SMITH AMUNDSEN LLC
LESLIE JOHNSON
150 N MICHIGAN AVE SUITE 330
CHICAGO, IL 60602

FINDINGS

On the dates of accident, **11/20/14 & 12/1/14**, 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 **11/20/14**, Petitioner *did* sustain an accident that arose out of and in the course of employment.

On **12/1/14**, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

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

Petitioner's current condition of ill-being *is not* causally related to the 11/20/14 accident.

In the year preceding the injury, Petitioner earned **$18,220.80**; the average weekly wage was **$354.00**.

On the date of accident, Petitioner was **42** years of age, *married* with **3** dependent children.

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

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

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

ORDER

Petitioner failed to prove that she sustained an accident arising out of and in the course of her employment on December 1, 2014. Therefore her claim for benefits related to that accident is denied.

Petitioner failed to prove that her current condition of ill-being is related to her November 20, 2014 accident. Therefore her claim for benefits related to that accident is denied.

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Signature of Arbitrator

1/7/16
Date

JAN 7 - 2016

17IWCC0283

Petitioner arrived 15 to 20 minutes later at the Presence St. Mary Hospital Clinic on November 24, 2014. She walked into the clinic with Sanchez. Sanchez informed Petitioner that the Petitioner would be paid the hours she missed from work for that day only. Sanchez then went with Petitioner to see a doctor in the clinic and translated from Spanish to English the questions and answers between the doctor and the Petitioner. Petitioner testified that she was told by the doctor to make another appointment and Sanchez asked Petitioner if December 1, 2014 at 3:30 pm was ok. Petitioner agreed to this next appointment and then left the clinic to return home. Petitioner was also given restrictions on her return to work. Petitioner was able to return to work through December 1, 2014.

On December 1, 2014, Petitioner went to work and punched in at her usual time. Petitioner testified that she worked that day until she was told by Juana Medina that it was almost time for her appointment. Petitioner testified that she went to an office to meet with Sanchez to tell Sanchez that she was ready to go to her appointment. Sanchez gave Petitioner a ride to Petitioner's car, which was parked further away in the company lot. Petitioner testified that after she got to her car, Petitioner was told by Sanchez to follow her. Petitioner then proceeded to follow Sanchez out onto the road. On route to the Presence St. Mary Clinic, Petitioner's vehicle was struck by a truck.

Petitioner was subsequently taken by ambulance to Riverside Medical Center, where she underwent extensive medical treatment for factures to her legs, her right arm, head injuries and internal organ damage. She underwent multiple surgeries, followed by physical therapy. All of Petitioner's medical treatment was put through her husband's group health insurance. She has not been released to return to work as of the date of the last arbitration hearing and continues to receive medical treatment. Petitioner has complaints of pain, mostly in her right leg and foot, and also has problems with her memory.

On cross examination, Petitioner testified that she did not speak with Amy Hiser of human resources about her left elbow injury. Petitioner denied that Amy Hiser was ever present when Petitioner discussed her left elbow accident with Sanchez. Petitioner further testified that she knew how to get to the Presence St. Mary clinic because she had treated there for a prior eye injury, and that Sanchez was going with her to the appointment because Petitioner did not have anyone else who could translate for her on December 1, 2014.

Nayeli Sanchez testified that on November 20, 2014, she worked for Respondent as a Human Resources Associate. Part of her job involved translating for Spanish speaking employees, translating accident reports and transporting injured employees. On November 24, 2014, Sanchez first spoke with Petitioner about her November 20, 2014 elbow injury. Sanchez would also call medical providers to set up appointments for injured employees, but she did not recall whether she called Presence St. Mary Clinic for Petitioner's visit on November 24, 2014. Sanchez explained that the Respondent's policy regarding where an injured employee can receive medical treatment is to ask the injured employee if there is a medical provider they would like to see. Sanchez confirmed that she did not have the authority to deny an employee's choice of medical provider, nor did she tell employees that they have to go to any particular medical provider. Sanchez indicated as an example that a typical medical provider chosen by Respondent's injured employees is Riverside Medical Center.

Sanchez confirmed that on November 24, 2014, she drove Petitioner in Sanchez's car to her appointment at Presence St. Mary Clinic, where she provided Spanish to English translation between the Petitioner and the clinic's staff. When told by the doctor that Petitioner was to have a follow up appointment,

vehicle accident on her way to a follow-up medical appointment related to her November 20, 2014 work injury, constitutes an accident arising out of and in the course of her employment with the Respondent. The Arbitrator notes that the Illinois Supreme Court addressed this precise issue in the case of Lucious Lee v Industrial Commission (Tootsie Roll), 167 Ill 2nd 77, Supreme Court of Illinois (1995). In that case, the Supreme Court affirmed the denial of a claim made by an employee who was injured while travelling to a follow-up medical appointment. In support of their decision, the Supreme Court concluded that the claimant was not: 1) acting at the direction of his employer in going to an employer-approved clinic; 2) performing an act incidental to an assigned duty of his employment; or 3) acting pursuant to his duty of employment. The Court in Lucious Lee concluded that the claimant's subsequent injuries sustained while attending a follow-up medical appointment did not arise out of and in the course of that claimant's employment.

In the present case, the evidence is clear that the Petitioner was free to choose her medical provider and was not directed to go the employer-approved clinic of Presence St. Mary Hospital. Petitioner's attendance at the follow-up medical visit on December 1, 2014 was also not an act incidental to an assigned duty of her employment with Respondent. Finally, Petitioner was under no duty, statutory or otherwise to attend her follow-up appointment at the Presence St. Mary Clinic on December 1, 2014. The testimony of all of Respondent's witnesses are not rebutted with regard to the fact that the Respondent exerted no control or direction of Petitioner's medical care. The fact that the Respondent provided Petitioner with a translator for her medical appointments do not change the fact that the Petitioner was free to go to any medical provider and was free to attend follow up appointments knowing that she would not be paid to attend those follow up visits. There was no evidence presented that Petitioner was under any obligation or duty to attend her follow medical appointment or that such attendance was incidental to any of her duties with Respondent. In light of this evidence and the governing case law, the Arbitrator concludes that the Petitioner's motor vehicle accident on December 1, 2014 was not an accident arising out of and in the course of Petitioner's employment with Respondent.

2. Regarding the issue of causation, the Arbitrator finds that the Petitioner's current condition of ill being is not causally related to her alleged work related accident. Other than an initial diagnosis of an elbow contusion, there was no further evidence to show the Petitioner continued to suffer any disability to her elbow. Furthermore, having found that the Petitioner's December 1, 2014 incident was not an accident covered under the Act, the Arbitrator further finds that December 1, 2014 incident was an intervening incident, breaking any causation between Petitioner's November 20, 2014 compensable accident and her current condition of ill-being.

3. Based on the Arbitrator's findings with respect to the issues of accident and causation, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TARA ALEXANDER,

Petitioner,

vs. NO: 15 WC 04393

STATE OF ILLINOIS-DHS,

Respondent.

17IWCC0284

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, causal connection 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).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner has worked for the State for 15 years. She was a Collector at the time of accident. She answers the phone all day taking collection calls. She types letters and responds to correspondence, transcribes calls and drafts reports which require typing and 10 key entry. She works 8 to 4:30 Monday through Friday. She gets two 15 minute breaks and a 30 minute lunch. On average she took 35 phone calls a day. On certain

days she could take as many as 70 calls. She uses a headset, but does have to remove the phone off of the receiver to field calls. She estimated that she types 90 percent of each work day. When she is at her desk, her elbows are high consistently.

2. Prior to January of 2014 Petitioner was a Case Worker. Her job duties were similar to those described above. She had a make-shift desk with mismatched tables. Her left arm would sit more level back then, however, while her right arm was a little lower.

3. Petitioner first noticed pain in her right arm and hand in 2013. It became more consistent in 2014 when she was at her desk more. She used a wrist splint for a month, but was told to stop by Dr. Wottowa if it was not helping. She wore it all day and slept with it on.

4. Dr. Wottowa is a board certified orthopedic surgeon. He testified via deposition that, upon examining Petitioner, he initially suggested ergonomic adjustments to Petitioner's work station in order to decrease the angle of her elbow. He stated that the angle could potentially cause nerve irritation, and that extended flexion could lead to cubital tunnel syndrome. He recommended Petitioner raise her seat height and lower her keyboard so her elbow will not be as flexed as it has been. He opined that Petitioner's cubital tunnel syndrome may have been aggravated by her work duties.

5. Petitioner began noticing more pain, and sought treatment on January 5, 2015. Her physician told her to adjust her work station. However, this was not possible based on the setup of her work station. She underwent an EMG on January 13th. Two weeks later she was recommended for surgery for her right carpal cubital tunnels.

6. On January 28, 2015 Petitioner noticed even more pain with her right arm and began dropping things due to finger numbness. Her symptoms progressed throughout the work day, but did not progress when she was at home. She reported the injury to her supervisor on February 5, 2015.

7. Dr. Emanuel (Respondent's §12 examiner) is also a board certified orthopedic surgeon who examined Petitioner. The exam revealed signs of ulnar nerve neuritis at the elbow and very mild carpal tunnel on the right. Dr. Emanuel attempted to relate Petitioner's potential cubital tunnel to her answering the phone, but stated that she would have to answer 50-60 calls daily in order to develop cubital tunnel. Dr. Emanuel stated that doing so would cause flexion and extension.

8. Dr. Emanuel opined that, although Petitioner's cubital tunnel was not work-related, he did agree with the cubital tunnel surgery recommendation.

The Commission affirms the Arbitrator's finding of no accident or causal connection with respect to Petitioner's carpal tunnel syndrome. However, the Commission reverses the

17IWCC0284

Arbitrator's finding of no causal connection to Petitioner's cubital tunnel syndrome. Dr. Emanuel indicated that Petitioner's phone answering frequency did not rise to the level necessary to cause cubital tunnel syndrome. However, Dr. Wottowa's causal connection opinion was not related to Petitioner answering phones, but to the constant flexion of her elbow while at her work desk. Respondent relied upon the opinion of Dr. Emanuel, but failed to rebut the opinion of Dr. Wottowa.

Accordingly, the Commission hereby modifies the Arbitrator's causal connection ruling, and finds causal connection with respect to Petitioner's cubital tunnel syndrome condition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's cubital tunnel syndrome is causally related to her work duties.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for all reasonable and necessary medical expenses related to Petitioner's cubital tunnel surgery and recovery under §8(a) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $20,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 4 - 2017
O: 3/9/17
DLG/wde
45

David L. Gore

Stephen Mathis

Kevin Lamborn

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

ALEXANDER, TARA
Employee/Petitioner

Case# **15WC004393**

STATE OF ILLINOIS-DHS
Employer/Respondent

17IWCC0284

On 7/15/2016, 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 0.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1727 LAW OFFICES OF MARK N LEE
KEVIN J MORRISON
1101 S SECOND ST
SPRINGFIELD, IL 62704

4993 ASSISTANT ATTORNEY GENERAL
AMY S OXLEY
500 S SECOND ST
SPRINGFILED, 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

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

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

JUL 15 2016

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Tara Alexander
Employee/Petitioner

v.

State of Illinois - DHS
Employer/Respondent

Case # **15** WC **004393**

Consolidated cases: **N/A**

17IWCC0284

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Springfield**, on **May 24, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0284

FINDINGS

On the date of accident, **1/28/2015**, 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 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 **$65,598.00**; the average weekly wage was **$1,261.50**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of **$0.00** 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 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 she sustained an accident on January 28, 2015 that arose out of and in the course of her employment with Respondent or that her current condition of ill-being in her right hand/wrist and arm is causally connected to her accident. Petitioner's claim for benefits and 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.

Nancy Lindsay
Signature of Arbitrator

July 12, 2016
Date

ICArbDec19(b)

JUL 15 2016

Findings of Fact and Conclusions of Law

The Arbitrator finds:

Petitioner began working for the State of Illinois on April 2, 2001 as a Department of Rehabilitation Office Associate, a position she held until June 16, 2006. (PX 2)

Petitioner worked for Respondent as a Human Service Caseworker from June 16, 2006 to January 14, 2014. (PX 2)

Petitioner was promoted to an Executive I with Respondent on January 15, 2014. For the first couple of weeks Petitioner was involved in training and transcribing (PX 2; RX 3)

Petitioner took 564 calls for the month of February of 2014 (an average of 31.3 calls/day).

Petitioner took 662 calls for the month of March of 2014 (an average of 31.5 calls/day). (RX 3)

Petitioner took 457 calls for the month of April of 2014 (an average of 20.8 calls/day). (RX 3)

Petitioner took 387 calls for the month of May of 2014 (an average of 18.4 calls/day). (RX 3)

Petitioner took 318 calls for the month of June of 2014 (an average of 15.1 calls/day). (RX 3)

Petitioner took 291 calls for the month of July of 2014 (an average of 13.2 calls/day). (RX 3)

Petitioner took 216 calls for the month of August of 2014 (an average of 10.3 calls/day). (RX 3)

Petitioner took 276 calls for the month of September of 2014 (an average of 13.1 calls/day). (RX 3)

Petitioner took 257 calls for the month of October of 2014 (an average of 11.7 calls/day). (RX 3)

Petitioner took 192 calls for the month of November of 2014 (an average of 12 calls/day). (RX 3)

Petitioner took 223 calls for the month of December of 2014 (an average of 10.1 calls/day). (RX 3)

Petitioner took 236 calls for the month of January of 2015 (an average of 11.8 calls/day). (RX 3)

On January 5, 2015, Petitioner had an office visit with Dr. Christopher Wottowa. She had been referred by her primary care physician, Dr. Michael Comerford, who received a copy of the office note. Petitioner's history included a diagnosis of hypertension. Petitioner reported that for the past year or so she had been experiencing numbness and tingling to her right 5th digit and, occasionally, the right 4th digit. Dr. Wottowa noted that it bothered her with writing as she typed all day and when at her work station typing and answering the phone, her symptoms would progressively worsen as the day went on. Dr. Wottowa advised her to change her work station so that her elbow would not be as flexed as it has been and to move her phone to the opposite side so she wouldn't have to move her elbow a lot to answer

the phone. Petitioner also reported that she experienced symptoms at home as well and at night, occasionally waking her up. Petitioner felt her hand was clumsy and weak and that she was dropping things. She denied any symptoms of numbness or tingling to her thumb, index, or long fingers. Petitioner was noted to have three children and denied any symptoms while pregnant with the children. Dr. Wottowa performed a physical examination noting she had a fairly classic history and presentation for cubital tunnel syndrome but he saw no evidence of carpal tunnel syndrome. She denied any symptoms on the left hand. Dr. Wottowa recommended nerve conduction studies with Dr. Gelber and changes to her work station. (PX 5)

An EMG/nerve conduction study was performed on January 13, 2015. Petitioner gave a one year history of numbness and tingling primarily involving the 4th and 5th fingers of the right hand. Testing was done as ulnar neuropathy was suspected. Testing results reflected mild right carpal tunnel syndrome and mild right cubital tunnel syndrome. (PX 4)

Petitioner returned to see Dr. Wottowa on January 28, 2015. At that time, they reviewed Dr. Gelber's findings. Dr. Wottowa recommended that Petitioner proceed with a surgical release for her carpal and cubital tunnel syndrome. Petitioner decided not to proceed with surgery at that time because her daughter was undergoing knee surgery and her husband had severe carpal tunnel syndrome and needed to undergo surgery first. (PX 5)

On February 5, 2015 a Tristar Workers' Compensation Employee's Notice of Injury form was completed. In it Petitioner indicated that she had reported her injury to her supervisor, Chuck Peek, on February 2, 2015. Petitioner further attributed her injury to her "hands, arm, and elbow" as stemming from repetitive typing, answering the phone, and the ergonomics of her work station. She indicated that the pain increased throughout her day after typing and answering the phone, her hand would go numb and she finally had to seek treatment. (PX 1)

On February 6, 2015 Petitioner signed her Application for Adjustment of Claim alleging that she sustained repetitive trauma resulting in carpal tunnel syndrome. (AX 2)

On March 2, 2015 Petitioner typed up a job description. She indicated that she began working for the State of Illinois in April of 2001 and underwent several promotions first becoming a Human Service Caseworker in June of 2006 and then becoming an Executive I as of January 15, 2014. In total, she had worked for the State of Illinois fourteen years. According to Petitioner all three jobs consisted of clerical duties, answering the phone, filing, stuffing envelopes, typing and some hand writing. As of March 2, 2015 Petitioner was working 8:00 – 4:30, Monday through Friday with a fifteen minute break in the morning, half an hour lunch, and a fifteen minute afternoon break. She was currently working about ten hours of weekly overtime. As an Executive I Petitioner answers phones (3-70/day), returned phone calls (varying number), responds to mail inquiries in a typed letter format, prints off letters and envelopes and stuffs them, enters calls and letters into a system , uses a 10 key calculator to figure payment plans for clients. Petitioner noted she was right hand dominant and performed the bulk of her duties with her right hand but had been trying to use her left hand more and more. (PX 2)

On August 20, 2015, Petitioner attended a Section 12 examination at the request of Respondent performed by Dr. James Emanuel of Parkcrest Orthopedics. (RX 1) Petitioner provided her work history and medical history to Dr. Emanuel. She indicated that her job consists of primarily answering phones. She stated that her elbows did not rest on any type of arm rest and her hands were away from her body with her elbow flexed at 90 degrees while typing. (RX 1, p. 1) On examination, Petitioner was described

as obese and having a "shallow" cubital tunnel. Dr. Emanuel diagnosed Petitioner with cubital tunnel syndrome and carpal tunnel syndrome. Dr. Emanuel also reviewed Petitioner's medical records, including a note from December 5, 2014 which indicated that Petitioner had two years of progressive right wrist pain, a weight gain of 70 pounds, hypertension, vitamin B12 deficiency and iron deficiency. (RX 1, p. 2) Dr. Emanuel found no causal connection between Petitioner's carpal and cubital tunnel syndromes and her work activities. He indicated that Petitioner's pre-existing conditions of obesity, being female, and malabsorption syndrome were related to her carpal and cubital tunnel syndromes. He recommended conservative treatment with night splints for the wrist and the elbow before any surgical intervention. (RX 1, p. 3)

The deposition of Dr. Christopher Wottowa was taken on October 5, 2015. Dr. Wottowa is a board certified orthopedic surgeon. (PX 5, p.5). Dr. Wottowa's testimony was consistent with his treatment notes of Petitioner. Dr. Wottowa testified that he initially recommended some ergonomic changes to Petitioner's work station as raising up her seat and lowering her keyboard could make her elbow extend more and flex less. Dr. Wottowa explained that elbow flexion causes the nerve to become irritated and occurs when bending the elbow (as when reaching you hand up to your face). Extension is when one puts the hand away from the face. He felt if Petitioner's seat was higher and the keyboard lower she would not have to extend her elbow towards her face; rather it would extend down towards her knee. He further explained that one of the provocative factors for cubital tunnel syndrome is the extended flexion. The flexion of the elbow is less an aggravating factor for carpal tunnel syndrome. (PX 5, pp. 8-9) With regard to the wrist and carpal tunnel syndrome one is looking for a combination of wrist flexion or extension extremes combined with forceful grip. He testified "So not necessarily with keyboard use but with more industrial environment where your wrist is flexed and you are gripping firmly." (PX 5, p. 10) He testified that there has been no study linking keyboard use to carpal tunnel syndrome. (PX 5, pp. 10-11) He has, however, seen situations where a person has carpal tunnel syndrome and the symptoms are so bad that they get worse with a keyboard. (PX 5, p. 11)

Dr. Wottowa testified that if Petitioner wished to proceed with surgery that would be reasonable. (PX 5, p. 14) He also agreed that more conservative care was an option. (PX 5, p. 14)

Dr. Wottowa was shown photographs of Petitioner's work station. Based upon the photographs he felt Petitioner's elbows were somewhat flexed when sitting at her keyboard and her wrists were slightly extended. He noted he had no information on the frequency of activities shown in the photos. (PX 5, p. 16)

After listening to a hypothetical regarding Petitioner's job duties including the fact she worked 8:00 a.m to 4:30 p.m. with two 15 minute breaks and a one hour lunch break, that all of her jobs since going to work for Respondent had involved clerical duties, answering the phone, filing, stuffing envelopes, typing throughout the day, and manually writing, and that as an Executive I she answered the phone up to 70 calls per day, returned phone calls, responded to mail inquiries in a typed letter format, printed letters and envelopes and stuffed them, and that she was currently working overtime involving using a ten-key function to her right to figure clients' payment plans (and that comprised a large part of her day) Dr. Wottowa testified that Petitioner's cubital tunnel syndrome may have been aggravated by her work duties. (PX 5, pp. 17- 22) He explained that causation has to be determined on a person to person basis but her main complaint to the doctor was that her symptoms were worse when she was at work and if her elbow was in a flexed position it would aggravate it. He did not believe that her job duties caused or aggravated her carpal tunnel syndrome. (PX 5, pp. 20-21)

Dr. Wottowa testified that Petitioner had certain risk factors for carpal and cubital tunnel syndrome. Dr. Wottowa indicated that carpal tunnel syndrome has multiple causes and risk factors. (PX 5, p. 23) Petitioner had risk factors of hypertension, obesity, iron deficiency and B12 deficiency. (PX 5, pp. 24-25) (PX 5, pp. 23 – 26) He further testified that he did not know if the "aggravation" made Petitioner's cubital tunnel permanently worsen, as it could be only a temporary increase in her symptoms. (PX 5, p. 26-27)

Dr. Wottowa also acknowledged that Petitioner did not provide him with a detailed description of her job duties, just a "rough sketch." (PX 5, pp. 27-28) Dr. Wottowa further opined that if Petitioner was using a headset and only had to pick up the phone receiver and set it immediately back down answering the phone would not be an aggravating factor in the development of her cubital tunnel syndrome. (PX 5, p. 28)

Dr. Wottowa admitted that Petitioner did not show signs of carpal tunnel syndrome during his physical examination and the only reason he was recommending a carpal tunnel release was because it could be performed at the same time as the cubital tunnel release. (PX 5, pp. 28-29)

Dr. Wottowa confirmed that Petitioner also had symptoms of carpal and cubital tunnel syndrome while at home and that there could be activities that she performed at home which caused or aggravated her conditions. (PX 5, pp. 29-30)

The deposition of Dr. Emanuel was taken on October 19, 2015. (RX 2) Dr. Emanuel is a board certified orthopedic surgeon. (RX 2, p. 7) Dr. Emanuel's testimony was consistent with his report. He testified that Petitioner provided him with a history of a gradual onset of numbness and tingling in her hand for about three years prior to the date of the examination. She complained of dropping things especially around Thanksgiving of 2014. Since then she had experienced multiple episodes of dropping things. She had no complaints regarding her left hand. (RX 2, pp. 1-11)

On physical examination he noted Petitioner had a very shallow cubital tunnel and her nerve was easily palpated and prominent. Phalen's testing and Tinel's testing was positive at the elbow. He testified that Petitioner described her job as primarily requiring her to answer phones using a headset. She would use her right hand on the computer, using the ten key portion of her computer. She typed with both hands. Her elbows did not rest on any type of armrest and her hands were away from her body with the elbow flexed at ninety degrees while typing. He felt she had signs of ulnar nerve neuritis at the elbow and very mild carpal tunnel syndrome, both limited to the right extremity. (RX 2, pp. 11 -13)

Dr. Emanuel testified that there was no causal connection between Petitioner's job duties and her carpal and cubital tunnel syndromes. He opined that Petitioner had pre-existing risk factors for the development of carpal tunnel syndrome, including obesity, female gender, and malabsorption syndrome. He further explained that there are no peer-reviewed studies that causally relate carpal tunnel syndrome to typing and stated that typing would not cause cubital tunnel as it would be impossible to type in a manner which would place pressure on the ulnar nerve. (RX 2, pp. 13- 16)

After reviewing photographs of Petitioner's workstation, Dr. Emanuel did not change his opinion regarding causation. (RX 2, p. 17) Dr. Emanuel did acknowledge that if Petitioner was answering the phone 50 to 60 times per day, that activity could be repetitive enough to aggravate her cubital tunnel syndrome. (RX 2, p. 17) The following exchange occurred:

Q. Now you mentioned repetitive elbow flexion and extension as a cause for cubital tunnel. If Ms. Alexander was picking up the phone and answering it up to 50-60 times a day, do you believe that would cause or aggravate carpal tunnel or cubital tunnel?
A. That could. It could aggravate it.
Q. Now would that aggravation be because she is holding the phone to her ear?
A. No. It would be the repetitive flexion and extension.
Q. How many times a day would you say would be, like, a threshold? How many times a day would be enough to aggravate the condition?
A. I think, you know, a hundred times, two hundred times a day would be, I think, considered repetitive.
Q. Okay. Anything under that, you wouldn't consider repetitive?
A. You know, there's no magic number. But I would say, you know, two or three times an hour is not repetitive.
Q. Okay.
A. Twenty times, 15, 20 times could be considered repetitive.
(RX2-pg. 17-18)

Dr. Emanuel recommended conservative treatment in the form of braces for the wrist and elbow for six weeks to see if there was any improvement. If no improvement, he would then recommend surgery. (RX 2, pp. 18, 25) Dr. Emanuel further testified that he provided an impairment rating of zero percent due to lack of causation. (RX 2, p. 19)

On cross-examination Dr. Emanuel acknowledged that Petitioner had a shallow cubital tunnel, which is where the nerve travels, and that a shallow nerve can be more easily aggravated or irritated than a less shallow one. When asked if an individual with a shallow nerve would possibly require less repetitive activity to replicate symptoms, Dr. Emanuel replied that he felt such an individual would be more susceptible to direct contact than repetitive motion. (RX 2, pp. 19-20, 23) He also did not believe that the ergonomics of one's work station was something to be considered in addressing causation/aggravating but added he would probably need more detailed information as to the specifics. He felt that if Petitioner were in a small cubicle and hitting her elbow against something all the time, it might be; however, if it was the actual position of the elbow and doing data entry, he did not think it would be a contributing factor. He did not feel that a drop down keyboard would make any difference because he simply didn't believe clerical work caused either carpal or cubital tunnel syndrome. (RX 2, pp. 21-22)

On further cross-examination Dr. Emanuel returned to the subject of the number of times one might be answering the phone and while he though 100 to 200 times a day could possibly be repetitive enough to aggravate a cubital tunnel syndrome, he acknowledged that no one had studied the issue and it "certainly could be different for different people." (RX 2, p. 22) He had no way of telling how many times one would do that to cause cubital tunnel syndrome. (RX 2, p. 22)

Dr. Emanuel also explained that a person with a shallow nerve would be almost less irritated with flexion and extension because it's the nerve located more deeply within the tunnel which is more angled. (RX 2, p. 23) He also testified that if Petitioner placed her elbow on the desk after picking up the phone that would not be direct contact of the elbow/ulnar nerve. (RX 2, p. 24)

Dr. Emanuel also testified that if Dr. Wottowa had attempted conservative treatment (cock-up splints) and it failed, surgery would not be unreasonable. (RX 2, pp. 24-25)

On redirect examination Dr. Emanuel testified that if Petitioner wore a headset to answer the phone it would change his opinion regarding the act of reaching for the phone constituting an aggravating factor,

explaining that he didn't know how she activated her headset other than pushing a button on the telephone receiver but it's not quite the same as reaching for a handset, back and forth. (RX 2, pp. 25-26)

On further cross-examination Dr. Emanuel acknowledged that if Petitioner was answering "back and forth with a headset" on a telephone 100 to 300 times that could aggravate cubital tunnel syndrome. (RX 2, p. 26)

Petitioner's case proceeded to arbitration on May 24, 2016. Petitioner was the sole witness at the 19(b) hearing. The disputed issues were: accident; causal connection; medical bills; and prospective medical care. At the time of trial Petitioner amended her Application for Adjustment of Claim to allege right carpal tunnel syndrome and right cubital tunnel syndrome. (AX 2)

Petitioner testified that she has worked for the State of Illinois for fifteen years. Petitioner is currently employed as an Executive I for the Bureau of Collections at DHS. Petitioner became an Executive I in January 2014. Prior to that, Petitioner worked as a human service case worker. As a Human Service Case Worker, Petitioner's job duties were similar to her duties as an Executive I, but she also met with clients one-on-one.

Petitioner testified that as an Executive I she is basically "a collector." Petitioner testified that she answers collection telephone calls, speaks with customers, types letters, responds to correspondence, transcribes phone calls, and prepares reports. Petitioner testified that she answered an average of 35 phone calls per day; however some days she did not answer the phone at all. Petitioner wears a headset while using the phone and answers phone calls by picking the phone receiver off the hook and placing it on the table next to the phone. She described a "back and forth" motion with her right hand.(RX 3)

Petitioner testified that 90% of her day at work is spent typing. Petitioner testified that her hands are above a 90 degree angle when she types because her elbows hit her armchair rests. Petitioner testified that the letters that she types are mostly form letters, where she inserts the appropriate information. Petitioner testified that she tries to work on letters in between telephone calls.

Petitioner worked from 8:00 A.M. to 4:30 P.M. Monday through Friday, with two-fifteen minute breaks and a half-hour lunch each day.

Petitioner's Exhibit 3 contains photographs of Petitioner's workstation. Petitioner's Exhibit 3A shows Petitioner typing at her workstation. Petitioner's Exhibit 3B shows Petitioner stapling a phone script. Petitioner's Exhibit 3C shows Petitioner answering the phone. Petitioner's Exhibit 3D shows Petitioner typing on the ten-key portion of her keyboard. The photographs in Petitioner's Exhibit 3A and 3D show Petitioner's hands in a neutral position and her arms not resting on the armrests while typing. Petitioner testified that her keyboard sits on top of her work station because her desk is too low and the keyboard couldn't be placed below it or she would hit it with her knees.

Petitioner identified PX 2 as a fairly accurate job description that she prepared.

Petitioner testified that she is currently 5 foot, 8 inches tall and weighs 264 pounds. In January 2015, Petitioner weighed approximately 250 pounds. Petitioner denied being diagnosed with high blood pressure. Petitioner was diagnosed with B12 and iron deficiencies 12 years ago, following her gastric bypass surgery.

Petitioner testified that in January of 2015, she began experiencing more pain in her right arm and had finger numbness. Petitioner testified that she noticed the symptoms progress throughout the day at work, but did not notice an increase in symptoms at home.

Petitioner testified that she was given a wrist splint before she saw Dr. Wottowa by her primary care physician, Dr. Comerford. She testified that she wore it for a month, but it did not help her symptoms.

Petitioner testified that on February 5, 2015, she reported her injury to her supervisor, Chuck Peek. Petitioner also testified that some adjustments were made to her work station after her January 5, 2015 visit with Dr. Wottowa.

Petitioner has not yet undergone the surgery recommended by Dr. Wottowa.

On cross-examination Petitioner acknowledged the use of a headset since January of 2014. Petitioner also acknowledged being diagnosed with both an iron and B-12 deficiency about twelve years ago.

Petitioner believed she started having problems with her right arm and hand in 2013. It was "hit or miss" but in 2014 when she was at her desk more and doing more typing it became more consistent.

While Petitioner didn't experience any symptoms at home on a regular basis she acknowledged having some symptoms when doing her hair or cooking at home.

Petitioner acknowledged getting a wrist splint from Dr. Comerford but it didn't help. She tried it for about a month.

RX 3 is a summary of Petitioner's phone calls. Between February 1, 2014 and January 31, 2015 Petitioner completed 4, 079 calls. (RX 3)

The Arbitrator concludes:

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

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

Petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her right hand and right arm due to repetitive work activities that arose out of and in the course of her employment by Respondent and manifested itself on January 28, 2015. The Arbitrator also finds Petitioner has failed to prove by a preponderance of evidence that her current conditions of ill-being in her right upper extremity is causally related to her injury.

Generally, repetitive trauma cases are compensable as accidental injuries under the Illinois Workers' Compensation Act. In *Peoria County Belwood Nursing Home v. Industrial Commission*, the Illinois Supreme Court held that "the purpose behind 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." 115 Ill.2d 524, 529, 505 N.E.2d 1026, 1028 (Ill. 1987). In a repetitive trauma case, it is imperative that the employee place into evidence specific and detailed information concerning the employee's work activities, including the frequency, duration, and manner of performing these activities. It is also important that the medical experts have a detailed and accurate

understanding of the employee's work activities. It is axiomatic that the unique facts of each case must be closely scrutinized in a repetitive trauma case.

Petitioner's job duties consist of being a collector of funds for Respondent. She would respond to telephone calls, transcribe messages, prepare form letters, and prepare reports. While Petitioner testified that she spent 90% of her day typing, her testimony regarding her various job duties seems to contradict this statement. On the issue of causation herein, Petitioner relied upon the opinions of Dr. Wottowa, her treating physician. The strength of his causation opinions depends upon the accuracy of Petitioner's job duties as understood by him.

Dr. Wottowa clearly and concisely testified that Petitioner's right carpal tunnel syndrome was not caused or aggravated by her job duties for Respondent.

With regard to her right elbow, Dr. Wottowa essentially provided two opinions that differed based upon the manner in which Petitioner answered the phone while working. Petitioner performed several tasks for her employer over the course of the day. While she focused on the repetitive nature of all these tasks, her treating doctor, Dr. Wottowa, focused his expert opinions on the one activity that potentially involved flexion of her right elbow – answering the phone. Dr. Wottowa indicated that Petitioner's work duties could have aggravated her cubital tunnel syndrome if she was in a position where she had her elbow flexed or irritated the nerve. Dr. Wottowa testified that since Petitioner had her phone conversations on a headset, the action of taking phone calls would not have aggravated her cubital tunnel syndrome. Based upon the evidence presented at arbitration, Petitioner used a headset. Thus, based upon the manner in which Petitioner answered the phone Dr. Wottowa would not find causation for her cubital tunnel syndrome.

Even if the issue of the manner in which Petitioner answered the phone and used her headset was set aside, both Dr. Wottowa and Dr. Emanuel were misled by Petitioner regarding the number of telephone calls she handled per day. Dr. Emanuel stated that Petitioner's work duties did not cause or aggravate her cubital tunnel syndrome. While he testified that answering more than 100 phone calls per day could aggravate Petitioner's cubital tunnel syndrome and that 15 – 20 calls per day "might" be repetitive, the latter was not definitive or specific to Petitioner's case. It was Dr. Wottawa's understanding, based upon Petitioner's history to him, that she answered the telephone up to seventy times a day. None of the evidence provided by Petitioner or Respondent indicates that Petitioner would make or receive 100 phone calls per day, as Petitioner testified that she averaged 35 phone calls per day, while Respondent's phone data (RX 3) indicates that Petitioner averaged between 10 to 31 phone calls per day, depending on the month. This would amount to between 1.26 and 3.9 phones calls per day which, to this Arbitrator, seems relatively little in terms of frequency.

Given the totality of the evidence, the Arbitrator concludes that Petitioner's cubital tunnel syndrome did not arise out of or in the course of her employment with 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. Is Petitioner entitled to any prospective medical care?

Having found Petitioner has failed to prove by a preponderance of the credible evidence that she sustained injuries to her right hand and right arm due to repetitive work activities that arose out of and in the course of her employment by Respondent and failed to prove by a preponderance of the credible evidence that her current condition of ill-being as it relates to her right hand and right arm is causally related to the alleged accident, the Arbitrator finds these remaining issues moot.

Petitioner's claim for compensation is denied and no benefits are awarded.

****

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

EDITH ROBINSON,

Petitioner,

17IWCC0285

vs.

NO: 11 WC 11714

SOLO CUP COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Respondent appeals the January 6, 2016 Section 19(b) Decision of Arbitrator Simpson finding that Respondent shall pay the reasonable and necessary expenses incurred for prospective medical care recommended by Dr. Treister pursuant to Sections 8(a) and 8.2 of the Act and that Respondent shall pay for temporary total disability benefits from February 22, 2011 through July 29, 2013 as provided in Section 8(b) of the Act. Respondent additionally seeks a determination on permanent partial disability.

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

The parties stipulated to accident. Petitioner testified that on February 21, 2011 she was working as a leader helping pack plastic cups in a plastic bag and the bags into a box. While working, Petitioner was bending down with her back turned when she felt something drop on her, "like six boxes which pushed her." Petitioner testified that the boxes weighed about 50 pounds and had fallen from a "fork lifter." Petitioner testified 60 boxes fell and she was struck on her leg and her knee when they fell. She fell face down to the ground. (T, pp. 18-22)

Petitioner first treated at Holy Cross Hospital, then at Excel Occupational Health Clinic. (Px1, Px2) Petitioner testified that she chose to treat with her primary care physician, Dr. Wanda Elliot-Pearson rather than continue at Excel. (T, p. 27)

Dr. Elliot-Pearson referred Petitioner for a left knee MRI which was done at Advocate Trinity Hospital on March 5, 2011. (Px3, p. 24). Dr. Elliot-Pearson also referred Petitioner to Dr. Richard Egwele, an orthopedist, on March 18, 2011. (T, pp. 12, 27, Px3, p. 45)

Dr. Egwele's March 21, 2011 Worker's Compensation processing form documents Petitioner's history of having x-rays and an MRI of her left knee that were unremarkable. (Px3, p. 19)

On June 22, 2011 the therapist at Maximum Rehabilitation noted in the Assessment Narrative that "the patient demonstrates inconsistent efforts during strengthening exercises and progression of exercise has been slow due to low endurance and complaints of pain from the patient." (Px3, p. 13)

Dr. Egwele released the Petitioner to regular work June 22, 2011. (Px4, p.33) Petitioner testified she tried to return to work July 22, 2011 and never worked since. (T, pp. 29-32)

Dr. Egwele continued to treat Petitioner through September 2, 2011. At his last examination he noted she had Genu Valgum deformity, that she had full ROM and was uncomfortable in hyperflexion. Dr. Egwele noted that she limped greatly though came in without aids. Her quad strength was 12U on the left and 27U on the right. Peripheral N-V function was okay. She had no edema or popliteal fullness. He recommended a second opinion per her PCP's choice. (Px4, p. 43)

Petitioner testified that she returned to Dr. Elliott-Pearson, her primary care physician, and was then referred to Dr. Dilella, from Bone & Joint Physicians for a second opinion. (T, p. 32) She saw Dr. Dilella the first time on September 30, 2011. Dr. Dilella noted in his Plan that he could not correlate her disability and continued pain based on the findings in her MRI scan from March. (Px6, p. 11) He recommended a repeat MRI scan of the left knee which was done on October 24, 2011.

At Petitioner's final evaluation at Maximum Rehabilitation on October 5, 2011, her pain in her left knee was rated at 1-2/10 at best, 3-4/10 at worst and was noted to have improved. Her functional activity index from September 6, 2011 to re-evaluation on October 5, 2011 showed areas of improvement in exercise and walking. Work hardening was recommended. (Px5, p. 3)

On October 28, 2011, Dr. Dilella recommended pursuing conservative treatment based on the degenerative nature of the MRI findings. He gave Petitioner an injection of Lidocaine and Depomedrol in her left knee and prescribed one month of therapy. (Px6, p.8) Dr. Dilella saw Petitioner again on December 9, 2011 when he noted she had simply not progressed in her recovery. Dr. Dilella noted an IME was scheduled and deferred treatment pending results thereof. (Px6, p. 7).

Dr. Dilella saw Petitioner again on January 13, 2012. She was still reporting pain and that she was unable to perform her normal work duties. He reviewed the second IME authored by Dr. Bernard Bach from Rush and agreed that the patient's symptoms were simply not consistent with any of her radiographs or physical exam findings. Dr. Dilella determined that Petitioner should undergo a functional capacity evaluation (FCE) to determine validity of her effort and to set further work restrictions. (Px6, p. 6)

Petitioner underwent the FCE on February 1, 2012. The physical demand level (PDL) of her job as a packer was classified within the Sedentary-Light PDL. During the FCE, the Petitioner demonstrated the ability to perform 83.8% of the physical demands of her job as a Packer. She demonstrated the physical capabilities and tolerance function at the Sedentary-Light PDL. The therapist recommended daily work conditioning to increase Petitioner's overall physical capabilities and tolerance in the areas of walking and standing tolerance. (Px6, pp. 30-45)

Dr. Dilella reviewed the results of the FCE and provided her a prescription for the work conditioning. (Px6, p. 5) When Dr. Dilella saw Petitioner again on April 6, 2012 he noted that Petitioner reported that she was unable to tolerate the work conditioning. Dr. Dilella agreed with Dr. Bach, the Respondent's Section 12 examiner, that the Petitioner may be magnifying her symptoms regarding her knee. He opined that the previous MRI of her left knee did not, in his opinion, reveal any significant pathology to justify this amount of continued pain. He advised her to seek an additional opinion regarding her subjective left knee pain. (Px6, p.4)

The Respondent terminated Petitioner's TTD benefits on May 25, 2012 after Dr. Dilella's last office note.

The Petitioner was examined by Dr. Michael Treister, at Treister Orthopaedic Services, Ltd., at the request of her attorney. Dr. Treister authored a letter on June 22, 2012 addressed to Petitioner's attorney. He noted that x-rays taken at the emergency room of Holy Cross Hospital were basically normal except for a tiny oval bone density at the insertion of the anterior cruciate ligament which was felt to be old. (Px7, Depx2, p.2) Dr. Treister testified that he reviewed the first March 5, 2011 left knee MRI. (Px7, DepT pp. 8, 9) Dr. Treister opined that Dr. Egwele's opinion that the first MRI of Petitioner's left knee showed no evidence of internal derangement was "absolutely and totally incorrect." (Px7, DepT, p. 11)

Dr. Treister testified he reviewed a report from a second left knee MRI dated June 15, 2011 which was reported as normal but he had not reviewed the actual MRI. Dr. Treister thought that was highly unlikely as another MRI made shortly thereafter showed all kinds of pathology basically identical to that seen on the first MRI except for the additional deterioration of the patellofemoral joint. (Px7, DepT, p. 13, 28, 29) Dr. Treister testified that he reviewed the October 24, 2011 MRI. (Px7, DepT, pp. 15-16) Dr. Treister opined that the most recent MRI showed extensive medial meniscal tearing, lateral meniscal tearing, and advanced chondromalacia—cartilage deterioration in the knee—not present on the earlier study. (Px7, DepT, p. 16)

Dr. Treister recommended a bone scan and an EMG/NCV and a psychological or psychiatric evaluation prior to the performance of any surgical procedure. (Px7, Depx2, p. 9) Dr. Treister testified that he thought Petitioner "might clearly be exaggerating some, but I thought it was her persona. I didn't think it was because of this incident. I think she was just very dramatic." (Px7, p. DepT, pp. 56-57) Dr. Treister did not know Petitioner's job description, if she had work hardening or whether or not she had underwent a FCE. (Px7, DepT, pp. 48, 50, 53)

Dr. Bernard Bach of Midwest Orthopedics at Rush saw the Petitioner at the request of the Respondent pursuant to Section 12 on two occasions, May 18, 2011 and December 19, 2011. (Rx1). Dr. Bach reviewed the records from Petitioner's treatment after his last independent medical evaluation in 2011, including the FCE, and authored a letter dated September 20, 2012. Dr. Bach opined that the Petitioner has had maximum medical improvement independent of nonsurgical treatment. Dr. Bach reviewed the physical demands analysis generated through Solo Cup Company demonstrating Petitioner's essential job functions and physical demands and a video of individuals noted to assemble packets of Styrofoam plates in multiple groupings and placed them into bags that were opened through forced air. On his review of the FCE rendered through Accelerated Rehabilitation, Dr. Bach noted that the conclusions appeared to be consistent with Petitioner's job demands. He opined that Petitioner could be released to return to work without restrictions as of December 2011. (Rx1, Depx2, p. 1, DepT, pp. 38-39)

Petitioner testified that she was not receiving any treatment for her left knee or left leg at the time of the arbitration hearing. (T, p. 34)

Petitioner testified that she does household duties including cleaning her yard, her furniture, and she mops. She testified she cooks dinner, goes out with her mother and daughter to do things like shopping and that she is able to drive a car. (T, pp. 36, 39, 41) The Commission notes that various surveillance videos show Petitioner walking unassisted, placing bags into a vehicle and driving off. She did not appear to have difficulty walking and carrying the bags. She climbed stairs to her house without apparent difficulty.

The Commission finds that the records and opinions of the treaters Dr. Egwele and Dr. Dilella are consistent with those of Dr. Bach as it pertains to the Petitioner magnifying her symptoms regarding her left knee. Dr. Treister also conceded that there may be some element of symptom magnification. The Commission also finds that the opinions and records of Dr. Egwele and Dr. Dilella, the two treating doctors, and Dr. Bach are more persuasive than those of Dr. Treister regarding the Petitioner's ability to work and are bolstered by the therapy records and video surveillance. Dr. Treister admitted that he did not know Petitioner's job description and that he could not recall reviewing her FCE. The Commission finds it significant that Dr. Treister recommended a psychological or psychiatric evaluation of Petitioner prior to the performance of any surgical procedure opinion.

As a result of the Commission's findings herein, the Arbitrator's awards of prospective medical expenses and temporary total disability benefits after May 25, 2012 are hereby vacated.

17IWCC0285

IT IS THEREFORE ORDERED BY THE COMMISSION that the prospective surgery as awarded by the Arbitrator is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that temporary total disability benefits awarded after May 25, 2012 are hereby vacated; Respondent shall pay to Petitioner the sum of $306.89 per week for a period of 63-5/7 weeks, for the period from February 22, 2011 through May 25, 2012, 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 $276.20 per week for a period of 26.875 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 12.5% of the left leg.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $7,500.00.

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

DATED: MAY 4 - 2017
KWL/bsd
O-03/07/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

17IWCC0285

ROBINSON, EDITH
Employee/Petitioner

Case# **11WC011714**

SOLO CUP COMPANY
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:

0838 SHELDON HODES & ASSOC
DAVID H GREENSTEIN
205 W RANDOLPH ST SUITE 1410
CHICAGO, IL 60606

1109 GAROFALO SCHREIBER HART ETAL
JAMES CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

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)

17IWCC0285

Edith Robinson
Employee/Petitioner

v.

Solo Cup Company
Employer/Respondent

Case # 11 WC 11714

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **July 29, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0285

FINDINGS

On the date of accident, **February 21, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$23,937.68**; the average weekly wage was **$460.34**.

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

Respondent shall be given a credit for payment of TTD from February 22, 2011 through May 25, 2012.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $306.89 / week for 65.71 weeks commencing May 26, 2012 through July 29, 2013, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for the medical treatment recommended by Dr. Treister and any necessary follow-up or after care, pursuant to the medical fee schedule or by prior agreement, whichever is less, pursuant to 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.

Deborah L. Simpson

Signature of Arbitrator

January 6, 2016
Date

ICArbDec19(b)

JAN 6 - 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Edith Robinson,	)	
	)	**17IWCC0285**
Petitioner,	)	
	)	
vs.	)	**No. 11 WC 11714**
	)	
Solo Cup Company,	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on February 21, 2011, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree that on that date the Petitioner suffered accidental injuries that arose out of and in the course of employment and that the Petitioner gave the Respondent notice of the accident which is the subject matter of the dispute within the time limits stated in the Act. The parties agree further that in the year preceding the injury the Petitioner earned $23,937.68 and her average weekly wage calculated pursuant to Section 10 of the Act was $460.34. The parties also agree that the Respondent has paid $19,923.95 in TTD and/or maintenance benefits.

At issue in this hearing is as follows: (1) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (2) Is the Petitioner entitled to TTD from February 24, 2011 to the present or was she entitled to TTD from February 24, 2011 through May 25, 2012; and (3) What is the nature and extent of the injury.

STATEMENT OF FACTS

The Petitioner testified that she worked for the Respondent for 21 years before her accidental injury on February 21, 2011. She testified that she worked for the Respondent full time and that on that date she was the team leader. Her duties as team leader involved sending the girls to lunch and filling in for them while at lunch. She helped them pack, either the back room or the one doing the emergency. The Petitioner explained that packing involved packing plastic cups in a plastic bag, wrapping them and then throwing them in boxes and pushing them down. The box guy would then take it off the railing and stack them up in the tray.

The Petitioner testified that prior to February 21, 2011, her health had been good. She went to work that day starting somewhere around 7:00, she went straight to the station and

started stamping boxes. At approximately 7:15 or 7:30, she was bending down and her back was turned when she felt something drop on her, like six boxes which pushed her. The boxes weigh about fifty pounds each and had fallen from a "fork lifter." Petitioner believes she was struck with about 60 boxes. They struck her leg and her knee when they fell. Petitioner fell face down and the boxes were on top of her, such that she could not move her body. According to the Petitioner it knocked her out for two or three minutes, and the only thing she could do was hold up her right hand and say help. The Petitioner testified that she could not feel her leg at the time of the accident and she remained laying down on the floor for fifteen minutes until the ambulance arrived. The Petitioner was lifted from the ground, placed on a stretcher and taken by ambulance to Holy Cross Hospital.

At Holy Cross Hospital, in the emergency department, Petitioner complained of bilateral knee pain; she described the pain in her knee as aching, and rated it at 10 on a scale of 1 to 10. She reported to the hospital personnel that it had started a couple of hours ago when she was injured at work. An ice bag was applied to her knees bilaterally, in the emergency room. (PX 1, p. 8-9) Petitioner reported to Dr. Patrick Malik that she had pain in her right knee and her left shin, describing the pain as sharp and the severity as moderate. (PX 1, p.10) Petitioner was sent to x-ray where her left knee and her right leg were x-rayed. (PX 1, p.9, 14-15) The x-rays of the left knee revealed no acute bone or joint pathology; tiny ununited oval bony density at the tip of the intercondylar eminence of the proximal tibia possibly could be related to old injury. (PX 1 p. 14) The x-rays of the right leg demonstrated no bone or joint pathology. (PX 1, p. 15) By the time patient was discharged, with crutches, a knee immobilizer and naproxen her pain was reported to be a 3 on a scale of 1-10. Petitioner was referred to an orthopedic specialist. Her work status was to be determined by the specialist. (PX 1, p. 12-13)

Petitioner treated at Excel Occupational Health Clinic. On February 24, 2011 Petitioner was seen for an initial evaluation. Petitioner complained of pain in her left knee and soreness to her whole body. The doctor noted swelling to the left knee as compared to the right knee, no ecchymosis to the bilateral knees. There is extreme tenderness to palpation and guarding to the left knee especially over the medial joint line/popliteal area and left quadriceps. Active range of motion to the left knee was reported as 5 through 15 degrees secondary to guarding. Lachman's testing appeared negative though again significantly guarded on exam. The doctor recommended that Petitioner use 600 mg ibuprofen and Tylenol #3 as directed for pain, remain off of work until next visit, continue use of the left knee immobilizer while out of bed and ambulate with crutches and ice the left knee 3-4 times a day for 20 – 30 minutes at a time. Petitioner was to return on February 28, 2011. (PX 2, p. 17, 20-21)

Petitioner returned for follow-up on February 28, 2011. At that time the Petitioner reported that she had been taking the ibuprofen but not the Tylenol #3 because she did not want to use a narcotic. She reported that if she is not wearing the immobilizer she can hardly walk on the leg. She was still using the immobilizer and the crutches. The doctor noted that Petitioner was extremely resistant to physical exam; she preferred to sit upright with her left knee extended. The circumference of the right knee was 33 cm and 33.5 on the left. Active range of motion to the left knee was 5 to 25 degrees. There is medial and lateral joint line pain on palpation but the Petitioner complained of constant severe and diffuse pain everywhere around the knee throughout the exam. The doctor recommended an MRI of the left knee and that Petitioner

remain off of work continue taking the ibuprofen 600 mg and added 500mg acetaminophen two tablets four times per day, not to exceed 4000 mg of acetaminophen per day. Petitioner was directed to return on March 3, after the MRI so that the doctor could review the results and make a more definitive treatment plan. (PX 2, p. 10-14)

Petitioner's MRI was approved and scheduled for March 3, 2011, at One Call Medical. Excel Occupational Health Clinic called Petitioner on the phone to advise her to attend the MRI on the third and to reschedule her appointment for a date after the MRI. Petitioner's daughter took the call, advised she would have her mother call back to reschedule. Petitioner did not attend the MRI, nor did she call to reschedule her follow- up appointment. (PX 2, p. 5)

On March 5, 2011, the Petitioner had an MRI at Advocate Trinity Hospital. The results indicated that there was signal abnormality seen in the medial collateral ligament with fluid signal seen on either side of the ligament, correlating for a least a partial tear; the anterior and posterior horns of the lateral meniscus appear intact. There is small signal abnormality seen in the inferior aspect of the posterior horn medial meniscus, correlate for a small tear with no evidence of a free or flipped fragment. Appearance could be due in part to motion artifact. The anterior horn of the medial meniscus appears intact. Signal abnormality seen at the anterior aspect of the tibia plateau correlated for a bone contusion. The Articular cartilage, patellar tendons, lateral collateral ligaments complex, posterior cruciate ligament, anterior cruciate ligament and quadriceps tendon all appeared intact. (PX 3, p.24) The findings were reported as compatible with at least a partial tear of the medical collateral ligament; moderate joint effusion; bony contusion in the anterior aspect of the tibia. There is motion artifact on the examination which limits detailed evaluation. There is a question tear versus motion artifact seen in the posterior horn of the medial meniscus. (PX 3, p. 25)

The Petitioner treated with Dr. Richard A. Egwele at Exchange Medical Center, Orthopedic Surgery and Hand Surgery from April through September of 2011. (PX 4, p. 30-44) The Petitioner had X-Ray's of her left knee taken at Preferred Open MRI on June 15, 2011, ordered by Dr. Egwele. (PX 4, p.2-7) There was no evidence of a fracture or dislocation, there was some joint effusion but otherwise the x-ray was normal. *Id.* The Petitioner was sent to Maximum Rehabilitation Services for physical therapy which she attended from May through September of 2011 during which time she showed some improvement, being able to exercise for 30 minutes as opposed to not being able to exercise at all when she started and being able to stand at least 30 minutes as opposed avoiding standing because it increased pain immediately when she started physical therapy and later less than 10 minutes. (PX 4, p.12, 15, 18) Petitioner still had complaints of pain and was walking with a limp.

The Petitioner has not had any other accidents since the accident on February 21, 2011. Petitioner testified that she received her last pay check for TTD on May 25, 2012.

On cross examination the Petitioner testified that she does not do the laundry, her mother does that. Petitioner cleans her room and cooks dinner. She does go out with her mother and daughter. She tries to do things like shopping. She is able to drive a car. She stated that she has four grandchildren and they all live with her, her mother and her daughter. Petitioner also testified that she has three foster children ages 10, 13 and 14.

According to Petitioner at first she used crutches, then a cane. She stopped using the cane last year when she got a cyst on her hand. Petitioner agreed that her walking has improved since the day that she returned to work. She has not looked for work since the day Jim told her she could not work walking like she was at the time.

The Petitioner said that Dr. Egwele gave her only one letter to go back to work. She saw him again after that but he did not give her anymore letters. One of the doctors told her to stop using the cane but she does not remember who and she does not remember being told to come back and see them if she needed to.

The Petitioner saw Dr. Bernard R. Bach, Jr. at the request of the Respondent for examination pursuant to Section 12 of the Act on May 18, 2011. (RX 1) Dr. Bach prepared a written report after his examination of the Petitioner and review of her medical records and test results. (Exhibit 2 contained in RX 1) Dr. Bach agreed that she appeared to have a posterior horn medial meniscal tear and a bone contusion on the anterior aspect of the lateral tibial condyle, some patellofemoral chondromalacia. He noted that the ACL appeared intact and that no fractures were noted. At the time of the first evaluation Dr. Bach opined that the diagnosis was profound quad weakness secondary to injury, subsequent immobilization and only recent initiation of supervised physical therapy. He was of the opinion that her treatment had been less than ideal, the immobilization of the knee with a splint was proper because of the contusion mechanism, however she should have begun physical therapy much sooner than three months after the injury. He agreed that her condition at the time was related to her work injury. (RX 1) He opined that she could perform sedentary work; however with the pronounced limp that she had she was a risk for additional injury or a fall at work. (RX 1)

On December 19, 2011, the Petitioner reported for a second examination by Dr. Bach at the request of the Respondent pursuant to Section 12 of the Act. On that date Petitioner reported discomfort, pain stiffness and difficulty walking. He opined that her past treatment of anti-inflammatory medications, supervised physical therapy, interarticular corticosteroid injection and the use of ambulatory assistance were all reasonable, necessary and related to her injury. (RX 1) The doctor reported that he believed her current condition was related to her work injury. He had previously opined that the patellar tendinitis, medial meniscal tear symptoms, the bone contusion and the swelling that she experienced were more likely than not causally related to the mechanism of injury. He also opined that the chondromalacia was more than likely preexisting. (RX 2) It was at this time that he recommended two possible courses of treatment, first an FCE to see what permanent restrictions would be appropriate or second that she undergo surgical treatment with an attempt to identify and treat her condition. (RX 1)

In his letter of September 20, 2012, Dr. Bach continued with his recommendation of sedentary work, based upon her condition when he last saw her about a year and a half ago. He noted that he had no idea what improvements, if any, she had made over the past 18 months. He indicated that he had some concerns that Petitioner may have been magnifying her symptoms; however he still considered it possible that she was at risk for additional falls if she returned to work walking like she did the last time he examined her.

The Petitioner was also examined by Dr. Michael Treister, an Orthopedic Surgeon, at the request of her attorney on June 7, 2012. Dr. Treister reviewed the medical records and test records as well as performing his own examination. According to Dr. Treister the conservative treatment that the Petitioner had previously undergone was appropriate, however it was ineffective. He pointed out that Dr. Bach had opined, and he appears to agree with him, that the one month delay in beginning the physical therapy could have allowed substantial muscle atrophy to progress, synovitis to smolder and meniscal tearing and cartilaginous damage to progress unchecked. (PX 7, Ex 2) Since conservative treatment had failed, he was of the opinion that the Petitioner required, at the very least, arthroscopic surgery as was initially recommended by Dr. Bach (RX 1) should an additional period of physical therapy that he recommended not improve her condition. He stated that the arthroscopic surgery would likely alleviate some of her symptoms, and would serve to define absolutely and accurately the interior condition of her joint. (PX 7)

Dr. Treister pointed out that even if the chondromalacia in her knee was pre-existing, it was not symptomatic at the time of the injury and became symptomatic after the accident. (PX 7, Ex 2) In reviewing the MRI ordered by Dr. Carl Dilella, Dr. Treister determined that the MRI revealed that the medial meniscus was torn in its body and posteriorly, that there was a tear of the lateral meniscus; that there was synovitis and Capsulitis; that there was grade III chondromalacia of the Patello-femoral joint and cartilage erosions of the lateral aspect of the medial femoral condyle and of the cartilage in the lateral knee compartment. He opined that the articular cartilage in the left knee is failing. (PX 7, Ex 2 p. 8)

According to Dr. Treister, the medial meniscal pathology could be significantly improved with a partial medial meniscectomy during arthroscopic surgery; the later meniscal pathology could be significantly improved with a partial lateral meniscectomy during arthroscopic surgery; the capsulitis and synovitis could be significantly improved with an extensive synovectomy during arthroscopic surgery; and the cartilaginous injuries and deterioration could be well documented by arthroscopic micro-photographs and if significant fragmentation is present they could probably be improved with chondroplasty during arthroscopic surgery. (PX 7, Ex. 2 p. 8) As far as Dr. Bach's opinion regarding symptom magnification, Dr. Treister stated that the patient does describe her symptoms in a dramatic fashion that could be interpreted as symptom magnification, however, after reviewing the medical records and comparing the first and third MRI studies there are very reasonable and real bases for her subjective complaints and physical findings. Dr. Treister opined that he was not able to rule out a component of regional pain syndrome or a diagnosis of chronic pain syndrome. (PX 7, Ex 2 p. 8)

After watching the CD's of the video surveillance of the Petitioner on October 26, 2012, November 6, 2012 and January 7, 2013, the Arbitrator notes that the Petitioner was observed driving a motor vehicle, exiting her vehicle and walking into her residence carrying what appears to be papers. She was walking without the assistance of a cane or a crutch, which Petitioner had testified she no longer used on October 26. It was difficult to tell from the CD if the Petitioner's gait was unsteady. Petitioner was not recorded on the CD on November 6, 2012, only an unidentified male, apparently working on the vehicle the Petitioner was driving on October 26, and a child who entered the residence. On January 7, 2013, the Petitioner was recorded, leaving her home, getting into her vehicle and driving to the bank and then the dollar store. She is also

recorded exiting the store, carrying bags, walking unassisted to the car, placing the bags into the vehicle and driving off. Petitioner did not appear to have difficulty walking and carrying the bags. The Petitioner eventually returns to her house, parks the car and exits it carrying a child's car seat and balloons. She climbs the stairs to enter her house without difficulty from what could be seen.

The recordings of the Petitioner were not lengthy and were not complete since she goes in and out of observation. What she is observed doing in the surveillance is compatible with what was recorded in her physical therapy notes as far as the progress she made being able to walk about ½ a mile without too much difficulty etc. (PX 4, p. 8)

CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987).

In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions of law:

Both Dr. Bach, the Respondent's Section 12 examiner and Dr. Treister agree that the Petitioner's current condition of ill being is causally related to the injury that the Petitioner suffered. Dr. Treister's opinion is based upon his reading and comparison of the first MRI and the third MRI. He agrees with Dr. Bach that the initial care was less than optimal having allowed the Petitioner's leg to remain immobilized nearly three months before beginning physical therapy and supervised movement of the joint. Dr. Treister examined the Petitioner in June of 2012 and found that the history given by the Petitioner as to her current condition was supported by the medical records and tests as well as his own examination.

The Petitioner testified that prior to the February 21, 2011, accident that she was in good health, was working full time without restrictions and was able to perform all of her work duties without any physical problems or limitations. She has been unable to work since that time

For these reasons, the Arbitrator finds that Petitioner current state of ill-being is causally related to her work injury.

In support of the Arbitrator's decision with regard to whether the Petitioner is entitled to any prospective medical treatment, the Arbitrator makes the following conclusions of law:

Dr. Treister opined that the treatment that the Petitioner received prior to his examination on June 7, 2012, was reasonable and necessary but that it was incomplete. According to Dr. Treister, the medial meniscal pathology could be significantly improved with a partial medial meniscectomy during arthroscopic surgery; the later meniscal pathology could be significantly

improved with a partial lateral meniscectomy during arthroscopic surgery; the capsulitis and synovitis could be significantly improved with an extensive synovectomy during arthroscopic surgery; and the cartilaginous injuries and deterioration could be well documented by arthroscopic micro-photographs and if significant fragmentation is present they could probably be improved with chondroplasty during arthroscopic surgery.

The Arbitrator finds the opinions of Dr. Treister to be credible and reliable and supported at least in part by the opinion of Dr. Bach, who also recommended surgical intervention. The Respondent is ordered to authorize or approve and pay for the treatment recommended by Dr. Treister and any follow-up care that flows from the treatment.

In support of the Arbitrator's decision with regard to the amount due for temporary total disability, the Arbitrator makes the following conclusions of law:

Based upon the foregoing discussion, the Arbitrator finds Petitioner's alleged period of temporary total disability, from February 22, 2011 through July 29, 2013, to be supported by the record. Respondent had paid through May 25, 2012, and shall be given credit for all money previously paid.

In support of the Arbitrator's decision with regard to the nature and extent of Petitioner's injury, the Arbitrator makes the following conclusions of law:

The Petitioner has not yet reached MMI, in view of the opinion of Dr. Treister that the Petitioner could benefit from surgical intervention, therefore unless the Petitioner elects not to undergo the surgical treatment recommended, this issue is premature.

ORDER OF THE ARBITRATOR

Respondent shall pay Petitioner temporary total disability benefits of $306.89 / week for 65.71 weeks commencing May 26, 2012 through July 29, 2013, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for the medical treatment recommended by Dr. Treister and any necessary follow-up or after care, pursuant to the medical fee schedule or by prior agreement, whichever is less, pursuant to the Act.

Deborah L. Simpson

Signature of Arbitrator

January 6, 2016
Date

STATE OF ILLINOIS)	☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK)	☒ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD De GRAZIA,

Petitioner,

17IWCC0286

vs.

NO: 10 WC 47440

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein, and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability and 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, for the reasons stated below.

Findings of Fact and Conclusions of Law

The Petitioner, a 50 year single male on August 23, 2010, worked as an asphalt helper/laborer since 1982 for the City of Chicago. Petitioner's average weekly wage rate was $1,408.00 on August 23, 2010. At the time of the Arbitration hearing, Petitioner testified that he was 55 years old and retired in 2011. Petitioner testified that he has not looked for work since retiring. (T, p. 48)

Petitioner testified his job duties included shoveling grindings into a truck, patching holes, raking asphalt and tamping or stomping down the asphalt with a tool. Petitioner testified that his job required constant bending and heavy lifting. Petitioner alleges an accident occurred while shoveling grindings on August 23, 2010.

Petitioner testified that he had other prior workers' compensation claims. He testified that one of them was stemming from an incident on April 7, 2007 when he injured his neck. As

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a result, Petitioner was treating with Hinsdale Orthopaedics and Dr. Lorenz. He had injections, physical therapy, and ultimately required surgery for his cervical spine. After the April 7, 2007 work accident Petitioner underwent a cervical fusion on June 27, 2008. (Px3) The subject case was previously consolidated with case 07 WC 39921. The 2007 case was settled. (T, p. 6)

Petitioner treated with Dr. Lorenz from the 2007 injury until June 2009 when he returned to work. During his treatment in the years 2007 through 2009, Petitioner was also treating with Dr. Lorenz for his lumbar spine. Petitioner also testified that he a prior accident that involved his low back in the early '90s when he was in a car and rear-ended. Petitioner testified that he filed a workers' compensation claim for that accident and returned to work. (T, pp. 10-15, 45)

Petitioner testified that he never had left leg pain prior to the subject incident. (T, p. 23) His prior treating records belie that testimony.

Three years before the subject incident, Petitioner complained of lumbar spine pain to Dr. Lorenz on September 24, 2007. Petitioner reported a sensation of pain down the left lower extremity. More than one year prior to the subject date of accident, a May 15, 2009 lumbar spine MRI revealed mild foraminal narrowing at L2-3, mild to moderate foraminal narrowing at L3-4, moderate foraminal stenosis, greater on the left and mild central spinal stenosis with narrowing of the left lateral recess at L4-5 & mild bilateral foraminal narrowing at L5-S1. On June 10, 2009, Petitioner reported lumbar pain and pain down the back of his left leg in the S1 dermatome.

In 2009 Dr. Lorenz diagnosed Petitioner with lumbar spondylosis with acquired stenosis at L4-5 and L5-S1 and a left-sided disc herniation with left leg radiculitis for which he recommended a lumbar epidural steroid injection (ESI).

With respect to his longstanding history, Respondent's attorney asked Petitioner on cross-examination if he had lumbar back pain while working during the year between June 2009 and August of 2010 and Petitioner conceded that he did. (T, p. 46)

Petitioner testified that while he was shoveling grindings on August 23, 2010 "something popped in my lower back." (T, p. 20) Petitioner did not, however, seek medical consult until the next day at MercyWorks. The Commission notes that the medical histories, including his first consults at MercyWorks and Hinsdale Orthopaedics, are devoid of any mention, or derivative, of the word "pop" but are otherwise consistent with Petitioner's activity. The first history at MercyWorks the day after the alleged incident stated that Petitioner reported while shoveling grinding(s) he developed pain across the lower back. The October 15, 2010 history at Hinsdale Orthopaedics documents that he was shoveling asphalt grindings on August 23, 2010. In the process of shoveling, he developed back pain and left leg radiculopathy.

Petitioner also reported a prior back injury to MercyWorks and the Petitioner's second medical history confirms that he reported he had been diagnosed with three herniated discs in the lumbar spine in the 1990s. Petitioner went to MercyWorks, including physical therapy, until October 1, 2010 when Petitioner requested, and received, a release to return to full-duty work (RTW) despite ongoing pain complaints. He was released to return to work (RTW) effective October 4, 2010. (Px1, pp. 3, 4)

At his first visit at Hinsdale Orthopaedics on October 15, 2010, Petitioner reported he was released to full-duty work one week prior. Respondent's temporary total disability (TTD) payment history documents benefits paid from August 24, 2010 (1st consult) through October 3, 2010, then payments resumed one month later on November 3, 2010. (Rx3) Respondent's attorney questioned Petitioner about his work status during that period of time at the hearing. Petitioner testified that he "could not recall." (T, p. 47) The Commission finds that the Petitioner worked for at minimum two weeks between October 4, 2010 and up to October 15, 2010 when he saw Dr. Lorenz.

When Petitioner saw Dr. Lorenz on October 15, 2010, he reported back pain going into his left buttock, behind his left knee, into his left foot and into his small toe. Contrary to what he told the MercyWorks doctor, Petitioner reported to Dr. Lorenz that his symptoms were the same and not improved with his short course of physical therapy. Dr. Lorenz noted that he had no injections, no MRI, no Medrol.

An MRI on October 22, 2010 showed that a comparison was made to the MRI of the lumbar spine dated May 15, 2009. The 2010 Impression was: 1) Mild spondylotic changes similar to the previous exam; 2) Moderate stenosis left of midline at L4-5 with asymmetric in a coachmen (sic) upon the left-sided L5 nerve root within the lateral recess; 3) Mild to moderate stenosis at L3-4; 4) Asymmetric stenosis of the left neural foramen at L5-S1; 5) Mild stenosis at L2-3. Respondent's expert opined the second October 15, 2010 lumbar spine MRI showed improvement over the 2009 MRI.

Petitioner saw Dr. Lorenz two months later on December 20, 2010 after he underwent the lumbar spine MRI. The "Plan" notes of this second visit document: "The patient at this point has failed conservative care. He wishes to proceed with surgical intervention." There are no records corroborating that the Petitioner had any additional physical therapy after the eight visits while treating at MercyWorks or an epidural steroid injection (ESI) for the lumbar spine after the subject accident. In fact, the records show that Petitioner refused the recommended ESI in 2009. Petitioner testified that he never went for the ESI because "they didn't work for him." (T, p. 46)

Petitioner did not return to Dr. Lorenz until eleven (11) months later on November 14, 2011. Petitioner testified he was unsure if he wanted surgery, and that there was a question of "who" would pay for it. The Commission notes that Petitioner's return to Dr. Lorenz was shortly after termination of his TTD benefits on November 4, 2011. (Rx3)

He underwent one further lumbar spine MRI at the Hinsdale Orthopaedics Imaging Center on November 15, 2011 which noted that there was no substantial change identified from the previous study of October 22, 2010.

Petitioner's attorney submitted Hinsdale Orthopaedics records predating the alleged subject incident, however, those records did not include Dr. Lipov's records from that period despite a referral and did not include the P.T. notes from ATI from the cervical spine functional capacity evaluation/assessment (FCE/FCA). Petitioner was referred for the Functional Capacity Assessment (FCA) on October 22, 2008 which according to Dr. Graf's April 1, 2011 addendum was completed on October 24, 2008. According to Dr. Graf's April 1, 2011 addendum the

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functional capacity evaluation was reviewed regarding the cervical spine. Dr. Graf noted within this examination that there are multiple complaints of severe back pain. (Rx1, Depx3)

The Hinsdale Orthopaedics' October 23, 2008 office note documents "His neck feels quite well." At the visit on November 24, 2008, Dr. Lorenz signed off on PAC Pittman's note: "He does have an FCA which is a valid test. It shows his capabilities at Light Physical Demand Level." The subsequent office visits do not reference Petitioner's cervical spine functional capacity. After Petitioner's lumbar spine MRI and recommendation for an ESI, Dr. Lorenz released him eight (8) months later to full-duty work on June 10, 2009 despite the fact that the notes document that Petitioner was complaining of continued leg pain down the back of his left leg in the S1 dermatome at that time.

Dr. Lorenz testified via evidence deposition that on June 10, 2009 he recommended the ESI injection as one of the options if the pain was severe enough for him to be concerned. Dr. Lorenz further testified that Petitioner was returned to full-duty work at that time because the patient really had no symptoms. He was able to handle the activity and wanted to go back to work. Dr. Lorenz saw no reason to keep him off. Dr. Lorenz testified this his diagnoses at the last visit in June 2009 was status post cervical fusion and acquired stenosis which is a form of degenerative changes at 4-5 and 5-1 with a left-sided disc. (Px10, pp. 11-12). Dr. Lorenz never referenced the results of the cervical functional capacity evaluation which the Commission finds relevant to Petitioner's work capabilities when he returned to work for Respondent in June 2009.

The petitioner was seen on two occasions by the respondent's expert, Dr. Carl Graf, on February 20, 2011 and on June 4, 2014. Dr. Graf also wrote an addendum to his February report on April 1, 2011 after receiving additional treating records that predated the subject incident. After his first Section 12 evaluation, Dr. Graf noted the Petitioner advised him he was ready to retire from his job with the City of Chicago. Dr. Graf also noted that Petitioner claimed injury to his back occurring on August 24, 2010 although Petitioner's intake sheet noted that the duration of his symptoms was a "couple years."

Dr. Graf reviewed Petitioner's May 15, 2009 lumbar spine MRI, taken at a time that Petitioner was off-work for the cervical injury. Dr. Graf opined that the lumbar spine MRI demonstrated a large facet cyst on the left side with impingement of the traversing L5 nerve root, slightly improved on the October 22, 2010 lumbar spine MRI following the subject injury in question. Regarding diagnosis at that time, Dr. Graf opined that Petitioner had an L4-L5 facet cyst causing impingement on the L5 nerve root corresponding to his symptoms on examination.

Regarding causation, Dr. Graf opined that the condition was certainty preexisting in nature, and that the lumbar spine MRI actually demonstrated an improvement from the 2009 to the new October 22, 2010 lumbar spine MRI. In Dr. Graf's opinion an ESI would be reasonable; however, Petitioner told him he did not wish to undergo an ESI. Therefore, Dr. Graf opined a facet decompression and decompression of the L5 nerve root would be reasonable. He requested the medical records regarding the lumbar spine prior to the injury so he could review them regarding the causation issue. Dr. Graf thought the Petitioner could work in a sedentary fashion at that time. (Rx1, Depx2)

Dr. Graf's April 1, 2011 addendum opinion reviewed the records from the Petitioner's treatment for the period June 27, 2008 through October 22, 2010. Dr. Graf noted at the time of the initial Independent Medical Evaluation (IME) that the Petitioner denied a previous history of lumbar complaints. Review of the medical records belied that statement. In Dr. Graf's opinion the surgery Dr. Lorenz recommended, a lumbar decompression at the L4-L5 level, was reasonable but was not causally related to the subject injury in question and should be attributed to Petitioner's preexisting lumbar spondylosis. (Rx1, Depx3)

Petitioner had surgery on January 20, 2012 performed by Dr. Lorenz of Hinsdale Orthopaedics and Dr. Fronczak from West Suburban Neurosurgical Associates consisting of 1) L4 decompression of the left; 2) L5 decompression of the left; 3) L4-L5 interbody fusion; 4) L4-L5 interbody fusion; 5) L4-L5 cage insertion, 9mm cage Orthofix; 6) L4-L5 posterior segmental fixation with Orthofix; 7) Iliac crest bone graft harvest, left iliac crest; 8) Implementation of DBM; 7) Implementation of BMP; 10) Stem cell allograft transplant including washing & thawing; and 11) Intraoperative x-rays interpreted by both surgeons.

At his initial evaluation at Pain Care Specialists on February 17, 2012, Petitioner related that he had a long history of problems with his lower back for about the past 30 years, starting after a rear-end motor vehicle accident. He also reported that over the years he did have a course of injections and went to therapy. The symptoms became progressively worse with lumbar back and left leg pain and that he had a lumbar fusion the prior month. Petitioner also related that he had a history of cervical fusion and that he has been using Vicodin on a regular basis since 2007 or 2008. (Px6, p. 13)

The records of Pain Care Specialists document that on March 5, 2012 Petitioner reported that that he had a TIA about one week prior affecting his left arm and leg with temporary numbness and weakness and that he had several TIAs in the past. (Px6, p. 9)

On May 10, 2012 the records of Pain Care Specialists document that a trial of gabapentin was recommended and it was noted the Petitioner would not be allowed a refill of Nucynta or the Norco as he had positive and inconsistent findings on his urine drug screen. They also recommended a left dorsal L5, S1, S2 & S3 lateral branch block to address persistent left buttock pain. (Px6, p.1)

The Hinsdale Orthopaedics office notes are replete with evidence documenting Petitioner's request for additional refills of narcotics during the same period of time that he had a pain management referral.

At the time of his last Section 12 evaluation on June 4, 2014, Petitioner told Dr. Graf that on an average day he has 5/10 pain, and noted he was happy with the outcome of the surgery. Petitioner testified his pain was a constant "8." Dr. Graf found on examination that Petitioner demonstrated multiple inconsistencies and multiple nonorganic pain signs. Further Dr. Graf opined that Petitioner had a FCE in which he demonstrated self-limiting behavior. He noted many of the tests performed lack a significant elevation in heart rate indicating poor effort. (Rx1, Depx4)

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Dr. Graf also reviewed various treating records including those of Dr. Christopher Morgan. Dr. Graf noted that the records contained a February 21, 2012 urine drug test ordered by Dr. Christopher Morgan which was inconsistent. The report indicated that Petitioner was currently prescribed Norco but that the testing results indicated that there were no opioid compounds detected on screening. Dr. Graf also noted an April 15, 2012 drug test report from a specimen obtained from Petitioner on April 12, 2012. Petitioner's prescribed medications at that time included Norco, Nucynta, tapentadol and Ambien. Testing results indicated the presence of hydrocodone, norhydrocodone, cocaine and cocaine metabolites in this specimen. Dr. Morgan had also referred the Petitioner for a psychology evaluation. (Rx1, Depx4)

Petitioner was released to resume physical therapy with no restrictions on July 2, 2012 after a bilateral hernia episode. The ATI physical therapy handwritten note dated July 5, 2012 reflected his lumbar spine symptoms were present since 2009 or 2010.

Petitioner was released to return to work and deemed at maximum medical improvement (MMI) by Dr. Lorenz on February 6, 2013 per the January 23, 2013 FCE which documented that Petitioner was still capable of a Light Physical Demand level, no lifting greater than 25 lbs. He saw Dr. Lorenz on one additional occasion in October 2013 and had no complaints with his neck, lower back or lower extremities. X-rays demonstrated well-placed hardware with a solid fusion from L4-L5 with no significant degenerative changes above or below the fusion site.

The Commission notes the overlap of Petitioner's symptoms between 2009 and 2010 and finds it significant that Petitioner had a longstanding history of low back pain and left sided radiculopathy. Nonetheless, the Petitioner has established that his pre-existing lumbar spine condition was aggravated by his work related activities on August 23, 2010.

For the reasons stated above, the Commission finds Petitioner sustained accidental injuries arising out of and in the course of his employment on August 23, 2010. The Commission further finds that the Petitioner aggravated his pre-existing lumbar spine condition and this aggravation was a contributing cause to the need for the lumbar fusion surgery performed on January 20, 2012.

With regard to the issue of medical expenses, no medical bills were listed on the Joint exhibit #1, the request for hearing form representing the trial stipulations. The Petitioner stipulated that Respondent will receive a credit for any bills paid; Respondent disputed and claimed "demands strict proof." Respondent claimed it paid an amount "to be shown" in medical bills through it group medical plan for which credit may be allowed under Section 8(j) and Petitioner agreed. Respondent submitted an itemization of medical payments made in Respondent's exhibit #2 which was admitted without objection.

Petitioner submitted itemized bills with the treating records from medical providers in exhibits (1) through (8). Petitioner's exhibit 10, admitted with no objection, is a list of the providers and summary of outstanding amounts due the following providers: 1) $65,067.00 for Hinsdale Orthopaedics; 2) $1,386.70 outstanding from a total bill of $136,238.15 for Adventist Hinsdale Hospital; 3) $60,678.00 for West Suburban Neurological Associates; 4) $688.00 for Pain Care Specialists; 5) $1,147.00 for Hinsdale Family Medical Center; 6) $27,282.07 outstanding from a total bill of $32,520.87 for ATI Physical Therapy; and 7) $646.20

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outstanding from a total bill of $3,671.00 for Chicago Lake Shore Medical Association.

Relying on its finding of accident and causal connection herein, the Commission finds that the reasonable necessary medical bills related to the Petitioner's lumbar spine condition and surgery shall be paid by Respondent to the referenced providers in Petitioner's exhibit 10 pursuant to Sections 8(a) and 8.2. Respondent shall get credit for all amounts previously paid.

Petitioner testified that he retired in 2011 and he never looked for work thereafter. The Respondent paid TTD through November 4, 2011 per Respondent's exhibit 3, admitted without objection, a total of 58 2/7 weeks. Based upon the Commission's finding of accident and causal connection, the supporting medical records and testimony, the Commission finds the Petitioner was temporarily totally disabled for a period of 124 weeks. The Commission awards Petitioner TTD from August 24, 2010 through October 3, 2010 and from November 3, 2010 through February 6, 2013. Based upon the Commission's finding that Petitioner reached maximum medical improvement as of his February 6, 2013 release by Dr. Lorenz, and the fact that Petitioner retired in 2011 and testified that he never looked for work thereafter, Petitioner's claim for temporary total disability benefits subsequent to February 6, 2013 is denied. Respondent shall get credit for all amounts paid.

Petitioner waived his rights pursuant to Sections 8(f) and 8(d)1 per his attorney's statements at the Oral Argument.

With regard to the issue of permanent partial disability, the Commission finds Petitioner sustained 20% loss of use of the person as a whole under Section 8(d)2.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's October 9, 2015 Decision is reversed for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $938.71 per week for a period of 124 weeks, from August 24, 2010 through October 3, 2010 and from November 3, 2010 through February 6, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $844.80 per week for a period of 100 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 20% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical expenses attendant to the Petitioner's lumbar spine condition including lumbar fusion surgery pursuant to §8(a) and §8.2 of the Act.

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

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

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

DATED: MAY 4 – 2017
KWL/bsd
O-03/07/17
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Michael J. Brennan

Thomas J. Tyrrell

DISSENT

I respectfully dissent from the decision of the majority. I would affirm Arbitrator William's decision in its entirety and without modification. I find the Arbitrator's decision to be thorough and well-reasoned. I would affirm and adopt.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0286

DE GRAZIA, RICHARD
Employee/Petitioner

Case# **10WC047440**

CITY OF CHICAGO
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:

2234 CHEPOV & SCOTT LLC
NICHOLAS CLIFFORD
5440 N CUMBERLAND AVESUITE 150
CHICAGO, IL 60656

0766 HENNESSY & ROACH PC
AUKSE R GRIGALIUNAS
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

17IWCC0286

RICHARD DE GRAZIA
Employee/Petitioner

Case #10 WC 47440

v.

CITY OF CHICAGO
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on September 29, 2015. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On August 23 2010, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $73,216.00; the average weekly wage was $1,408.00.
- At the time of injury, the petitioner was 50 years of age, single with no children under 18.
- The parties agreed that the respondent paid $54,716.06 in temporary total disability benefits.

ORDER:

- The petitioner's claim is dismissed and his request for benefits is denied.

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

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

17IWCC0286

Robert E. Williams

Signature of Arbitrator

October 9, 2015
Date

OCT - 9 2015

FINDINGS OF FACTS:

On August 24, 2010, the petitioner, an asphalt helper/laborer, received medical care at MercyWorks for low back pain radiating into his legs that developed while shoveling grindings on August 23rd. He reported a back injury in the 1990's and a more recent cervical injury and surgery. The exam revealed bilateral tenderness over the petitioner's sacroiliac joint, left greater than the right and mild tenderness over his paralumbar muscles. The diagnosis was a lumbar strain for which medication, conservative care and no work was advised. He followed up for continuing low back pain on August 27th and worsening back pain on September 9th and October 1st.

The petitioner returned to Dr. Mark Lorenz on October 15, 2010, who he last saw on June 10, 2009, for lumbar pain with pain down the back of his left leg in the S1 dermatome. An MRI on May 15, 2009, revealed mild foraminal narrowing at L2-3, mild to moderate foraminal narrowing at L3-4, moderate foraminal stenosis, greater on the left, and mild central spinal stenosis with narrowing of the left lateral recess at L4-5 and mild bilateral foraminal narrowing at L5-S1. The diagnosis then was lumbar spondylosis with acquired stenosis at L4-5 and L5-S1 and a left-sided disc herniation with left leg radiculitis for which Dr. Lorenz recommended a lumbar epidural injection. On October 15, 2010, the petitioner reported back pain going into his left buttock, behind his left knee, into his left foot and into his small toe. An MRI on October 22nd revealed mild spondylotic changes similar to the MRI on May 15, 2009, mild stenosis at L2-3, mild to moderate stenosis at L3-4, moderate stenosis, greater left of midline at L4-5, and asymmetric stenosis of the left neural foramen at L5-S1. Dr. Lorenz opined on December 20th that the MRI revealed a small disc herniation and a facet joint cyst compressing the

exiting L5 root at the L4-5 interval and recommended a decompression of the L5 root at L4-5 on the left side.

At the request of the respondent, the petitioner was evaluated by Dr. Carl Graf on February 28, 2011. On April 1st, Dr. Graf reviewed some prior medical records of the petitioner and opined that the petitioner's condition was a continuation of his preexisting lumbar degenerative changes and lumbar facet cyst and that the MRI findings prior to and after August 23, 2010, were essentially identical.

On November 14, 2011, the petitioner was reevaluated by Dr. Lorenz. He reported back pain radiating down his left leg. An MRI on November 15th revealed degenerative changes at L3-4 resulting in mild right neural foraminal narrowing and degenerative changes at L4-5 resulting in moderate left neural foraminal stenosis, mild central canal stenosis and mild right neural foraminal narrowing but no substantial change compared with the MRI on October 22, 2010. On January 5, 2012, Dr. Lorenz opined the MRI revealed spinal stenosis at the L4-L5 interval along with a herniated disc and annular tear.

On January 20, 2012, Dr. Lorenz performed a decompression on the left at L4 and L5, interbody and posterior fusions at L4-L5 with a cage, a posterior segmental fixation and iliac crest bone graft. Dr. Lorenz noted on February 6th that x-rays demonstrated well-placed hardware and that the petitioner complained of pain and weakness. He refilled the petitioner's Norco prescription and referred him for pain management treatment because of continuing lower back pain. Dr. Morgan at Pain Care Specialists saw the petitioner on February 17th and noted complaints of pain from 8 to 10 out of 10 and no significant pain relief with the use of Norco 5/325 on the average of eight times a

day. The test result of the petitioner's fluid specimen given on the 17th was negative for Norco. The petitioner received physical therapy from July 5th through March 29th. Dr. Morgan treated the petitioner through May 10th.

Joshua Hicks, a certified athletics trainer, opined that the functional capacity evaluation on January 23, 2013, was valid and demonstrated the petitioner's functional capabilities at the light physical demand level. On February 6th, Dr. Lorenz released the petitioner to work at the light physical demand level with a permanent 25-pound occasional lifting restriction. He opined that the petitioner had reached MMI.

On October 16th, the petitioner saw Dr. Lorenz for a urinary retention condition. The petitioner reported no complaints with his neck, lower back or lower extremities. Dr. Lorenz noted that the petitioner was doing well since his lumbar fusion, that there were no long track signs with the neurological exam, that he had good power throughout and a normal gait and that he had no fasciculation or atrophy. X-rays demonstrated well-placed hardware with a solid fusion from L4-5 with no significant degenerative changes above or below the fusion site.

Dr. Graf evaluated the petitioner on June 4, 2014, and opined that the petitioner demonstrated multiple inconsistencies and non-organic pain signs and demonstrated self-limiting behavior during the FCE. He opined that the FCE was not valid due to the lack of a significant elevation in heart rate indicative of poor effort and findings demonstrating multiple inconsistencies and subjective complaints that were out of proportion to the evaluation.

FINDING REGARDING WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF THE EMPLOYMENT WITH THE RESPONDENT AND 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 failed to prove that he sustained an accident on August 23, 2010, arising out of and in the course of his employment with the respondent and that his current condition of ill-being with lumbar spine is causally related to a work injury. The petitioner had a prior lumbar condition of ill-being for which he sought medical care and reported the same level of back pain with pain down the back of his left leg to his heel. The MRIs on May 15, 2009, October 22, 2010, and November 15, 2011, revealed moderate foraminal stenosis, greater on the left and mild central spinal stenosis with narrowing of the left lateral recess at L4-5 and mild bilateral foraminal narrowing at L5-S1 and were substantially unchanged. Dr. Lorenz's diagnosis in 2009 was lumbar spondylosis with acquired stenosis at L4-5 and L5-S1 and a left-sided disc herniation with left leg radiculitis. Dr. Lorenz opined on December 20, 2010, that there was a small disc herniation and a facet joint cyst compressing the exiting L5 root at the L4-5 interval, essentially the same assessment as in 2009. And on January 5, 2012, he opined that an MRI revealed spinal stenosis at the L4-L5 interval along with a herniated disc and annular tear, again the same assessment as in 2009. Moreover, on April 1, 2011, Dr. Graf opined that the petitioner's condition was a continuation of his preexisting lumbar degenerative changes and lumbar facet cyst and that the MRI findings prior to and after August 23, 2010, were essentially identical.

Also inexplicable is the petitioner's complaint of an unrelenting 8 out of 10 pain level, the need for Norco medication and a negative test for Norco of a fluid specimen taken on February 17, 2012. The inconsistencies lend support to Dr. Graf's opinion on June 4, 2014, that the petitioner demonstrated multiple inconsistencies and non-organic

pain signs and demonstrated self-limiting behavior during the FCE; and, that the FCE was invalid due to the lack of a significant elevation in the petitioner's heart rate.

Based on the multiple inconsistencies and disproportional complaints, the petitioner is not believable or credible. The opinion of Dr. Lorenz is not consistent with the evidence and is not given any probative weight. The petitioner failed to establish by a preponderance of the evidence that his lumbar symptoms on August 23, 2010, were more than just a continuation of his prior lumbar problems and that his work duties that day caused a permanent aggravation of his pre-existing lumbar condition of ill-being. The petitioner's claim is dismissed and his request for benefits is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Raul Brena,
Petitioner,
vs.

17IWCC0287
NO: 12 WC 35540

ADP Total Sources/Best Buy Carpets,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 26, 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: MAY 4 – 2017
KWL/vf
O-5/2/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF MOTION AND ORDER

ATTENTION. You must attach the motion to this notice. If the motion is not attached, this form may not be processed.

Raul Brena
Employee/Petitioner

v.

Best Buy Carpets
Employer/Respondent

Case # 12 WC 035540

17IWCC0287

TO: Patrick J Morris
Wiedner & McAuliffe, Ltd.
One N. Franklin
Suite 1900
Chicago, Illinois 60606

On February 17, 2015 at 2:00 PM, or as soon thereafter as possible, I shall appear before the Honorable Luskin, or any arbitrator or commissioner appearing in his or her place at Wheaton, Illinois, and present the attached motion for:

____ Change of venue (#3072)	____ Fees under Section 16 (#1600)	X Reinstatement of case (#3074)
____ Consolidation of cases (#3071) (list case#)	____ Fees under Section 16a (#1645)	____ Request for hearing (#R33)
____	____ Hearing under Sect.19(b) (#1902)	____ Withdrawal of attorney (#3073)
____ Dismissal of attorney (#3052)	____ Penalties under Sect. 19(k) (#1911)	____ Other (explain) ____
____ Dismissal of review (#3085)	____ Penalties under Sect. 19(l) (#1912)	

Signature Petitioner

David Z. Feuer
Attorney's name and IC code # (please print)

GOLDSTEIN BENDER & ROMANOFF #0226
Name of law firm, if applicable

1 N. LA SALLE STREET, 26th FLOOR
Street address

CHICAGO, IL 60602
City, State, Zip code

(312) 346-8558
Telephone number

gbr@gbrlegal.com
E-mail address

ORDER

The motion is set for hearing on 2/26

Signature of arbitrator or commissioner

2-17
Date

ORDER R33 T and/or T's counsel not in Court

The motion is ___ Granted ___ Withdrawn ___ Continued to ____

X Denied ___ Dismissed ___ Set for trial (date certain) on

Signature of arbitrator or commissioner

FEB 17 2015
Date 2/26/15

17IWCC0287

PROOF OF SERVICE

If the person who signed the *Proof of Service* is not an attorney, this form must be notarized.

I, David Z. Feuer , affirm that I [_] delivered [X] mailed with proper postage in the city of Chicago a copy of this form at 1 N. La Salle Street, Lobby Outgoing Postal Mail on **December 31, 2014** to each party at the address(es) listed below.

TO:	**Patrick J Morris** **Wiedner & McAuliffe, Ltd.** **One N. Franklin** **Suite 1900** **Chicago, Illinois 60606**

Signature of person completing *Proof of Service*

Signed and sworn to before me on **December 31, 2014**

Notary Public

[i] The Workers' Compensation Commission assigns code numbers to attorneys who regularly practice before it. To obtain or look up a code number, contact the Information Unit in Chicago or any of the downstate offices at the telephone numbers listed on this form.

ILLINOIS WORKERS' COMPENSATION COMMISSION
PETITION TO REINSTATE CASE

ATTENTION: This petition must be filed within 60 days of receipt of the dismissal order.

17IWCC0287

Case # 12 WC 035540

Raul Brena
Employee/Petitioner

v.

Best Buy Carpets
Employer/Respondent

On 11/13/14, this case was dismissed for want of prosecution. I received the dismissal order on

12/19/2014. On 2/17/15, I will present this petition to reinstate the case before

Arbitrator **Luskin** for the following reason:

Meritorious Claim and Contentions.

Signature

David Z. Feuer - #0226
Name (please print; attorneys, please include IC code #)

(312) 346-8558
Telephone number

December 31, 2014
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☒ 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 Carley,
Petitioner,
vs.

17IWCC0288

NO: 10 WC 48641

Integrys/North Shore Gas,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 11, 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 $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: MAY 4 - 2017
KWL/vf
O-5/2/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0288

CARLEY, LARRY
Employee/Petitioner

Case# 10WC048641

INTEGRYS/NORTHSHORE GAS
Employer/Respondent

On 5/11/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

1109 GAROFALO SCHREIBER HART ETAL
TODD E WEGMAN
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

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

17IWCC0288

Case # 10 WC 48641

Consolidated cases: N/A

Larry Carley
Employee/Petitioner

v.

Integrys/North Shore Gas
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Waukegan**, on **March 22, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 11, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$69,767.88**; the average weekly wage was **$1,341.69**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **0** dependent children.

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

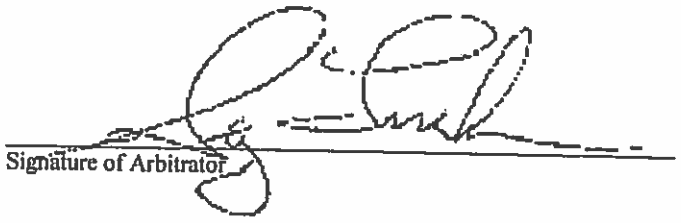
Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 225 weeks, because the injuries sustained caused the 45% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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



Signature of Arbitrator

May 3, 2016
Date

MAY 11 2016

Statement of Facts

At trial and pursuant to Arbitrator's Exhibit 1, the parties stipulated that there is no claim for unpaid medical bills. To the extent the bills have not been paid by workers' compensation, those bills have been paid through a group insurance which is funded by North Shore Gas. The parties also stipulated that there is no dispute with respect to temporary compensation. Temporary total disability was paid for a short period of time and then a disability policy came into effect essentially paying Petitioner from October 10, 2010 to the present.

Petitioner Larry Carley testified that he has been employed by Respondent North Shore Gas/Integrys since 1991 as a pipefitter. He described the physical requirements of the job as a physically demanding job involving a lot of bending, crawling, standing, kneeling, and awkward work positions. He worked outside, inside, cold, snow, heat, carrying in excess of 75 pounds on a daily basis. He testified that on March 11, 2010, he went into a supply closet to retrieve some pamphlets for the class that day and he twisted, heard a pop in his knee, and experienced immediate pain. He testified that he attempted to work through it and see if it would just go away. By the end of the next day, it was not getting any better, so he advised Ms. Greathouse that he needed to seek medical attention and was sent to Condell Acute Medical.

Petitioner testified that immediately before March 11, 2010 his knee was fine. He had surgery in 2002, but nothing prevented him from doing his job. He was taking no medication and was not in therapy or seeing Dr. Summerville.

The records of Advocate Condell Medical Center were admitted as Petitioner's Exhibit A. Petitioner was seen on March 12, 2010 with a history of a twisting injury to the right knee at work on March 11, 2010. The records note a prior right knee ACL repair. Petitioner was diagnosed with a right knee sprain, rule out internal derangement. He was provided Norco and crutches and taken off work (PX A). Petitioner testified he was referred to Dr. Bruce Summerville.

Dr. Summerville's records were admitted as Petitioner's Exhibit B. Petitioner saw Dr. Summerville on March 17, 2010. The record includes a consistent history of accident and complaints of sharp throbbing pain with instability and sensitivity to touch over the medial compartment. The physical examination noted effusion, tenderness and reduced range of motion. X-rays demonstrated advanced tri compartmental degenerative changes. Dr. Summerville diagnosed an aggravation of right knee preexisting arthritis. Petitioner received a steroid injection on April 11, 2010. He reported it was not effective during the April 30, 2010 visit. Dr. Summerville suggested Petitioner would be a candidate for a total knee arthroplasty (PX B).

Petitioner was seen for a Section 12 examination at Respondent's request on June 23, 2010 by Dr. Bernard Bach (RX 1). Dr. Bach diagnosed Petitioner as post ACL reconstruction with tri compartmental arthritis. He opined that he suspected a bucket handle tear of the medial meniscus. He recommended arthroscopic surgery rather than a knee replacement. He did not recommend an ACL repair. He opined that the condition was not an aggravation of the preexisting arthritis but rather a mechanical block. He also recommended an MRI (RX 1).

The MRI of the knee of was performed on July 23, 2010. The impression was postoperative changes, consistent with prior ACL reconstruction. The graft appears intact. The exam also found signal abnormality of the posterior horn of the medial meniscus, consistent with meniscal degeneration or tear. Dr. Summerville reviewed the results and on August 2, 2010 changed his opinion and recommended an arthroscopy consistent

with the opinion of Dr. Bach (PX B). Dr. Bach reviewed additional medical records and the MRI and authored two addendum reports on August 3, 2010 and August 9, 2010 (RX 1). Dr. Bach opined that Petitioner had preexisting arthritis and a possible medial meniscal tear and a loose body that could be causing mechanical symptoms. He agreed with an arthroscopic procedure to address these findings. He opined that the mechanism of injury could cause a meniscal tear or the loose body (RX 1).

Dr. Summerville performed arthroscopic surgery on August 27, 2010 consisting of debridement a tear of the posterior horn of the medial meniscus and a radial tear of the lateral meniscus. His operative report notes extensive chondromalacia in the knee (PX B). Petitioner testified that following surgery, he underwent a course of physical therapy with Dr. Summerville. Dr. Summerville released Petitioner to back to work light duty on September 7, 2010 (PX B). Petitioner testified that Respondent accommodated the restrictions through October 10, 2010.

Petitioner testified that a short time before the August 27, 2010 right knee surgery, he started noticing that his lower back was beginning to hurt. Petitioner testified that he was referred to Dr. Parikh for treatment for his low back. Dr. Parikh's records were admitted as Petitioner's Exhibit C. Dr. Parikh saw Petitioner on October 1, 2010. Petitioner complained of low back pain worsening over the last two weeks. He reported intermittent back pain over the last 1 ½ months due to what he believed was limping and favoring his right side. Dr. Parikh's assessment was lumbar strain with bilateral radiculitis. He recommended medication, physical therapy and an MRI and EMG (PX C). Dr. Summerville ordered an MRI of the lumbar spine which was performed on October 7, 2010. The impression was a moderate sized focal disc herniation at L4-5 and a mild L5-S1 disc protrusion (PX B). Dr. Parikh took Petitioner off work as of October 7, 2010. On October 18, 2010, Dr. Parikh performed an EMG/NCV which he concluded demonstrated bilateral L5 and S1 radiculopathy (PX C).

On October 20, 2010, Dr. Summerville saw Petitioner for an assessment of the right knee. He noted that Petitioner was treating for his back with Dr. Parikh and that is unrelated. With respect to the knee, Dr. Summerville continued Petitioner's restrictions and stated he could return to work without restrictions as of November 1, 2010. He states that Petitioner has a chronic disability in the right knee. In regard to his meniscal tear and arthroscopy, Petitioner will reach maximum medical improvement at about three months postoperatively. He may give consideration to further treatment of the right knee. Dr. Parikh's restrictions will override his work recommendations (PX B).

Petitioner underwent physical therapy and a series of epidural steroid injections with Dr. Kin on November 2, 2010, November 8, 2010 and December 23, 2010 which provided only short term relief (PX E). Dr. Parikh's December 14, 2010 note records that Petitioner was making good progress, but fell 3 days ago, causing a slight flare up of low back pain. On January 11, 2011, Petitioner reported no relief from the most recent injection and no further progress in physical therapy. Dr. Parikh continued work restrictions and recommended a neurosurgical consult. Petitioner's care was transitions to Dr. Ghanayem on February 8, 2011 (PX C).

Petitioner underwent a Section 12 evaluation with Dr. Edward Goldberg on November 3, 2010 (RX 2). After reviewing additional medical records, Dr. Goldberg generated an addendum report dated December 2, 2010. His diagnosis was that Petitioner had a disc herniation at L4-5 causing spinal stenosis with resultant low back and bilateral lower extremity paresthesia. He noted that Petitioner did not complain of any lumbar problems from the time of his accident until potentially the knee surgery. He did not believe that Petitioner's altered gait would have resulted in a central herniation. He stated that traumatic herniations could arise without intervening

trauma. He recommended two epidural steroid injections and if this did not provide relief he recommended a surgical discectomy.

Dr. Ghanayem's records were admitted as Petitioner's Exhibit F. Dr. Ghanayem first saw Petitioner on January 26, 2011. Petitioner provided a history of the March 11, 2010 knee injury. He stated that as he favored his knee over time he developed back pain a few months later. Dr. Ghanayem reviewed the MRI which revealed a central disc herniation at L4-5 and some changes at L5-S1.Dr. Ghanayem stated that with a gait disturbance, particularly over a long period of time, one can develop back pain or aggravation of an underlying low back condition. He believed this to be the case with Petitioner. Dr. Ghanayem expressed concern over Petitioner's narcotic use. He discussed the possibility of a lumbar fusion (PX F).

On February 25, 2011, Dr. Ghanayem recommended a discogram. On March 16, 2011, he reported that the discogram did not produce concordant pain. He therefore did not believe that Petitioner was a surgical candidate. He recommended that Petitioner work with Dr. Gnatz from rehabilitation medicine. On May 19, 2011, Dr. Ghanayem indicated that Dr. Gnatz had essentially maximized his benefit. He recommended an FCE (PX F).

Dr. Summerville prepared a narrative report dated May 4, 2011. Dr. Summerville notes that Petitioner had been under his care for a number of years. He performed an ACL reconstruction several years ago at which time Petitioner already had some degenerative changes. Dr. Summerville noted he did not review his prior records. Petitioner had given up basketball in the last few years because of complaints in his right knee, but had tolerated ordinary activities of his occupation. He opined that Petitioner suffered a displaced symptomatic medial meniscus tear as a result of the accident. He also opined that the patient aggravated the preexisting moderate degenerative changes. He stated that Petitioner likely will require an arthroplasty of the right knee secondary to the ACL deficiency and degenerative changes. The meniscal tear may have hastened the need for the arthroplasty due to the loss of the cushioning effect of the meniscus. He disagreed with Dr. Bach that the work related injury had no effect on the need for future surgery. He concludes that Petitioner had a preexisting ACL deficiency and moderate degenerative changes. The ACL deficiency contributed to the injury. Because the knee was unstable, it was more likely to cause a meniscus tear. The degenerative changes progress in the face of the partial meniscectomy. The timeframe for progression is unclear (PX B).

Dr. Summerville saw Petitioner on July 18, 2011 for continued, persistent symptoms in the right knee. Petitioner reported he has been unable to return to work. Dr. Summerville provided a steroid injection. Dr. Summerville last saw Petitioner on August 8, 2011. He provided a second injection and recommended viscosupplementation. He provided Petitioner with restrictions of 30 pounds lifting and no kneeling, stooping, squatting or bending of over one hour per day. He noted that Petitioner has separate restrictions with respect to his low back which may supersede the restrictions on his knee (PX B).

Petitioner testified that he then sought consultation for a knee replacement with Dr. Ronald Silver. Dr. Silver's records were admitted as Petitioner's Exhibit D. On October 1, 2011, Dr. Silver recommended a total knee replacement. His opined that Petitioner's twisting injury in March of 2010 not only caused meniscal tearing, but also accelerated and exacerbated his asymptomatic degenerative changes in his right knee (PX D). Petitioner testified that Dr. Silver performed a right total knee replacement on November 1, 2011.

Petitioner continued with post operative care with Dr. Silver. He was discharged from care on June 26, 2012 at maximum medical improvement with permanent work restrictions of no squatting, kneeling, crawling, or

climbing and no long periods of walking or standing and avoiding uneven ground. Dr. Silver saw Petitioner periodically thereafter with complaints of pain on March 25, 2014 and August 12, 2014 when he also advanced complaints in the left knee. He was seen by Dr. Silver on January 14, 2016 and was doing reasonable well. The x-rays showed the right knee replacement in excellent position and alignment. Dr. Silver stated Petitioner is unable to work in any manner due to his discomfort (PX D).

Following release by Dr. Ghanayem, Petitioner continued follow up with Dr. Kin for back pain. Dr. Kin's care consisted primarily of dispensing narcotic medications (PX E). Petitioner sought further treatment for his low back with Dr. Jonathon Citow beginning May 24, 2013. Dr. Citow's records were admitted as Petitioner's Exhibit G. Dr. Citow's initial note records complaints of back pain without radicular leg pain. He diagnosed spondylosis. An MRI performed on July 18, 2013 demonstrated moderate to severe left foraminal narrowing at L4-5 and moderate to severe bilateral foraminal narrowing at L5-S1. Dr. Citow recommended a left sided L4 and L5 minimally invasive hemi laminectomy with bilateral decompression. This surgery was performed on August 29, 2013 (PX G). Postoperatively Petitioner continued to see Dr. Kin. On November 6, 2013, Dr. Kin's records state that Petitioner regrets the surgery and wished he never had it done (PX E). Dr. Citow saw Petitioner on April 11, 2014. He notes Petitioner has recovered with no radicular leg pain. Petitioner reports recently recurrent back pain. The physical examination notes full range of motion, negative straight leg raising, normal strength, sensation and reflexes. Petitioner had a sacroiliac injection on April 24, 2014 (PX G). Petitioner testified that he was released by Dr. Citow at that time.

Petitioner testified that since then, his back has been the same. If he does light activity, he is okay. Any increase and he suffers pain, swelling and limited mobility. He testified that his knee is good. It is not so much the issue as his back. He testified he has not sought further treatment. He is trying to live with it. He is not taking prescription pain medications any more. He uses over the counter medication and, in extreme cases, he uses Lidoderm patches that he was given some time ago. Petitioner remains an employee of Respondent on long term disability.

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

The parties stipulated that Petitioner sustained an accidental injury arising out of and in the course of his employment on March 11, 2010 when he twisted his right knee. The parties agree and the evidence supports that Petitioner sustained a tear of the medial meniscus in the right knee at that time. The dispute is whether Petitioner's further condition of ill being and treatment to the right knee and the condition of ill being in Petitioner's low back are causally connected to the accidental injury sustained.

With respect to the right knee, Petitioner had a prior surgery in 2002. The Advocate Condell records note a prior right knee ACL repair. Dr. Summerville notes that Petitioner had degenerative changes at the time of the original surgery. He also states that, while Petitioner was able to continue his work activities, that he stopped playing basketball. Following the accident, Petitioner was diagnosed with a medial meniscus tear, with pre existing degenerative arthritis and an ACL deficiency. Petitioner underwent arthroscopic surgery on August 27, 2010 consisting of debridement a tear of the posterior horn of the medial meniscus and a radial tear of the lateral meniscus. His operative report notes extensive chondromalacia in the knee.

Thereafter, Petitioner showed improvement and was released by Dr. Summerville to return to limited duty work. Dr. Summerville stated Petitioner should reach maximum medical improvement for the surgery at about three months postoperatively. He may give consideration to further treatment of the right knee. Dr. Summerville discussed a return to full duty work in November, 2010, but in follow up visits continued to restrict Petitioner to 30 pounds lifting though his last visit on August 2, 2011.

Dr. Summerville diagnosed a preexisting moderate degenerative changes and ACL deficiency, and opined that this caused instability that contributed to the meniscal tear. He also stated that the degenerative changes progress in the face of the partial meniscectomy, but the timeframe for progression is unclear. Dr. Silver opined that Petitioner's twisting injury in March of 2010 not only caused meniscal tearing, but also accelerated and exacerbated his asymptomatic degenerative changes in his right knee.

Dr. Bach opined that Petitioner had preexisting arthritis and a possible medial meniscal tear and a loose body that could be causing mechanical symptoms. He agreed with an arthroscopic procedure to address these findings. He opined that the mechanism of injury could cause a meniscal tear or the loose body. He opined that the condition was not an aggravation of the preexisting arthritis but rather a mechanical block.

The Arbitrator has weighed the medical opinions presented and finds the opinion of Dr. Bach more persuasive. Petitioner had noted improvement in his condition after surgery and Dr. Summerville noted maximum medical improvement and a possible return to work. The Arbitrator therefore finds that Petitioner's diagnosis of a medial and lateral meniscus tear, and the treatment by Dr. Summerville causally connected to the accidental injuries sustained on March 11, 2010.

With respect to the low back complaints, there is no evidence that Petitioner injured his low back on the date of accident. Petitioner did not advance complaints in his back until after the August 27, 2010 knee surgery. His history alleges that the condition occurred as a result of limping and favoring his right side. Dr. Ghanayem took a history of the March 11, 2010 knee injury. Petitioner stated that as he favored his knee over time he developed back pain a few months later. Dr. Ghanayem reviewed the MRI which revealed a central disc herniation at L4-5 and some changes at L5-S1.Dr. Ghanayem stated that with a gait disturbance, particularly over a long period of time, one can develop back pain or aggravation of an underlying low back condition.

Dr. Goldberg diagnosed a disc herniation at L4-5 causing spinal stenosis with resultant low back and bilateral lower extremity paresthesia. He noted that Petitioner did not complain of any lumbar problems from the time of his accident until the knee surgery. He did not believe that Petitioner's altered gait would have resulted in a central herniation. He stated that traumatic herniations could arise without intervening trauma.

Based upon the history of complaints advanced, the Arbitrator finds the opinions of Dr. Goldberg more persuasive. Petitioner's complaints arose only after his knee surgery. The records do not substantiate the history of ongoing progressive complaints over a long period of time as surmised by Dr. Ghanayem.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that he sustained a medial and lateral meniscus tear causally connected to the accidental injury sustained on March 11, 2010 and that the medical treatment by Advocate Condell and Dr. Summerville was causally connected to the accidental injury. The Arbitrator further finds that Petitioner failed to prove by a preponderance of the evidence that any other condition of ill being in the right knee, left knee, or low back was

causally connected to the accidental injuries sustained on March 11, 2010 and any other treatment including the treatment to the right knee by Dr. Silver and all treatment to the low back was not causally connected to the accidental injury sustained on March 11, 2010.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Petitioner's date of accident is before September 1, 2011 and therefore the provisions of Section 8.1b of the Act are not applicable to the assessment of partial permanent disability in this matter.

Based upon the Arbitrator's finding with respect to Causal Connection, the Arbitrator found Petitioner sustained a medial and lateral meniscus tear causally connected to the accidental injury sustained on March 11, 2010 and that the medical treatment by Advocate Condell and Dr. Summerville was causally connected to the accidental injury. Dr. Summerville performed surgery on August 27, 2010 and, on October 20, 2010, found that Petitioner would reach maximum medical improvement three months from the surgery.

Petitioner had been released to return to work with restrictions on September 7, 2010, which Respondent had accommodated until Petitioner was taken off work as a result of his low back complaints on October 7, 2010. Dr. Summerville discussed a return to full duty work as of November 1, 2010, before the anticipated date of maximum medical improvement. But when seen thereafter by Dr. Summerville on July 18, 2011 for continued, persistent symptoms in the right knee, Petitioner reported he has been unable to return to work. Dr. Summerville provided Petitioner with restrictions of 30 pounds lifting and no kneeling, stooping, squatting or bending of over one hour per day. Petitioner's unrebutted testimony was that he was unable to perform his regular job duties within these restrictions.

Even when considering the unrelated conditions of ill being to Petitioner's low back and right knee, Petitioner has been released to return to work with restrictions. Respondent has not offered employment within the restrictions and has placed Petitioner on long term disability. Petitioner did not provide evidence of any job search or any vocational evidence as to his employability within his current restrictions. Petitioner testified that he can perform light duty activities without increased symptoms. Based upon the evidence submitted, Petitioner has failed to establish that he would qualify as an odd lot permanent total disability. Further, no evidence to support a wage differential award under Section 8(d)1 was presented.

Based upon Dr. Summerville's permanent restrictions with respect to the right leg and Petitioner's unrebutted testimony as to the physical requirements of his job as a pipefitter, including the physical requirements of the job involving a lot of bending, crawling, standing, kneeling, and awkward work positions, the Arbitrator finds that Petitioner could not perform these duties within the restrictions provided. The Petitioner's disability is therefore more appropriately assessed as a loss of occupation under Section 8(d)2 of the Act. Petitioner is precluded from performing heavy employment, which he did for Respondent for over 20 years.

Based upon the record as a whole and the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Petitioner has suffered a loss of 45% of the person as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ken Olzewski,

Petitioner,

vs.

NO: 14 WC 30155

City of Highland Park,

Respondent.

17IWCC0289

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner is a 50 year old employee of Respondent, who described his job as Lieutenant paramedic/firefighter. Petitioner had been with Respondent for about 27 years; hired August 19, 1989. He worked for no other departments other than Highland Park during that period. Petitioner had two associate degrees; criminal justice and firefighting. He has numerous certifications as paramedic, hazardous materials tech, and others. He was still employed by Respondent pursuant to a collective bargaining agreement with the union

(current May 1, 2013—December 31, 2015). In his position he is responsible for his station. Typically he is at Station 3. His responsibilities include making sure his team members come in on a daily basis, checking out the apparatus and responding to calls. As a firefighter/paramedic they have daily training on schedule from the battalion chief. There are three stations in Highland. He was typically on Shift C. The ranks in the department are Chief, deputy chief, and three battalion chiefs (1 per shift). Lieutenants are below the battalion chiefs and firefighters below lieutenants. He typically oversaw three members on his crew. His typical work schedule was working a 24 hour shift every third day. He started at 8:00am and went to the apparatus floor to make sure the rigs and equipment were properly placed and in proper working for the day. They would do station duties after or if there was training in the morning, they would attend. They had to clean the apparatus floor, wash and wax the engine, clean the kitchen, maintain the grounds; the time it took depended on the day and type of duties; a couple hours. They had lunch 12:00 to 1:00. He stated the afternoons were directed by either training or doing preplans or emergency calls. They did EMS training, tactical training, and specialty training like extraction. Sometimes they did training at the training tower away from the station. Petitioner testified that once those things were done, between 4:00pm and 5:00pm was their mandatory physical fitness; done at the station. Petitioner stated that was an hour during the contractual work day where they were expected to exercise in some way, shape or form to improve their fitness. Petitioner stated at Station 34 they had the fitness room/gym in the upper loft with treadmill and stair stepper. On the lower level they had a treadmill and elliptical machine as well as free weights, a TRX military strap, medicine balls, dumbbells, and a multi-machine which has a squat rack and bench press. Petitioner stated that they also had an exercise bike and dip bar and chin up station. Petitioner testified that the other station (Ravinia Station – Station 32) was like equipped. He stated the central station had a larger gym and more equipment. Petitioner testified that the equipment was provided via the City through grants.

- Petitioner reported to the battalion chief, Tim Pease as he did July 31, 2014. On the date of accident, July 31, 2014, Petitioner testified that he reported to the battalion chief, Tim Pease. Petitioner stated that he started work at 8:00am and it was a normal day; he did not recall specific calls or specific training for that day other than his accident. He was at the station the entire day. Petitioner testified that at 4:00 to 5:00pm he was doing the mandatory exercising and he sustained an injury. Petitioner stated at the time he was performing incline bench press. He was like in a lean back position and he was lifting the barbell with free weights with both hands pushing upwards over his head. He was pressing 135 pounds at the time. Petitioner stated that during the press up he felt a sharp pop and pain in his left shoulder that made him discontinue the exercise and set the bar. He stated the only other person present was Paul Grzybek, a crew member (also was a certified peer fitness counselor, trainer). Petitioner stated that Paul did not see it happen; he was around the corner (Petitioner indicated Paul heard him yell—stricken). The fitness trainers are co-workers available for assistance with their fitness program. He believed

the fitness trainers' certification program is paid via a grant, now out of the City budget. He indicated the trainers are paid by the City to assist with workouts from 4:00 to 5:00pm; during his shift.

- Petitioner testified that after the injury he noticed a significant amount of pain and he terminated his workout. He stated he went and took some Advil and a shower and he realized that he would not be able to complete his work day the way his shoulder felt. Petitioner stated that he told his crew about it and Paul Grzybek (trainer). Petitioner stated he told them he had injured his shoulder immediately; he stated he said that he thought he had pulled or tore something in his shoulder. Petitioner stated that he also told his battalion chief, Tom Pease, that he was going to have to take the rest of the shift off. Petitioner testified that he filled out a Duty Injury Report (ICE report) stating that he had injured his left shoulder while he was working out. Petitioner testified the workout was mandatory. He stated he had been told that from the former Chief, Pat Tanner. He stated they were told during officer's meetings and they were reminded that they would workout in an effort to reduce back injuries and that it was mandatory. Petitioner stated that they were told that the officers would have their firefighter's workout and that it would be documented in firehouse training under Section 1A at Wellness. He stated that it was documented through firehouse reporting, where they entered all their training, runs, and ambulance runs. Petitioner viewed PX20 and identified it as their training sheet of physical fitness training for an hour; the purpose of it was to document all their training as required by Respondent. Petitioner indicated that the Lieutenants (like him) typically documented that. Petitioner noted the people documented there as himself, Paul Grzybek, Brian McDonald, and Michael Schmidt. He or another Lt. inputted the information; he did that on the exhibit. Petitioner testified that the document was kept in the normal course of business at the fire department. Petitioner testified that he was required to enter the physical fitness training information for his company every shift. Petitioner testified that he inputted the information in PX20. He inputs what he does and the other members for the physical fitness training, as part of his job, every duty day. He agreed the physical fitness training was 4:00-5:00pm every contractual duty day and he was paid compensation during that time. He was not allowed to leave the station during that time. Petitioner testified that if they were in different training or if there were calls or other specific duties they had to finish, they had to continue that; it was okay not to work out. He testified that during that time he was required and expected to work out. Petitioner stated that he was familiar with Respondent's Fire Department Wellness and Fitness Program. He stated that was their fitness program. The book defines all the benefits of working out. He understood the purpose of the workouts was firefighter fitness, job longevity. Petitioner testified that that makes him a better firefighter. Petitioner stated that it certainly provides a benefit to the fire department by being more physically fit, it reduces injuries. Petitioner stated that there was a year while the program was going on that they had no back injuries for an entire year; that allows them better customer service.

- Petitioner viewed PX 1 and identified it as a document that accompanied the physical results from their annual physical from Dr. Fragen dated August 27, 2007 (to Chief Wax from Dr. Fragen). Petitioner testified that as a result of the examination he was allowed to participate in the department's physical fitness program. That document was provided to Chief Wax. Petitioner testified that the document is kept in the normal course of business as it was in his training jacket/file. With the exam results he was allowed to do the fitness program and continue as a firefighter. Petitioner stated that those are very comprehensive physicals. Petitioner stated that lab work and screenings, stress test with strength components, sit-ups and push-up tests for flexibility and grip strength testing are all part of that exam. Petitioner testified that the physical fitness program noted in that letter was Respondent's wellness and fitness program. Petitioner viewed PX 5 and he identified it as Respondent's Wellness and Fitness Program; he stated that he was familiar with the document as it is located at all the fire stations. Petitioner testified that that document was in the fire station July 31, 2014 and it is kept as a normal business record at the fire station. He viewed page 3 of it and read the 'goals' of the program; to insure a physically and mentally healthy work force minimizing occupational injuries, disability requirements and Worker's Compensation costs. While complying with OSHA requirements, the programs focus was educational and rehabilitative rather than punitive. Petitioner indicated that he agreed with the statement and his understanding of the wellness and fitness program. Petitioner stated that the first sentence of the last paragraph read, 'This Wellness and Fitness Program has been developed by the department's Labor Management Subcommittees to ensure proper health and safety support for Fire Department personnel.' Petitioner stated that was a true statement to his understanding. Petitioner testified that he had operated and conducted himself accordingly from the date the program was implemented until July 31, 2014. He further read, 'Public safety personnel involved in fire suppression and emergency medical services work in a notably dangerous conditions and are exposed to a variety of threatening situations. He further read, 'Safe performance of job duties requires these personnel to achieve and maintain peak fitness levels to minimize risk of work associated injuries and illness. The intent of the fitness portion of this program is to provide accessible fitness opportunities for all sworn Fire Department personnel'. Petitioner stated that he agreed with and understood that both statements applied to him as a firefighter/paramedic. Petitioner further read, 'Provision of multiple fitness opportunities for the Fire Department personnel demonstrates in a changeable manner the Department's commitment to ensuring a well-balanced wellness and fitness program and maximizes opportunities for the Highland Park Fire Department to have a more motivated, safer and capable work force....'. Petitioner testified that the intent was there for the fitness program and how it impacts him as a firefighter/paramedic. Petitioner understood Respondent was committed to the wellness program. Petitioner read further, 'Daily fitness training is mandatory for all on duty Emergency Response Department personnel'; he indicated that applied to him. Petitioner read further, 'Time will be provided every day for fitness training. It is expected that activities such as emergency calls or extended training will occasionally

preclude personnel from participating in fitness training. These days should be the exception and not the rule'. He indicated in his experience that was the case from when it was implemented through July 31, 2014. Petitioner read further, 'Fitness training shall be documented in the daily journal and the firehouse software program as training using Category 1A, physical fitness training'. Petitioner stated that is what he testified to in PX20. Petitioner read, 'All Fire Department officers and acting officers are given the responsibility for making daily fitness training a priority activity'; he stated that was his understanding as a paramedic/firefighter for Respondent. Petitioner testified that through July 31, 2014 no one ever communicated to him that the program was voluntary and not mandatory. It was further noted the requirement of wearing workout clothing consistent with Respondent's uniform standards and once workout is completed requirement to change out of the workout clothing. Petitioner indicated the clothing was what he wore 4-5:00 during workouts during his shifts. Petitioner brought a set of the long sleeve tees and shorts for workouts (not admitted into evidence) and he testified those were provided by Respondent, he believed, with part of the original grant money, he knew he did not buy that. He indicated that was the clothing indicated above and he noted the logo for Respondent Station 33.

- Petitioner noted the section on page 17 regarding Respondent's fitness trainers receiving training and certification from a recognized training/fitness trainer course. Petitioner testified the trainers volunteer to participate in that capacity and then they are trained for Respondent. Petitioner noted Paul Grzybek was their fitness trainer and Petitioner understood he was to be re-certified the month of this hearing. Petitioner viewed PX 5 Respondent's Wellness and Fitness Program book (admitted). Petitioner viewed PX12 and noted it as Petitioner's 1A physical fitness training 2/24/08-7/31/14; a compilation of his fitness training, documented for the various dates during that timeframe. Petitioner noted they maintain the training records as Respondent told them to. He noted the training regimen from cardio to strength and conditioning (PX12 admitted). Petitioner viewed PX 6 and he identified it as the Collective Bargaining Agreement between Respondent and their union. (NOTE--Page 65 of the Agreement noted the requirement to participate in the fitness program). Petitioner testified as to the fitness program being established therein and their requirement to participate. Petitioner understood the program had been implemented as noted there. He indicated no one ever told him it had not been implemented.

- Petitioner agreed he first sought treatment for the injury at Northwestern Lake Forest Hospital August 6, 2014. Petitioner testified that he was sent there by Respondent as that is the location of Respondent's occupational health clinic. Petitioner was seen by Dr. Shropshire there at Corporate Health. Petitioner stated he described the accident and the pain he was having at that time. He told her of the pain in his shoulder after lifting the weights. Petitioner stated that the doctor was not familiar with what an incline bench was

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but he did describe it. The doctor prescribed an MRI and Petitioner was given lifting restrictions and told not to do any lifting overhead. She did not recommend exercises to strengthen the shoulder but told him to do shoulder exercise twice per day. Petitioner testified that the limited duty and shoulder exercises did not resolve the pain. Petitioner had follow up visits with that doctor but he did not notice any improvement as a result. The MRI was ordered but never approved by WC then. The doctor was seeking approval for the MRI and therapy. Petitioner testified he was referred to Dr. Cham, an orthopedic specialist but he did not see the doctor at that time. Petitioner could not see the doctor as the doctor was not in his network. As WC had denied authorization Petitioner stated that he tried to use his group. Petitioner testified that he went through his HMO and was referred to Dr. Dunlap, an orthopedic specialist at North Shore University Orthopedics. Petitioner first saw Dr. Dunlap October 6, 2014 and he recommended an MRI. Petitioner underwent that left shoulder MRI at North Shore on October 14, 2014. He saw Dr. Dunlap October 20, 2014 to discuss the MRI findings. Dr. Dunlap recommended steroid injections therapy and restrictions. Petitioner had therapy at North Shore beginning November 4, 2014 and attended all scheduled sessions. After therapy Petitioner returned to Dr. Dunlap December 22, 2014. Petitioner indicated he had improvement with the injection and therapy but it was not long lasting and the symptoms returned. The doctor retained the light duty restrictions and gave another injection to the shoulder February 2, 2015. Subsequent to the injection the doctor discussed the possibility of surgery. Petitioner understood he was a surgical candidate. The doctor recommended continued light duty and home exercises. After that Petitioner saw Dr. Chams at Illinois Bone & Joint, June 4, 2015. Petitioner described feeling popping and pain in the shoulder while the doctor manipulated it. Petitioner understood the doctor knew what was wrong and could fix it. Dr. Chams diagnosed a tear in the shoulder from the MRI and recommended arthroscopic surgery to repair it. Petitioner stated that he wanted to have the surgery.

- Petitioner testified that prior to July 31, 2014 he never had any left shoulder treatment and he had no prior similar symptoms of popping in the shoulder. Petitioner stated that he had no new injuries since this accident. Petitioner stated that some of the bills had not been paid and some were paid via group insurance as WC had denied the bills. Petitioner stated that he had paid out of pocket towards some of the bills; he had not been reimbursed. Petitioner paid Dr. Chams $235 for the evaluation. Petitioner was currently on light duty status and he was pending surgery per Dr. Chams. Records and bills in PX 2 (Northwestern Medicine), PX 3 (North Shore), and PX 4 (Dr. Chams), were introduced.

- Petitioner agreed he testified that the workout equipment and clothing were provided to firefighters, for the physical fitness training, by Respondent via a grant. Petitioner was familiar with the grant and documents related to it. Petitioner stated the grant they received was for the fitness equipment and program and he noted the letters authored by the Chief, Alan Wax on Respondent's behalf to Senators Durbin and Obama, and Kirk. Petitioner testified that those letters were maintained in the normal course business (PX13

admitted). Petitioner identified PX14 (admitted) as the grant paperwork to Homeland Security for the Fitness and Wellness Program signed by Tim Pease and kept in the normal course of business. Petitioner read the grant application which indicated the program was mandatory. The grant application noted it 'Requests funding to implement mandatory health and fitness program'. The application further noted that in 1990 an optional wellness program was implemented and the goal was to expand program to be more comprehensive and comply with NFPA 1582 standard on medical requirements for firefighters. The application further noted that the program was to be mandatory for all emergency response personnel and administered on an incentive rather than punitive basis. Petitioner indicated in his experience that was how the department operated since obtaining the equipment purchased under the grant. He read, 'this program will allow the HPFD to effectively address the most dangerous aspect of firefighters' jobs and improve the well-being and fitness level of each member'. Petitioner agreed with the statement. The application read "with the assistance of federal funding, HPFD (the Respondent) would be able to implement this most valuable program." Petitioner testified that the department had received that grant money which was used to purchase the equipment (total cost $42,837) as well as provide training for Peer trainers (total costs $13, 341.90). Petitioner testified that peer trainers are those trainers who volunteer to help people there with their workouts; that money had been provided via the grant. The application further read, 'Our organization is committed to making this program work. It is absolutely vital'. Petitioner understood that was how Respondent viewed the program. He further indicated the request needing the assistance of the federal government for the program. The application further noted that 'within the past three years, the Highland Park Fire Department has also experienced two firefighters being placed on permanent disability due to back injuries' and that 'These injuries could have been avoided if a mandatory physical fitness program were in place.' Petitioner identified PX15 as a letter from Homeland Security Office of Grants and Training to Respondent. (exhibit admitted). Petitioner read the letter regarding the $74,692.00 grant approved for the program to purchase the equipment and provide peer training. Petitioner testified no one ever said the workout each shift was voluntary.

- Petitioner testified there is no ban from them using the equipment when off or on duty. He stated he does cardio in the morning and weight training later. He stated cardio is difficult during the day as they can get a call in the middle and that stops the workout. Petitioner again stated there is nothing to prevent a firefighter from using the equipment at other times. He indicated his immediate family can come there on off days. He can exercise more than an hour per day.

- Mr. Horne testified for Petitioner, he has worked for Respondent Fire Department for 29 years; a lieutenant paramedic/firefighter. He also serves the union in various capacities; he was part of the negotiating team at the time of hearing. He is a company officer so he

works with a crew of 3-5 and they carry out normal duties as firefighters, fire calls, EMS, water calls. He works on gold shift; 24/48 shift, 24 hours on, 48 hours off, on a rotating basis. Respondent has 3 stations. They are assigned to stations by the battalion chief and they rotate through. He ultimately reports to the fire chief and they have a deputy chief and a battalion chief on his shift. He had worked under 5 chiefs in his career; current chief is Dan Pease. Mr. Horne stated that on a typical shift day they start at 8:00am and they do morning checkouts and they check the rig to be ready for calls. He stated the battalion chief provides a daily roster of people assigned to the station and rig. They also assign if they want special training or public education details completed. It is considered a contractual workday. Between 8:00 and 5:00 they respond to emergency calls and they train and at 4:00 they do physical fitness until 5:00. He stated there is workout gear in every station and everyone works out; he believed that was part of their job. He indicated the prior Chief Tanner, had a conversation with him about physical fitness training requirements after he was promoted to lieutenant, about October 2010. He indicated the conversations occurred during officer meetings on more than one occasion; they have scheduled monthly meetings when he is on duty. He indicated management staff is present at the meetings; chiefs, lieutenants. The chief conducted the meetings and those meetings are protocol. Petitioner testified that Chief Tanner, at those meetings, said the physical fitness training was mandatory and they were to instruct all their personnel to participate in the program. He stated they were presented with facts like their goals to reduce back injuries. He indicated they attributed no back injuries during a period to the fitness program. He was told everyone shall participate at their own level and non-participation was only when on calls or other duties or training was going on. Mr. Horne stated he knew that from his experience with the contract meeting with the people to set up the program for individual workout plans. There was no specific workout routine. Mr. Horne stated that everyone was expected to participate at their own fitness level; no one was told not to as to a particular workout. He indicated he understood the peer fitness trainers met with individuals on the shift if they were asked to help them reach personal goals. Mr. Horne testified that the peer trainers had special training and certification classes provided by Respondent. Mr. Horne testified at no time was he ever told the program was voluntary. He stated in the last contract negotiation the city proposed a word change from 'may' to 'shall' and he thought that strengthened it.

- Mr. Horne viewed and identified PX 6 as the collective bargaining agreement in effect from May 1, 2013-December 31, 2015. He noted Section 19.3A provided that the 'The city and fire department peer fitness trainers may establish a wellness program which shall include individuals and departmental goals. While employees shall be required to participate in any such program while on duty'; the word 'shall' was the city proposal; it was 'may' before. Mr. Horne stated the agreement was accepted by the union and changed. He was a signatory on the agreement for the union.

- As to the fitness equipment, Mr. Horne stated there is a mix of cardio gear and weights and machines; equipment present at all stations. In the union he represents an area of northern Illinois firefighters. He had been president and on the negotiating team before. He is familiar with labor management committee as he had participated in many. He read 19.3A, 'While employees *shall* be required to participate in any such program while on duty, no employee will be disciplined for failure to meet any goals that may be established as long as the employee makes a good faith effort to meet any such goals and is able to meet reasonable minimal job required physical fitness standards as established by the city and for department peer fitness trainers'. He noted the program had to be reviewed and discussed before it was implemented. He had been present at implementation meetings for the program. Mr. Horne stated he understood after the meetings that he participated in with Chief Wax, that the program was implemented. He testified after the program was implemented the workouts started. Mr. Horne testified the 4:00-5:00 workouts started with Chief Wax; Mr. Horne was not a Lt at that time. He testified that the workouts continued after Chief Wax. Mr. Horne stated that Chief Tanner was more direct as to the workouts. He stated they were told the workouts were part of the job duties. At that time he was a Lt and was told to make sure the employees participated. Part of his job as a Lt. was to make sure people worked out and participated in the program to whatever extent. He stated they have some who walk around the station and others who work out more than an hour. He stated he (the Lt's) notes on the daily log the workouts; whether firefighter/paramedics participated; and inputted the hours.

- Mr. Horne viewed and read from PX13 (the grant letters June 2, 2006 to Senator Durbin) as to implementation of the fitness program. He read, "We recognize that the cost of less than maximum health and fitness in our emergency responders is not only monetary but also can be emotionally devastating to the department'. He agreed with Chief Wax statement there. He read further, "By preventing injuries and illness and improving employee health, the department will reduce costs associated with workers' compensation, disability pensions, insurance premiums and overtime". It read further that moral improvement would result in better protection of life and property and benefits the City, community. He agreed with that. Mr. Horne testified that the 4:00-5:00 period was for workout and not for naps or reading; he stated they were not allowed to leave the station during that period; they were expected to exercise then. Mr. Horne stated that he believed that exercising makes you a better firefighter, makes the job safer, allows more efficiency on the job, allows better decisions and provides for your well-being. Mr. Horne felt it allowed him to provide better service to the community.

- Mr. Lindgren testified for Petitioner, he is a lieutenant firefighter/paramedic who has worked for Respondent for 24 years. He was hired initially as firefighter/paramedic and then promoted about 2008. He supervised a station with usually 3 other firefighters. He organizes the day. He stated they do training and duties and manage the calls which could be firefighter or EMS calls. He noted the battalion chief sends out a roster with any other

training. He indicated the typical schedule is 24 hours on with 48 hours off. They start at 8:00am and do roll call and go through the roster and note special duties and training for the day. He stated after they check the rigs which takes about 45 minutes to an hour and after that maybe some training or other duties. He noted about noon they have lunch and after they train, and then at 4:00 they do the wellness workout. Mr. Lindgren indicated the workout could be any kind of physical conditioning you want; running, treadmill, weight lifting, stretching. Mr. Lindgren testified that the workout is mandatory going back quite a few years with Chief Tanner. He noted that they were told on more than one occasion at the meetings with Tanner about the training program. He indicated the first time it was noted as to the wellness program was summer 2008. He indicated unless they were on other training or calls 4:00 was the fitness program. He indicated it was a direct order to work out as he understood. Mr. Lindgren testified that at no time since then were they ever told it was a voluntary program. He noted they have to fill out the training sheet every time they are finished; mandatory 1 hour. He would fill out the sheet for his crew and enter it into the computer that they worked out. He testified that was a regular part of the job duties. He indicated the workouts were standard, not an elective recreational activity for free time. Mr. Lindgren testified the workouts took place during their contractual day. He stated he was told by Tanner they were trying to reduce back injuries, to keep firefighters in better shape. He stated there that there was a big push to reduce back injuries at that time. Mr. Lindgren testified the wellness program helps by working out and reducing back injuries by being in better shape. He recalls a good year with no back injuries and they attributed that to being in better shape from the workouts with the program. Mr. Lindgren testified he thought it was a great program that provided a benefit to the department; in better shape and preventing injury. He thought it was great PR for the city with them being in better shape; 'no one wants to see an out of shape fireman'. He testified it helped him perform his job better. Mr. Lindgren testified that the wellness program was mandatory, not voluntary and was in place on July 31, 2014.

- Mr. Pease testified for Respondent. Mr. Pease testified to being employed by Respondent as fire chief for about a year. He had started with Respondent October 5, 1987. His job is preparing budgets, strategic direction and implementing the vision. He was involved, as a negotiator, with negotiating the contract with the union. Prior to May 1, 2013 he was deputy fire chief and was involved with negotiations then also. Mr. Pease is familiar with Petitioner and aware of the injury July 31, 2014. He agreed injuries are to be reported to direct supervisors (notice is stipulated to), and an accident report is prepared and moves up the chain of command. He viewed RX 5 (admitted) and recognized it as the supervisor report by his brother; he had seen it before; it was signed August 6, 2014. The report is kept in normal business practice; done for every injury claimed. Mr. Pease indicated he was familiar with the general employee policies and rules of the department. Mr. Pease indicated that as of July 31, 2014 there were no physical fitness requirements, city wide for Respondent. He testified the city is under a physical wellness program that the fire union is not part of; he indicated they chose not to accept the city's wellness program, he

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believed per the collective bargaining agreement. He viewed PX 6 and identified it as the agreement between the city and fire union effective May 1, 2013 through December 31, 2015. He testified the agreement was applicable July 31, 2014. Mr. Pease testified that he was familiar with the terms of PX 6 as he was involved with negotiations. He viewed page 65 (fitness examinations) and indicated that the provision on that page concerned the question of physical fitness to return to duty. He indicated that the fire chief makes the determination if there is justifiable concern as to medical fitness for duty. He indicated that prior to July 31, 2014 there was no concern regarding Petitioner's fitness; Petitioner had not been scheduled for any such exams. Mr. Pease was then pointed to the 'Physical fitness program' section and stated that a peer fitness trainer is a person trained in physical fitness activities and certified for the fire department. He testified there were certified trainers July 31, 2014. Mr. Pease testified to being a member of the labor management committee as on July 31, 2014. Mr. Pease indicated that between May 1, 2013 and July 31, 2014 there had been no meeting of the labor management committee regarding the wellness program. He had been present at all meetings and he stated that a wellness program had never been brought up for discussion. There had been meetings since; 3 per year. He stated a wellness program had not been brought up and no such program had been adopted at the meetings. Mr. Pease testified there was no other mechanism besides the collective bargaining agreement to establish a binding agreement on the wellness program. Mr. Pease testified that there presently does not exist, a physical fitness program and there had not been one before May 1, 2013. Mr. Pease testified that no command officers had ever disapproved of physical fitness activities between 4:00 and 5:00pm. He indicated per the agreement they are permitted to do that activity from 4:00 to 5:00pm (provided other duties were done) but it was not required. In his capacity he had been to fire houses between 4:00 and 5:00pm from time to time and had observed employees working out and not working out. He stated he had observed employees cooking, completing reports and watching TV during that time. He testified if he was at a station from 4:00 to 5:00pm and observed someone not working out he would not advise them to work out and there would be no discipline for not working out. He had seen no such reports from any officer. Mr. Pease testified that there was no other program that employees must complete a mandatory workout from 4:00 to 5:00pm. He viewed the Wellness incentive program fitness bonus hours section. He indicated that was earning additional time off performing a physical fitness assessment with a wellness coordinator; he stated that was a voluntary program. He indicated they contract out for a coordinator through HR for that. He indicated that would be performed at a country club; operated by the park district. Mr. Pease testified that on July 31, 2014 Petitioner was not performing that assessment with a wellness coordinator.

- Mr. Pease testified that there are legal standards of safety and well-being that apply to firefighters. He viewed RX 6 and indicated it is a medical evaluation of candidate form (minimum standards per State of Illinois). He indicated they are advised to do that but that was not mandatory; Respondent does comply with that. He stated it is an

examination done once per year. He indicated Petitioner would have been scheduled for that exam fall 2014, but not scheduled as of July 31, 2014. He stated the sole purpose of the exam is to determine if the person is fit for duty. He did not know if there was a specific level of strength of fitness to pass the exam. Mr. Pease testified that employees have varying levels of physical fitness that pass the exam, but he did not know the measurement.

- Mr. Pease was familiar with the location of Petitioner's injury within the station. He indicated they have other facilities at other locations. Mr. Pease testified that they received the equipment per a grant and donations from residents. He indicated there are amenities at the station the firefighters can use other than exercise equipment when they have completed their duties; a day room with TV, recliner chairs, desks, bunks, computers. He testified the employees are not required to use any of those amenities. He indicated people other than firefighters can use the equipment at station 33. Mr. Pease agreed, per the collective bargaining agreement, that Respondent provides certain clothes to the firefighters. He stated they provide standard uniform, tee shirts, shoes, and turnout gear. He stated not fitness/exercise wear. Mr. Pease testified that he was aware of firefighters purchasing their own workout gear. He indicated one firefighter sells things with the logo he had designed for Respondent. He testified if a firefighter purchases those things they are not reimbursed by Respondent. He indicated workout clothing had been provided when they had the original grant (under Chief Wax). Mr. Pease became chief December 2014. He indicated during Chiefs Wax and Tanner's tenure as chiefs there was no formal program to work out. There are policy changes every 2 years that are posted but not in the employee handbook. Mr. Pease testified that there is a formal fitness requirement set in the handbook for non-union employees, not the fire department. He indicated the firefighters did not accept that program. He stated they did not agree to the city's ability to raise insurance premiums based on mere participation in the program. He indicated the union had a disagreement with the wellness program tied to the insurance premiums (with the prior agreement). Mr. Pease testified that there was no formal wellness program with the May 2, 2013 agreement (PX 6). Mr. Pease testified that he as chief had not applied any pressure on officers to engage in workouts and to his knowledge neither did Chief Tanner. He stated they were trying to develop a wellness program but the union rejected it. The agreement had been enacted during Chief Wax' tenure. He had never issued any orders contrary to the agreements. He had been a union member when he was a firefighter.

- Mr. Pease agreed there are people in the department certified as peer fitness trainers. He stated the people pay for their certification every few years; the department does not reimburse them. He stated at the development of the wellness program Respondent did pay to certify peer fitness trainers in anticipation of the union accepting the policy, but they did not and the fitness program went by the wayside. The wellness and fitness guide

was published February 1, 2008 and the program was subject to acceptance by the union and the acceptance was not given, so the City stopped paying for the trainers certifications. Mr. Pease testified that recording of training hours is required by the fire department. Nothing happens if they do not work-out on a given day. He indicated the supervisors/lieutenants (or the firefighters) at each station are instructed to complete those entry hours. No action is taken against a Lieutenant for not logging it. He stated as they do not require it they do not really track it. He stated that all training hours should be recorded but there is no penalty if not recorded properly. He indicated not all firefighters are equal status of physical fitness. Some are overweight; no action is taken for that. To his knowledge no prior chief disciplined for failure to work out.

- On cross examination, Mr. Pease again stated that the peer fitness trainers are not reimbursed by the department; they could have been under prior chiefs but were not under his reign. He stated Chief Wax did as he was the one that certified them as peer fitness trainers. He agreed he was not chief July 31, 2014 (date of accident). He indicated that to his knowledge at that time the peer fitness trainers were not paid for; he did not know. Mr. Pease indicated some of the fitness equipment was purchased from money received elsewhere; some through the grant. He indicated the grant received was from Homeland Security; he was not intimately familiar with that grant. He viewed the grant and indicated it had been prepared by his brother, Lt. Tim Pease. He indicated the intent was to fund a program that was never accepted by the union. He agreed the department received the grant money and he believed it was used to buy the equipment. He indicated that to his knowledge the money was not given for a mandatory health and fitness program ((NOTE-this was contrary to grant language)). He then indicated he was not sure what was communicated by Homeland security about it.

- Mr. Pease testified that the firefighters can go to grocery shopping from 4:00-5:00pm. He testified it was up to the officers' discretion what they did during that hour based on completion of the assigned duties for the day. He agreed the equipment purchased by the city with assistance of the grant money was so that the firefighters would work out; a physically fit firefighter can do better at his job and benefit the fire department, and in turn the community at large. He stated they bought the equipment with the intent of implementing the program as the city would benefit from physically fit firefighters, regardless of whether the program was implemented or not. The City was willing to let them workout during work for that. Mr. Pease indicated they are neither encouraged nor discouraged from working out; it was up to the individual. He agreed he testified the training hours (working out) are required to be recorded. As chief he has not taken any steps to communicate to the firefighters that workouts were not required. He was not aware of prior chiefs communicating if they did not want to work out they did not have to. He testified that the equipment was left in the stations for the guys to use because the

city wanted them to. He did not know if you can correlate equipment use with low back injuries. Mr. Pease indicated they have no measurement of whether back or knee injuries are diminished or increased from a workout. He indicated the wellness program was not to decrease low back injuries but to increase physical fitness. He indicated with awkward positions even a physically fit person can throw their back out. He did not know how much money was received from the grant. He indicated to his knowledge Chief Tanner did not give orders contrary to the collective bargaining agreement (CBA). Mr. Pease had not told anyone not to record training hours. Mr. Pease testified that he does encourage everyone to work out and record physical fitness hours that they do not do at the firehouse. He encourages them to be physically fit; whatever they had to do; a workout could be one of those things to do.

- Ms. Taub, testifying for Respondent, stated that she had been employed by the City of Highland Park for about 5.5 years. Her title has been Human Resources manager for the past 3 years; since January 2013. Ms. Taub handles employee relations, performance management, policy development and compliance, insurance plans and workers' compensation. With regard to policy development she was involved with proposed policies like the wellness program. She agreed policies like that are revised and updated from time to time. Ms. Taub testified that presently there is no minimum level of physical fitness required under Respondent's policies. She testified that there was no such policy July 31, 2014 or prior. She testified in the past there had been performance measures for evaluation for performance of their duties; it changed in 2011. Ms. Taub stated that in 2011 the City completely revamped the performance evaluation process and went looking for personal attributes to job-based competencies; job specific competencies. She testified none of those took assessment level of physical fitness. Ms. Taub testified that when looking at new candidates for positions the City does not take physical fitness into account. She testified that the City does have fitness incentives for employees; to earn extra time off if they meet certain levels. Ms. Taub testified that is described in the employee handbook. She testified the employee is not required to participate in that program and they are not penalized for not doing that. Ms. Taub indicated policies are typically communicated via writing and all employees are asked to acknowledge receipt and they would comply; the policies are in the handbook. Ms. Taub identified RX 1 as the employee handbook; it was forwarded to the attorney for this litigation. She indicated that was in effect July 31, 2014. She indicated access to the handbook is also available on-line for the employees. She testified the handbook applies to all employees, including those covered by a collective bargaining agreement. She indicated policies are not affected by the CBA but if there is a conflict the CBA controls.

- Ms. Taub testified that Respondent has a central workout facility for employees and their families. Ms. Taub testified that employees are not required to use the workout center and

she stated the City does not track if they do or not. She indicated employees can to self-identify for purposes of a wellness program.

The Commission notes that Petitioner presented PX 1, a Certification of Health dated August 29, 2007 from Dr. Fragen to Chief Wax regarding Petitioner's physical and fitness for duty. The Certification noted Respondent's wellness and fitness program. Petitioner also presented PX 5, the Highland Park Fire Department Wellness & Fitness Program book. It noted the 'Goal' of the program was, to insure wellness and fitness physically and mentally in the workforce and minimize occupational injuries, disability requirements (WC), complying with OSHA requirements and that the focus was education and rehabilitative rather than punitive. Section 5 index indicated the Mandatory fitness training section. It noted the development of the program and noted enhancing health and safety of its most valuable assets—the employees. It noted that the Peer fitness trainers were to upkeep equipment and to monitor programs valuable to boost morale with injured employees. There is also a section on fitness protocols to determine base levels and evaluate progression year after year. Petitioner presented PX 6, the Collective Bargaining Agreement; as per testimony. Page 65 of Agreement noted the fitness program and the requirement to participate in program. Petitioner presented PX10, meeting minutes, July 15, 2013, -priorities- reduction of vehicle accidents; continue success with back injury reduction; ensure proper lifting techniques; possible increase in use of stair chair. Petitioner presented PX13, letters dated June 2, 2006 regarding grant application. The letters noted that the grant would provide for the purchase of equipment for the program which would be of benefit to the community. It further noted it would provide healthier, more productive responders for the department and better aid stricken communities. Petitioner presented PX14, the Grant application (via Department of Homeland Security) as per testimony. The Grant was requested for the Fire Department to purchase exercise equipment and other things for a mandatory fitness wellness program. Petitioner presented PX22, the Affidavit of Frank Nardomarino, a Peer fitness trainer and firefighter/paramedic for Respondent, dated May 18, 2016. He noted he was first certified in 2013 and re-certified November 2015. He noted since November 2015 Respondent has stopped paying costs for training and re-certification for trainers.

The Commission finds that there is clear testimony that Chief Tanner, the prior chief and chief at the time of Petitioner's accident, had indicated that the fitness and wellness program was mandatory. Testimony was presented that Petitioner worked out regularly. Clearly in such a demanding and responsible position, the fitness program (voluntary or mandatory) was a benefit to him and certainly a benefit to Respondent. Clearly, keeping Petitioner in shape and on the job longer decreased turnover and the necessity to train new firefighters. Having healthy veteran firefighters/paramedics certainly benefitted Respondent and its citizens. Px. 5, the Wellness and Fitness Program indicated, 'This Wellness and Fitness Program has been developed by the department's Labor Management Subcommittees to ensure proper health and safety support for Fire Department personnel'. It further noted 'Public safety personnel involved in fire suppression and emergency medical services work in a notably dangerous conditions and are exposed to a variety of threatening situations'. Furthermore, 'Safe performance of job duties requires these personnel to achieve and maintain peak fitness levels to minimize risk of work

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associated injuries and illness. The intent of the fitness portion of this program is to provide accessible fitness opportunities for all sworn Fire Department personnel'. Petitioner testified that he understood that both statements applied to him as a firefighter/paramedic. The Federal grant, from the Department of Homeland Security, clearly indicated it was for a mandatory program; if it was not implemented as mandatory Respondent would be in violation of the grant provisions. The Commission notes that there is no question that the 4:00 to 5:00pm time period during Petitioner's shift was designated for wellness and fitness in the facilities in the fire stations as long as they were not on calls or performing other duties for the day. There were no punitive measures for not participating in the hour for fitness and the testimony and the CBA indicated that there was to be no penalty for not participating. The Commission finds that there is clearly issue as to whether or not it was a mandatory program, but the preponderance of credible testimony and evidence indicates it was mandatory at the time of Petitioner's injury. It is clear Petitioner's activities between 4:00 to 5:00pm were during Petitioner's paid shift. Petitioner was required to be on the premises during that time other than if on a call or other mandated activity. The fitness period was an exercise break from regular firefighter/paramedic duties as the time of the accident. The preponderance of evidence makes clear that along with Petitioner's firefighter/paramedic duties and responsibilities around the station, that hour provided for exercise was equally a part of his duties and responsibilities whether mandatory or not. Petitioner working out was not merely a recreational activity for his enjoyment, but rather, and clearly a benefit to Respondent and their community and other communities for which they may need to respond. Clearly a physically fit firefighter/paramedic is an asset and great benefit to the community at large.

The Commission notes a case on point is Elvery v. Village of Lombard, 06 IWCC 1076; 2006 Ill. Wrk. Comp. LEXIS 1261. There a firefighter was on duty and during a break period (from his cooking duties at the firehouse) was playing softball on the premises when he was injured; the Commission reversed the Arbitrator's decision and found accident and remanded the matter back to the Arbitrator for further proceedings. In Campbell v. Taylorville Fire Dept., 13 IWCC 574; 2013 Ill. Wrk. Comp.LEXIS 559., the petitioner was voluntarily playing basketball on a break with a number of other co-workers when he was injured. The Arbitrator found accident there and the Commission affirmed and adopted that finding. In Duran v. Peru Volunteer Ambulance. 15 IWCC 312; 2015 Ill. Wrk. Comp. LEXIS 313, the Commission affirmed the arbitrator's finding of accident. There, Petitioner was a paramedic, also required to remain at the station on an extended shift. While on a break, he was helping a co-worker work on a personal radio and while Petitioner was walking to return tools to his vehicle he fell and was injured. In each of these cases the Commission applied the personal comfort doctrine to find accident arising out of and in the course of employment. Here, Petitioner was not playing ball or walking to his car but rather working out for wellness and fitness which clearly was of benefit to him and Respondent and the communities at large. Furthermore, the evidence on the record indicates the intent of Respondent obtaining the grant from the Department of Homeland Security, to obtain fitness equipment, for a wellness and fitness program for its firefighter/paramedics, whether considered mandatory or not. Petitioner was on a 24 hour shift and he had to be on premises other than for calls or other duties that took him away. Analyzing the evidence pursuant to the personal comfort doctrine

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would also result in a finding for Petitioner as there had to be some downtime for personal comfort seeing that Petitioner had to be present at the station and remained on the clock for the entirety of his 24 hour shift. Again, Petitioner working out is of great benefit to him and Respondent and communities at large, and also considering the Homeland grant (mandatory) intent was for keeping emergency personnel fit as a benefit for all. The preponderance of credible testimony and evidence finds Petitioner met the burden of proving accident that arose out of and in the course of his employment and further a causal relationship to his condition of ill-being. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, and, herein, reverses the Arbitrator's decision and finds, by the preponderance of the evidence that Petitioner met the burden of proving accident that arose out of and in the course of employment, and further met the burden of proving a causal relationship between the accident and Petitioner's current condition of ill-being.

The Commission, with the above finding of accident and causal connection, further finds evidence of medical treatment and medical expenses to warrant reversal for an award of medical expenses and 'prospective medical care' and, herein, orders Respondent to pay the reasonable and necessary related medical bills, subject to the fee schedule, and for Respondent to pay for the reasonable and necessary costs related to the surgical procedure recommended by Dr. Chams. Respondent offered no evidence they are not liable for that surgery, other than by way of their denying accident/causal connection. Petitioner has had the surgery since the start of the hearings so the matter is, hereby, remanded to the Arbitrator, to obtain further evidence (again this was result of §19(b) proceedings) to determine the medical expenses and any further treatment and/or temporary total disability (TTD), and/or any permanent partial disability (PPD) benefits. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence, and, herein, reverses the decision of the Arbitrator, and awards the reasonable and necessary medical expenses, and expenses related to the 'proposed medical care' (surgery and post-operative treatment) and any TTD related to the surgery, and, herein, remands the matter to the Arbitrator for further proceedings consistent with this order.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses and 'prospective' medical care under §8(a) of the Act, subject to the fee schedule.

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

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

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

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

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

MAY 4 - 2017

DATED:
o-2/23/17
DLG/jsf
045

David S. Gore

David Gore

Stephen J. Mathis

Stephen Mathis

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on **2/23/2017** before a three member panel of the Commission including members **David Gore, Stephen Mathis** and **Mario Basurto** at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of member **Mario Basurto** on **3/1/2017**, a majority of the panel members had reached agreement as to the results set forth in this decision and opinion, **as evidenced by the internal Decision worksheet initialed by the entire three member panel,** but no formal written decision was signed and issued while former member **Mario Basurto** still held his appointment.

Although I was not a member of the panel in question at the time Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the majority in this case, **I have reviewed the Decision worksheet showing how the departing member** voted in this case, as well as the provisions of the Supreme Court in Zeigler v. Industrial Commission, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Deborah L. Simpson

Deborah Simpson

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

OLZEWSKI, KEN
Employee/Petitioner

Case# **14WC030155**

CITY OF HIGHLAND PARK
Employer/Respondent

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On 8/8/2016, 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 0.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4192 OWENS & LAUGHLIN PC
BRIAN M LAUGHLIN
9 CRYSTAL LAKE RD SUITE 205
LAKE IN THE HILLS, IL 60156

0075 POWER & CRONIN LTD
ADAM RETTBERG
900 COMMERCE DR SUITE 900
OAKBROOK, IL 60523

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STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KEN OLZEWSKI
Employee/Petitioner

v.

CITY OF HIGHLAND PARK
Employer/Respondent

Case # **14** WC **30155**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George Andros**, Arbitrator of the Commission, in the city of **Waukegan/Chicago**, on **11/18/15, 2/8/16, 4/27/16, and 5/20/16**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

KENNETH OLZEWSKI V. CITY OF HIGHLAND PARK 14 WC 30155

STATEMENT OF FACTS

As a 27 year veteran and now a Lieutenant Paramedic firefighter his job responsibilities include overseeing crew and apparatus, training and responding to calls.

The crew works a 24-hour shift every third day, meaning that they are on duty for 24 hours, then off-duty for 48 hours. Station duties follow or training attendance, if scheduled. Lunch is noon then the afternoon would be dictated by training or preplanned events. All are subject to emergency calls and responses.

Between 4:00 pm and 5:00 pm Petitioner would perform what he described as mandatory physical fitness at the station. Station 34, to which he is assigned, includes a "gym," which Petitioner described as a room containing treadmills, a stair stepper, elliptical, & weightlifting equipment. The other two Highland Park stations have similar equipment, with central station 34 having a much larger gym.

On July 31, 2014 Petitioner reported to work in his ordinary capacity at Station 34 at 8:00 a.m. Between the hours of 4:00 and 5:00 p.m. he was exercising, both because he described it as mandatory and because he enjoyed it. While performing an inclined bench press he felt a sharp pop and pain in his left shoulder. He then discontinued. The only one present was Paul Grzbek, a who did not see the event. Mr. Grzybek is a "peer fitness trainer," an individual trained as part of a wellness program to be available for assistance with fitness. Petitioner believed that Respondent paid for the training and certification of these "peer fitness trainers". Following the injury Petitioner felt significant pain in his left shoulder.

He self-medicated, advised his crew, then called his battalion chief Tim Pease reporting he was going home sick. He completed "ICE Report," which is a duty injury report. Petitioner stated therein he injured his left shoulder while working out.

Petitioner believed his workout was mandatory based on being told by former Fire Chief Pat Tanner during an officer's meeting. No date was established. He testified all training including workouts were reported and documented on an ongoing basis. (Pet. Ex. 20) Such documentation was required by the Department. Petitioner produced a printout of the training log of July 31, 2014, which listed himself, Paul Grzybek, Brian McDonald, and Michael Schmidt. Petitioner compiled the document, inputting the information, and testified that it was part of his job to do so on every shift.

During the hour from 4:00 to 5:00 p.m., Petitioner is paid, and this time is part of his contractual workday. He cannot leave the fire station during this hour. The workout would not be required if training / events over ran into that hour, or other specific duties required completion, an emergency call arose. Otherwise, Petitioner's belief was that he was required to remain in the station and engage in a workout during that hour. Importantly to Petitioner, after they completed workouts, one responsibility was to record in the training logs the number of hours the crew worked out in the gym in station 34. Pet. Ex.12 and Pet Ex.20. This was one of his "duties" along with maintenance of apparatus, EMS and training, and responding to calls.

The Petitioner testified Chief Tanner told him at officers meetings workouts were mandatory; All officers and firefighters work out; Lieutenants were responsible for recording and document in training logs, under the category "1A physical fitness training," the hours each firefighter spent in participating in fitness training.

Petitioner was examined in August 2007 by Dr. Fragen at the City's request. As a result Dr. Fragen determined he was "fit to participate in the department's Physical Fitness program." (Pet. Ex. #1)

Petitioner testified regarding Respondent's "Wellness and Fitness Program". This program encompassed the purchase of exercise equipment, time to work out, plus book on its benefits. The purpose of this program was enhancing fitness and job longevity, reduced injuries overall, and make him a better firefighter. Petitioner produced a letter dated 8/29/07 from Dr. Fragen to Chief Wax, noting that Petitioner had undergone a physical examination and was therefore allowed to participate in the Department's physical fitness program. (See Pet. Ex. 1) He asserted the physical fitness program was the same as Fire Department Wellness and Fitness Program. See testimony infra from the HR director and Chief Pease regarding these programs & CBA.

Petitioner produced a document titled "Highland Park Fire Department Wellness and Fitness Program." (See Pet. Ex. 5) This document included a "Goals" section that stated:

"The Highland Park Fire Department operates a wellness and fitness program to ensure a physical and mentally healthy work force, thus minimizing occupational injuries, disability requirements and Workers' Compensation costs. While complying with occupational health and safety regulatory requirements, this program's focus will be educational and rehabilitative, not punitive. "Petitioner testified that this was consistent with his understanding and belief that the Fire Department was committed to this wellness program as of July 31, 2014.

He underscored Page 15 of the Highland Park Fire Department Wellness and Fitness Program binder Petitioner Exhibit number 5, also stated:

"Daily fitness training is mandatory for all on-duty emergency response department personnel. Time will be provided every day for fitness training. ...Fitness training shall be documented in the Daily Journal in the Firehouse

Software Programs contain "training" using the category "1A-Physical Fitness Training." All Fire Department Officers and acting officers are given the responsibility for making daily fitness training a priority activity." It is expected that activities such as emergency calls or extended training will occasionally preclude personnel from participating in fitness training. These days should be the exception and not the rule."

Petitioner testified that at no point from the time when he was so qualified through July 31, 2014 did anyone from the Department or the City communicate to him that the program was optional, voluntary and not mandatory. The City provided workout clothing; he believed this was in conjunction with an original grant used to purchase equipment.

This grant was discussed further (See Pet. Ex. 13); documents were produced showing former Chief Alan Wax issued letters requesting a grant from the federal government in early June 2006. This grant application indicated participation in the proposed wellness program would be mandatory, and that the purpose was to ensure better job performance through better physical fitness. The department did subsequently receive a grant using it to purchase exercise equipment. (See also Pet. Ex. 15)

Petitioner admitted "Collective Bargaining Agreement." (See Pet. Ex. 6) Section 19.3A of this document is subtitled "Physical Fitness Program." Petitioner read the following passage from this section during direct examination:

"The City and Fire Department peer fitness trainers may establish a wellness program which shall include individualized and departmental goals. While employees shall be required to participate in such a program while on duty, no employee will be disciplined for failure to meet any goals that may be established as long as the employee makes a good-faith effort to meet any such goals and is able to meet reasonable minimum job-required physical fitness standards as established by the City and the Fire Department peer fitness trainers. Before any such program is implemented, the City shall review and discuss the program at a meeting of the Labor Management Committee..."

Petitioner's understanding was this referred to the City's wellness program noted in Pet. Ex. 5. He testified the Department had established a wellness program. He asserted forthrightly no one ever told him it was not implemented. He conducted himself as though the program described in this section of the Collective Bargaining Agreement had been implemented as described.

The Petitioner and Lt. Horne testified that the Respondent provided training and certification for peer fitness trainers who would assist firefighters with setting up a plan for physical fitness goals. Respondent paid for training and certification, as well as re-training and re-certification of peer fitness trainers from November 2007 through November 2015. Pet.Ex 22)

Chief Pease testified he became Chief after the date of the accident at bar. He testified since he became chief, the Respondent no longer pays for the re-training and certification of peer fitness trainers. All agreed the workouts took place during their contractual work day.

The Petitioner, Lt. Horne and Lt. Lindgren all testified they were never advised by Respondent that workouts during their shift or participation in the fitness program were optional or voluntary. Chief Pease testified he was not aware of any communication by Respondent to its firefighters before he became chief that workouts did not have to be done during their shift. Moreover, since becoming chief he has not taken any steps to communicate workouts are not required.

Petitioner, Lt. Horne and Lt. Lindgren all testified the equipment provided and the workouts required by Respondent allowed them to be better firefighters plus helped the department to reduce on the job injuries , especially back injuries.

Testimony by Lt. Horne and Lt. Lindren regarding the mandatory nature of the of fitness training , recording of firefighter workout hours in the training logs by Lieutenants and statements by Chief Tanner, were similar to and consistent with Petitioner's testimony. Chief Dan Pease, the current fire chief and longtime employee of the City department testified that exercise equipment were for firefighters use; training hours spent working out were required to be logged.

Respondent's grant application to United States Dept of Homeland Security (Px. 14) requested funding to purchase exercise equipment for the department costing $42,837.00. The grant application represented the total cost for the wellness and fitness program was $82,988.00. City of Highland Park represented therein funding was requested in order to "implement a mandatory health and fitness program."

The executed, submitted grant application states that "Wellness and fitness programs are a basic component of any injury and illness prevention initiative. The cost of firefighters with poor health and fitness levels is not only monetary; it is also emotionally devastating to firefighters, their families, and the citizens that the firefighters are expected to help." Pet.Ex.14)

Petitioner and Lt. Horne asserted the grant was approved for $74,692.00 (Pet. Ex.15)

Following his injury, he was sent on August 6, 2014 to Northwestern Lake Forest Hospital occupational health service. Dr. Angela Shropshire issued restrictions, ordered MRI, therapy and eventually sent him to Dr. Chams, an orthopedic specialist. Petitioner used his private group health insurance to see an orthopedic specialist named Dr. Dunlap at North Shore University Orthopaedics, as Dr. Chams was not in his network. On October 6 he concurred for an MRI eventually performed on October 14, 2014. A shot and PT ensued. On December 22 he noted transient improvement but no lasting relief. After another shot on February 2, 2015 Dr. Dunlap discussed surgery ; he was a surgical candidate.

Petitioner then saw Dr. Chams with Illinois Bone & Joint Institute on June 4, 2015. Petitioner's understanding was Dr. Chams noted a tear within the shoulder, and agreed with the surgical recommendation for repair. Surgery ensued January 2016 followed by PT.; he was not released from treatment by Dr. Chams at hearing time.

On cross-examination he confirmed he thoroughly read the City of Highland Park's Employee Handbook, and that he was "probably" familiar with its contents. (R. Ex. 1)

Petitioner agreed this document also stated for any City employees also covered by a collective bargaining agreement, in the event of a conflict between that agreement and any of the City policies and procedures described in the Handbook, the collective bargaining agreement would control.

Petitioner admitted with respect to the "meeting of the Labor Management Committee" required under Section 19.3A of the Collective Bargaining Agreement, he was not aware of when such a meeting might have taken place, had not been present for such a meeting, and simply assumed that it had occurred.

Petitioner agreed the workout he was performing was not one intended to earn additional paid time off pursuant to the relevant section of the Handbook; further, no person purporting to be "the City's wellness coordinator" was present at the time. He did not know identity of City's wellness coordinator.

He agreed that on his "Employee's Statement of Injury" (R. Ex. 4), he stated:

"While performing my usual exercise, I felt a strong, sharp pain in my left shoulder. When the pain did not subside after Advil, it was reported to my supervisor."

Petitioner testified that it was his understanding that all employees on duty were required by Department policy to engage in workout activity between the hours of 4:00 and 5:00 p.m., barring the three excepted circumstances discussed previously.

Lieutenant Stephen Horne worked for Respondent for just over 29 years. He was past President of the union, now part of the union negotiating team. In negotiator role , he was involved in negotiations of new contracts when the time arose. He served under five Fire Chiefs during his service including Al Schneider, David Campagne, Alan Wax, Pat Tanner, and Dan Pease.

Lt. Horne testified typically physical fitness was performed between 4:00 and 5:00 p.m. His belief was this was part of his job, rather than a voluntary activity. He believed individuals could participate at their own levels, the only time they would not participate was when they were on emergency calls, if other training was occurring, or if duties existed yet completed. Based upon his knowledge of CBA it allowed for individuals to meet with peer fitness trainers to establish an individual workout plan. The HPFD paid for certification of peer fitness trainers.

He testified the physical fitness training was never communicated to him as voluntary and/or non-mandatory. He believed that in the negotiations for the last union contract the City had proposed language strengthening the requirement, changing the word "may" to "shall" in Section 19.3A of that contract. Lt. Horne was a signatory to the contract on behalf of the union.

The language in section 19.3A of the collective bargaining agreement requiring review and discussion of a proposed fitness program, prior to implementation, at a meeting of the Labor Management Committee was noted by lt. Horne. He testified that he had been present at such a meeting, plus his understanding was in fact the program had thereafter been implemented. He did not provide a date or an estimate as to when this meeting might have occurred. Between the hours of 4:00 and 5:00 p.m. the firefighters were not allowed to choose what to do with their time. They would not be allowed to nap, listen to music, read a book instead of working out. They would not be allowed to leave the station to eat.

The expectation was to exercise at ability level. Lt. Horne believed exercising made the firefighters better able to perform their jobs.

On cross-examination, he testified t any notes or records of the meetings he recalled having with Chief Tanner in approximately October 2010 would have been subsequently destroyed. No minutes were taken of these meetings; he was unable to place a more precise date or series of dates on which they had allegedly occurred.

He agreed that Petitioner's alleged injury on July 31, 2014 had taken place within the period of time controlled by the collective bargaining agreement. He agreed the language of Section 19.3A of that agreement said the City and Fire Department "may" establish a wellness program, but they were not required to do so. He agreed language of that section did require the City to discuss any proposed wellness program at a meeting of the Labor Management Committee prior to implementing any such program, and therefore if no such meeting were held, no such program could be implemented. He assumed that if a meeting had been held during the operation of a prior collective bargaining agreement, it would automatically carry over to subsequent agreements. He assumed such meetings had taken place. He did not recall when the meeting might have occurred. Lt. Horne testified under cross-examination that in his capacity as a lieutenant with crew members reporting to him he had never taken any disciplinary action against a member of his crew for not utilizing the workout equipment.

He agreed that the language of Section 19.3A of the collective bargaining agreement stating "employees shall be permitted to engage in physical fitness activities" indicated that employees had the choice of whether to participate, and in fact they could not be prevented from using the equipment if they had chosen to do so.

He agreed this section did not require employees to use the exercise equipment and did not require them to use it between the hours of 4:00 and 5:00 p.m. He agreed that this section contained no mechanism by which an employee choosing not to use the exercise equipment could be reprimanded or punished. This is important to the Arbitrator. He had received the City's Employee Handbook reviewed its contents, and certified that he had done so. He understood that the collective bargaining agreement controlled in the event of any conflict between its terms and the policies expressed within the Handbook.

On redirect examination, Lt. Horne reviewed documents indicating meetings had occurred on July 15, 2013, January 27, 2014, and April 21, 2014. (See Pet. Ex. 8, 9, 10) He recalled that at these meetings there was discussion of reduction of back injuries, which he attributed to the physical fitness program. On re-cross-examination, he agreed that none of them contained any reference to either an existing fitness program or establishment of a new fitness program.

Lt. Lindgren testified that he was a Lieutenant fire paramedic with Respondent and had been for 24 years. On a typical day at 4:00 pm would be a mandatory wellness workout. This would be any kind of physical conditioning that the individual wanted. His belief that the workout was mandatory went back "quite a few years when Pat Tanner was chief." (TX 2/8/16, p. 80)

He recalled being at an officers' meeting sometime in summer 2008 when Chief Tanner had said the workouts at 4:00 p.m. were mandatory barring training, other duties, or emergency calls. No one had ever told him since that the workouts weren't mandatory. The workouts would be logged on the training sheet, and he filled the sheet entering the computer. He believed the reason for the workouts was to reduce back injuries and make the department look better. He believed the workouts were of benefit to the department for these reasons.

On cross-examination, Mr. Lindgren received and reviewed employee handbook. He was familiar with the operative collective bargaining agreement but that he did not know its exact language well enough to say one way or the other that it made workouts mandatory. He agreed that he never took action against anyone for failure to work out at 4:00 p.m.; He could not recall whether anyone on his crew had failed to complete a workout.

Daniel Pease has been the Fire Chief at the Department since December 2014, and worked for HPFD since October 5, 1987. He was involved on City's behalf in union CBA negotiations.

He was a city negotiator/ deputy Chief for the CBA effective on the date of Petitioner's injury.

Chief Pease noted on accident date his direct supervisor had been Tim Pease, his brother. RX 5.

Chief Pease is familiar with the general employee policies of the City not specific to the FD. City policies in effect on July 31, 2014 did not include any physical fitness requirements. They did contain a wellness program that the fire union Local 822 was not part of, because that bargaining unit had chosen not to accept the city's wellness program pursuant to a collective bargaining agreement.

Chief Pease is familiar with CBA in effect on July 31, 2014. (Pet. Ex. 6) Section 19.2 of that CBA (Pet. Ex. 6, p. 65) is titled "Fitness Examination." Chief Pease testified this spoke to a situation wherein there was a justifiable concern about an employee's medical fitness for duty, and it indicated that the City may require the employee to submit to an examination by a qualified and licensed physician or appropriate professional. The decision whether a justifiable concern existed was made by the Fire Chief; prior to July 31, 2014, there existed no such concern about the Petitioner.

As of accident date Petitioner was not scheduled for an exam contemplated by this section.

Section 19.3A of the collective bargaining agreement is titled "Physical fitness program." Chief Pease noted as of July 31, 2014 certified as peer fitness trainers existed but not Petitioner. Chief Pease was a member of the Labor Management Committee named in Section 19.3A of the agreement, had been so prior to July 31, 2014, and had been in attendance at the meetings of that Committee through July 31, 2014. He testified that at no point from the onset of effectiveness of the collective bargaining agreement through July 31, 2014 was a meeting of the Labor Management Committee as contemplated under Section 19.3A of the agreement held during which any proposed wellness program was reviewed and discussed.

At none of these meetings was any vote taken regarding establishing such a program. At each meeting there would be three members of the union and two representatives of the City. These meetings occur at a frequency of approximately three per year, and are scheduled as events warrant. Chief Pease testified he had been present at additional such meetings after July 31, 2014; at none of those meetings had there been any review or discussion of a proposed wellness program. No such program had been adopted at any of these meetings.

Chief Pease testified there was no other mechanism within the CBA by which a wellness program could be established that bound union members. Accordingly, there was no such program in effect during the lifetime of this collective bargaining agreement. Chief Pease testified prior to this agreement there had been no such wellness program in effect prior to the CBA in question, supra.

The language of Section 19.3A states in relevant part:

"While (not) in service for emergency response, employees shall be permitted to engage in physical fitness activities (unless any such activity is disapproved) after 1600 hours on weekdays and before 1700 hours on weekends and holidays...provided that all assigned duties and training for that shift day have been completed as determined by the company officer"

Chief Pease testified that, consistent with this language, he never issued an order disapproving of that activity, and that to his knowledge, neither had any of the other command officers under him. Therefore, provided that an employee had completed all of his other duties for the shift and was not engaged in training activity or an emergency call, that employee would be permitted to engage in a workout. No employee was required to do so pursuant to this section of the collective bargaining agreement.

Chief Pease further testified during this period of time each shift, an employee who had completed his or her assigned duties and training responsibilities would be allowed to engage in activities other than physical fitness. Chief Pease had been present at some of the stations during these hours and observed employees performing activities other than physical fitness, including completing written reports, cooking, or watching TV. He did not advise any such employee that they needed to be using the exercise equipment, had never taken any disciplinary action against such an employee; he knew of no other officer under his command who did so. He never received any written report from any officer under his command regarding disciplining of an employee who did not engage in workout activity between 4:00 and 5:00 p.m. on a given day.

An additional section of the collective bargaining agreement numbered 19.3B is titled "Wellness Incentive Program Fitness Bonus Hours." This section describes how an employee is able to earn additional paid time off by performing a formal physical fitness assessment with a wellness coordinator. This is a voluntary program, and no employee has been disciplined for declining to take part. The City contracts out to a third party to be the wellness coordinator for this program, so no City employee has the title of "wellness coordinator" in either the formal or informal context. Examinations pursuant to this section would take place at the Highland Park Country Club, a facility owned by the Fire Department but leased to the Park District. On July 31, 2014, Petitioner was not engaged in such an examination.

An agency called the National Fire Protection Agency establishes minimum qualifications to be fit for duty in the State of Illinois as a firefighter. The Department chooses to ensure that its members are in compliance, although it is not mandatory. Medical fitness for duty is certified via examination by a medical professional once per year. The sole purpose of the examination is to determine if the individual is fit for duty. Employees of varying levels of physical fitness pass the examination, and results are not forwarded to Chief Pease. The only thing he receives is notice of whether the overall exam was passed or not, and he does not have knowledge of any strength component in this examination. On 7/31/14 Petitioner was not examined.

Chief Pease testified equipment in each station comes from a combination of grant money, donations from citizens, and donation from the Highland Park Country Club. Other amenities are present within the stations that the firefighters can choose to use, including a dayroom with a TV, recliner chairs, desks for personal studies, and computers to use for online activity.

Employees are not required to use these items. Only at Station 33, the site of the Wellness Center, can non- firefighters access the workout equipment.

Under the collective bargaining agreement, the City and Fire Department are responsible for providing firefighters with certain items of clothing. These include the standard-issue uniform components as well as protective gear used in hazardous fire situations. No workout or fitness wear is provided. Chief Pease is aware that employees purchase their own workout wear, some of which has a Department patch designed by an employee who sells this workout wear. Any clothing a firefighter purchases from Mr. Roche is not paid for by the City or the Department, and no reimbursement is made. Workout clothing was purchased by the City on one occasion, when the Foreign Fire Fund workout equipment was purchased sometime between May 2004 and October 2010 (the time when Alan Wax had served as Fire Chief).

When Chief Wax retired in October 2010 and Chief Tanner began to serve in that position, he did keep in place some policies Chief Wax had implemented, but there was no formal wellness program in place for him to sustain. Since then, the City of Highland Park has issued changes, revisions, and amendments to its general policies from time to time. This is done roughly every two years. Any changes are posted in the fire stations for employees to see.

Formal fitness requirements set forth in the City's Employee Handbook were binding on nonunionized employees. The police union had accepted the City's wellness program, and the fire union had not. Chief Pease has never applied any pressure to his employees to engage in workouts, and to his knowledge never had Chief Tanner before him. Prior to Chief Tanner, Chief Wax had attempted to develop a wellness program, but this had been rejected by the union and never implemented in a collective bargaining agreement.

Chief Pease has never issued an order in contravention of a term of the applicable collective bargaining agreement, and neither had Chief Tanner. Prior to joining the command section of the Department, Chief Pease was a member of the firefighters' union himself, and during that time he never experienced a fire chief issuing orders or setting policies that were contrary to provisions of the applicable collective bargaining agreement. If that had occurred, he would have petitioned the union to react. During all of these periods, no such reaction by the union to a violation of the applicable collective bargaining agreement has occurred.

With regard to "peer fitness trainers," Chief Pease was familiar with the concept. There are individuals in the Department who have been certified as peer fitness trainers. These individuals pay the costs of recertification themselves and are not reimbursed by the Department. When the wellness program (see Pet. Ex. 5) was first proposed to the union in 2008, the Department paid to certify peer fitness trainers in anticipation of the union accepting the policy. As it was rejected, this has not occurred again.

Chief Pease testified that training hours should be recorded by lieutenants, although individuals can also record their training hours, but that no penalizing action is taken if someone fails to do so. Within the Department there are employees of varying physical fitness levels, including employees who are overweight. No action is taken against an employee who is overweight or is perceived as having a lack of physical fitness. Chief Pease has never issued any reprimand or taken any disciplinary action against an employee for lack of physical fitness, and is not aware of any prior Chief having done so either.

Under cross-examination, Chief Pease testified that peer fitness trainers might have been reimbursed for the cost of certification under prior chiefs. With regard to federal grant money that had been received for an intended mandatory physical fitness program, the program was never implemented although the funds were received, because the union never accepted the program. He testified that firefighters are able to leave the department between 4:00 and 5:00 p.m. to go grocery shopping or engage in other activities at their officers' discretion once their daily duties are completed. Chief Pease agreed that the Department and City benefit from firefighters who are in better states of physical fitness; however individual firefighters were neither encouraged nor discouraged to or from working out.

Emily Taub has been employed by Respondent for approximately 5.5 years. For the past two years her job title has been Human Resources Manager. She handles employee relations, performance management, policy development and compliance, insurance plans, and workers' compensation matters. She is involved in drafting or revision to proposed or ongoing City policies, including those pertaining to health and wellness.

At all times pertinent, there has been no City policy requiring City employees to be at or above a minimum level of physical fitness. Prior to January of 2011, there was a City policy incorporating an employee's state of physical fitness into their performance evaluation, but in 2001 the City completely revamped its performance evaluation process, changing it from looking at personal attributes to job-based competencies. There are core competencies required of all employees in addition to job-specific competencies. None of these take any assessment of the employee's level of physical fitness. When evaluating new candidates for hire, the City does not take physical fitness into account in any way.

The City does have a fitness incentive for employees, allowing employees to earn additional time off by meeting certain levels of physical fitness. This is the program described in the Employee Handbook. No employee is required to participate, and no employee is admonished or penalized for choosing not to take part. City policies are communicated to employees via the Employee Handbook, and all employees have to acknowledge that they have received the Handbook (via print or electronic copy) and will read and comply with its policies. There are also meetings held to go over the policies with employees.

Employees subject to a collective bargaining agreement are still subject to the City policies, but in the event of a conflict between something stated in the Employee Handbook and the relevant collective bargaining agreement, the collective bargaining agreement would control.

The City has a central fitness facility available to employees. This facility is open to the families of the employees as well. No employee is required to use this fitness facility, and employee use of the facility is not tracked. However, employees are able to self-identify at the facility for purposes of any wellness program in which they may be participating.

Under cross-examination, Ms. Taub noted that prior to January of 2013, her job title had been Human Resources Coordinator, but that her title change to Human Resources Manager had been in name only – her duties were unchanged. She has heard the term "peer fitness coordinator" and knows that the Fire Department had looked into that, but wasn't involved with the process, as the Fire Department does not participate in the City's wellness program. She is also aware that firefighters are required to take physical examinations on an annual basis, but is not involved with that process and only knows that it occurs.

CONCLUSIONS OF LAW

Regarding Issue C: did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

Petitioner alleges that he sustained an accidental injury that arose out of and in the course of his employment by Respondent on July 31, 2014 when he injured his shoulder while exercising at his assigned fire station. Petitioner claims that he was participating in this exercise because it was a mandatory condition of his employment. Respondent claims that Petitioner's injuries did not arise out of and in the course of his employment because the injury took place while Petitioner was engaging in a voluntary activity.

Section 11 of the Act provides, in relevant part:

"Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties, and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program."

Therefore, if Petitioner's workout activity was purely voluntary and he was not ordered or assigned by his employer to participate, his injury would not arise out of and in the course of his employment.

The Arbitrator has reviewed both the testimony plus the documentary evidence in great detail. The Arbitrator has contemplated this matter in great depth over the days of testimony plus in deliberations in writing the Award. At all possible points in time this Arbitrator encouraged both parties in front of me to strongly consider a compromise settlement for the betterment of the FD and City.

All witnesses were presented in stellar, organized fashion with great credit to counsel on both sides. That alone kept the case on an even keel so to speak- until presentation of the last fire department witness, namely Chief Daniel Pease, the commanding officer of the HPFD.

All witnesses manifested credibility in presentation by counsel, content of testimony, demeanor, professionalism and extremely articulate manifestation of their beliefs of the "facts" and inferences to be drawn- both for and against compensability under the intent and language of section 11 of the Act. It was a professional honor to have presided over such a matter involving such dedicated, sincere first responders.

The challenge in deciding the case by a preponderance of the evidence is that both sides presented very compelling testimony/evidence whether this program was "required "or not for the firefighters.

As to the approach by the Petitioner, part of his theory was the program was in fact "implemented or constructively implemented" as quoted from his counsel's closing argument. Inter alia, Petitioner emphasized the language of the Homeland Grant application as intent to be "required." The argument is very compelling.

On the other hand , Respondent presented the testimony of Chief Pease noted above in part who gave a detailed explanation of the history and reasoning of the content of the evidence as well as the relationships between the CBA and the Wellness Program. Thus, the case is deemed in the vernacular as a "close call". Ultimately, the Commission may find a different result.

In conclusion, the Arbitrator in balancing the weight of the evidence, by the time proofs were closed adopts as most probative of the key issue at bar, is the testimony of Chief Daniel Pease.

The Arbitrator finds Chief Daniel Pease's testimony most probative and persuasive on all factual points and reasonable inferences therefrom.

Thus, based upon the totality of the evidence, the Arbitrator finds the case at bar is not compensable i.e. no compensable accident occurred under section 11 of the Workers Compensation Act, as amended.

All remaining issues are therefore moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

IOANNIS AVDIS, WIDOWER OF
SOFIA AVDIS, DECEASED

Petitioner,

17IWCC0290

vs.

NO: 09 WC 36001

NORTH PARK UNIVERSITY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, permanent partial disability, nature and extent of decedent's permanent disability, and whether the surviving spouse can collect on Decedent's permanent partial disability award, and being avdised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of Fact & Conclusions of Law

1. Petitioner, Ionannis Avdis, testified through an interpreter that on February 6, 2009 he was married to Sofia, and had been since 1966. They remained married until her death on November 28, 2011. She was "so-so" with command of English. She went through 6th grade of grammar school, which is the final year of grammar school in Greece. She worked for Respondent cleaning the rooms of students. She injured her back on February 6, 2009 when she fell at work. The next day she went to her principal care provider, Dr. Christopoulos. After an MRI, Dr. Chistopoulos moved out of the area and she was referred to his partner, Dr. Karabelas, who prescribed medication and physical therapy. He referred Petitioner to Dr. Bergin, a specialist.

2. Sofia had surgery on her back on April 26, 2010 and had physical therapy thereafter. She continued to have pain and had a second surgery on September 13, 2010. Even after the second surgery, Petitioner continued to have pain in her back and left leg. Respondent sent her for a Section 12 medical examination with Dr. Singh. He recommended additional testing. However, Petitioner did not want additional surgery and last saw Dr. Bergin on April 15, 2011. She still took aspirin but had no additional treatment for her back thereafter.

3. Petitioner also testified that Sofia had pain in her back and one leg was a little smaller than the other. "She would limp a little." She had no trouble walking prior to her accident. After Sofia last saw Dr. Bergin Petitioner "did everything" around the house and he had to "pull her up" to get her out of bed. Sofia died on November 28, 2011, but Petitioner did not know how; he was not at home. She was found at the bottom of a stairwell; "she fell downstairs in the basement." After an off-the-record discussion, Petitioner stipulated that Sofia's death was not related to the work injury. Sofia's death certificate, which indicated the cause of death was "accident," was submitted into evidence.

4. On cross examination, Petitioner testified his wife's pain was limited to her low back. She did not see any doctor between March of 2011 and her death and she was not taking narcotic medication during that time frame. Sofia did some gardening, but only rarely. Sofia did not contact Respondent for work from March 2011 to the time of her death. Petitioner worked for 25 years as a "presser" and "would make electrical things."

5. On redirect examination, Petitioner testified that besides her back, Sofia also had pain in a leg.

6. The medical records reveal that on February 7, 2009, Sofia presented to Dr. Chistopoulos for back pain. She injured her back while lifting old books lying around in the dormitory. He prescribed what appears to be Ibuprofen and Flexeril (the treatment note is handwritten). He also prescribed physical therapy and ordered an MRI.

7. The MRI was taken on February 18, 2009 and showed diffuse lumbosacral spondylosis with degenerative disc disease, a small disc protrusion at L4-5 with mild spinal stenosis and a tiny protrusion at L5-S1. There was also bilateral foraminal stenosis due to hypertrophic facets.

8. On May 21, 2009, Sofia presented to Dr. Karabelas for follow up. She reported on February 6, 2009 she lifted a bag of books at work and developed burning low back pain. The pain later began radiating into the left buttock and leg. She had medications and an MRI done and started physical therapy with minimal improvement. The pain was particularly bad going up stairs. Dr. Karabelas diagnosed low back pain with left-sided radiculopathy. It seems that he also prescribed medication including Flexeril. He took Petitioner off work until further notice.

9. On June 23, 2009, Sofia presented to Dr. Bergin complaining of low back pain radiating into the left leg. Her condition had worsened significantly over the past couple of weeks prompting her visit. He diagnosed disc herniations at L4-5 and L5-S1 and recommended epidural steroid injections.

10. On July 20, 2009, Dr. Chung performed left L4-5 and L5-S1 transforaminal epidural steroid injections for back pain with radiculopathy, spinal stenosis, diffuse lumbar spondylosis, facet arthropathy, and degenerative disc disease.

11. On July 27, 2009, Sofia returned to Dr. Bergin for follow up evaluation of low back and left leg pain. She had a history of disc herniations at L4-5 and L5-S1. Her radicular symptom began after a work-related injury on February 6, 2009 lifting a trash bag full of heavy books. She had her first set of epidural steroid injections from Dr. Chung which provided good relief for a day or two. Currently, she complained of worsening left foot pain and leg weakness. Dr. Bergin recommended another set of epidural steroid injections.

12. A month later, Dr. Chung performed another set of left L4-5 and L5-S1 transforaminal epidural steroid injections for back pain with radiculopathy, spinal stenosis, and diffuse lumbar spondylosis, facet arthropathy, and degenerative disc disease.

13. After the second set of epidural steroid injections, Dr. Bergin concluded that Sofia's symptoms emanated from the L4-5 disc and recommended a microdiscectomy at that level. Petitioner wanted to proceed. He ordered an MRI in anticipation of surgery.

14. An MRI taken on February 23, 2010, showed mild degenerative disc disease and facet arthritis at most levels of the lumbar spine, mild disc bulging at L3-4 without stenosis, left paracentral and foraminal disc protrusion at L4-5 causing mild narrowing of the left lateral recess, and a small central disc protrusion at L5-S1 with mild bilateral foraminal stenosis.

15. On April 26, 2010, Dr. Bergin performed left laminectomy/discectomy at L4-5 for herniated disc.

16. Sofia began physical therapy about three weeks after surgery. She reported that physical therapy was aggravating her symptoms. She began complaining of numbness and tingling in the toes bilaterally and increased left leg pain. Dr. Bergin wanted a repeat MRI to ensure there was not recurrent disc herniation.

17. The repeat MRI taken on August 9, 2010, showed a 6 mm left L4-5 "hypoenhancing structure along the paracentral disc" suggesting recurrent or residual disc protrusion. About a week later Dr. Bergin noted that the new MRI showed a large recurrent disc herniation at L4-5 and recommended a repeat microdiscectomy. Petitioner reported the sciatica was unbearable and wanted to proceed.

18. While the operative report does not appear to be in the record before us, the rest of the record establishes that on or about September 13, 2010, Dr. Bergin performed a repeat microdiscectomy/laminectomy at L4-5 for recurrent disc herniation.

19. Sofia progressed after the second surgery in physical therapy. By January 10, 2011, after about 13 physical therapy sessions Petitioner reported some functional gains but still reported 5-7/10 pain. This appears to be the final physical therapy note. Although additional therapy was recommended by the therapist, on February 1, 2011, physical therapy was terminated because no additional sessions were approved by insurance.

20. On February 15, 2011, Sofia returned to Dr. Bergin and reported some recurrence of pain, but x-rays showed no obvious instability. He indicated that she would be at maximum medical improvement unless she wanted a fusion. Dr. Bergin recommended a functional capacity evaluation ("FCE").

21. Sofia had an FCE on March 2, 2011, which was considered valid due to "good effort." She showed 2/5 Waddell signs and 1/21 Korbon criteria. Sofia reported 5/10 pain at the beginning and 6-7/10 pain during the evaluation. Sofia was able to function at the sedentary physical demand level and could not return to work at her heavy physical demand job of housekeeper.

22. At Respondent's request, on February 21, 2011 Sofia presented to Dr. Singh for a medical examination pursuant to Section 12 of the Act. She had surgery on April 26, 2010, but a repeat MRI showed a large recurrent left-sided disc herniation at L4-5, which he noted included severe foraminal stenosis. Dr. Singh also noted that Dr. Bergin performed revision surgery on September 13, 2010. Currently, Sofia reported 7/10 low back pain radiating to the dorsum of the left leg. Dr. Bergin had recommended an FCE. Dr. Singh opined that Petitioner's current condition was related to her work accident and her recurrent herniation was properly treated with revision. He recommended a new MRI prior to an FCE.

23. On March 15, 2011, Sofia returned to Dr. Begin and reported she still had persistent low back and left leg pain. However, Dr. Bergin indicated she was "actually doing quite well" after recurrent disc surgery at L4-5. He also noted that Dr. Singh had recommended a repeat MRI, but Petitioner was adamant about not having additional surgery as the pain was tolerable with limited activity. She had an FCE on March 2, 2011 which restricted her to sedentary duty with a 10-lb limit. Dr. Bergin did not believe the new MRI would be of any benefit because she was adamant about not having more surgery. Dr. Bergin declared her at maximum medical improvement, made permanent the restrictions specified in the FCE, and basically released her from treatment.

The Arbitrator awarded 129 weeks of permanent partial disability, representing loss of 60% of the left leg. In so doing she noted the medical records consistently documented radicular left-leg symptoms, as well as Petitioner's testimony about decedent's limp, her use of a cane, and leg atrophy.

The Arbitrator cited *Divittorio v. IIC*, 299 Ill. App. 3d 662 (1st Dist. 1999) as authority for her conversion of an 8(d)2 (person-as-a-whole) award to an 8(e) (loss of the left leg) award. In *Divittorio*, decedent suffered a hip injury requiring two hip surgeries. He died before his claim was arbitrated and alleged beneficiaries were substituted as claimants. The Arbitrator awarded a permanent partial disability award of loss of 16% of the person as a whole under 8(d)2 and held that the claimants could recover the award under Section 8(e)19. On review the Commission converted the permanent partial disability award to a specific loss of 40% of the left leg. The Commission also found that one of the claimants could recover the permanent partial disability award under Section 8(e)19. The Appellate Court affirmed the Decision of the Commission.

The Commission finds the Arbitrator's reliance on *Divittorio* as authority to convert the back injury from a person-as-a-whole award to an award for partial loss of the use of the left leg misplaced. A back injury, as a head injury, is an injury to the person-as-a-whole and any resulting permanent partial disability is based on the loss of the person-as-a-whole. Just because a claimant experiences symptoms to other parts of the body does not convert such an injury to an injury to the body part associated with such symptoms. In this instance Sofia's radicular symptoms and antalgic gait do not convert the back injury into an injury to a leg. In *Divittorio*, the Commission appropriately converted a hip injury from a person-as-a-whole award to a loss of use of a leg award. Hip injuries are considered loss of the leg and not of the person-as-a-whole. That conversion was affirmed by the Appellate Court.

The Commission notes that there are instances in which the Commission may convert an award for a specific body part to an award for the person-as-a-whole because the partial loss of the use of that body part resulted in the loss of the claimant's ability to engage in his/her normal occupation. However, we have not seen an instance in which a person-as-a-whole injury was converted into an award for loss of a specific body part. Therefore, the Commission finds that the Arbitrator erred in awarding the loss of the use of 60% of the left leg.

While the Commission finds that it was inappropriate for the Arbitrator to convert a spinal injury, representing an injury to the person-as-a-whole, to the specific loss of the use of the left leg, we do not necessarily dispute the Arbitrator's determination regarding Sofia's resultant disability. Petitioner suffered an injury which required two spinal surgeries. Dr. Singh obviously believed her symptoms after the second surgery were sufficiently severe to warrant another repeat MRI to determine ongoing pathology. Sofia had an FCE which placed her in the sedentary physical demand level. Thereafter, Dr. Bergin placed permanent restrictions of sedentary work with a 10-pound lifting limit. Clearly, she would not have been able to return to her heavy demand level job of housekeeper and her employment opportunities would be extremely limited due to her age and education. When Dr. Bergin placed her at maximum medical improvement, she still reported 5-7/10 pain.

In converting the Arbitrator's award from partial loss of use of the left leg to loss of use of the person-as-a-whole, we find an award of the loss of 27.5% of the person-as-a-whole is appropriate in this case and modify the Decision of the Arbitrator accordingly. The Commission must now address the question of whether Sofia's surviving spouse is still entitled to take on her permanent partial disability award after we have converted it from the specific loss of loss of the use of a leg to a person-as-a-whole award.

Section 8(e)19 of the Act provides:

> "In a case of specific loss and the subsequent death of such injured employee from other causes than such injury leaving a widow, widower, or dependents surviving before payment or payment in full for such injury, then the amount due for such injury is payable to the widow or widower and, if there be no widow or widower, then to such dependents, in the proportion which such dependency bears to total dependency."

Section 8(h) of the Act provides

> "In case death occurs from any cause before the total compensation to which the employee would have been entitled has been paid, then in case the employee leaves any widow, widower, child, parent (or any grandchild, grandparent or other lineal heir or any collateral heir dependent at the time of the accident upon the earnings of the employee to the extent of 50% or more of total dependency) such compensation shall be paid to the beneficiaries of the deceased employee and distributed as provided in paragraph (g) of Section 7."

In *Electro-Motive Division, General Motors Corp. v. Industrial Commission,* 250 Ill. App. 3d 432 (1st Dist. 1993), the court affirmed the imposition of 19(k) penalties and attorney fees against the employer imposed by the Commission. Respondent had not paid awarded benefits arguing its obligation to pay anything terminated upon the death of the injured employee. Specifically, it argued that the permanent partial disability award, 30% of the person-as-a-whole under Section 8(d)2, terminated because the employee's death resulted in the termination of his disability. The employer cited Section 19(h) as authority.

In rejecting the employer's argument the *Electro-Motive* court reasoned: "Decedent would have been entitled to the remaining weeks of PPD had he not died, assuming that nothing else occurred to change the status of the disability. Electro-Motive offered no evidence to suggest that but for his untimely death, decedent's disability would not have continued for the entire 150 weeks of the award. Thus, Electro-Motive's argument that section 19(h) applies because decedent was not entitled because his disability ended with his death is erroneous." 250 Ill. App. 3d 432, 438. Therefore, the *Electro-Motive* court made clear that the permanent partial disability award remains operative even after the death of the injured employee and by not paying that award the Respondent was subject to the imposition of penalties and fees.

It appears that the Arbitrator converted the normally person-as-a-whole back injury into a specific award for the left leg in order to allow Petitioner to collect the unpaid permanent partial disability award under Section 8(e)19. However, the Commission concludes that such maneuver was unnecessary. According to our interpretation of the decision of the Appellate Court in *Electro-Motive*, any unpaid permanent partial disability award for loss of the person-as-a-whole survives the death of the injured employee here, Sofia Advis. In addition, according to our interpretation of Section 8(h) of the Act, as surviving spouse of the inured employee, Petitioner here is entitled to receive any remaining unpaid person-as-a-whole permanent partial disability benefits awarded.

17IWCC0290

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $310.73 per week for a period of 71&1/7 weeks, from July 8, 2009 through December 2, 2009 and from March 11, 2010 through March 15, 2011 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 $310.73 per week for a period of 36&6/7 weeks, from March 16, 2015 through November 27, 2011 for maintenance under provided in §8(a) of the Act,

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner $279.65 for 137.5 weeks for the reason that the injuries sustained caused the loss of 27.5% of the person-as-a-whole under §8(d)2 of the Act

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

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

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

DATED: MAY 4 - 2017

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/dw
O-4/27/17
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0290

AVDIS, IOANNIS WIDOWER OF AVDIS, SOPHIA DECEASED
Employee/Petitioner

Case# 09WC036001

NORTH PARK UNIVERSITY
Employer/Respondent

On 3/29/2016, 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 0.47% 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:

0208 GALLIANNI DOELL & COZZI LTD
ROBERT J COZZI
20 N CLARK ST SUITE 825
CHICAGO, IL 60602

1752 LAW OFFICES OF RAYMOND L ASHER
LISA AZOORY
200 W JACKSON BLVD SUITE 1050
CHICAGO, IL 60606

17IWCC0290

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

Ioannis Avdis, Widower of Sofia Avdis, deceased
Employee/Petitioner

v.

North Park University
Employer/Respondent

Case # 09 WC 36001

Consolidated cases: ----

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **February 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [x] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On **2/6/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between the decedent, Sofia Avdis, and Respondent.

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

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

Petitioner established a causal relationship between the accident and the decedent's condition of ill-being. The parties agree that the decedent's death was unrelated to that condition.

In the year preceding the injury, the decedent earned $**24,236.68**; the average weekly wage was $**466.09.**

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

The decedent ***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 $39,248.00 for TTD and maintenance, and $ **0** for other benefits, for a total credit of $ **39,248.00.**

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 $310.73/week for 71 1/7 weeks, commencing 7/8/09 thru 12/2/09 and 3/11/10 thru 3/15/11 as provided under Section 8(b) of the Act.
- Respondent shall pay Petitioner maintenance benefits of $310.73 per week for 36 6/7 weeks, commencing 3/16/11 through 11/27/11, as provided in Section 8(a) of the Act.
- Respondent shall pay Petitioner permanent partial disability benefits of $279.65/week for 129 weeks because the injuires caused the 60% loss of use of the left leg as provided under Section 8(e) of the Act.

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

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

Molly C Mason

Signature of Arbitrator

3/29/16
Date

MAR 29 2016

Ioannis Avdis, widower of Sofia Avdis,
deceased, v. North Park University
09 WC 36001

Summary of Disputed Issues

The parties agree that Sofia Avdis (hereafter "the decedent") sustained an accident on February 6, 2009, while working as a housekeeper for Respondent. They also agree that the decedent was temporarily totally disabled from July 28, 2009 through December 2, 2009 and from March 11, 2010 through March 15, 2011, a period of 71 1/7 weeks. They further agree that the decedent was entitled to weekly benefits from March 16, 2011 through November 27, 2011, although they disagree as to whether those benefits should be guised as temporary total or maintenance. Finally, they agree that the decedent died of causes unrelated to the work accident on November 28, 2011 and that Respondent continued paying weekly benefits for a period following November 28, 2011. Petitioner stipulated that Respondent paid $39,248.00 in weekly benefits prior to the hearing. Arb Exh 1.

The primary disputed issue is nature and extent, with Respondent arguing that the decedent's injury was not a "specific loss" under Section 8(e) and that Petitioner is not entitled to benefits under either Section 8(e)19 or Section 8(h).

Summary of Petitioner's Testimony

Petitioner, Ioannis Avdis, was the only witness who testified before the Arbitrator. He testified through an interpreter.

Petitioner testified he married the decedent, Sofia Avdis, in 1966 and remained married to her until her death on November 28, 2011. Petitioner testified that the decedent attended six years of grammar school in Greece. He described the decedent's ability to read English as "so-so."

Petitioner testified that the decedent performed cleaning and other work for Respondent. The decedent injured her lower back while working for Respondent on February 6, 2009. She went to her own physician, Dr. Christopoulos, the following day, and then underwent an MRI. She later saw Dr. Karabelas, who eventually referred her to Dr. Bergin. Dr. Bergin operated on her lower back in April 2010. She underwent physical therapy after this operation. Dr. Bergin performed a second operation on September 13, 2010.

Petitioner testified that the decedent continued experiencing lower back and left leg pain after the second operation.

Petitioner testified that the decedent saw Dr. Singh for a Section 12 examination on February 21, 2011. Dr. Singh recommended more testing. The decedent returned to Dr. Bergin on March 15, 2011 and indicated she did not want to undergo any more surgery. She did not

see any other doctors for her work injury between March 15, 2011 and her death. She did not return to any kind of work during that period. She took aspirin for her symptoms during that period.

Petitioner testified that the decedent had no difficulty walking before the accident but that, afterward, he had to take care of all of the housework, including grocery shopping and laundry. In the morning, he had to pull the decedent out of bed. Between March 2011 and the decedent's death on November 28, 2011, he observed that one of the decedent's legs was smaller than the other, that she had low back pain and that she limped. During this period, the decedent relied on a cane and walked slowly.

Petitioner testified that, to his knowledge, Respondent never offered the decedent light duty. At some point in 2011, the decedent met with a person to discuss looking for work.

Petitioner testified that the decedent died on November 28, 2011, secondary to a fall that occurred in the basement of their home. He was not present when the fall occurred. The decedent was found dead at the bottom of a flight of stairs.

Under cross-examination, Petitioner testified that the decedent's pain was confined to her lower back. The decedent did not see doctors or take pain medication between March 2011 and her death. The decedent did some yard work on rare occasions during this interval. She would water the garden "a little bit" but did not do much bending. The decedent did not call Respondent and request work between March 2011 and her death.

Petitioner testified he worked for 25 years at a Chicago factory that made electric presses.

On redirect, Petitioner testified that the decedent's back and leg hurt between March 2011 and her death.

Summary of Medical Records

On February 7, 2009, Dr. Christopoulos, the decedent's internist, noted a complaint of back pain secondary to lifting books at work. The doctor diagnosed acute low back syndrome. He prescribed Vicoprofen and Flexeril. PX 1.

On February 14, 2009, Dr. Christopoulos prescribed a lumbar spine MRI and a bone density study. The MRI, performed on February 18, 2009, demonstrated diffuse lumbosacral spondylosis with disc degeneration, a small left central protrusion at L4-L5 resulting in mild spinal stenosis and a tiny central disc protrusion at L5-S1 with bilateral foraminal stenosis. PX 1.

On February 21, 2009, Dr. Christopoulos reviewed the MRI results with the decedent and imposed a 25-pound lifting restriction. PX 1.

The decedent saw another internist, Dr. Karabelas, on May 19, 2009. The doctor noted that the decedent reported lifting a bag full of books at work on February 6, 2009. He also noted that initially she experienced "fire like" pain in her low back and that this pain later began radiating into her left buttock and down her left leg. He diagnosed low back pain with radiculopathy. He took the decedent off work and prescribed a Medrol Dosepak, Flexeril and physical therapy. The decedent attended five therapy sessions thereafter, with the therapist noting persistent pain and recommending a pain clinic evaluation. PX 2.

The decedent first saw Dr. Bergin, a spine surgeon, on June 23, 2009. The doctor recorded a consistent history of the work accident and subsequent care. He noted that the decedent had been off work since April 27, 2009 and was complaining of worsening pain over the previous couple of weeks. He described the decedent's gait as antalgic, noting she spent less time on her left leg. He also noted positive straight leg raising on the left at about 50 degrees, producing pain in the posterior thigh and calf. He reviewed the MRI and obtained lumbar spine X-rays. He referred the decedent to Dr. Chang for a course of epidural injections and directed her to continue therapy and stay off work. PX 3.

Dr. Chang administered a left L4-L5 and L5-S1 transforaminal epidural steroid injection on July 20, 2009. In his note of that date, the doctor indicated that straight leg raising was positive on the left all the way up to 60 degrees. He prescribed Cymbalta, a Flector patch and Ultracet. PX 3.

On July 28, 2009, Dr. Bergin noted that the decedent reported deriving little improvement from the injection. He also noted complaints of "worsening left foot pain as well as lateral thigh radiculopathy and left calf cramps."

Dr. Bergin described the decedent's gait as antalgic. He noted positive straight leg raising on the left at approximately 70 degrees. After reviewing the MRI, he recommended a second epidural injection and anti-inflammatories. PX 3.

Dr. Chang administered a second injection on August 27, 2009. PX 3.

The decedent returned to Dr. Bergin on September 1, 2009. The doctor's examination findings were unchanged. He recommended a microdiscectomy at L4-L5. He directed the decedent to remain off work pending this surgery. PX 3.

The decedent saw Dr. Bergin again on March 2, 2010, having undergone another MRI in the interim. The doctor indicated that the repeat MRI showed a herniated disc at L4-L5 on the left side. He again recommended a microdiscectomy at L4-L5 on the left. He continued to keep the decedent off work. PX 3.

At Respondent's request, the decedent saw Dr. Kern Singh on March 11, 2010, for purposes of a Section 12 examination. The doctor's report concerning this examination is not in evidence.

On March 30, 2010, Dr. Bergin wrote to the decedent's counsel, outlining the treatment to date and indicating that two epidurals failed to provide lasting relief. He noted that the decedent had seen Dr. Singh and that this doctor had agreed with his surgical recommendation. He also noted he was awaiting authorization of the surgery. PX 3.

Dr. Bergin performed a microdiscectomy at L4-L5 on April 26, 2010. At the doctor's recommendation, the decedent underwent physical therapy postoperatively. On June 8, 2010, the doctor noted a therapy-related aggravation. He placed therapy on hold and continued to keep the decedent off work. At the next visit, on June 22, 2010, he noted complaints of numbness and tingling in the toes as well as cramping in the left foot and "worsening pain into the left lower extremity." He suspected a recurrent herniation and prescribed an MRI, to be performed with and without contrast. This MRI, performed on August 9, 2010, showed a "large, recurrent disc herniation at L4-L5" which Dr. Bergin characterized as consistent with the decedent's persistent left leg pain. On August 17, 2010, the doctor reviewed the MRI results with the decedent and recommended a repeat microdiscectomy at L4-L5. He performed this surgery on September 13, 2010. PX 3.

Following the repeat microdiscectomy, the decedent underwent land and aquatic therapy through February 1, 2011, at which point she was discharged "secondary to insurance denying further visits."

On February 15, 2011, Dr. Bergin met with the decedent and noted persistent pain and cane usage. He obtained new X-rays and interpreted them as showing no instability or facet fractures. He found the decedent to be at maximum medical improvement "unless she wants to consider a fusion at L4-L5 which she does not at this point." He recommended a functional capacity evaluation "with the potential for getting back to work with permanent restrictions." PX 3.

At Respondent's request, Dr. Singh re-examined the decedent on February 21, 2011. In his report of that date, he noted he had previously examined the decedent and diagnosed her with a left-sided herniation at L4-L5. He also noted that Dr. Bergin was now recommending a functional capacity evaluation "versus possible re-exploration of the surgical levels."

Dr. Singh noted that the decedent complained of back and left leg pain, rated 7/10. He described the left leg pain as "unchanged" and "radiating into the dorsum of [the] foot." He noted 5/5 negative Waddell findings.

Dr. Singh diagnosed "status post revision L4-L5 laminectomy and discectomy" and "possible L4-L5 recurrent disc herniation." He found a causal relationship between the work accident and the decedent's current symptoms. He recommended that the decedent stay off work and, before undergoing a functional capacity evaluation or more surgery, undergo another lumbar spine MRI, to be performed with and without contrast, "to evaluate whether she has a second-time recurrent disc herniation." RX 1.

The decedent underwent a functional capacity evaluation on March 2, 2011. The evaluator noted "good effort and valid results." On examination, he noted an abnormal gait pattern, decreased sensation in the left L4 dermatome and an increased left patella reflex. He found the decedent physically incapable of resuming her housekeeper job, noting that this job fell into the heavy physical demand level according to the Dictionary of Occupational Titles. He found the decedent capable of functioning at a sedentary to light physical demand level. He described the decedent's reported limiting factors as "stiffness and pain in her low back and down her left lower extremity." PX 3.

The decedent returned to Dr. Bergin on March 15, 2011. [See the parties' post-arbitration stipulation to supplement the record with the doctor's note of this date.] Dr. Bergin noted Dr. Singh's recommendation and indicated that the decedent was "absolutely" not interested in undergoing any additional surgery. He placed the decedent at maximum medical improvement. After reviewing the functional capacity evaluation, the doctor imposed permanent restrictions of no lifting over 10 pounds, limited bending and twisting and changes of position every 30 to 45 minutes. PX 3.

On April 29, 2011, the decedent's counsel sent Respondent's counsel a letter indicating that the decedent had brought Dr. Singh's most recent report to Dr. Bergin and that Dr. Bergin disagreed with the recommendation of a repeat MRI. Referencing the functional capacity evaluation, the decedent's counsel requested that Respondent either provide restricted duty or vocational rehabilitation. The decedent's counsel also requested that Respondent restart the payment of weekly benefits, noting Dr. Singh's "off work" recommendation and the fact that Dr. Bergin did not release the decedent to full duty. PX 4.

Petitioner offered into evidence two progress reports from Kelly Benge, MS, CRC, a vocational rehabilitation consultant affiliated with Triune. The Arbitrator sustained Respondent's foundational objection to these reports and rejected the exhibit. PX 5.

PX 6 is a certification of death record reflecting that the decedent died on November 28, 2011 due to an accident at home. PX 6 reflects that no autopsy was performed. PX 6.

No witnesses testified on behalf of Respondent. Respondent offered one exhibit, i.e., Dr. Singh's re-examination report of February 21, 2011. RX 1.

Arbitrator's Credibility Assessment

The Arbitrator found credible Petitioner's testimony as to what he observed about the decedent, his late wife, between March 2011 and November 28, 2011.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between the undisputed work accident and the decedent's condition of ill-being?

The Arbitrator finds in Petitioner's favor on the issue of causation. In so finding, the Arbitrator relies on the following: 1) Petitioner's credible testimony that, before the accident, the decedent worked as a housekeeper for Respondent and had no difficulty walking; 2) the treatment records, which reflect that the decedent consistently reported a lifting-related event followed by the abrupt onset of low back and radicular left leg pain; 3) the causation opinion rendered by Respondent's Section 12 examiner, Dr. Singh; and 4) Petitioner's credible testimony concerning his observations of the decedent between March 15, 2011 and her death on November 28, 2011.

Is Petitioner entitled to a permanency award?

Petitioner maintains he is entitled to a permanency award by virtue of Section 8(h). That section provides, in relevant part, that if "death occurs from any cause before the total compensation to which the employee would have been entitled has been paid, then in case the employee leaves any widow, widower, child, parent . . . . such compensation shall be paid to the beneficiaries of the deceased employee and distributed as provided in paragraph (g) of Section 7."

Respondent maintains Petitioner is not entitled to a permanency award. Respondent argues that the decedent's injury falls into the "person as a whole" category, set forth in Section 8(d)2 of the Act, and that Petitioner could only recover permanency if the injury could be classified as a "specific loss" under Section 8(e). Respondent notes that Section 8(e)19 of the Act references cases involving "specific loss" and "subsequent death from other causes than" the injury giving rise to the loss.

The Arbitrator, having considered the medical records, which consistently document radicular left leg symptoms and a gait disturbance, along with Petitioner's credible testimony as to the limp, leg atrophy and cane usage he observed between March 2011 and the decedent's death, views the undisputed accident as having resulted in a specific, scheduled loss of use of 60% of the left leg, equivalent to 129 weeks, under Section 8(e) of the Act. The Arbitrator acknowledges that the decedent underwent back and not leg surgery following the accident. The Arbitrator does not view this circumstance as barring an 8(e) award. The Arbitrator notes that, in DiVittorio v. Industrial Commission, 299 Ill.App.3d 662 (1st Dist. 1998), a case that also involved a subsequent unrelated death, the Appellate Court upheld the Commission's conversion of the Arbitrator's Section 8(d)2 award to an award of loss of use of a leg under Section 8(e) even though the decedent fractured his hip and underwent hip surgery. The Court found there was sufficient evidence in the record to support the leg award, citing the decedent's mother's testimony that she observed a "bad limp" after the decedent's second surgery.

What type of weekly benefits was the decedent entitled to from March 16, 2011 through November 27, 2011? Is Respondent entitled to credit?

The parties agree to two intervals of temporary total disability totaling 71 1/7 weeks. They also agree the decedent was entitled to weekly benefits from March 16, 2011 (the day after the decedent's last visit to Dr. Bergin) through November 27, 2011 (the day before the decedent's death), a period of 36 6/7 weeks. They disagree, however, as to whether the decedent was entitled to temporary total disability benefits or maintenance during that period. In reliance on Dr. Bergin's finding of maximum medical improvement on March 15, 2011, the Arbitrator finds that the decedent was entitled to maintenance rather than temporary total disability benefits from March 16, 2011 through November 27, 2011. The Arbitrator views the decedent's condition of ill-being as stabilizing as of March 15, 2011, the date on which Dr. Bergin noted she did not want to undergo additional surgery and imposed permanent restrictions per the functional capacity evaluation. Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010). There is no evidence suggesting the decedent sought out more treatment for her condition prior to her death.

The total TTD/maintenance award equals 108 weeks. 108 multiplied by $310.74 (the TTD/maintenance rate, based on the stipulated wage) equals $33,559.92. Petitioner stipulated that Respondent paid an amount in excess of this figure, i.e., $39,248.00. Arb Exh 1.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Adrian Alcantar,

Petitioner,

vs. NO: 14 WC 22132

Flawless Painting & Remodeling,

17IWCC0291

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 27, 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.

17IWCC0291

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 $30,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 5 - 2017
MJB/bm
o-5/2/17
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

ALCANTAR, ADRIAN
Employee/Petitioner

Case# **14WC022132**

FLAWLESS PAINTING & REMODELING
Employer/Respondent

17IWCC0291

On 5/27/2016, 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 0.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & PALERMO
JAY JOHNSON
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

1120 BRADY CONNOLLY & MASUDA PC
NICOLE WIZA
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF DU PAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Adrian Alcantar
Employee/Petitioner

v.

Flawless Painting & Remodeling
Employer/Respondent

Case # 14 WC 22132

Consolidated cases: ___

17IWCC0291

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **4/27/16**. 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. ☒ 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

17IWCC0291

On the date of accident, **6/13/14**, 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 **$28,435.16**; the average weekly wage was **$546.83**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of **$7,288.18** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$7,288.18**.

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 $364.55/week for 71-6/7 weeks, commencing 6/14/14 through 6/5/14, and 3/6/15 through 4/27/16, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services incurred for treatment at Cadence Physician Group (Px 8) subject to the Fee Schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for the prospective medical treatment recommended by Dr. Heim, including lumbar surgery.

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

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

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

5/26/16
Date

MAY 27 2016

FINDINGS OF FACT

This claim involves a Petitioner alleging injuries he sustained while working for the Respondent on Junhe 13, 2014. Respondent is disputing this case based on the issues of: 1) causation, 2) medical expenses, 3) TTD and 4) prospective medical care. Petitioner testified via a Spanish translator.

Petitioner was working for Respondent as a painter on June 13, 2014. On that date, he suffered a work related accident while transferring two 5-gallon paint pails. He lifted and carried these two pails, one in each hand. When he placed them on the ground, he felt immediate low back pain. The pain radiated to his stomach, left hip, and left leg. He had to lie down.

Petitioner sought immediate emergency medical treatment later that day at Edward Hospital. The emergency room records document Petitioner's history of accident as well as his complaint of acute low back pain radiating into his thigh. (Px 5). He received IV pain medications, was removed from work, and received a referral to Edward Corporate Health. (Px 5).

Petitioner followed up at Corporate Health on June 16, 2014. He rated his back pain at 7 out of 10. The pain continued to radiate into his left thigh. The doctor prescribed oral steroids, recommended an MRI, and referred Petitioner to Dr. Pelinkovic.

Petitioner had the MRI on June 20, 2014. The MRI revealed a new L3-L4 disc protrusion. The study revealed no other new pathology when compared to an MRI from 2011.

Petitioner followed up at Edward Corporate Health on June 23, 2014. The doctors continued to note ongoing radicular low back pain. Petitioner received a new referral to Dr. Pelinkovic.

Petitioner saw Stephen Solum, PAC, on June 27, 2014. Mr. Solum is Dr. Pelinkovic's physician assistant. Mr. Solum noted Petitioner's history of accident, treatment to date, and ongoing low back symptoms. He recommended physical therapy, pain management, and Tramadol. He removed Petitioner from work. (Px 3). Petitioner testified he began a course of physical therapy at ATI.

Petitioner underwent a series of lumbar epidural steroid injections. The injections took place on June 24, 2014, August 12, 2014, and August 26, 2014. Petitioner testified that the first injection provided 20% relief. The next two injections provided 80% relief. Following the injections, Petitioner returned to Dr. Pelinkovic.

Petitioner's follow up appointment with Dr. Pelinkovic took place on September 5, 2014. Petitioner was in essence pain free following the injections and physical therapy, according to Dr. Pelinkovic. Dr. Pelinkovic returned Petitioner to work. (Px 3).

Petitioner testified he did return to work on September 6, 2014. He testified that after he returned to work, his low back and leg pain increased, especially with prolonged standing and walking. Work became increasingly difficult. Petitioner again noted the low back pain began to radiate into his buttocks and left leg. He decided to return to Dr. Pelinkovic. Petitioner saw Dr. Pelinkovic on December 8, 2014. Dr. Pelinkovic noted Petitioner's work was aggravating his low back pain. (Px 2). Dr. Pelinkovic recommended additional physical therapy, injections, and placed Petitioner on a forty pound restriction. Respondent accommodated those restrictions.

Petitioner resumed physical therapy at ATI. Petitioner testified it did not offer much relief. Consequently, he sought a second opinion with Dr. Stephen Heim.

Petitioner first saw Dr. Heim on February 17, 2015. Dr. Heim noted Petitioner's accident history, and the treatment he had received since June 13, 2014. His office exam revealed that 80% of Petitioner's pain was coming from the LS junction. 20% of the pain was isolated to the left buttocks and left thigh. Dr. Heim diagnosed degenerative disc disease, spondylolisthesis, mechanical low back pain, and radiculitis. He recommended a new MRI and diskogram. He recommended that Petitioner refrain from working. (Px 6).

There was an apparent miscommunication regarding work status because Petitioner continued to work. On or about March 5, 2015, Petitioner reported increased low back pain after lifting a 5-gallon paint pail. After a few days, his pain returned to baseline. Dr. Heim noted that there was no change in Petitioner's condition as a result of this incident.

Petitioner underwent the MRI on March 10, 2015 and followed up with Dr. Heim later that day. Dr. Heim noted Petitioner's increase in symptoms following the March 5, 2015 lifting incident but that the symptoms had started to calm down. He specifically noted Petitioner had no new symptoms. Dr. Heim reviewed the MRI, diagnosed an L5-S1 annular deficit and L3-L4 herniation. He again recommended a diskogram and recommended that Petitioner remain off work.

Petitioner had the diskogram on March 30, 2015. He followed up with Dr. Heim on April 8, 2015 to get the results. The diskogram revealed a complex tear at L4-L5, L5-S1 spondylolisthesis, and L4-L5 herniation. There was concordant pain at L4-L5 and L5-S1. (Px 6). Based on the results of the diskogram, Dr. Heim recommended an L4-L5 microdiscectomy, a left L5-S1 foraminotomy, and an L4 to S1 fusion.

Petitioner testified that through the spring and summer of 2015, his low back pain and left leg pain persisted. He awaited surgical authorization. He did not work.

Petitioner testified he did go to the emergency room on January 25, 2016 after he experienced an increase in low back pain after bending over to pick up a pillow at home. The emergency room doctor noted Petitioner's prior history of low back pain and the prior recommendation for surgery. There was no new recommendation for treatment. (Px 7).

Petitioner last saw Dr. Heim on March 8, 2016. Petitioner continued to have low back pain with left leg radiculopathy. He testified that the flare-up following the January 25, 2016 incident had calmed down. Dr. Heim continued to recommend surgery and continued to restrict Petitioner from work. (Px 7).

Dr. Heim testified via evidence deposition on January 19, 2016. PX 1. Dr. Heim confirmed that his first time evaluating the Petitioner took place on February 17, 2015. Dr. Heim confirmed that in connection with examining the Petitioner he did not review any of the Petitioner's past medical records from any prior treatment location or had any knowledge of the Petitioner's spine condition prior to the February 17, 2015 evaluation. When Dr. Heim examined the Petitioner, the only medical he reviewed was the June

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20, 2014 lumbar spine MRI. Dr. Heim confirmed this diagnostic showed mild degenerative changes at L1-2, L3-4, L4-5 and L5-S1 with possible annular tear at L3-4 and L4-5 as well as grade 1 L5-S1 spondylotic spondylolisthesis. Dr. Heim opined that the incident from June 13, 2014 was directly responsibility for the Petitioner's ongoing mechanical back pain and left lower extremity and radicular symptoms based on the results of the discogram. Dr. Heim's causal opinion relates only the condition of Petitioner's L4-5 and L5-S1 discs to the June, 13, 2014 event. Dr. Heim testified that there is no relation whatsoever between the status of the Petitioner's L3-4 disc and any inciting event from June 13, 2014. He also recommended no medical treatment with regard to the level of L3-4.

Petitioner underwent a Section 12 examination with Dr. Lami on April 20, 2015. Dr. Lami testified via evidence deposition on April 4, 2016. Dr. Lami reviewed all of the Petitioner's records and opined that the Petitioner suffered from a minor back strain in connection with the June, 13, 2014 incident. However, any other symptomology was related to a degenerative condition of the petitioner's lumbar spine. As Dr. Lami testified, there were no acute or traumatic findings shown on any of the MRI testing to suggest petitioner's condition to be resultant from a traumatic event. Dr. Lami believed that the Petitioner's medical treatment was reasonable and that he had reached maximum medical improvement in September, 2014.

Petitioner testified he did have a prior low back injury in August 2011. In August 2011, he injured his low back while moving a washing machine at home. He received emergency treatment at Edward Hospital where he underwent an MRI. The MRI revealed an L4-L5 and an L5-S1 protrusion. (Px 4). The emergency room physician referred Petitioner to Dr. Pelinkovic and to Dr. Przybyl. Dr. Przybyl performed a lumbar epidural steroid injection on August 15, 2011. It provided substantial pain relief. Petitioner followed up with Dr. Pelinkovic thereafter. Dr. Pelinkovic released him from care on August 29, 2011. Dr. Pelinkovic noted that Petitioner was feeling much better. (Px 2). There was no surgical recommendation. Petitioner testified that following the August 2011 release from care, he had no additional low back problems until June 13, 2014. He needed no treatment. He missed no time from work due to low back pain. He received no recommendation for surgery. There is a reference in the medical records to a back injury when Petitioner was a child. He testified he had no recollection of such an injury.

At present, Petitioner testified he has low back pain. It can radiate from the left buttock down to the left heal. He has pain with prolonged sitting and standing. He has trouble sleeping. He wants the surgery that Dr. Heim has recommended.

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 supported by the Petitioner's unrebutted testimony and the medical evidence. Respondent is disputing this issue based on their IME opinions that the Petitioner sustained a back strain, had reached maximum medical improvement in 2014, and that his current condition is related to a pre-existing, degenerative condition. However, these opinions do not comport with the most recent MRI and discogram findings that show Petitioner's condition is more than simply a strain. Furthermore, the Arbitrator finds credible Petitioner's testimony that he had no complaints or medical treatment to his back from 2011 through the date of his injury with Respondent, and that since his accident, he continues to have back pain. Those complaints are corroborated by the treating medical records which show a consistent history of back pain following Petitioner's undisputed work accident on June 13, 2014. The

Arbitrator also finds Dr. Heim's testimony persuasive on this issue as his opinions rely on the results of the discogram, MRI and Petitioner's medical history both before and after his work accident. Accordingly, the Arbitrator concludes that the Petitioner's current condition of ill-being is causally connected to his undisputed work accident from June 13, 2014.

2. Based on the Arbitrator's conclusions with regard to the issue of causation, the Arbitrator finds that the Petitioner's medical treatment to date has been reasonable and necessary to address his work-related condition. The charges found in Px 8 (Cadence Physician Group) relate to treatment Petitioner received as a result of his work injury. As such, the Arbitrator orders Respondent to pay Petitioner, pursuant to the fee schedule, for these charges.

3. Regarding the issue of TTD, the Arbitrator finds that the Petitioner was temporarily and totally disabled from June 14, 2014 through September 5, 2014 and again from March 6, 2015 through May 12, 2015. Petitioner also claims he has been temporarily totally disabled from May 13, 2015 through April 27, 2016, the date of the hearing. During that entire period of time, Dr. Heim has restricted Petitioner from work because of his work injury. Based on the Arbitrator's findings with respect to causation, the Arbitrator orders Respondent to pay Petitioner TTD for the total time period of June 14, 2014 through September 5, 2014, and March 6, 2015 through April 27, 2016, subject to credit for TTD already paid.

4. With regard to the issue of prospective medical care, based on the Arbitrator's conclusions above, the Arbitrator finds that the Petitioner's request for the prospective medical care recommended by Dr. Heim is both reasonable and necessary in treating his current condition of ill-being related to his June 13, 2014 work accident. Dr. Heim recommended an L4-L5 microdiscectomy, a left L5-S1 foraminotomy, and an L4 to S1 fusion, which he relates to Petitioner's June 13, 2014 work injury. Petitioner testified that he wishes to undergo the surgical procedures proposed by Dr. Heim. Accordingly, the Respondent shall authorize and pay for the prospective medical care recommended by Dr. Heim, including the proposed lumbar surgery.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SCOTT SMITH,

Petitioner,

vs. NO: 10 WC 36361

PEPSI BEVERAGE CO.,

Respondent.

17IWCC0292

DECISION AND OPINION ON REVIEW PURSUANT TO §19(h) OF THE ACT

This matter comes before the Commission pursuant to Petitioner's Section 19(h) Petition. A hearing was held before Commissioner Michael J. Brennan on May 27, 2016. After reviewing the record in its entirety and being advised of the applicable law, the Commission hereby grants Petitioner's Petition and finds that Petitioner established a material increase in his condition as required under Section 19(h) of the Act. The Commission finds that Petitioner is entitled to an additional 10% loss of use of the man-as-a-whole (MAW) pursuant to Section 8(d)(2) of the Act. The parties have advised the Commission that all issues relative to Section 8(a) of the Act have been resolved and all medical bills have been satisfied.

Procedurally, this matter was tried before Arbitrator Edward Lee on June 25, 2012 on the sole issue of nature and extent. Petitioner was a sales support/delivery supervisor for Respondent with a prior history of injury and surgeries to his lumbar spine. On May 19, 2010, Petitioner re-injured his low back while stacking cases of beverages. As a result, Petitioner underwent a right revision L4-5 hemilaminectomy and microdiscectomy and later, a right L4-5 decompression, discectomy, and transforaminal lumbar interbody fusion. (PX2). Petitioner's treating physician, Dr. Sean Salehi, released Petitioner to work without restriction as of March 9, 2012. Petitioner testified at arbitration as to persistent pain and stiffness in his lumbar spine, particularly after a day with a lot of activity, driving, or sitting for extended periods of time. He still used over-the-

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counter medication and ice, and did stretching exercises as needed. The Arbitrator found Petitioner sustained 30% loss of use of the man-as-a-whole under Section 8(d)(2) of the Act.

On January 6, 2015, Petitioner filed a Section 19(h)/8(a) Petition. Pursuant to Section 19(h) of the Act:

> [A]s to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months... after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.

In Gay v. Indus. Comm'n, 178 Ill. App. 3d 129, 132 (4th Dist. 1989), the Illinois Supreme Court explained that:

> The purpose of a proceeding under section 19(h) is to determine if a petitioner's disability has "recurred, increased, diminished or ended" since the time of the original decision of the Industrial Commission. (Ill. Rev. Stat. 1985, ch. 48, par. 138.19(h); Howard v. Indus. Comm'n, 89 Ill. 2d 428 (1982). To warrant a change in benefits, the change in a petitioner's disability must be material. United States Steel Corp. v. Indus. Comm'n, 133 Ill. App. 3d 811 (1985). In reviewing a section 19(h) petition, the evidence presented in the original proceeding must be considered to determine if the petitioner's position has changed materially since the time of the Industrial Commission's first decision. Howard v. Indus. Comm'n, 89 Ill. 2d 428 (1982). Whether there has been a material change in a petitioner's disability is an issue of fact, and the Industrial Commission's determination will not be overturned unless it is contrary to the manifest weight of the evidence. Id.; United States Steel Corp. v. Indus. Comm'n, 133 Ill. App. 3d 811 (1985).

By the time this matter proceeded to hearing before Commissioner Brennan on May 27, 2016, all medical benefits had been paid. The sole issue before Commissioner Brennan was the nature and extent of Petitioner's injury and whether Petitioner was entitled to additional permanent partial disability (PPD) benefits, pursuant to Section 19(h) of the Act.

At the May 27, 2016 Section 19(h) petition hearing, Petitioner presented evidence that in February 2015, he developed right leg pain that went down to his right calf area and had numbness in his leg. (T.12; PX2).

Respondent sent Petitioner for a Section 12 examination on March 26, 2015 with Dr. Frank Phillips, M.D. During the examination, Petitioner complained of redeveloping right leg symptoms, paresthesias in the great toe, anterior thigh discomfort, and axial back pain. His pain level was a seven out of 10. Dr. Phillips' examination indicated Petitioner had an antalgic gait and no Waddell signs; he noted lumbar tenderness to palpation; lumbar range of motion was 70 degrees of flexion and 45 degrees of extension; motor testing was in the 5/5 strength category; sensation was diminished in the L4-5 and L5 distribution on the right, and straight leg raise on the right caused radicular pain into the right calf. (RX1).

In his Section 12 report, Dr. Phillips stated he reviewed diagnostic tests of the lumbar spine. The September 11, 2014 MRI showed diffuse disc bulging at L5-S1 without stenosis. At L4-5, there was a central left-sided disc protrusion with some caudal migration of the disc causing some effacement of the thecal sac. The January 22, 2015 study demonstrated the presence of a left paracentral disc protrusion at L5-S1 with some contact of the left S1 nerve root; no acute disc herniation or neural compression was seen on the right side. However, Dr. Phillips stated that a CT scan, also completed on January 22, 2015, showed some bone overgrowth on the right and towards the right neural foramen with perhaps some foraminal narrowing related to this. (RX1).

With these findings, Dr. Phillips diagnosed Petitioner with a lumbar sprain/strain with possible L4-5 disc herniation. He opined that a decompression discectomy would be reasonable. (RX1). However, as Dr. Salehi pointed out, Petitioner had already undergone an L4-5 fusion. Dr. Salehi stated the new imaging showed left-sided disc herniation and facet arthropathy at L5-S1. He therefore recommended and subsequently proceeded with a facetectomy, discectomy, and fusion at L5-S1 with hardware on May 16, 2015. (T.13; PX2; RX2).

By July 13, 2015, Petitioner returned to work for Respondent with permanent restrictions of no lifting more than 35 pounds and no driving semi-trucks or any truck with air brakes. (T.10; T.15; T.18; T.26). A valid functional capacity evaluation (FCE) conducted on December 1, 2015 confirmed that Petitioner was able to perform within the medium physical demand category. (PX3).

Petitioner last saw Dr. Salehi for continued pain in February 2016. (T.15; PX1). At the Section 19(h) hearing, Petitioner testified that he continued to have minor pain. "It is very hard to put my socks on. It is a lot harder to bend." (T.17). Petitioner testified that he coaches his seven-year-old son's T-ball team. (T.18). He can walk, but he cannot run. Petitioner no longer plays softball. (T.18). Petitioner is not taking any medication. (T.17).

Based on the totality of the evidence, the Commission finds that Petitioner has suffered a material increase in his condition pursuant to Section 19(h) of the Act to the extent of an additional 10% loss of use of the man-as-a-whole.

17IWCC0292

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $664.72 per week for a further period of 50 weeks, as provided in Section 8(d)(2) of the Act, for the reason that the injuries sustained caused an additional 10% loss of use of the man-as-a-whole.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $33,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 5 – 2017

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/pm
D: 4-11-17
052

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

GERALD LEAHY,

Petitioner,

vs. NO: 09 WC 51638

DHL EXPRESS,

Respondent.

17IWCC0293

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Appellate Court of Illinois, First District, Workers' Compensation Division. In its Opinion filed September 25, 2015, the Appellate Court reversed the circuit court's finding that the claimant failed to prove a causal connection between his knee injuries and his workplace accident. All other aspects of the circuit court's judgment was affirmed.

Procedurally, the circuit court confirmed the Decision of the Commission in its entirety. In its Decision dated November 19, 2012, the Commission modified the Decision of the Arbitrator as to Petitioner's average weekly wage. The Commission affirmed and adopted all else including the Arbitrator's finding that Gerald Leahy failed to prove that his left and right knee condition was causally related to the September 9, 2009 work-related accident.

Following the remand order from the Appellate Court, the parties advised the Commission that portions of the record had been lost. The Commission met with the parties on several occasions in an effort to reconstruct the record. A stipulation of the parties was filed November 14, 2016. Per the stipulation, the parties offered the missing exhibits into the record. The stipulation further stated that the now recreated record represented a true and complete copy of all the transcripts, orders, briefs, and decisions. The Commission accepted the parties' stipulation on November 14, 2016.

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The Appellate Court remanded the matter back to the Commission stating:

> The record in this case leads us to conclude that, on the question of a causal connection between the accident suffered by the claimant while working on September 9, 2009, and the condition of ill-being of his knees, a conclusion opposite to the one reached by the Commission, is clearly apparent. First, Dr. Cohen's opinion that the current condition of the claimant's knees was simply the result of a normal degenerative process of his preexisting arthritic condition lacks credibility, as the arbitrator noted, because Dr. Cohen was unaware of the September 9, 2009, accident. Dr. Collins, on the other hand, offered unrebutted medical opinions that (1) the September 9, 2009, accident and the subsequent physical therapy that the claimant underwent to treat his lumbar spine were contributing factors in the claimant's need to have total knee replacement surgeries; and (2) had the claimant not returned to a physically demanding job, his knee pain likely would not have worsened as quickly.
>
> Further, the claimant's medical records do not show that he continued treating with Dr. Collins, or any other knee specialist, after Dr. Collins released him to work in 2008. The first occasion post-2008 that the claimant complained about the condition of his knees was October 1, 2009. In the physical therapy report of that date, the therapist noted that the claimant reported having "a lot of tightness in the left knee" after their previous session. Dr. Zindrick's notes of October 13, 2009, also state that the claimant reported that he was unable to perform the physical therapy exercises assigned to him because his knees were causing him pain. Likewise, the claimant testified that he began experiencing knee pain while undergoing physical therapy for his lumbar spine. Based on this record, the only reasonable conclusion which can be reached is that either the September 9, 2009, accident or the subsequent physical therapy which was required to treat the claimant's lumbar spine injury, aggravated or accelerated the preexisting arthritic condition in the claimant's knees. While neither the September 9, 2009, accident nor the subsequent physical therapy treatment was the sole causative factor, or even in all probability the primary causative factor, of the claimant's current condition of ill-being in his knees, the record establishes that these events were at least a causative factor.

> Therefore, we reverse the judgement of the circuit court to the extent that it confirmed that portion of the Commission's decision which found no causal connection between the claimant's accident while working on September 9, 2009, and the condition of ill-being of his knees and the Commission's resultant denial of benefits under the Act for that condition; we affirm all other aspects of the circuit court judgment; we reverse that portion of the Commission's decision which found no causal connection between the claimant's accident while working on September 9, 2009, and the condition of ill-being of his knees and the Commission's resultant denial of benefits under the Act for that condition; and we remand this matter back to the Commission for further proceedings consistent with this decision.

Based upon the mandate of the Appellate Court, finding that Petitioner's bilateral knee condition is causally related to the September 9, 2009 work injury, the Commission finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Michael Collins. Dr. Collins performed a left total knee arthroplasty on November 22, 2010. As of December 19, 2011, the date of arbitration, Petitioner was still under Dr. Collins' care for his bilateral knee condition and was in need of a right total knee replacement. The Petitioner had not reached maximum medical improvement (MMI) as of the date of arbitration hearing.

An employee is temporarily and totally disabled from the time that an injury incapacitates him from working until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 149 Ill. Dec. 253 (1990). According to our supreme court, the dispositive inquiry is whether the claimant has reached MMI. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142, 923 N.E.2d 266, 337 Ill. Dec. 707 (2010). There are, however, three recognized exceptions. TTD benefits may be suspended or terminated before an employee reaches MMI if he: (1) refuses to submit to medical, surgical, or hospital treatment essential to his recovery; (2) refuses to cooperate in good faith with rehabilitation efforts; or (3) refuses work falling within the physical restrictions prescribed by his doctor. *Interstate Scaffolding, Inc.*, 236 Ill. 2d

The purpose of the Act is to compensate an employee for lost earnings resulting from work-related injuries. *Freeman United Coal Mining Co. v. Industrial Comm'n*, 99 Ill. 2d 487, 496, 459 N.E.2d 1368, 77 Ill. Dec. 119 (1984). When work within an injured employee's medical restrictions is available and the employee does not avail himself of the opportunity by voluntarily retiring, continued payment of TTD benefits does not further that purpose. In such a case, the employee's lost earnings are the result of his volitional act of removing himself from the work force, not his work-related injuries. As we have held before, to establish entitlement to TTD benefits, an injured employee must prove not only that he did not work, but also that he was

unable to work. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 832, 769 N.E.2d 66, 263 Ill. Dec. 864 (2002).

The record establishes that Petitioner accepted the Respondent's buy-out retirement option and voluntarily resigned in March 2010. Petitioner testified that he has not looked for work since he accepted the buy-out in March 2010. While it was his opinion that he was not yet physically able to work, the work-restrictions provided by his medical doctors indicate he was able to work in a modified fashion.

After reviewing the medical records, the evidence establishes that Dr. Collins took Petitioner off work completely on November 2, 2009. Dr. Michael Zindrick continued Petitioner's off work status on November 16, 2009. Dr. Collins then returned Petitioner to modified work on June 29, 2010. Those restrictions included no lifting greater than 10 pounds, no bending, no squatting, no kneeling, sedentary work only, no operating moving vehicles, and no climbing ladders. Petitioner then underwent a total left knee replacement on November 22, 2010. Per the May 24, 2011 medical report, Dr. Collins noted that Petitioner was allowed to perform some light duty work. Dr. Collins then provided Petitioner with restrictions on July 26, 2011 consisting of no lifting greater than 10 pounds, no bending, no squatting, no kneeling, sedentary work only, and no climbing ladders.

Accordingly, the Commission finds that Petitioner is entitled to TTD benefits from September 10, 2009 through February 1, 2010 as previously awarded by the Arbitrator and confirmed by the Appellate Court.

The Commission further awards Petitioner TTD benefits from February 2, 2010 through June 28, 2010. Dr. Collins had Petitioner off work completely as of November 2, 2009, and Dr. Zindrick continued the off work status on November 16, 2009. The Petitioner's off work status remained in effect through June 28, 2010.

The Commission also awards TTD benefits from November 22, 2010 through May 24, 2011. Petitioner underwent a total left knee replacement on November 22, 2010 as a result of his September 9, 2009 work-related accident. The Petitioner's off work status remained in effect through May 24, 2011.

The Commission, however, denies TTD benefits from June 29, 2010 through November 21, 2010. On June 28, 2010, Dr. Collins' modified Petitioner's off work status and returned him to modified work. His modified work status remained in effect until November 21, 2010.

The Commission further denies TTD benefits from May 25, 2011 through December 19, 2011, the date of Arbitration hearing. Dr. Collins' report dated May 24, 2011 indicated that Petitioner was capable of performing some light work. The work status reports thereafter reveal Petitioner was allowed to work modified duty.

17IWCC0293

Despite voluntarily resigning in March 2010, Petitioner offered no evidence that he presented the modified work restrictions to the Respondent to determine whether they could accommodate the work restrictions. Despite being able to perform modified work, Petitioner testified that he has not looked for any work since the buy-out. Petitioner has not established that he was unable to work. Thus, his claim for TTD benefits during the periods for which he was given modified work duty are denied.

Petitioner is also entitled to medical expenses totaling $110,209.75 with Respondent entitled to an 8(j) credit of $6,916.80. Respondent is entitled to an additional credit of $23,097.24 for TTD benefits previously paid. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $861.39 per week for a period of 67-5/7 weeks, from September 10, 2009 through June 28, 2010 and November 22, 2010 through May 24, 2011 that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $110,209.75 for medical expenses related to the right and left knee 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 this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

17IWCC0293

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: MAY 5 - 2017

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
D: 4-25-17
052

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEVIN VAN DUYN,

Petitioner,

vs.

NO: 02 WC 00828

JOSEPH WEIL & SONS,

17IWCC0294

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Appellate Court of Illinois, First District, Workers' Compensation Commission Division. In its Order filed November 4, 2016, the Appellate Court concluded that the Circuit Court's order, remanding this case to the Commission for a recalculation of medical expenses, did not constitute a final and appealable order; and, therefore, dismissed Petitioner's appeal for want of prosecution and remanded the matter to the Commission for further proceedings.

The Arbitrator found that Petitioner established causal connection between his current condition of ill-being to his neck, low back, and right foot, and the November 29, 2001 work accident, when a forklift struck Petitioner from behind. The Arbitrator also found that the August 19, 2002 motor vehicle accident did not constitute an intervening accident.

The Arbitrator awarded Petitioner temporary total disability (TTD) benefits through October 17, 2012, permanent partial disability (PPD) benefits of 60% loss of use of the man-as-a-whole pursuant to Section 8(d)(2) of the Act, all reasonable, necessary, and related medical expenses, and $6,037.16 in conditional Medicare payments.

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The Commission in its Decision, dated October 29, 2014, modified in part, but otherwise affirmed and adopted the Arbitrator's Decision. The Commission found that the August 19, 2002 motor vehicle accident was an intervening accident that broke the causal chain between Petitioner's November 29, 2001 work accident and his current condition of ill-being.

The Commission modified the award, finding Petitioner was entitled to TTD only through January 30, 2002, and payment of medical expenses through August 19, 2002. The Commission further vacated the 60% loss of use of the man-as-a-whole award, and found Petitioner suffered a 10% loss of use of the right foot.

In its Order, dated July 14, 2015, the Circuit Court confirmed the Commission's Decision in all parts except with regard to the medical expenses related to Petitioner's treatment for the right foot. The Circuit Court found that the August 19, 2002 accident did not sever the relationship between Petitioner's right foot condition and the November 29, 2001 work injury.

Thus, the Circuit Court reversed and remanded the Commission's Decision with regard to the medical expenses related to the right foot and ordered the Commission "to determine what, if any, medical expenses following the car accident are related to the treatment of [Petitioner's] foot, and to calculate any awards due based on that determination."

Petitioner appealed this matter to the Appellate Court, but it was dismissed for want of prosecution and remanded back to the Commission. In conformance with the Circuit Court's Order, the Commission will only address those medical expenses following the August 19, 2002 motor vehicle accident that are related to medical treatment of the Petitioner's right foot.

The Commission's determination as to the medical charges related to the right foot required an in-depth analysis of the testimony and exhibits contained in the voluminous record as well as the arguments submitted by the parties. Following the Appellate Court's Order of November 4, 2016, it was necessary to obtain the complete record. Following repeated requests for the complete record in this matter, the Commission was able to make its findings as ordered by the Circuit Court.

The Commission is not bound by the Arbitrator's findings, and may properly determine the credibility of witnesses, weigh their testimony, and assess the weight to be given to the evidence. R.A. Cullinan & Sons v. Indus. Comm'n, 216 Ill. App. 3d 1048, 1054 (3rd Dist. 1991). It is the province of the Commission to weigh the evidence and draw reasonable inferences therefrom. Niles Police Dep't v. Indus. Comm'n, 83 Ill. 2d 528, 533-34 (1981). Interpretation of medical testimony is particularly within the province of the Commission. A. O. Smith Corp. v. Indus. Comm'n, 51 Ill. 2d 533, 536-37 (1972).

Under Section 8(a) of the Act, the claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. Univ. of Ill. v. Indus. Comm'n, 232

Ill. App. 3d 154, 163 (1st Dist. 1992). The claimant has the burden of proving that the medical services were necessary and the expenses incurred were reasonable. F & B Mfg. Co. v. Indus. Comm'n, 325 Ill. App. 3d 527, 534 (1st Dist. 2001). Whether an incurred medical expense was reasonable and necessary and should be compensated is a question of fact for the Commission. Univ. of Ill. v. Indus. Comm'n, 232 Ill. App. 3d 154, 163 (1st Dist. 1992). The Commission's Decision must be supported by the record and not based on mere speculation or conjecture. Sisbro, Inc. v. Indus. Comm'n, 207 Ill. 2d 193, 215 (2003).

The medical bills incurred after the August 19, 2002 motor vehicle accident that are related to the right foot are as follows:

1. Dr. Timothy Schening of Schening Chiropractic Clinic – Petitioner testified that Dr. Schening provided therapy to his neck, low back, thigh, right foot and ankle. (T.31-32). Petitioner offered into evidence two overlapping itemized statements for Dr. Schening. One listed the onset date as November 28, 2001 and the other statement had an onset date of August 19, 2002. (PX11).

   The Commission finds that the itemized statement does not delineate what treatment Petitioner received for each particular body part. (PX11). Petitioner argued that the amount incurred as it relates to the right foot is simply one-third of the itemized statement. Respondent claimed that treatment to the right foot was limited to Neuromuscular re-education (NMR).

   According to Dr. Schening's initial evaluation report, dated May 22, 2002, the treatment plan for the right foot was, "Further therapy will include Neuromuscular re-education on the right ankle region to restore normal spinal biomechanics." The therapy prescribed for the back included diversified adjustive technique, electrical stimulation, and hot packs. This plan was repeated on each subsequent therapy note. (PX10).

   The Commission finds that said electrical stimulation, hot pack, CMT 3-4 (chiropractic manipulative treatment), and NMR (Neuromuscular re-education) are the only treatments listed on the statements. Considering the record as a whole, the Commissions finds that treatment to the right foot was limited to the Neuromuscular re-education. The charges listed under NMR on the statement with the onset date of August 19, 2002, total $315.00.

2. Dr. Jose Medina – Dr. Medina is a board certified neurologist with The NeuroCenter. (PX12). Petitioner testified that he saw Dr. Medina every month "for my neck, my lower back, the nerve damage in my thigh, my ankle, and my right foot." (T.44). Petitioner confirmed that he last saw Dr. Medina in September 2012 and the conditions that Dr. Medina treated him for were the same conditions that started on November 29, 2001. (T.44).

By his brief, Petitioner refers to Dr. Medina's itemized statement but then states the following: "Irrespective of treater following Dr. Kane, treatment to the right foot after 8/5/2004 is not medically necessary and will not be awarded." The Petitioner then states the amount incurred as it relates to the right foot is $1,018.33:

> The charges associated with spinal care and several EMG's do not relate to treatment for the right foot care. After subtracting out those tests and analyzing care prior to 08/5/2004 a calculated total charge of $3,055.00 (Vol. 1 pp. 774-775). Taking 1/3rd of those charges which relate to care for the right foot/ankle one arrives at $1,018.33. (Petitioner's Brief on Remand, pg. 4).

First, the Commission finds that the record contains two itemized statements for Dr. Medina, one of which lists purported charges from June 20, 2002 through November 30, 2011. (PX13). The second itemized statement lists charges incurred from December 2011 through 2012, with an amount due of $22.38. The rest of this second statement appears to have been paid by Medicare and Public Aid. (PX12). Petitioner's requested relief, as stated in the preceding paragraph, pertains to the first statement only – Petitioner's Exhibit 13. Petitioner makes no claims as to the second itemized statement.

Second, the Petitioner refers to treatment provided by Dr. Kane. However, a thorough review of the record demonstrates that no itemized bill or statement for Dr. Kane was offered into evidence.

Third, the parties make reference to unrelated medical care to the right foot after August 5, 2004. The only information of record regarding this issue is found in the records of Dr. Kane. Those records demonstrate that Petitioner may have had a nerve disorder in both feet – the origin of which is unclear. Dr. Kane referred Petitioner to Dr. Medina to evaluate this nerve disorder. (PX9). There is no further information contained in the record for the Commission to determine whether medical care to the right foot after August 5, 2004 was related or not.

Finally, Petitioner presented an itemized statement from Dr. Medina. This statement lacks needed information to determine which charges are reasonable, necessary, and related. Again, the Commission finds that the itemized statement does not delineate what treatment Petitioner received for each body part, and in particular the right foot. (PX13). Dr. Medina's medical records are inadequate in that they contain no information regarding examinations that were conducted or what treatment was prescribed for the right foot. Petitioner's Exhibit 26 is a Payment Summary Form from Medicare. This document shows that Medicare made payments towards Dr.

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Medina's charges. However, no such payments are reflected on the statement for Dr. Medina that was submitted into evidence by Petitioner as Exhibit 13.

With such deficient medical evidence, the Commission cannot determine what medical expenses following the August 19, 2002 motor vehicle accident are related to the right foot, let alone what amount, if any, is actually due and owing.

Pursuant to the Circuit Court's Order, the remainder of the Commission's Decision dated October 29, 2014 is confirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $280.45 per week for a period of 9 weeks, from November 29, 2001 through January 30, 2002, 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 $252.41 per week for a period of 15.5 weeks, as provided in §8(e)11 of the Act, for the reason that the injuries sustained caused the 10% loss of use of the right foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable, necessary, and related medical expenses until August 19, 2002, pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that pursuant to §8(a) of the Act, Respondent shall pay to Petitioner the additional sum of $315.00 for reasonable, necessary, and related medical expenses for the right foot that were incurred after August 19, 2002. As these charges were incurred prior to February 1, 2006, they are not 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

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DATED:

MAY 5 - 2017

MJB/pm
D: 4/25/2017
52

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

Vanisa Duncan,

Petitioner,

vs.

NO. 09WC032818

Navistar/International Truck and Engine,

Respondent.

17IWCC0295

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 27, 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.

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

DATED: MAY 5 - 2017
SJM/sj
o-4/27/2017
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

DUNCAN, VANISA
Employee/Petitioner

Case# **09WC032818**

NAVISTAR/INTERNATIONAL TRUCK & ENGINE
Employer/Respondent

17IWCC0295

On 1/27/2016, 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:

0293 KATZ FRIEDMAN EAGLE ET AL
RICHARD K JOHNSON
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY
LINDA ROBERT
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

17IWCC0295

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Vanisa Duncan
Employee/Petitioner

v.

Navistar/International Truck & Engine
Employer/Respondent

Case # **09** WC **32818**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **LYNETTE THOMPSON-SMITH**, Arbitrator of the Commission, in the city of **Chicago**, on **August 20, 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 _____

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FINDINGS

On **3/27/2008**, 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 $**29,632.01**; the average weekly wage was $**881.06**.

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

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

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

Respondent shall be given a credit of $**139,317.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**139,317.28**.

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

ORDER

Respondent shall pay Petitioner maintenance benefits of $587.37/week for 33 weeks, commencing 3/12/2013 through 10/28/2013, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $1,399.50, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $587.37/week for 245 weeks, commencing 6/17/2008 through 1/10/2009 and 1/24/2009 through 3/11/2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 10/29/2013, of 470.13/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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

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

FINDINGS OF FACT

The disputed issues in this case are: 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; 5) maintenance; 6) 8(d)1; and 7) the nature and extent of Petitioner's injuries. *See,* AX1.

Ms. Vanisa Duncan, (hereafter "Petitioner") began working for Navistar International Truck (hereafter "Respondent") at the Melrose facility on July 18, 1994. At the time of the hearing, Petitioner was still employed by Respondent, but was on medical leave, authorized by Respondent. At the time of the hearing, Respondent was not paying workers' compensation benefits but Petitioner was eligible for health care and retirement benefits.

Petitioner began working as an assembler for Respondent in 2008. While working for Respondent, she assembled Haldex pumps and engines. While assembling the pumps, she testified that she stacked rubber washers on a rack. The rack was five shelves high and she would stack four rubber washers on each shelf. She testified that she is 5'3" and the top shelf was at her neck level. She would assemble about 275-310 pumps in an eight hour day.

Petitioner also assembled engines, using power tools/guns to tighten bolts to the engines. The power guns hung on power lines. She would reach up for a power gun, tighten the bolts, and then return the gun above her head. She testified that the power lines were so high that she would sometimes have to jump to reach the gun. She testified that she would also have to torque 12 bolts on the top of each engine. Torqueing involved holding the wrench with her right hand, and pulling back. Petitioner testified that she would assemble 265-275 engines in an eight hour work-day.

Petitioner's normal shift was eight hours per day, but she often worked up to 12 hours per day. She testified that she had two breaks, 12 minutes each; and a 35 minute lunch. Petitioner testified that she is right-handed and would use the tools in her right hand but used her left hand to assist. She would work with arms at or above shoulder level, 80% of the work-day.

In 1998, Petitioner reported shoulder pain to Respondent's medical department. However, she explained that she was on rotating job duties at that time; and the pain went away when she was moved to a new position. Although Respondent moved Petitioner from job to job within the plant, she always had the same classification. Petitioner testified that all of the jobs involved the use of her right arm above shoulder level, for about 80% of the day.

In October 2007, Petitioner went to the plant medical department, reporting upper extremity pain. She was sent to a hospital in Maywood; and the physician there sent her to physical therapy. Petitioner testified that the pain improved and she was able to return to work.

On March 27, 2008, Petitioner again went to Respondent's medical department. She reported that her shoulder had been hurting the last couple of months because she was working a lot of overtime. She testified that she was in so much pain, it felt like her shoulder was about to burst. An x-ray of her right shoulder was performed which showed no fracture or dislocation. Dr. Ehni at Respondent's plant medical recommended that Petitioner attend physical therapy for her shoulder, which she did. PX1.

Dr. Ehni referred Petitioner to Dr. Ryon Hennessy at Orthopedic Specialists. On April 16, 2008, Dr. Hennessy stated most of Petitioner's symptoms were consistent with rotator cuff tendonitis. He performed an injection and recommended that she stay on light duty restrictions. On May 12, 2008, Dr. Hennessy recommended an MRI of her right shoulder which was performed on May 21, 2008. Dr. Hennessy diagnosed her with rotator cuff tendinopathy with mild impingement signs. She continued treating with Dr. Ehni in Respondent's medical department through June and July.

Petitioner worked light duty at this time, based on Dr. Ehni's recommendations. However, even with light duty, she was still required to use her right arm. She testified that she was using hammers, which caused pain. On June 17, 2008, Petitioner was taken off work by Respondent because no light duty was available.

As she was still experiencing right shoulder pain and swelling, Petitioner decided to seek a second opinion and presented to Dr. Morrell, at Midwest Sports Medicine, on July 24, 2008. Dr. Morrell opined that Petitioner's symptoms were caused by the repetitive nature of her job, building up to 275 engines per day. Dr. Morrell noted that "It is common to develop impingement syndrome due to the repetitive nature of her job duties, especially with working overhead." On August 14, 2008 she received an injection in her left shoulder by Dr. Morrell, who continued to conservatively treat Petitioner's right shoulder. PX3.

On September 15, 2008, Dr. Morrell noted that Petitioner was failing conservative treatment and noted that a right shoulder arthroscopy, with subacromial decompression and distal clavicle resection may be necessary. On October 3, 2008, Dr. Eugene Lopez, Dr. Morrell's colleague at Midwest Sports Medicine, evaluated Petitioner and noted that she had trouble combing her hair, putting on a belt, raising her arm above shoulder level and across her chest. Dr. Lopez recommended a right shoulder arthroscopy, subacromial decompression, distal clavicle resection, and possible rotator cuff repair. On October 17, 2008, Dr. Lopez performed the right shoulder arthroscopy, subacromial decompression surgery, with Dr. Morrell's assistance.

On December 22, 2008, Dr. Morrell noted that although Petitioner was improving post operatively in regards to her right shoulder, her left shoulder pain was increasing due to compensating for her right extremity injury. Dr. Morrell noted that it might take longer for Petitioner to return to work, due to

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the demands of her job. Dr. Morrell injected her left shoulder with a corticosteroid on January 19, 2009 and Petitioner attended physical therapy during this time and was kept on light duty.

Respondent accommodated her light duty restrictions from January 11, 2009 through January 23, 2009. She was given light duty work the first week, photocopying materials. The second week she was switched to the second shift, working with washers. She testified that she was okay in this new position for about an hour, but soon after her shoulder swelled and became painful. Petitioner testified that her right shoulder was so swollen that a security guard brought a bag of ice for her. She stopped working on January 24, 2009 because Respondent could no longer accommodate her restrictions.

Petitioner continued to follow up with Dr. Morrell who kept her on the light duty restrictions. On June 10, 2009, Dr. Morrell recommended Petitioner take part in a work-conditioning program, which she did.

Deposition of Dr. Bryan Neal

Petitioner was examined by Dr. Bryan Neal, at the request of Respondent, on July 22, 2009 and testified by way of evidentiary deposition. He diagnosed Petitioner with right shoulder pain, right lateral epicondylitis; and subjective right upper extremity swelling. He stated that based on the medical records that he had reviewed, he believed her right lateral epicondylitis and subjective right upper extremity swelling was unrelated to her occupational activities. Dr. Neal opined that the etiology for her right shoulder pain was intrinsic, an underlying right acromioclavicular joint arthropathy, but stated that additional medical records could provide further information. Dr. Neal opined that the surgery performed by Dr. Lopez on Petitioner's right shoulder was reasonable and necessary. He stated that it was his "professional instinct" that she would be unable to return to work without restrictions.

On August 5, 2009, Dr. Morrell stated that Petitioner had plateaued with her physical therapy and work-conditioning programs. Dr. Morrell opined that unless Respondent was able to accommodate her work restrictions, she would not be able to return to work.

Dr. Neal re-evaluated the petitioner on October 17, 2013. The petitioner again complained of swelling in her right arm around the elbow joint. Measurements taken of the Petitioner's right arm did not reveal any difference in circumference between the right and left elbow. Dr. Neal also noted symptom magnification and lack of cooperative effort demonstrated during the physical examination. Through various tests, Dr. Neal documented inconsistent findings. Dr. Neal also reviewed surveillance of the Petitioner and noted that her complaints during his examination were inconsistent with the video obtained. He further opined that the petitioner's right shoulder complaints and subsequent surgery were not causally related to her job duties. He opined that the petitioner's right shoulder symptoms were due to a combination of metabolic issues due to Petitioner's diabetes and osteophytes under the acromioclavicular joint. He opined that the petitioner's architectures caused her pain and that her job duties did not cause, accelerate or aggravate the Petitioner's shoulder condition. He stated that the

Petitioner would have had those symptoms regardless of her work activities. RX1, pp. 34-40; RX1, pp. 51, 60 Dep. Ex2; pp. 12- 13; PX3.

Petitioner underwent an MRI of her right shoulder on August 10, 2009, which showed her rotator cuff was intact, with mild changes in the supraspinatus tendon consistent with her previous surgery. Based on the results of the MRI, Dr. Morrell recommended Petitioner undergo an functional capacity evaluation ("FCE"). Petitioner underwent an FCE on September 4, 2009, which found that she could work in a light duty capacity. The report stated that she could not perform her pre-injury job as an assembly operator. She could occasionally lift up to 15 pounds to waist height and 10 pounds bilaterally over shoulder height. She was told to limit repetitive overhead work with her right arm to no longer than ten (10) minutes.

On October 27, 2009, Dr. Morrell found that Petitioner had reached maximum medical improvement ("MMI") and could return to work with the restrictions stated in the FCE. Dr. Morrell's January 12, 2010 office note stated that Petitioner had returned to work and was required to lift heavy boxes and perform repetitive work. She was only able to tolerate this for about 45 minutes. Dr. Morrell modified her restrictions to no lifting greater than 10 pounds and no over the shoulder level work. Petitioner testified that the last date she worked for Respondent was in January 2010 but that she remained an employee, as of the date of trial. PX3.

Petitioner testified that at this time, she noticed that her shoulder would flare up, swell, and burn. Even if she would not use her arm at all, it would swell up. On February 2, 2010, Petitioner reported to Dr. Morrell that she was still having pain, working with light duty work restrictions. Her fingers would occasionally discolor or develop white spots. Dr. Morrell referred Petitioner to the Illinois Pain Institute for pain management treatment.

On February 10, 2010, Petitioner saw Dr. Yano and on February 16, 2010, Petitioner underwent an MRI of her cervical spine at Dr. Yano's request. On February 27, 2010, Dr. Yano diagnosed Petitioner with suprascapular neuritis, a herniated cervical intervertebral disc, cervical radicular symptoms, and complex regional pain syndrome ("CRPS"), involving her right upper extremity. Dr. Yano performed a right suprascapular nerve block. PX4.

On March 2, 2010, Dr. Morrell performed a cortisone injection in Petitioner's left shoulder and Petitioner continued to treat conservatively and attend physical therapy. In May 2010, Dr. Yano noted that Petitioner should undergo treatment for CRPS but Petitioner declined any further intervention.

On May 12, 2010, Dr. Morrell opined that Petitioner's restrictions were permanent and that she had reached MMI. Dr. Morrell restricted Petitioner to limited repetitive motion for 15 minute intervals; with 15 minute breaks and to not work more than four hours per day, four days per week.

Petitioner testified that Dr. Ehni also evaluated her for permanent restrictions. Petitioner testified that they had a private conversation at the plant medical department. He gave her a prescription for pain medication and told her that plant did not have anything light duty for her at that time.

Petitioner underwent a right upper extremity arterial Doppler study on December 24, 2010. It was read to show abnormal waveforms in the right brachial artery, which suggested increased vascular impedance to the flow. Petitioner saw Dr. Saleem on February 11, 2011, who diagnosed her as having persistent pain. On June 7, 2011, Dr. Morrell noted that Petitioner is on permanent disability and could not return to her job duties. Petitioner continued to follow-up with Dr. Morrell and treat conservatively. On December 13, 2011, Dr. Yano recommended an FCE, which was not authorized by Respondent. Petitioner continued treating conservatively about every six months with Dr. Morrell until the end of 2013. Petitioner testified, at the time of the hearing, that she was currently seeing Drs. Ward and Jackson in Tennessee. PX5 & 14.

Petitioner was sent by her attorney to Steve Blumenthal, for a vocational rehabilitation consultation, on December 30, 2012. Mr. Blumenthal took into account the results of the vocational evaluation testing and her past work history and determined that Petitioner would be able to work as a hostess, retail sales clerk, or hotel clerk, earning from $8.76 to $10.68 per hour. PX8.

Petitioner was sent for vocational rehabilitation at Vocamotive by Respondent. She attended training from March 2013 through October 2013. She testified that while working with Vocamotive, she went through job training, was sent to classes, worked on her resume; and searched for jobs. She looked for jobs on the computer and passed out her resume directly to employers. Petitioner had difficulty performing some of the activities due to pain and swelling in her arm. The vocational rehabilitation counselor working with her noted that her right arm, shoulder, and hand would become visibly swollen on multiple occasions and that the swelling was obvious. PX9, pp. 38, 46, 47.

Dr. Neal re-examined Petitioner on October 17, 2013 and diagnosed chronic right shoulder pain and right hand pain of unknown etiology. Dr. Neal stated that regardless of the etiology, her hand pain was unrelated to her work activities with Respondent. He opined that the root cause of her shoulder condition was due to intrinsic issues, probably genetically originating acromioclavicular joint arthrosis. He noted that she was displaying symptom magnification, a lack of effort and that there was no swelling in her upper right extremity. RX1, Dep. Ex. 3, pp. 28-32.

On October 29, 2013, Petitioner was hired at RadioShack in Montgomery and started working. Petitioner testified that she was paid $8.35 per hour, part time and that it would lead to a full time position. She had some difficulty performing the job due to the pain and swelling in her right arm. Petitioner left this job when she moved to Tennessee with her husband.

Deposition of Dr. Mary Kathryn Morrell, dated January 9, 2014
Petitioner's treating doctor, Mary Morrell, testified that Petitioner reported that she performed repetitive motions, at or above shoulder level, while working for Respondent. Dr. Morrell stated that she felt that Petitioner was honest about her complaints of pain and presented a reliable work history. Dr. Morrell opined that her condition of ill-being, in regards to her right upper extremity, was causally connected to her job duties while working for Respondent. PX12.

Deposition of Dr. Shingo Yano, dated October 10, 2014
Petitioner's treating doctor, Shingo Yano, testified by way of evidentiary deposition on October 10, 2014. Dr. Yano testified that he is a board certified specialist in anesthesiology and pain management, who treats patients with chronic pain problems. He opined that Petitioner was suffering from CRPS Type 1 and right shoulder pain. Dr. Yano explained that CRPS is a life-time diagnosis. Dr. Yano opined that Petitioner's repetitive motions at work resulted in her symptoms. He testified that he never had any indication that her reports of pain were inconsistent or not genuine. However, Dr. Yano admitted that he was not familiar with the Budapest Criteria and was not familiar with any recent research in this area. Dr. Yano's notes were reviewed with him and he did not make any changes to his physical findings as noted in his records. PX13, pp. 4-19.

Records review of Dr. Kiran Chekka
Dr. Kiran Chekka reviewed Petitioner's records, at the request of Respondent and testified by way of evidentiary deposition on June 25, 2015. Dr. Chekka testified that he never physically examined Petitioner however, he diagnosed her as having with chronic right shoulder and neuropathic pain but did not believe that she was suffering from CRPS. Dr. Chekka testified that after reviewing the Petitioner's medical records, it was his opinion that she did not suffer from CRPS. He was surprised that Dr. Yano did not know the Budapest Criteria for the diagnosis of CRPS, given the fact that Dr. Yano did his fellowship with the doctor that established the criteria. Dr. Chekka further testified that the Petitioner may have residual pain following surgery but the Petitioner did not have CRPS. He testified that her symptoms were an "unfortunate but not out of the bounds" response to the shoulder surgery performed by Dr. Lopez. He testified that there was no evidence of malingering in Petitioner's medical records and that her suprascapular neuritis and chronic shoulder pain were causally related to her work injury. RX2.

Drs. Morrell, Neal, and Chekka were given a functional job description for Petitioner's job, while she was working for Respondent. The report listed the essential job functions as: initiating the threading of bolts into top of engine block; reaching with cope to position camshaft, securing dampers onto engine blocks with hammer; utilizing hand held screw gun, torqueing oil cooler elbow, pulling completed engine on hoist; pushing piston and camshaft guides onto engine block; lifting the front cover to top shelf of cart; carrying 308 saddle from pallet to beginning of test line' and lifting trays of retainers with keepers off pallet. The "critical job demands" included: initiating the threading of bolts at 60 inches above ground, lifting 18 pounds to 55 inches above ground, pulling 51 feet-pounds of

horizontal force at shoulder height for 20 feet; pushing 55 feet-pounds of horizontal force at 44 inches above the ground; and torqueing with 71 feet-pounds of horizontal force at 40 inches above the ground. Petitioner testified that she is 5'3" tall. PX12, Dep. Ex. 2.

Petitioner testified that on some days her pain is reasonable, but other days she has constant throbbing pain. She testified that she can only use her arm in moderation; otherwise it swells and becomes painful. She takes medication and uses lidocaine patches for her pain 2-3 times per week. She also self-treats with ice packs, rubbing alcohol, and stretches. Petitioner testified that the heaviest weight she can lift is seven pounds. However, if she lifts something approximately seven (7) pounds multiples times, her shoulder will start to hurt and swell. Petitioner testified that she is able to bring an empty garbage can into the house after her husband takes out the full can. She testified that she sometimes is able to drive, shop, clean, dress, and cook, depending on her pain level at the time. The three, videotapes of Petitioner's activities, show her using her right arm in a fashion not inconsistent with her functional capacity evaluation, in fact the petitioner, who is right-handed, used her left hand to open and close the car door and the car trunk. Petitioner testified that she has not looked for a job in Tennessee because she does not know how long she would be able to last on a job. She testified that she has not reinjured her right arm since March 2008.

CONCLUSIONS OF LAW

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

The record reveals that Petitioner worked for Respondent performing assembly duties for Respondent at which time she developed right shoulder pain. The assembly duties, based upon Petitioner's unrebutted testimony, was arm intensive, physical, and required overhead arm use above shoulder level for about 80% of the day. Where an employer fails to contradict an employee's description of his or her job duties, the obvious conclusion is that the employee has provided an accurate description. *See Tolbert v. Ill. Workers' Comp. Comm'n*, 2014 IL App (4th) 130523WC, P42, 11 N.E.3d 453, 462. Petitioner's description of repetitive job duties is further corroborated in the job histories in her medical records and the functional job description report. In Illinois, there is no absolute threshold for a job to be considered "repetitive" enough to establish causal connection and there is no requirement that a certain percentage of an employee's day must be spent on a task to find repetitive trauma. *Edward Hines Precision Components v. Indus. Comm'n,* 356 Ill. App. 186, 193-194, 825 N.E.2d 773 (2nd Dist. 2005). When a worker's physical structure gives way under repetitive job-related stresses on the body, the injury is considered to arise out of and in the course of employment. *Interlake Steel, Inc. v. Industrial Comm'n.*, 130 Ill. App. 3d 269, 273, 474 N.E.2d 402, 406 (1st Dist. 1985). The Arbitrator finds that Petitioner has met her burden of proof in showing that she was

required to perform repetitive, arm intensive duties, the majority above shoulder level, while working for Respondent.

The credible evidence in the record establishes that Petitioner's symptoms manifested on March 27, 2008. The date of an accidental injury in a repetitive-trauma compensation case is the date on which the injury "manifests itself", or the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. *Peoria County Belwood Nursing Home v. Industrial Comm'n.*, 115 Ill. 2d 524, 531, 505 N.E.2d 1026, 1029 (1987). To deny an employee benefits for a work-related injury that is not the result of a sudden mishap or completely disabling penalizes an employee who faithfully performs job duties despite bodily discomfort and damage. *Id* at 530. On March 27, 2008, Petitioner reported to Respondent's medical department with pain that had been developing gradually and had reached the point that she was no longer able to perform her job duties. From that date forward, Petitioner was no longer able to perform her required job duties. A reasonable person would have become aware of the severity of the injury on that date. Based upon the evidence presented, supported by Petitioner's credible testimony, Petitioner's medical records, and Respondent's job duty report, the Arbitrator finds that Petitioner performed repetitive activities with both arms overhead and had an accident which manifested on March 27, 2008, which arose out of and in the course of her employment with Respondent.

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

It is established law that at hearing, it is the employee's burden to establish the elements of his claim by a preponderance of credible evidence. *See, Illinois Bell Tel. Co. v. Industrial Comm'n.*, 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. *Id.* A claimant must prove causal connection by evidence from which inferences can be fairly and reasonably drawn. *See, Caterpillar Tractor Co. v. Industrial Comm'n.*, 83 Ill. 2d 213; 414 N.E. 2d 740 (1980). Also, causal connection can be inferred. Proof of an employee's state of good health prior to the time of injury and the change immediately following the injury is competent as tending to establish that the impaired condition was due to the injury. *See, Westinghouse Electric Co. v. Industrial Comm'n*, 64 Ill. 2d 244, 356 N.E.2d 28 (1976). Furthermore, a causal connection between work duties and a condition may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident and inability to perform the same duties following that date. *See, Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 193 (1986).

Petitioner's treating physicians, Drs. Morrell, Lopez, and Yano, found that Petitioner's condition of ill-being, in regards to her right shoulder was causally related to her repetitive work duties for Respondent. Further, Respondent's expert, Dr. Chekka opined that Petitioner's chronic shoulder pain was causally related to her work injury. The only physician who found Petitioner's condition was not related to her work duties was Respondent's Section 12 examiner, Dr. Neal, who was also the only physician to find she was magnifying symptoms and not giving full effort in the examination. The

17IWCC0295

Arbitrator finds Drs. Morrell, Yano, Lopez and Chekka's opinions to be more persuasive than those of Dr. Neal. The Arbitrator places greater weight in these doctors' opinions, regarding the issue of causation. The Arbitrator notes that the petitioner apparently has a genetic condition with her right shoulder, which makes her more prone to have pathological medical issues however, the employer takes his employees as it finds them and this employee has worked for Respondent since 1994 and for several years thereafter, before she succumbed to this shoulder problem.

The Arbitrator further notes that Drs. Chekka, Morrell, and Yano, agree that Petitioner is suffering from chronic right shoulder pain. Dr. Chekka only differed in his opinion from Petitioner's treating doctors in regards to what was causing her chronic pain. Drs. Yano and Morrell opined that she was suffering from CRPS while Dr. Chekka opined that she was only suffering from suprascapular neuritis. The Arbitrator finds the opinions of Drs. Morrell and Yano more credible in this regard, as Dr. Chekka has never physically examined Petitioner.

The Arbitrator finds that Petitioner's condition of ill-being, with regards to her right shoulder chronic pain and suprascapular neuritis, is causally related to her work injury on March 27, 2008.

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

Respondent disputed the medical expenses based upon liability. After determining that Petitioner's chronic shoulder pain is work-related, the Arbitrator finds the medical services provided for the conditions were reasonable. The Arbitrator notes that Petitioner was highly compliant with the treatment prescribed, missing and cancelling almost no prescribed physical therapy sessions. Respondent is liable for the unpaid medical bills from Dr. Morrell for $125.00 and Steven Blumenthal for $1,274.50, totaling $1,399.50.

K. What temporary benefits are in dispute? – TTD and Maintenance.

Respondent disputed temporary total disability ("TTD") and maintenance benefits based upon liability. As the Arbitrator finds that Petitioner's condition is work-related, the Arbitrator awards TTD benefits from June 17, 2008 through January 10, 2009 and January 24, 2009 through March 11, 2013, totaling 245 weeks of TTD benefits. Temporary total disability benefits generally are available only until an injured employee has recovered as fully as the nature of her injury permits but she may still be entitled to "maintenance" under Section 8(a) of the Act while she is in a prescribed rehabilitation program. *Connell v. Industrial Comm'n.*, 170 Ill. App. 3d 49, 55, 523 N.E.2d 1265, 1269 (1st Dist. 1988). Petitioner is therefore entitled to maintenance benefits from March 12, 2013, the date Respondent initiated vocational rehabilitation, through October 28, 2013, the day before Petitioner became employed by Radio Shack, totaling 33 weeks. The parties have stipulated that Respondent has paid $139,317.28 in TTD benefits, for which Respondent is entitled to a credit.

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

The Arbitrator finds Petitioner sustained a permanent injury to her right shoulder, preventing her from returning to work at her usual and customary employment as an assembler. Petitioner sustained an injury to her right shoulder and initially underwent arthroscopy surgery. She continued to have symptomology in her right upper extremity and therefore needed physical therapy and pain management. Her treating physicians, Drs. Morrell and Ehni, have stated that she has permanent work restrictions. Drs. Yano, Morrell and Chekka, have opined that she needs further treatment. At arbitration, Petitioner testified that she is still an employee of Respondent but they have been unable to accommodate her permanent work restrictions. Petitioner noted that she continues to have pain and swelling in her right upper extremity. Petitioner takes analgesics, utilizes lidocaine patches; and performs self-treatment measures when her symptoms become severe. The Arbitrator concludes Petitioner testified in a credible fashion, consistent with the medical records and other evidence; and is entitled to a wage differential under Section 8(d)(1). Also, her testimony was unrebutted.

The parties have stipulated that Petitioner would be making $25.98 per hour working for Respondent at the time of the hearing. The Arbitrator finds Petitioner is entitled to a wage differential based on the $8.35 per hour which she was being paid at Radio Shack beginning October 29, 2013. This hourly rate is consistent with the findings of her vocational assessment by Mr. Blumenthal. The fact that she terminated her employment with Radio Shack when she moved to Tennessee with her husband, is immaterial. An employee need not be working at the time of the hearing to be awarded an 8(d)(1) wage differential. *See McGuire v. Chrysler,* 01WC 60272 (Commission awarded a wage differential when the claimant was employable but not working at the time of the hearing, relying upon a labor market survey to award the 8(d)(1) wage differential). Petitioner is entitled to a wage differential of $470.13 per week for the duration of her disability, commencing October 29, 2013. Said amount was calculated by subtracting $8.35 from $25.98, multiplying by 40 hours per week, and then multiplying that figure by 2/3rds.

17IWCC0295

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
09WC 32818
SIGNATURE PAGE

L Thompson Smith
Signature of Arbitrator

January 27, 2016
Date of Decision

JAN 2 7 2016

STATE OF ILLINOIS)
) SS.
COUNTY OF McCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jason Miner,

Petitioner,

vs. NO. 16WC001526

State of Illinois Department of Corrections,

Respondent.

17IWCC0296

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, and causal connection, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 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.

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

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

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

DATED: MAY 5 - 2017
SJM/sj
d-4/27/17
44

Stephen J. Mathis

Deborah L. Simpson

David L. Gore

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

MINER, JASON
Employee/Petitioner

Case# **16WC001526**

SOI/DOC/LINCOLN C C
Employer/Respondent

17IWCC0296

On 10/13/2016, 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 0.49% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1590 SGRO HANRAHAN DURR RABIN
BENJAMIN M SGRO
1119 S 6TH ST
SPRINGFIELD, IL 62703

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

1350 CENTRAL MANAGEMENT SYSTEMS
RISK MANAGEMENT SERVICES
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

OCT 13 2016

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

17IWCC0296

STATE OF ILLINOIS)
)SS.
COUNTY OF McClean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jason Miner
Employee/Petitioner

v.

SOI/DOC/Lincoln CC
Employer/Respondent

Case # **16** WC **01526**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael K. Nowak**, Arbitrator of the Commission, in the city of **Bloomington**, on **8/23/16**. 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. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **11/26/15**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$36,843.58**; the average weekly wage was **$708.53**.

On the date of accident, Petitioner was **30** 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 **$1,064.49** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,064.49**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $4,340.14, as set forth in PX 11, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of $472.35/week for 8 5/7 weeks, commencing 11/27/15 through 1/26/16, 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.

Michael K. Nowak, Arbitrator

9/12/16
Date

ICArbDec19(b)

OCT 13 2016

FINDINGS OF FACT

On November 26, 2015, Petitioner was employed by Respondent as a Movement Officer at Lincoln Correctional Facility. Petitioner had been employed in that position for approximately six months prior to the date of injury. Petitioner testified that his job duties required him to perform a "count inspection" every day at exactly 3:30 p.m. to be completed no later than 4:00 p.m. Failure to complete the count check by 4:00 p.m. was routinely met with reprimand.

Petitioner testified that on November 26, 2015 he was performing a count check pursuant to his duties. After collecting a number of the count slips he contacted the officer performing the count check with him to see whether he needed assistance. The other officer responded that he was finished with his collection, and almost back to the shift commander's office where the count slips were to be delivered. Petitioner testified that he then cut across the grass in an effort to deliver count slips to the shift office in a timely manner, a route which numerous employees utilize to expedite the delivery of the count slips. While cutting through the grass he steped into a hole and twisted his left ankle immediately causing his tendon to rupture.

Petitioner testified that he required immediate medical treatment at Memorial Medical Center, followed up with his primary care physician, was referred to an orthopedic specialist, and has undergone extensive physical therapy directly related to this injury. He further indicated that he was unable to work from the date of the accident through January 26, 2016, as Lincoln Correctional Facility did not have light duty work available. He actually returned to employment on January 27, 2016.

Finally, Petitioner testified that at some point during his recovery Tristar denied his claim, and the correctional facility terminated his employment, thereby causing a lapse in his health insurance and leaving him to cover all medical expenses during this time. He had also encountered costly co-pays for the expenses incurred before his insurance lapsed.

The Petitioner was cross-examined regarding a prior injury to his back resulting from a motorcycle accident in 2012, and one treatment in March 2016 regarding that injury. He indicated that, outside of the time listed above, he was not required to miss any additional work, and that he had no prior injuries or trauma to his left ankle.

CONCLUSIONS OF LAW

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

In order for an injury to arise out of employment, its origin must stem from a risk connected with, or incidental to, the employment. *Dodson v. Industrial Commission*, 308 Ill.App.3d 572 (1999); *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 58 (1989). "A risk is incidental to the employment where it belongs or is connected with what an employee has to do in fulfilling his duties." *Id.* Petitioner's delivery of the count slips to the shift office for Respondent was expressly a function of his duties.

The *Caterpillar* Court went on to state that "injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing her duties, and while she is at work, or within

a reasonable time before and after work, are generally deemed to have been received in the course and scope of employment." *Caterpillar*, 129 Ill.2d at 57. In this instance it has been established that Petitioner was acting in the course and scope of his employment at the time of the incident, that the incident occurred while Petitioner was at work, and that Petitioner's injuries arose directly from the incident. While Petitioner traveled through the grass to reach his destination, he testified that the majority of employees utilized the same route to reach the shift office quickly, and that failure to deliver the slips in a timely manner would result in reprimand. It is also difficult to imagine a premises more controlled by the employer than within the walls of a prison.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met his burden of establishing that he did sustain an accident which arose out of and in the course of his employment by Respondent?

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
Issue (L): What temporary benefits are in dispute?

Respondent did not dispute the reasonableness or necessity of the medical treatment Petitioner received or the period of Petitioner's incapacity. Respondent disputed liability for these benefits based upon the issue of accident.

Petitioner submitted medical expenses totaling $4,340.14. (PX11). The parties agreed that Petitioner was temporarily and totally disabled for 8 5/7 weeks, commencing November 27, 2015 through January 26, 2016. (AX1)

Based upon the foregoing and the record taken as a whole, including the Arbitrator's finding with regard to issue C above, Respondent shall pay reasonable and necessary medical services of $4,340.14, as set forth in PX 11, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall further pay Petitioner temporary total disability benefits of $472.35/week for 8 5/7 weeks, commencing 11/27/15 through 1/26/16, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $1,064.49 for TTD benefits which have been paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kermith Alejos,
Petitioner,

vs. NO: 14 WC 40944

17IWCC0297

Grayhawk Leasing, LLC,
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 casual connection, nature and extent of Petitioner's permanent partial disability, and the Arbitrator's award of a credit for temporary total disability, and being advised of the facts and law, modifies the Decision regarding temporary total disability and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The parties stipulated that the claimant was owed 32 weeks of TTD benefits incurred from 4/5/2014 through 11/15/2014, and that the respondent would be credited $19,286.29 in TTD benefits previously paid (see Arbitrator's Exhibit I). The Arbitrator acknowledged such at the hearing, and included the credit for TTD benefits in the "Findings" section of the decision, but did not overtly specify the TTD award in the "Order" section, so the Commission adds the following language to the "Order" section of the Arbitrator's Decision:

Pursuant to the parties' stipulations, the respondent shall pay the petitioner temporary total disability benefits of $602.67/week for 32 weeks, from 4/5/2014 through 11/15/2014, as provided in Section 8(b) of the Act. Against this amount, the respondent shall be given a credit of $19,286.29 for disability benefits paid to date.

The Commission further notes that the Arbitrator included 19(b) boilerplate language in the decision, but the case was tried on all issues, so the Commission strikes the line from the "Order" section noting that the award is not a bar to a subsequent hearing for medical benefits or compensation for temporary or permanent disability.

17IWCC0297

All other factual determinations and awards are affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $602.67 per week for a period of 32 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 $542.40 per week for a period of 55.65 weeks, as provided in §§8(e)(10) and (11) of the Act, for the reason that the injuries sustained caused the 20% loss of use of the right leg (43 weeks) and 5% loss of use of the right arm (12.65 weeks).

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 8 - 2017

Joshua D. Luskin

0-04-12-17
jdl/mp
68

Charles J. DeVriendt

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALEJOS, KERMITH
Employee/Petitioner

Case# **14WC040944**

GRAYHAWK LEASING LLC
Employer/Respondent

17IWCC0297

On 1/11/2016, 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:

4070 LAW OFFICE OF CHARLES FANUCCHI
2069 CHESHIRE DR
HOFFMAN ESTATES, IL 60192

5001 GAIDO & FINTZEN
ROBERT L SMITH
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kermith Alejos
Employee/Petitioner

v.

Grayhawk Leasing LLC
Employer/Respondent

Case # **14** WC **40944**

Consolidated cases: **-0-**

17IWCC0297

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **November 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. ☐ 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: Nature and Extent

FINDINGS

On the date of accident, **April 4, 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 **52-week period** preceding the injury, Petitioner earned **$47,000.00**; the average weekly wage was **$904.00**.

On the date of accident, Petitioner was **50** 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 $19,286.29 for TTD, $0 for TPD, $0 for maintenance, and $0 for medical benefits, for a total credit of $0.

ORDER

The Arbitrator concludes that Petitioner sustained disability to the extent of 20% loss of use of the right leg (43 weeks); and 5% loss of use of the right arm (12.65 weeks). The Respondent shall pay the Petitioner $542.40/week for 55.65 weeks, because the injuries sustained caused the 5% loss of the right arm and 20% loss of the use of the right leg, as provided in Sections 8(e) (10) and 8(e) (11) 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.

Deborah L. Simpson

Signature of Arbitrator
ICArbDec19(b)

January 8, 2016
Date

JAN 11 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kermith Alejos,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 14 WC 40944**
	)	
Grayhawk Leasing, LLC,	)	
	)	
Respondent.	)	**17IWCC0297**
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on April 4, 2014, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. On that date the Petitioner sustained an accidental injury or was last exposed to an occupational disease that arose out of and in the course of the employment. They further agree that the Petitioner gave the Respondent notice of the accident within the time limits stated in the Act. The parties agree that in the year preceding the injury that the Petitioner earned $47,000.00 and his average weekly wage was $904.00.

At issue in this hearing is as follows: (1) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; and (2) what is the nature and extent of the injury.

STATEMENT OF FACTS

Petitioner, Kermith Alejos, is employed by Respondent, Grayhawk Leasing, as a field service technician. Petitioner testified that he has worked for the employer for 25 years. Petitioner has held a number of positions within the company beginning as an installer, then a shop technician and currently, for about 12 years, he has been employed as a field service technician where his job includes going out to customer sites to replace fountain units and clean and repair the tubes for those units. The job involves repairing cooling and refrigeration and maintaining fountain units. Petitioner is required to crawl around, pulling cords and lines on fountain units and vending machines as part of his employment.

On April 4, 2014, Petitioner had parked his vehicle in the designated parking lot and was crossing the street to report to the main building when he was struck by a vehicle. Petitioner testified that he "went flying and got knocked out." He testified further that his head slammed on

the concrete floor and that he was "in and out" until the ambulance arrived. Petitioner testified that he felt pain in his head, right arm, and right leg.

Petitioner's Exhibit 4, the City of Chicago Fire Department incident report, indicates Petitioner reported pain to the back and leg both rated at 3/10 and non-radiating. The notes in the Chicago Fire Department initial report indicate that the Petitioner was alert and oriented on scene.

Petitioner was transported via ambulance to Mercy Hospital and Medical Center. Those records were admitted into evidence as Petitioner's Exhibit 1. At the hospital Petitioner reported that he was struck on the left side by a car pulling out at low speed. Petitioner also reported that he hit his head but that there was no loss of consciousness. A CT scan of Petitioner's head was negative. X-rays of Petitioner's cervical, thoracic and lumbar spine, as well as his right knee were all negative. Petitioner was diagnosed with cervical strain a right elbow medial head fracture and right knee contusion. (PX 1)

The Petitioner was seen for an orthopedic consult with Sinai Medical Group on April 9, 2014; those records were marked for identification and admitted as Petitioner's Exhibit 3. Dr. Mason Milburn ordered an updated set of x-rays for the Petitioner's right wrist, right elbow, and right humerus. These x-rays were also negative for fractures or dislocations. Petitioner was assessed with a right elbow injury, was ordered off work for two weeks and advised that there was no need to splint the right arm or elbow. Petitioner declined the option of an arm sling for support and was advised that he could have full range of motion of his right arm. (PX 3)

On April 30, 2014 Petitioner returned to Dr. Milburn with complaints of right knee pain. On May 14, 2014, Dr. Milburn ordered an MRI of the right knee. Renewed x-rays of the right elbow were taken and were again negative of any fracture or dislocations. (PX 3)

On May 30, 2014 Petitioner returned to Dr. Milburn. The MRI of the right knee revealed a medial meniscus tear.

On June 17, 2014 Petitioner's right knee was examined by Dr. Carrilero. On July 18, 2014, Dr. Carrilero performed a right knee arthroscopy with partial medial meniscectomy and a chondroplasty of the chondral legions at the level of the patellofemoral joint and weight-bearing area of the medial femoral condyle. (PX 2)

At his follow-up appointment with Dr. Carrilero on July 31, 2014, Petitioner reported his level of pain as 0/10 for his right knee. Petitioner was advised to continue physical therapy at that time. On November 18, 2014 Petitioner was released from care and permitted to return to work at full duty on November 24, 2014. (PX 2)

Petitioner returned to work in November 2014. Petitioner testified that he was paid "TTD" benefits throughout his recovery process and that they are not in dispute. Petitioner also testified that all of the medical bills were submitted and paid; therefore they are not in dispute.

Petitioner returned to his regular job as a field service technician. Petitioner testified that he is doing the same job for the same hours. Petitioner testified that it now hurts his knees when he crawls around on the ground to get at the compressors. He also stated that after he walks a block and a half he starts limping because of the pain. With respect to his right arm, it hurts with weather changes and sometimes when he is lifting the compressors. He cannot chase his kids around anymore because he cannot run. He has three boys ages, 4, 6 and 9. According to the Petitioner before the accident he did his job pain free, now the pain increases the more work he does.

On cross examination, Petitioner testified that since returning to work he has not sought follow-up medical care for the right arm or right knee. Petitioner testified on cross-examination that since returning to work he has not reported the pain to his employer. The Petitioner testified that not only is he working in the same capacity that he was prior to the accident but that he has never been notified by his employer that his work is diminished or that any complaints have been made about his work quality. According to the Petitioner they do not have annual reviews regarding job performance. Petitioner stated that he believes he has had a pay increase since returning to work consistent with union negotiations. Petitioner has no pending medical appointments for any body part related to the April 4, 2014 incident.

On re-direct examination the Petitioner testified that when working the pain is only in his right knee, not the left one, with respect to crawling on the ground and working on the compressors. He stated that when he discussed it with his doctor that he was told that it would heal in time.

CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). This includes the nature and extent of the petitioner's injury.

In determining the level of permanent partial disability, for injuries that occur on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. (820 ILCS 305/8.1b)

To be compensable under the Act, the injury complained of must be one "arising out of and in the course of the employment". *820 ILCS 305/2*(West 1998). An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury. *Parro v. Industrial Comm'n,* (1995) 167 Ill. 2d 385,393, 212 Ill. Dec. 537, 657 N.E. 2d 882.

While it is true than an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. *Caterpillar Tractor Co. v. Industrial Commission,* 83 Ill. 2d. 213, 46 Ill. Dec. 687, 414 N.E. 2d 740 (1980).

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

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

Petitioner carries the burden of proving his case by a preponderance of the evidence. "Preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence offered in opposition to it; it is evidence which as a whole shows that the fact to be proved is more probable than not." *Houck v National Rail Service* 11 WC 249 11 IWCC 249, (overturned on other grounds); *Parro v. Industrial Comm'n,* 630 N.E.2d 860 (1st Dist. 1993); *Central Rug & Carpet v. Industrial Comm'n*, 838 N.E.2d 39 (1st Dist. 2005). Among the factors to be considered in determining whether a claimant has sufficiently carried his burden is his credibility. *See, Houck, supra.* Credibility is the quality of a witness which renders his evidence worthy of belief. To determine whether a claimant has met his requisite burden of proof by a "preponderance of credible evidence," it is necessary for the Commission to look for consistency and corroboration between a witness's testimony, and conduct and other documentary evidence to determine the truth of the matter.

Petitioner's recounting of the accident and subjective pain complaints are inconsistent with the medical records. Petitioner testified at trial that after he was struck he went flying as a result of being struck by a vehicle and that he was knocked out. However, in Petitioner's Exhibits 1 and 4, the Petitioner was described as alert and fully oriented on scene when he was transported to Mercy Hospital where he denied loss of consciousness.

In *Shell Oil v. Industrial Commission*, the Illinois Supreme Court noted that "declarations of an injured person to a treating physician as to his physical condition, and the cause thereof, are admitted into evidence for the reason that it is presumed that a person will not falsify such statements to a physician from whom he expects and hopes to receive medical aid." 2 Ill. 2d 590 (1954) *citing, Shaughnessy v. Holt*, 236 Ill. 485 (1908).

With regard to the right elbow pain, Petitioner testified that his right arm sometimes hurts when lifting. This complaint is inconsistent with the medical records or Petitioner's work history over the last year. Petitioner stopped receiving medical treatment for his elbow on May 14, 2014according to the testimony of the Petitioner and the medical records that were offered and admitted into evidence. The third set of x-rays of the right arm and elbow were taken on May

14, 2014, revealing for the third time that there were no dislocations or fractures present. No other medical evidence was entered into the record regarding Petitioner's right upper extremity. The Petitioner testified that upon his full duty return to work he continued working by himself and never filed a report that he was in pain for his right arm nor has he sought medical treatment for his right arm.

With regard to the right knee, Petitioner testified at trial that he has difficulty walking sometimes and his knee will now bother him after crawling on the ground to get at the compressors, his right knee only. He also claimed to limp from the pain after walking more than one and one half blocks. Petitioner testified that he has not returned for medical care with regard to his right knee since November 18, 2014 when he was released to full duty. On cross examination, Petitioner conceded that he has been able to maintain his 40 hour workweek, has received no complaints for his caliber of work, and has not filed a report or sought medical care for his right knee or leg.

Given the conflicting statements made by the Petitioner to the medical personnel verses what he stated at the hearing and the fact that Petitioner has not complained of current pain or sought additional treatment for the pain he claims he is experiencing it is difficult to determine what condition the Petitioner is currently. Petitioner carries the burden of proof in this matter to show that his current claimed condition of ill being is causally connected to the April 4, 2014 incident the Arbitrator finds that the Petitioner has failed to sustain his burden. Petitioner has not proven that his current condition of ill-being is causally related to the injury he sustained on April 4, 2014.

What is the nature and extent of the injury?

The Arbitrator adopts by reference all prior findings and conclusions into this Section without restating them herein. This claim arose after September 1, 2011, therefore the 5 factors for determining Permanent Partial Disability shall be applied here. The Arbitrator notes the five factors to determine Permanent Partial Disability are: 1) AMA Impairment Rating; 2) Occupation of the injured employee; 3) Age of the employee at the time of the injury; 4) Employee's future earning capacity; and 5) Evidence of disability corroborated by the treating medical records. No one factor shall be controlling but a written explanation is required if an award is greater than the AMA Impairment Rating. 820 ILCS 305/8.1b(b).

It is the claimant's burden to prove all aspects of his claim for benefits. This includes entitlement to Permanent Partial Disability.

1. ***AMA Impairment Rating***: Neither Petitioner nor Respondent presented an AMA Impairment Rating. Based on the failure to submit an AMA Impairment Rating the Arbitrator cannot consider this factor.

2. ***Occupation of the injured employee***: Petitioner was employed by Respondent as a field technician, servicing and maintaining fountain units and vending machines. According to the Petitioner he is currently working at the same rate and under the same requirements as he did prior to the work incident. No evidence was admitted or testimony elicited that showed that the

Petitioner's current condition has impeded his ability to do the same job that he had prior to the incident. He has not reported any inability to perform the job requirements, has not sought help doing the job and has not had any complaints about how he is doing the job. Considerable weight is given to this factor.

3. ***Age of the employee at the time of the injury***: Petitioner was 50 years old at the time of his accident. There is no evidence that Petitioner's age impacted his injury or created any permanent disability in the record. The Arbitrator gives some weight to this factor.

4. ***Employee's future earning capacity***: Petitioner testified that he continues to work full time, full duty. He testified that he has not been required to work less hours as result of the injury and that he has received raises as they have been negotiated by the union that he is a member of.

Petitioner did not testify to any diminution of his earnings since this accident. There is no evidence of disability due to this factor and the Arbitrator gives significant weight to this factor.

5. ***Evidence of disability corroborated by the treating medical records***: The Petitioner sustained an injury to his right arm and left knee. According to the Petitioner he has pain in the right knee after crawling on the ground with the compressors, limps due to pain in his knee after walking more that 1 ½ blocks and cannot chase his three sons because he cannot run due to the leg injury. As to his right arm Petitioner contends that the weather causes pain in the arm as does lifting the compressors. He has not sought any medical treatment for these described ailments and they have not prevented him from being able to carry out his job duties.

The medical records admitted into evidence reference a functional capacity evaluation that was completed by the Petitioner in October 2014. However, this record was not produced or admitted into evidence by either party. No medical records from either a treating or examining physician were offered or admitted into evidence regarding disability. The Petitioner's medical records reveal that Petitioner stopped treating on May 14, 2014 for the right elbow and November 18, 2014 for the right knee. The Petitioner has been working at full, unrestricted duty since November 2014.

The Parties agree that the Petitioner did sustain an injury to his right arm and right leg that arose out of and in the course of his employment with the Respondent. Medical treatment was paid for by the Respondent as well as TTD for the time period that Petitioner was kept off of work by his treating doctors.

Surgery consisted of a right knee arthroscopy with partial medial meniscectomy and a chondroplasty of the chondral legions at the level of the patellofemoral joint and weight-bearing area of the medial femoral condyle. By July 31, 2014, Petitioner reported his level of pain as 0/10 for his right knee. Petitioner continued physical therapy and on November 18, 2014 he was released from care and permitted to return to work at full duty on November 24, 2014. The Arbitrator concludes Petitioner sustained disability to the extent of 20% loss of use of the right leg (43 weeks).

X-rays of the Petitioner's right wrist, right elbow, and right humerus were negative for fractures or dislocations. Petitioner was assessed with a right elbow injury, was ordered off work for two weeks and advised that there was no need to splint the right arm or elbow. The Petitioner declined a sling for his right arm. The Arbitrator concludes that the Petitioner sustained disability to the extent of 5% loss of use of the right arm (12.65 weeks).

ORDER OF THE ARBITRATOR

Petitioner is found to have suffered a permanent injury pursuant to Section 8(e) (10) and 8(e) (11) of the Act. Respondent shall pay Petitioner permanent partial disability benefits of $542.40/week for 55.65 weeks, because the injuries sustained caused the 5% loss of the right arm and 20% loss of the use of the right leg, as provided in Sections 8(e) (10) and 8(e) (11) of the Act.

Deborah L. Simpson

Signature of Arbitrator

January 8, 2016
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Hoffman,
Petitioner,

vs. NO: 15 WC 03170

17IWCC0298

Advanced Mechanical Systems, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, wage rate, medical expenses, prospective medical expenses, and employer-employee relationship and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 9, 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.

17IWCC0298

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,000.00. 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: MAY 8 - 2017

Joshua D. Luskin

o-04/12/17
jdl/wj
68

Charles J. DeVriendt

DISSENT

"Proof that a relationship of employer-employee existed at the time of the accident is an essential element of an award under the Workmen's Compensation Act. [citation omitted]." *Alexander v. The Industrial Commission*, 72 Ill. 2d 444, 448, 381 N.E.2d 669 (1978). "A contract for hire is made where the last act necessary for the formation of the contract occurred. [citations omitted]." *Cowger v. The Industrial Commission*, 313 Ill. App. 3d 364, 370, 728 N.E.2d 789 (2000). The majority in adopting the decision of the arbitrator finding the employment relationship was established when Petitioner arrived at the Arlington Height's headquarters disregards the evidence in the record- Petitioner's employment was conditioned on his ability to 1) pass a drug test, and 2) report to the job site. Further assuming *arguendo* an employment contract was formed after Petitioner presented to Clinical Reference Laboratory for drug testing, "[t]his court has repeatedly held that 'when an employee slips and falls, or is otherwise injured, at a point off the employer's premises while traveling to or from [*484] work, his injuries are not compensable [internal citations omitted].'" *Illinois Bell Telephone Company v. The Industrial Commission*, 131 Ill. 2d 478, 483-4, 546 N.E.2d 603 (1989). Two exceptions exist: 1) falls on parking lots owned, maintained, or controlled by an employer; and 2) an employee is required to be at a certain location in the performance of his job duties where he is exposed to a risk common to the general public but to a larger degree. *Id.* at 484. Neither of these exceptions is applicable. Lastly, Petitioner is not a traveling employee as his job duties did not require him to travel away from the Respondent's premises. *The Venture-Newberg-Perini, Stone & Webster v. The Illinois Workers' Compensation Commission*, 2013 IL 115728. Accordingly, I respectfully dissent.

The last act necessary for the formation of the employment contract was Petitioner's presentation at the job site. Petitioner testified on Monday, January 26, 2015, he traveled to Arlington Heights where he participated in safety training, filed out forms, and was provided with safety equipment- a hard hat and glasses. T. 22-23. Following the completion of the safety training, Petitioner testified Mr. Bill Murray provided Petitioner with the address of his assigned job site in downtown Chicago as well as the address for the drug testing facility as a drug test was required prior to commencing work i.e. a job offer. T. 25. Mr. Brian Murray testified consistently with Petitioner regarding the necessity of a drug test and passing the same before any job offer would be extended. T. 81, 97. Additionally Mr. Murray testified Petitioner was required to report to the job site before wages would be paid. T. 108.

For a contract to form there must be a meeting of the minds and mutual acceptance by both parties. "'To be valid, an acceptance must be objectively manifested, for otherwise no meeting of the minds would occur.'" Citing *Rosin v. First Bank,* 126 Ill. App. 3d 230 (1984), *Energy Erectors Ltd. v. The Industrial Commission*, 230 Ill. App. 3d 158, 162, 595 N.E.2d 641 (1992). Petitioner testified during his initial conversation with Mr. Murray, he advised Mr. Murray he did not want the job. T. 21. It logically follows Petitioner's acceptance of the job and the formation of an employment contract would occur when he presented himself to the job site. How else would there be a meeting of the minds. As the Court noted in *Energy Erectors Ltd.*, "[t]he respondent as offeror had no way of knowing that John had accepted the offer for employment until he showed up at the job site." *Id.* Given Petitioner's failure to present at the job site, the last act necessary for the formation of an employment contract did not occur. As such no employer/employee relationship exists.

Even assuming *arguendo* the last act necessary was the passing of the drug test, such act occurred after Petitioner's fall. Petitioner testified he could not recall if he was advised of the results of the drug test at the time of testing. T.26. Mr. Murray testified the results were sent via email or a call was made the same day. T. 82, 93. Mr. Murray testified he did not actively look for the results on January 26, 2015 given Petitioner's fall and his inability to report to work. T. 99. Mr. Murray testified he was aware of the negative test results the following day. T. 99. At best the employment contract was binding on January 26, 2015 when Mr. Murray received the test results by email and at worst the next day. In either case the employment contract was formed after Petitioner's fall.

Even assuming *arguendo* an employer/employee relationship existed at the time of Petitioner's fall, Petitioner failed to prove he sustained an accident which arose out of or in the course of his employment. Again as a general rule accidents which occur on an employee's commute to or from work are not compensable. *Illinois Bell Telephone Company v. The Industrial Commission*, 131 Ill. 2d 478, 483-4, 546 N.E.2d 603 (1989). The courts recognize two exceptions: 1) falls on parking lots owned, maintained, or controlled by an employer; and 2) an employee is required to be at a certain location in the performance of his job duties where he is exposed to a risk common to the general public but to a larger degree. *Id.* The first exception is not applicable. Petitioner fell while leaving the facility where the drug testing occurred which is not the Respondent's premises. T. 40. As for the second exception, it too is not applicable. "This court has held, however, that 'the mere fact that the duties take the employee to the place of the injury and that, but for the employment, [s]he would not have been there, is not, [*486] of itself, sufficient to give rise to the right to compensation.'" *Id.* at 485-68 quoting *Caterpillar*

Tractor Company v. The Industrial Commission, 129 Ill. 2d. 52, 62 (1989). Illinois is not a positional risk state. *Brady v. Louis Ruffolo & Sons Construction Company*, 143 Ill. 2d. 542, 578 N.E.2d 921 (1991).

The exception requires Petitioner to be in performance of his job duties. Petitioner is a union pipefitter whose first interaction with the Respondent was on January 26, 2015. T. 14-15, 55. A pipefitter as briefly defined by the area agreement is one who participates in "[t]he handling, setting, moving, fabricating, assembling, installation, maintenance, repair and service of all piping systems and their associated equipment used for the transfer of heat, fluids, solids, chemicals or gases." RX1, p.11. The agreement continues on to provide an exhaustive explanation of the duties of a pipefitter. RX1, p. 11-12. Petitioner's job duties as a pipefitter did not require his presence at the public area where he fell. Moreover, the facts fail to establish Petitioner was exposed to a risk greater than the general public. Petitioner was leaving a medical clinic when he slipped and fell on an icy sidewalk. The general public was exposed to the exact same risk.

Further the majority's reliance on *Bolingbrook Police Department* is misplaced. In *Bolingbrook Police Department v. The Illinois Workers' Compensation Commission*, 2015 IL App (3d) 130869WC, a police officer injured his lower back while lifting his duty bag at home. The court reasoned the officer as part of his employment duties was required to secure his duty bag whether it is at work or at home. As such lifting the duty bag was an employment risk which directly arose out of his employment. Further given the sensitive nature of a duty bag which contains live ammunition and other potentially dangerous equipment which could pose a hazard to public safety coupled with the claimant's belief he was required to keep his duty bag on his person, such injury occurred in the course of his employment. Neither the facts nor the holding is applicable to the present matter. Petitioner was a union pipefitter who fell on a public sidewalk on his commute to his job site, again assuming *arguendo* an employment contract exists.

Lastly assuming *arguendo* an employment contract exists, Petitioner is not a traveling employee. A traveling employee is one "whose employment duties require travel away from the work site. [citation omitted]." *Lee v. The Industrial Commission*, 167 Ill. 2d 77, 81, 656 N.E.2d 1084 (1995). As detailed above, Petitioner's job duties did not require his travel nor did his job duties require him to leave the job site. Petitioner is a pipefitter who was to be assigned to a job site in Chicago. He simply is not a traveling employee.

For the reasons set forth above, I conclude Petitioner is not entitled to benefits under the Act as no employer/employee relationship existed at the time of his fall. As such I would reverse the decision of the arbitrator. Accordingly, I dissent.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOFFMAN, MARK
Employee/Petitioner

Case# **15WC003170**
15WC015877

ADVANCE MECHANICAL
Employer/Respondent

17IWCC0298

On 12/9/2015, 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 0.53% 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:

0598 LUSAK AND COBB
JOHN E LUSAK
221 N LASALLE ST SUITE 1700
CHICAGO, IL 60601

1596 MEACHUM STARCK BOYLE & TRAFMAN
MICHAEL D SPINAZZOLA
225 W WASHINGTON ST SUITE 500
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mark Hoffman
Employee/Petitioner

v.

Advance Mechanical
Employer/Respondent

Case # 15 WC 3170

Consolidated cases: 15 WC 15877

17IWCC0298

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Arbitrator Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **October 27, 2015 and November 19, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, 1/26/2015, 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 established causation as to the need for the treatment provided by Dr. Rhode but did not establish causation as to any current condition of ill-being.

Petitioner's average weekly wage was $1,840.00.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner reasonable and necessary medical expenses in the amount of $2,800.19 (Orland Park Orthopaedics/Dr. Rhode), subject to the fee schedule. PX 1. The other claimed medical expenses are denied, for the reasons set forth in the attached decision.

Respondent shall pay Petitioner temporary total disability benefits in the amount of $1,226.67 per week from January 28, 2015 through May 17, 2015, a period of 15 5/7 weeks, pursuant to Section 8(b) of the Act.

For the reasons set forth in the attached decision, 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

12/9/15
Date

ICArbDec19(b)

DEC 9 - 2015

17IWCC0298

Mark Hoffman v. Advance Mechanical Systems, Inc.
15 WC 3170 and 15 WC 15877 (consolidated)

Procedural Note

Both of Petitioner's claims allege a work accident of January 26, 2015. The Arbitrator granted Respondent's motion to consolidate on October 27, 2015, the date of hearing.

Because the claims are duplicate filings, the Arbitrator issues only one decision.

Summary of Disputed Issues

The threshold issue is employment.

Petitioner, a union pipefitter, alleges he received a job offer from Respondent via telephone on Friday, January 23, 2015 and underwent safety training, signed a W2 and received a work assignment at Respondent's offices on the morning of Monday, January 26, 2015. Petitioner further alleges he sustained a compensable work accident when he fell later the same morning, after exiting a facility in Elk Grove Village where he underwent required drug testing and while embarking on his trip to the assigned Chicago jobsite.

Arbitrator's Findings of Fact

Petitioner testified he was working at a power plant (for a company other than Respondent) on Friday, January 23, 2015, when he received a voice mail message on his cell phone. Petitioner testified the message was from Bill Murray, Respondent's shop superintendent, who stated, "I have an offer for you – give me a call." Petitioner testified he promptly returned the call and spoke with Murray, who offered him a job and told him to come in on Monday morning. Petitioner testified he told Murray he did not want to leave his current job. Murray replied, "if you want a job, be there by 6:30 AM on Monday."

have also signed a form acknowledging he attended a safety meeting.

participants they had to undergo drug testing before going to the jobsite. Murray provided them with the address of the testing facility.

Petitioner testified he left Respondent's shop at about 8:00 AM on January 26, 2015. He went to the drug testing facility. Petitioner identified PX 3 as a document showing that the facility was Alexian Brothers in Elk Grove Village. At the facility, Petitioner provided his identification and a urine sample.

PX 3 is a Clinical References Laboratory "on-site custody and control/result form." PX 3 lists "Advance" as the employer and Petitioner as the donor. The stated reason for the test is "pre-employment." The time of the analysis is shown as 08:57 on January 26, 2015. The form reflects that the urine specimen was released to "onsite analysis" as opposed to "short term storage." The test results are described as "negative."

Petitioner testified his accident occurred shortly after he and a co-worker exited the drug testing facility. The weather at that time was very cold. There were large amounts of snow and ice on the ground.

Petitioner testified he was about eight to ten steps away from the facility when his feet flew out from underneath him. He fell backward, initially striking his head and then his neck and lower back. He acknowledged there were no cracks or defects in the sidewalk. He was wearing construction boots at the time of the accident. He had had to exercise caution and walk slowly when he entered the facility, earlier that morning, but he had managed to stay on his feet.

Petitioner testified he felt "electricity" in his head after he landed. He was wheeled back into the facility. Personnel at the facility took his vital signs and called an ambulance. Paramedics transported him to the Emergency Room at Alexian Brothers Medical Center.

Petitioner testified he gave a history of the accident at the Emergency Room. He told his providers he fell on snow and ice.

Petitioner did not offer the Emergency Room records into evidence.

Petitioner testified he tried to reach Murray via telephone while he was at the Emergency Room. He wanted to ask Murray for a ride back to the drug testing facility because his car was parked there. Murray did not respond. Petitioner testified he eventually took a taxi back to the facility and drove home from there. At that point, he felt disoriented. He had a lump on his head and was having trouble turning his head.

Petitioner testified he called Murray two days later. Murray identified himself and asked Petitioner whether he would be returning to work in a day or two. Petitioner said no and indicated he was going to see a doctor later that week.

Petitioner testified he saw Dr. Rhode after the accident. He obtained the doctor's name from the telephone book.

Dr. Rhode's records reflect that Petitioner saw the doctor's assistant, Mark Bordick, P.A. [hereafter "Bordick"], on Wednesday, January 28, 2015. Bordick's note reflects that Petitioner complained of pain in his head, neck and back secondary to a slip and fall occurring two days earlier. Bordick noted that Petitioner reported slipping on a sidewalk and striking his head, neck and back after undergoing a "new employee screening" and a drug test. On initial neck examination, Bordick noted a limited active range of motion and negative Spurling's testing. On initial back examination, Bordick noted pain over the paraspinal muscles, a limited active range of motion and negative bilateral straight leg raising. Bordick noted that Petitioner provided reports concerning the head and neck CT scans he had undergone in the hospital. According to Bordick, the head CT showed no significant acute findings and the neck CT showed no fracture and a mild dextroscoliosis.

Bordick prescribed Flexeril and Norco. He took Petitioner off work and directed him to return in two days. PX 1.

Petitioner returned to Dr. Rhode's office on Friday, January 30, 2015 and again saw Bordick. Bordick noted a complaint of persistent daily headaches. His examination findings were unchanged. He recommended a course of physical therapy, ordered lumbar spine X-rays and directed Petitioner to remain off work. PX 1.

Petitioner underwent an initial physical therapy evaluation on February 3, 2015. The evaluating therapist noted complaints of non-radiating lower back pain, right worse than left, bilateral neck pain and associated headaches. He recommended that Petitioner attend therapy twice weekly for six weeks. PX 1.

Petitioner began attending therapy on a regular basis thereafter. PX 1.

Petitioner saw Dr. Rhode on February 20, 2015. The doctor noted improvement but indicated Petitioner expressed concern about an "indentation in his posterior skull where he impacted." He refilled Petitioner's medication and recommended he see his primary care physician "about the calcifications." PX 1.

Petitioner saw Dr. Rhode on March 9, 2015, with the doctor noting complaints referable to the head, neck, back and right lateral thigh. On lumbar spine examination, the doctor noted positive straight leg raising on the right. He prescribed Ultram and a lumbar spine MRI. PX 1.

The lumbar spine MRI, performed on March 11, 2015, showed a degenerative bulging disc and facet arthropathy at L3-L4, a degenerative bulging/protruding disc and facet degeneration at L4-L5 and a degenerative bulging disc with right foraminal protrusion accompanying marginal spurs and facet degeneration at L5-S1 with moderate right foraminal encroachment. PX 1.

On March 16, 2015, Dr. Rhode noted that Petitioner was still experiencing pain in his back, neck and right lateral thigh. On lumbar spine examination, he noted positive straight leg

raising on the right. After reviewing the MRI, he recommended an epidural injection and directed Petitioner to remain off work. PX 1.

On April 14, 2015, Dr. Rhode performed an epidurograph and a transforaminal lumbar epidural steroid injection on the right at L5-S1. PX 1.

Petitioner attended additional therapy sessions between April 21 and May 6, 2015. On May 6, 2015, the therapist indicated Petitioner remained symptomatic but was making "significant gains toward goals." PX 1.

On May 6, 2015, Bordick noted that Petitioner reported improvement of his leg pain following the injection but was still experiencing lateral back pain to the right. Bordick recommended that Petitioner continue therapy and remain off work. PX 1.

On May 15, 2015, Bordick noted that Petitioner had improved and wanted to return to work. He released Petitioner to full duty on a trial basis as of May 18, 2015. He recommended that Petitioner continue performing home exercises. PX 2.

Petitioner returned to Dr. Rhode on June 12, 2015. The doctor's note reflects that Petitioner returned to full duty "due to financial necessity." On cervical spine examination, the doctor noted pain over the bilateral paraspinous muscles and negative bilateral Spurling's testing. On lumbar spine examination, the doctor noted pain over the right lumbar paraspinal muscles and negative bilateral straight leg raising. He allowed Petitioner to continue full duty. PX 1.

Petitioner testified he eventually received three hours of pay for January 26, 2015. [PX 5 is a copy of a Respondent field payroll check stub dated March 19, 2015 reflecting a gross payment of $138.00 and a net payment of $118.87 for three hours worked. The hourly rate is described as $46.00. The pay period end date is designated as March 22, 2015.] Petitioner testified he never received any bills concerning his medical treatment. He directed his providers to send their bills to Liberty Mutual. He received no compensation other than the three hours of pay.

Petitioner testified he found the accident and its aftermath very difficult to deal with. He felt he had been mistreated after many years in the union. As of the hearing, he was "doing okay" and moving on with his life.

Petitioner testified his head, neck and lower back are now "fine." He is able to perform full duty.

Under cross-examination, Petitioner testified he spoke with Bill Beane, the business agent for his union, in late March or early April 2015. As of that point, he had not received any wages for January 26, 2015. The check he received for the three hours of pay was dated March 19, 2015. He has been a member of Local 597 for 21 years.

Petitioner could not recall the address or intersection of the jobsite that Murray directed him to on January 26, 2015. He did not work for Respondent on any other days. In May 2015, he began working for a different contractor, Chetny Mechanics. This contractor laid him off in August 2015. He applied for unemployment benefits on September 6, 2015. He did not claim any unemployment benefits from Respondent.

Petitioner testified he began working for his current employer, Hayes Mechanical, the Monday before the hearing.

Petitioner testified he has seen the collective bargaining agreement for Local 597. This agreement has been "around [his] family" for years. His father was a member of Local 597.

Petitioner acknowledged he never performed any installation work for Respondent. At the meeting held on the morning of January 26, 2015, Murray gave him a schedule indicating he would be working from 7 AM to 3:30 PM, Monday through Friday. On Tuesday, January 27, 2015, he called Respondent's shop and asked for Murray. He was put through to a woman. He did not call Respondent on Thursday, January 29, 2015. He had already spoken with Murray as of that date.

Petitioner testified he has not returned to Dr. Rhode. He reiterated that his head, neck and back are "fine."

On redirect, Petitioner testified that, on January 26, 2015, Murray gave him a piece of paper showing the address of the jobsite he was supposed to go to. He no longer has this piece of paper. When he talked with Murray on Wednesday, January 28th, Murray asked him if he was returning to work.

In addition to the exhibits previously discussed, Petitioner offered into evidence a two-page letter dated March 12, 2015 from the recording secretary of Local 597 to Petitioner's former counsel. In this letter, the recording secretary rendered an opinion as to whether Petitioner was Respondent's employee as of the accident. The Arbitrator sustained Respondent's hearsay and other objections to PX 2 and marked PX 2 as a rejected exhibit. Petitioner also offered into evidence a letter dated February 6, 2015 from Liberty Mutual Insurance Company to Petitioner (PX 4) referencing Petitioner's workers' compensation claim and advising Petitioner that his "employer" is participating in a Preferred Provider Program. The Arbitrator sustained Respondent's relevancy and hearsay objections to PX 4 and marked PX 4 as a rejected exhibit.

On the Request for Hearing form, Petitioner claimed bills from six medical providers. Of the enumerated bills, only the $2,800.19 bill from Dr. Rhode/Orland Park Orthopedics is in evidence. PX 1.

Bill Murray testified on behalf of Respondent. Murray testified he has worked for Respondent for 41 years. He has been a superintendent for the past 17 years. As a superintendent, he hires workers, runs the safety program and oversees labor at various jobsites. Before he became a superintendent, he worked as a foreman and general foreman. As a foreman, he ran smaller jobs.

Murray testified his job duties include hiring. He hires through the union hall and on his own. He has been a member of Local 597 for 41 years. Respondent faces a penalty if he fails to hire a certain percentage of employees through the union hall. He regularly transmits hiring and layoff paperwork to the union hall via E-mail.

Murray described Respondent as an HVAC contractor that works on commercial properties.

Murray testified he is familiar with a good portion of the collective bargaining agreement running between the union and contractors such as Respondent. He identified RX 1 as the area agreement dated June 1, 2015. He is familiar with the agreement that was in effect prior to June 1, 2015. He is not aware of there being any significant differences between the two agreements.

Murray testified that Respondent has a safety program. All Respondent employees are required to adhere to the safety rules of Respondent or the subcontractor, "whichever are more stringent." At a minimum, Respondent employees have to wear helmets at all times.

Murray testified that no Respondent hire can work until the results of his drug test are in. On some occasions, employees have attended a safety meeting and not gone to the drug testing facility. It is after an employee undergoes testing at the facility that he starts heading to the designated jobsite. Murray receives an employee's drug test results via E-mail from Karen in Respondent's accounting department. He usually receives these results before the worker show up at a jobsite. If a worker attends a safety meeting but does not undergo drug testing, he is not paid. Petitioner took the required drug test but did not show up at the jobsite. He first learned of Petitioner's test results the day after Petitioner's accident. He spoke with Petitioner on January 27 or 28, 2015. During that conversation, Petitioner told him he had fallen at the drug testing facility, that he did not like the physician at Alexian Brothers and that he was going to see a doctor on his own. He talked with Petitioner again a month or two later. He received a call from Bill Beane a month and a half or two after Petitioner's accident. After he spoke with Beane, he went to Respondent's accounting department and directed an employee to cut a paycheck for Petitioner. He knows the check was issued because, initially, it came back in the mail. The union called him and told him Petitioner did not receive it. He then called Petitioner, who provided a new address. He arranged for the check to be re-sent to this address.

Murray testified that, on some occasions, employees have shown up, taken the drug test and not started working due to lack of test results. Drug test results are sometimes

inconclusive. When he encounters an inconclusive result, he tells the worker he cannot start working absent definitive results.

Murray testified that the area agreement provides that a worker is entitled to "show up" time if he goes to a jobsite but cannot work for some reason, such as weather. The area agreement does not cover a situation in which a worker fails to make it to the jobsite for some reason.

Murray testified that, if a worker fails the drug test, he is not hired and not paid.

Murray testified that Petitioner was assigned to a jobsite at State and Chestnut in Chicago. In the Loop, work hours are generally 7 AM to 3:30 PM.

Murray testified that, on a normal workday, Petitioner would not have been required to go to Respondent's shop before going to a jobsite.

Under cross-examination, Murray identified PX 3 as a record from a medical facility called Advocate. He has sent employees to this facility.

Murray reiterated he did not receive Petitioner's drug test results on the day of the accident. He stated: "being that [Petitioner] fell, I wasn't looking for [the] results."

Murray acknowledged Petitioner's drug test results were negative.

Murray testified he reports employees' hours to Respondent's payroll department. Respondent ultimately paid Petitioner for three hours at the rate of $46/hour. He arranged for Petitioner to be paid because Bill Beane told him to pay Petitioner. Bill Beane is not his boss. Bill Beane told him to pay Petitioner because otherwise Respondent would have to "go before the [union] hall" and it was not worth doing this over three hours of pay.

Murray acknowledged giving Petitioner a helmet, safety glasses and a work assignment.

On redirect, Murray testified that a worker receives no pay if he does not show up at the jobsite.

Karen Heindl also testified on behalf of Respondent. Heindl testified she works as an accounting manager for Respondent. She oversees accounting, assists human resources with health and dental insurance issues and oversees drug testing paperwork. Respondent's superintendent sends potential employees for drug testing. She receives the test results via telephone and relays the results to the superintendent via telephone. Several days later, she receives a letter memorializing the results.

Heindl identified RX 3 as a log she maintains concerning Respondent's receipt of workers' drug test results. The log shows the worker's name, the date of testing, the results

and the invoice number. Petitioner's name appears on the log. She received a letter setting forth Petitioner's test results. She has never met Petitioner.

Under cross-examination, Heindl testified that PX 3 is not the letter she received concerning Petitioner's drug test results. She does not have the letter with her. The letter she received indicated that Petitioner's drug test results were negative. Most drug test results are immediate but, in Petitioner's case, she received a letter.

Heindl identified the check Respondent sent to Petitioner. Deductions were taken from Petitioner's pay. Respondent's accounting department generated the check. The check is a payroll check.

In addition to the exhibits previously discussed, Respondent offered into evidence, with no objection from Petitioner, a "Notice of Claim to Non-Chargeable Employer" sent to Respondent by the Department of Employment Security on September 11, 2015. The notice identifies Petitioner. It reflects that Petitioner "has filed a claim for unemployment insurance." The notice describes Petitioner's first and last days of work for Respondent as "unknown." It also describes the "reason for separation" as "unknown." It reflects $0 earnings for four different base period quarters in 2014 and 2015. The second page contains the following sentence: "this notice is being sent to you because the claimant worked for you during the past 18 months." RX 2.

After the Arbitrator rejected PX 2, Petitioner requested a continuance for the specific purpose of producing testimony from a representative of Local 597. Respondent objected to the motion. A discussion ensued as to the extent of the attorneys' pre-hearing communications, with Petitioner's counsel asserting he provided all of his exhibits to Respondent's counsel via hand delivery and Respondent's counsel indicating he did not receive PX 2. The Arbitrator ultimately overruled Respondent's objection and continued the hearing.

At the continued hearing, held on November 19, 2015, Petitioner's counsel did not call a union official, as he had previously indicated he planned to do. Instead, he offered into evidence a document entitled "Pipe Fitting Council of Greater Chicago Agreement and Declaration of Trust." PX 7. The Arbitrator sustained Respondent's hearsay and foundational objections to PX 7. The Arbitrator marked PX 7 as a rejected exhibit.

Arbitrator's Credibility Assessment

Petitioner's testimony concerning his initial interaction with Murray and the events preceding his accident was detailed and credible. Murray did not contradict that testimony. He readily acknowledged providing Petitioner with a hard hat and glasses and assigning Petitioner to a particular jobsite. While Petitioner did not recall the exact address of that jobsite, Murray did.

The Arbitrator had some problems with Murray's and Heindl's testimony concerning Respondent's receipt of Petitioner's drug test results. Murray claimed he did not learn of these results on the day the test was performed but also acknowledged he "wasn't looking for" the results, "being that [Petitioner] fell." Heindl claimed Respondent received the results via letter, rather than immediately, but did not produce the letter. Instead, she produced a "log" that she created. The log (RX 3) lists 43 HVAC employees, along with test dates and the manner in which Respondent purportedly received notice of the test results. 34 of the listed employees are described as having negative results. [Petitioner's negative results are not reflected.] The log reflects that, with respect to all 34 of those employees, including the 3 who underwent testing the same day Petitioner did, Respondent learned of the negative results via phone call. The Arbitrator questions the accuracy of the entry reflecting that Respondent learned of Petitioner's results solely via letter.

The Arbitrator relies on PX 3 rather than Murray or Heindl and concludes that Petitioner's negative test results were made available to Respondent on January 26, 2015. The "chain of custody" section of PX 3 reflects that Petitioner's urine sample was "released to on-site analysis" as opposed to "short-term storage." PX 3 also shows the time and date of the analysis to be 08:57 on January 26, 2015. It makes sense to the Arbitrator that the analysis was to be done immediately and that the results were to be transmitted as soon as available, given that Murray had already directed Petitioner to present to a particular jobsite after undergoing the testing.

Arbitrator's Conclusions of Law

<u>On January 26, 2015, was the relationship of the parties one of employer and employee?</u>

The Arbitrator finds that Petitioner was Respondent's employee at the time of his accident on January 26, 2015. Petitioner credibly testified that Murray, Respondent's superintendent, extended a job offer to him via telephone on January 23, 2015, and directed him to present to Respondent's offices the following Monday morning, which he did. Petitioner also credibly testified that, after he arrived, he and several other individuals participated in a meeting, conducted by Murray, and received safety equipment, including hard hats and glasses (bearing Respondent's name), from Murray. Petitioner further testified he received and signed a W2 form at that time and also received a piece of paper showing the address of the jobsite he was supposed to go to that day. Murray did not dispute any aspect of this testimony. In fact, he confirmed he gave Petitioner the address of a jobsite in Chicago.

Respondent asserts that its offer of employment to Petitioner was contingent on his passing a drug test and appearing at the jobsite. Petitioner did, in fact, pass the drug test but did not appear at the jobsite due to the accident.

The Arbitrator concludes that the parties entered into an employment relationship at the morning meeting on January 26, 2015 and that the activities Petitioner engaged in between the time he arrived at Respondent's offices that morning and the time of the accident were

incidental to his employment and in furtherance of Respondent's interests. See, e.g., Bolingbrook Police Department v. IWCC, 2015 IL App (3d) 130869 WC, citing Sears, Roebuck & Co. v. Industrial Commission, 79 Ill.2d 59, 71-72 (1980). Respondent's argument fails, in light of Petitioner's and Murray's testimony that Petitioner underwent training, received safety equipment bearing Respondent's name, signed a W2 form and received a specific job assignment before leaving Respondent's premises on the morning of January 26, 2015.

Did Petitioner sustain an accident on January 26, 2015 arising out of and in the course of his employment?

The Arbitrator has already found that Petitioner was Respondent's employee as of his January 26, 2015 accident. The Arbitrator further finds that Petitioner was a traveling employee at the time of his accident, since he was in the process of making a required trip from a drug testing facility to his assigned jobsite. In Kertis v. IWCC, 2013 Ill.App. LEXIS 410 (2nd Dist. 2013), the Appellate Court noted that "special rules" apply to traveling employees and that "the dispositive question" in determining the compensability of a traveling employee's claim is "whether the employee was injured while engaging in conduct that was reasonable and that might reasonably be anticipated or foreseen by the employer." The Arbitrator finds that Petitioner's conduct at the time of the accident was both reasonable and foreseeable. At the time of the accident, Petitioner was doing exactly what Murray had directed him to do. He was making his way from a medical facility in Elk Grove Village, where he had undergone Respondent-mandated drug testing, to his car, which he testified was parked at the facility, so that he could travel to his assigned jobsite in Chicago. It is not as if he was in the process of commuting from his home to Respondent's offices. He was traversing, or attempting to traverse, a sidewalk in wintry conditions when he lost his balance and fell. His conduct was reasonable and eminently foreseeable.

Based on the foregoing analysis, the Arbitrator finds that the accident of January 26, 2015 arose out of and in the course of Petitioner's employment.

Did Petitioner establish a causal connection between the accident of January 26, 2015 and any current condition of ill-being?

The Arbitrator finds that Petitioner established causation as to the need for the treatment he underwent at Orland Park Orthopaedics. Petitioner credibly testified he fell backward, striking his head, neck and back. Petitioner provided a consistent history of the accident to Dr. Rhode and his assistant. There is no evidence suggesting Petitioner had any problems with his head, neck or back before the accident.

The Arbitrator further finds that Petitioner failed to prove causation as to any current condition of ill-being. On direct examination, Petitioner readily, and rather emphatically, stated his head, neck and back are "fine" and he is able to perform full duty. He did not claim any current condition of ill-being.

What were Petitioner's earnings?

At the hearing, Petitioner claimed earnings of $93,103.92 and an average weekly wage of $1,790.46. Petitioner offered into evidence the paycheck he ultimately received from Respondent. This paycheck reflects gross earnings of $138.00 and an hourly rate of $46.00. [It is not clear how Petitioner arrived at $1,790.46 since, even if Petitioner relied on Murray's testimony and RX 1 to claim there were 40 hours in a work week, 40 hours multiplied by $46.00 equals $1,840.00] Respondent disputed this claim, arguing that Petitioner "had no earnings prior to the injury as he was not an employee." In its proposed decision, Respondent alternatively argued that Petitioner's average weekly wage is $138.00.

The Arbitrator, having already found that Petitioner was Respondent's employee as of his accident and that the activities he engaged in prior to the accident were incidental to his employment and of benefit to Respondent, finds Petitioner's average weekly wage to be $1,840.00. The Arbitrator arrives at this figure by incorporating Murray's testimony as to Petitioner's work schedule along with the "standard work week" and "standard work day" definitions set forth in Article IV of RX 1, and dividing $138.00 by .075 , with the former representing Petitioner's earnings before the accident and the latter representing the "weeks and parts thereof" Petitioner worked prior to the accident.

In calculating Petitioner's average weekly wage, the Arbitrator also notes that Respondent's own exhibit (RX 1), the area agreement, establishes that "no employer shall employ an employee for less than the rates established by negotiations through the Joint Arbitration Board nor under any terms and conditions less favorable to such Employee than are expressed in this Agreement."

Is Petitioner entitled to reasonable and necessary medical expenses?

As indicated above, Petitioner listed a number of bills on the Request for Hearing form but offered only one bill, that of Orland Park Orthopaedics/Dr. Rhode, into evidence. The Arbitrator has already found that Petitioner established causation as to the need for the treatment Dr. Rhode provided. The Arbitrator awards Petitioner the $2,800.19 bill from Orland Park Orthopaedics (PX 1), subject to the fee schedule.

Is Petitioner entitled to temporary total disability benefits?

At the hearing, Petitioner claimed he was temporarily totally disabled from January 26, 2015 (the date of accident) through May 18, 2015. Respondent claimed Petitioner was never its employee and is thus not entitled to any benefits. Arb Exh 1.

The Arbitrator has already found in Petitioner's favor on the issues of employment, accident and causation as to the treatment rendered by Dr. Rhode. Petitioner first sought treatment at Dr. Rhode's office on January 28, 2015, at which point the doctor's assistant took him off work and recommended treatment. Petitioner underwent therapy and an injection

thereafter. The records document gradual improvement. The doctor released Petitioner to full duty, at Petitioner's request, as of May 18, 2015.

Based on the foregoing, the Arbitrator finds that Petitioner was temporarily totally disabled from January 28, 2015 through May 17, 2015, a period of 15 5/7 weeks. The Arbitrator declines to award benefits from January 26, 2015 through January 27, 2015, as requested by Petitioner, because Petitioner did not submit his Emergency Room or any other records to support his claim of disability during this period. Having found Petitioner's average weekly wage to be $1,840.00, the Arbitrator awards temporary total disability benefits at the rate of $1,226.67 per week.

What is the nature and extent of the injury?

This is a post-amendatory case, since Petitioner's accident occurred after September 1, 2011. The Arbitrator would typically look to Section 8.1b of the Act for guidance in assessing permanency but, based on her previous causation finding and the state of the evidence, takes a different approach.

The Arbitrator has previously found that Petitioner failed to establish causation as to any current condition of ill-being, noting Petitioner's assertion that the body parts he injured in his fall (i.e., his head, neck and back) are "fine" and that he is able to perform full duty. When Petitioner last saw Dr. Rhode, in June 2015, the doctor noted some complaints of pain but described Spurling's and straight leg raise testing as negative. He released Petitioner from care and allowed him to continue full duty. Petitioner did not offer any medical records establishing permanent disability. Respondent, electing to rely on its other defenses, did not offer any impairment rating or Section 12 examination report.

Based on the foregoing, the Arbitrator awards no permanency benefits in this case.

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

Keith Wilson,
Petitioner,

vs. NO: 12WC 22640

City of Springfield,
Respondent.

17IWCC0299

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, 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 6, 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.

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

DATED: MAY 10 2017
o041117
MJB/jrc
052

Michael J. Brennan

Kevin W. Lamborn

17IWCC0299

DISSENT

I respectfully dissent from the finding that Petitioner failed to establish that he sustained his carpal tunnel condition in the course and scope of his employment with Respondent. In my view, the evidence shows that Petitioner's work was the primary factor causing his condition of ill-being. Failing that, the manifest weight of the evidence shows that, at the very least, Petitioner's work was an aggravating factor in the development of his condition. See *Sisbro v. Illinois Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003) (if a condition pre-existed a claimant's work, the claimant may recover under the Act by showing that his work aggravated or accelerated it).

By adopting the arbitrator's decision, the majority provides three bases for its finding that Petitioner's work did not aggravate or accelerate his carpal tunnel condition: (1) the testimony of Brian Lawson, Petitioner's supervisor, that Petitioner did not engage in repetitive physical work after he became a supervisor; (2) the persuasiveness of Dr. Rotman's opinion that Petitioner's work could not have been an aggravating factor in Petitioner's condition; and (3) the lack of persuasiveness in Dr. Greatting's opinion that Petitioner's work was an aggravating factor. I address each basis in turn.

Lawson's Testimony

I begin with Lawson's testimony, which the majority relies on to support the remaining two bases for its ruling. As the majority recounts, Lawson did testify that Petitioner was not expected to use welding tools or take an active role in physical work, and even that his doing so may have offended union boundaries. However, this testimony described only the abstract job position Petitioner held. When pressed on cross-examination, Lawson allowed that "for the majority" of the time, he was not out at work sites with Petitioner, and he agreed that he did not monitor Petitioner's minute-to-minute actions. Thus, Lawson's testimony does nothing to contradict Petitioner's more detailed account of his job activities, which in Petitioner's description included periodic but regular use of tools to help or instruct front line workers. Petitioner also recalled that he took this hands-on approach to follow guidance from his prior supervisor, and he explained why the approach was required of someone in his position. Petitioner's testimony is consistent with the job description in effect for his supervisory position at the time he took it. Until July 2012, that job description included "significant" amounts of repetitive motions and "moderate" grasping and lifting. Based on Petitioner's testimony, which was not effectively rebutted and was supported by the job description, I would find that Petitioner did engage in the repetitive physical activities he described as part of his supervisory role.

Dr. Rotman's Opinion

The majority cites the second basis for its finding, Dr. Rotman's opinion, for three points. First, the majority notes Dr. Rotman's statement that Petitioner's supervisory duties were insufficient to cause his condition. For the reasons stated above, that statement is not tenable based on the evidence presented.

Second, the majority notes Dr. Rotman's observation that Petitioner produced no medical records indicating that he had hand problems prior to 2012. Although Petitioner produced no such records, he did testify that he had experienced the problems for several years. To discount this testimony, which is not otherwise effectively refuted, is to penalize Petitioner for persisting through his pain to continue his work, and indeed to use his dedication as a reason to question his credibility. The Illinois Supreme Court has emphasized that repetitive-stress injury cases require "fairness and flexibility" to ensure a fair result. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 71 (2006). " 'An employee who continues to work on a regular basis despite his own progressive ill-being should not be punished merely for trying to perform his duties without complaint. On the other hand, it is not this State's policy to encourage disabled workers to silently push themselves to the point of medical collapse before giving the employer notice of an injury.' " *Durand*, 224 Ill 2d at 71-72 (quoting *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 49 (1989)). Petitioner here endured what was likely graduating pain, but he did not approach the level of medical collapse that would render his perseverance unreasonable. Holding his perseverance against him upsets the balance our Supreme Court urges in these cases, and it gives too little heed to the Supreme Court's recognition of claimants' often delayed reporting of repetitive stress injuries.

Third, the majority notes Dr. Rotman's observation that Petitioner's EMG/NCV findings were insufficiently severe to indicate a longstanding carpal tunnel condition. However, even if I were to discount the contrary evidence and accept that Petitioner's condition was recently onset, that conclusion does nothing to belie the possibility that Petitioner's work—before or after he became a supervisor—aggravated or accelerated his condition. Further, Dr. Rotman's conclusion is directly contradicted by Dr. Greatting's opinions, which enjoy evidentiary support.

Dr. Greatting's Opinion

This raises the third basis for the majority's finding: its discounting the opinion of Dr. Greatting. The majority states that Dr. Greatting "bas[ed] his opinion on the activities Petitioner had ceased doing as of May 1, 2009," the date he began working as a supervisor and that Dr. Greatting failed to explain how Petitioner's condition had worsened "while he was a supervisor and not performing those activities at all or on any kind of a regular basis." I explain above that the manifest weight of the evidence establishes that Petitioner did, in fact, engage in repetitive physical activity as a supervisor, and that point alone refutes the impeachment of Dr. Geatting's opinion. Further, as explained above with respect to Dr. Rotman's opinion, this observation does not belie the possibility that Petitioner's pre-2009 welding work accelerated his condition.

Indeed, there is strong evidence in the record that Petitioner's work either before or after 2009 at the very least accelerated or aggravated his carpal tunnel condition. Petitioner testified regarding the extensive repetitive physical tasks he performed as a welder. His testimony illustrates that work rather plainly: in his telling, he worked for two decades using, among other tools, "slug wrenches *** to break the bolts with," "presses *** to press bearings," "sledgehammer[s] to beat" bolts off of mills, hand-pounding impact guns to remove bolts, vibrating "arm twisters," "rattlers," and "hand held jackhammers" that "make[] your teeth vibrate." As Dr. Greatting observed, aside from Petitioner's work there are no other significant risk factors for his developing carpal tunnel disease. Petitioner also testified that his hand

symptoms became more acute when he used tools as a supervisor; that testimony creates a strong link between his work activities and his condition of ill-being. Finally, and persuasively, Petitioner offered medical records containing Dr. Greatting's opinion that his "work activities over an extended period of time either caused him to develop carpal tunnel syndrome or were a significant factor that aggravated or exacerbated his symptoms." Dr. Greatting held this opinion even after learning of Dr. Rotman's evaluation.

For the above reasons, I would reverse the arbitrator's decision and find that the Petitioner developed a repetitive stress injury as a result of his employment with Respondent.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILSON, KEITH
Employee/Petitioner

Case# **12WC022640**

CITY OF SPRINGFIELD
Employer/Respondent

17IWCC0299

On 5/6/2016, 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 0.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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 FIFTH
SPRINGFIELD, IL 62703

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
PO BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Keith Wilson
Employee/Petitioner

v.

City of Springfield
Employer/Respondent

Case # 12 WC 22640

Consolidated cases: N/A

17IWCC0299

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **3/23/2016**. 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 **4/04/12**, 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.

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

In the year preceding the alleged date of injury, Petitioner earned $**86,090.68**; the average weekly wage was $**1,655.59**.

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

ORDER

The claim for benefits is denied.

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

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

Edward Lee
Signature of Arbitrator

5/3/16
Date

ICArbDec p2

MAY 6 - 2016

FINDINGS OF FACT

As of the date of arbitration, Petitioner had been retired for three and one-half years. Prior to that retirement, he had worked for Respondent for 33 years, 3 months and 3 days. Petitioner thought that he began with Respondent in January of 1980 in an apprenticeship. After another two year apprenticeship, he became a certified welder, a title which he held until he became a supervisor at the power plant. He was a certified welder for about 22 years. Petitioner testified regarding photographs in Petitioner's Exhibit 7 going back to the time when he was a certified welder. These photographs included a look at what his toolbox was like. There were photographs of larger tools used in his job. On page 11 there was a photograph of an impact gun. There was also a photograph of electric impacts. Photographs were taken of hand held jackhammers. There were many photographs of other tools including grinders and a rattler. Petitioner described the use of the various tools and also explained with regard to some of the tools what he felt in his hands when using those tools. Petitioner also described what he would do with regard to welding in certain areas. He noted a weld could take two hours or up to two days.

As a certified welder, Petitioner indicated his typical work day was 7:00 a.m. to 3:30 p.m. He noted that there was a lot of overtime, especially during outages. They could average from 10 to 12 hours five days a week. Petitioner indicated that as a certified welder he would use the tools that he described about six hours a day. Petitioner indicated that after he became a supervisor, his duties changed. Petitioner agreed that he was made the maintenance supervisor on a temporary basis because of an accident involving someone else. He agreed that he would have been a temporary maintenance supervisor for about three and a half months before he was officially awarded the job in August of 2009. He also agreed that he retired from the job as a maintenance supervisor at the end of November in 2012.

With regard to his job change, Petitioner indicated that he went from working on a lot of the stuff to supervising the crews that went out and did the work. He indicated his job was getting paperwork ready, assigning crews to specific areas where they were needed and answering questions or showing his crew how to do something. Petitioner thought he had 12 people he was supervising. They would be divided up into two or three man crews. He also might have apprentices involved from time to time. He could have anywhere from four to six crews working at a time. Petitioner indicated that once he assigned the crews out, he would take his paperwork and drop it at the Dallman plant. He would then head out on his rounds to check on each crew. He indicated that he would go anywhere he had to in the plant between 7:45 and 9:30. If the crew was on a critical job, he would be checking on them six to eight times a day. If it was just a regular job, he would check three times a day. Petitioner indicated there was a meeting at 2:15 p.m. every day, at which time he would need to explain where his crews were and what they were doing. Petitioner noted that in checking on the crews, he would be walking through the plant, going upstairs and downstairs. He noted that sometimes he would be going up ladders. Petitioner testified that as a supervisor, he would help the guys do their jobs. He indicated that he still did manual labor as a supervisor including climbing and crawling to any job. He also mentioned teaching welding. Petitioner indicated that it is not a good supervisor unless you teach them to do things and help them out. Petitioner agreed that the grinding, welding, jackhammering and cleaning the headers on the nozzles were activities engaged in on a regular basis when he was a certified welder. With regard to those activities, he indicated he would show his crew how to do certain things after he became a supervisor.

Petitioner indicated that if somebody was having problems with their work, he would try to show them the better way. He noted that the only way to have a good apprentice is to teach them and show them what to do. Petitioner indicated that his crew would show the apprentices, but if they were back getting something else, he would show the apprentices. Petitioner indicated that he was always teaching. Petitioner estimated that using tools as a supervisor was "not-an hour to 30 minutes." Petitioner indicated that it was hard to give up the tools as a supervisor and he would help the guys get stuff unbolted and help them out. He thought it was constant that

he spent the day climbing up and down ladders and scaffolding and stairs, maybe 70% of the day. Petitioner thought he might spend 30 minutes crawling on his hands and knees during a day. Petitioner noted that his wrists were really hurting when he was down on them. As a supervisor, he thought he might spend 30 minutes in a day using wrenches. He indicated 30 minutes to an hour would be spent typing. He noted he was out in the plant more than anything. Petitioner noted that once he became a supervisor, his hands felt about the same as they had when he was a welder. Specifically, Petitioner noted pain in the wrist and numbness. He noted the hands falling asleep while driving. He complained of aching for many years.

The first date of medical care in the medical records is a visit to a physician's assistant, Robert Whitman, on 3/15/12 (PX1). Petitioner testified that he actually went to see the physician's assistant because of his knees. He also mentioned his wrists, and Whitman referred Petitioner to Dr. Fortin. Petitioner indicated that Dr. Fortin told him he had carpal tunnel syndrome. Dr. Fortin performed EMG/NCV studies on 3/27/12 and noted findings consistent with bilateral median neuropathies at both wrists. The doctor noted that Petitioner's symptoms were consistent with bilateral carpal tunnel (PX2). Petitioner returned to the physician's assistant and was referred to Dr. Greatting. Dr. Greatting performed a right carpal tunnel release on 9/04/12 and a left carpal tunnel release on 10/10/12. Petitioner was released to return to regular duty work without restrictions on 11/08/12. There was a follow up visit with Dr. Greatting on 12/10/12. At that time, Petitioner was very happy with the results of the surgeries. Numbness in both hands was resolved. Petitioner told the doctor that his strength was good. Dr. Greatting indicated that Petitioner had good strength of his abductor hallucis brevis bilaterally. The doctor felt Petitioner was at maximum medical improvement and was released from care at that time. The doctor noted Petitioner would be seen back on an as needed basis (PX3). There is no indication that Petitioner has sought any further medical care with regard to bilateral carpal tunnel problems.

Petitioner was first seen by Dr. Greatting on 5/02/12. Petitioner reported numbness in both hands for greater than three years. He reported numbness and tingling during the day with driving, reading, typing on the computer, and climbing. In the past, when he did a lot of grinding, welding and using jackhammers at work, he would note numbness and tingling. He also reported symptoms cleaning multiple headers or nozzles. Petitioner indicated to Dr. Greatting that he did not do as much activity involving grinders, welding and jackhammers since he has been a supervisor. He noted that when he does do some welding, he will get symptoms. Dr. Greatting felt that the work activities of frequent welding and use of grinders and jackhammers has caused Petitioner to develop bilateral carpal tunnel syndrome. He identified no other risk factors (PX3).

Dr. Rotman evaluated Petitioner on behalf of Respondent on 7/09/12. By way of a history, Petitioner told Dr. Rotman that prior to becoming a supervisor three years before, he did a lot of hand-intensive work, including grinding, welding and using jackhammers. He advised the doctor that he did not do a whole lot of jackhammering or welding as a supervisor, but occasionally taught others how to grind. Petitioner advised Dr. Rotman that he had had symptoms for 10 years, but that it was only within the last year that the symptoms were bad enough that he sought treatment. Dr. Rotman diagnosed bilateral carpal tunnel. He indicated risk factors would be Petitioner's age and his weight being in the obese category. With regard to the EMG/NCV results, the doctor noted that the distal motor latency on the right and left were pretty similar. He indicated it would be just mild to moderate carpal tunnel. Dr. Rotman felt that the carpal tunnel was not too bad, being more on the mild side. The doctor stated that if Petitioner was having carpal tunnel for 10 years, he would expect a worse number. On the other hand, if he is only having symptoms over the last year, then the numbers he did have would be expected. Dr. Rotman indicated that the numbers did not correlate with symptoms for 10 years. Dr. Rotman indicated it was impossible to say that Petitioner's work activities were an aggravating factor for his bilateral carpal tunnel. He noted that he had been working in a supervisory position for three years. That type of work would not be an aggravating factor for an idiopathic carpal tunnel. He indicated there was no medical documentation of symptoms prior to that to support that he had carpal tunnel back before he was a supervisor.

Additionally, the nerve studies do not support it. The doctor further indicated that the occasional use of tools in teaching activities would not be an aggravating factor. He noted that it was not being done on a repetitive basis. The doctor also testified that repetition without high force is not a risk factor.

Petitioner testified regarding a job description which was dated June 2, 1993 (PX6). He disagreed with some of the percentages with respect to how he would spend his day. There was also a job description for a maintenance supervisor dated 7/06/12 (RX2). Both the 1993 job description and the 2012 job description note Petitioner's job to be light work, exerting up to 20 pounds of force occasionally. Both job descriptions have a section indicating equipment, aids and tools. Neither suggests any of the duties that Petitioner would have done as a certified welder. The 2012 job description shows no percentage of the time involved with repetitive motions.

Brian Lawson testified as the superintendent of maintenance at the power plant for the last eight years and the supervisor for Petitioner when he was a maintenance supervisor. He noted he was familiar with what Petitioner's job duties were starting about May 1, 2009. He noted that with the supervisors, their main function is to get the crews and work orders aligned, assigning the work to the different crews. The supervisor is to make sure that the crews are following procedures including safety. It is his job to get them out on the floor and get them working and to follow the jobs to make sure the priority jobs were getting done. Lawson testified that he did not consider Petitioner to be a working supervisor. He indicated there are no working supervisors at the plant. He further indicated that there was no expectation that any supervisor would use tools or run machinery. The people he was supervising would do those things. Lawson indicated that all non-union personnel are not allowed to use tools to perform the functions of the jobs. He noted that there would be grievances if a non-union person was using tools. In the 26 years he had been there, he noted that it was a very jurisdictional issue with unions and non-unions about using tools. The activities reported on the Petitioner's accident report were what Petitioner did when he was with the union. He did not do those activities when he became a maintenance supervisor about 5/01/09. That would be through the time he retired in 2012. Petitioner did not do a significant amount of repetitive motion activities in his three and a half years as a maintenance supervisor. Lawson felt that Petitioner probably did do some repetitive activities based upon a definition of repetitive motion. He mentioned grabbing a piece of paper and getting out of a chair and walking to the different areas so that some of it could be defined as repetitive. Lawson indicated that all line supervisors are not to use tools.

CONCLUSION

With regard 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 concludes as follows:

This is a repetitive trauma claim wherein the Petitioner's work activities changed significantly on or about May 1, 2009. At that time, Petitioner became a maintenance supervisor. Petitioner testified that his duties changed as of becoming a supervisor. He went from working on a lot of stuff to supervising the crews who did the work. Petitioner's testimony was that he would supervise on a daily basis anywhere between four and six crews. On critical jobs, he would be checking on a crew six to eight times a day. On a regular job, he would check in on them three times a day. He noted a meeting at 2:15 p.m. every day at which he would explain what his crews were doing and where they were. Petitioner indicated that he spent 70% of his day or maybe more out in the plant supervising. The Arbitrator notes that Petitioner's testimony regarding any work with tools after he became a supervisor was limited to teaching or showing his crew how to do something. This was a very small part of what he was doing on a daily basis. His supervisor, Brian Lawson, testified that Petitioner did not do a significant amount of repetitive motion activities when he was a maintenance supervisor. The activities listed on the accident report were done by Petitioner when he was in the union and not after he became a maintenance

supervisor around 5/01/09. Brian Lawson specifically testified that non-union personnel are not allowed to use tools to perform jobs.

Although Petitioner testified that his condition remained the same after he became a supervisor, the Arbitrator notes that Petitioner told the physician's assistant, Robert Whitman, Dr. Fortin, and Dr. Rotman that his condition had recently become worse. Dr. Rotman understood that to be within the last year. Dr. Rotman testified that Petitioner's activities as a supervisor were not sufficient to aggravate the bilateral carpal tunnel. The doctor indicated that if there were some proof in medical records that Petitioner had complained of problems when he had been a certified welder, the doctor would feel that there was an aggravation. The Arbitrator notes there is no medical evidence at all prior to the date Petitioner became a maintenance supervisor. In fact, the medical evidence here does not start until 2012. With regard to Dr. Greatting's comments on causation, the Arbitrator notes that the doctor was basing his opinion on the activities Petitioner had ceased doing as of May 1, 2009. There was no explanation as to how Petitioner's condition had worsened, causing him to seek medical attention, while he was a supervisor and not performing those activities at all or on any kind of regular basis. The Arbitrator finally notes the testimony of Dr. Rotman with regard to the EMG/NCV findings being suggestive of a recent onset of carpal tunnel.

Based upon the evidence in the record, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he sustained repetitive trauma injuries causing bilateral carpal tunnel syndrome in the course and scope of his employment with Respondent. Therefore, the claim for compensation is denied.

The Arbitrator would note that the other issues in this case are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Don Ott,

Petitioner,

vs. NO: 12 WC 37400

Alliance Fire Protection, Inc.,

17IWCC0300

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 4, 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.

17IWCC0300

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 10 2017
TJT:yl
o 5/2/17
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

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

OTT, DON
Employee/Petitioner

Case# **12WC037400**

ALLIANCE FIRE PROTECTION
Employer/Respondent

17IWCC0300

On 2/4/2016, 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 0.46% 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:

0391 HEALY SCANLON LAW FIRM
KEVIN VEUGELER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
GUY N MARAS
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

17IWCC0300

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)

DON OTT
Employee/Petitioner

v.

ALLIANCE FIRE PROTECTION
Employer/Respondent

Case # 12 WC 37400

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **December 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 _____

17IWCC0300

FINDINGS

On the date of accident, **November 1, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$79,680.00**; the average weekly wage was **$1,992.00**.

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

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

ORDER

Respondent shall pay Petitioner $1,902.000 for the reasonable and necessary medical services provided by Dr. Guido Marra as delineated in Petitioner's Exhibit 5, pursuant to §8(a) and §8.2 of the Act.

Respondent shall authorize and pay for all reasonable and necessary medical treatment as recommended by Dr. Marra, i.e. all reasonable and necessary prospective medical services related to the surgery on Petitioner's left shoulder and right elbow and all necessary rehabilitative treatment needed thereafter, as provided in Section 8(a) of the Act.

Penalties or attorney's fees are not awarded pursuant to the Act.

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

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

17IWCC0300

Findings of Fact

The disputed issues in this matter are: 1) causal connection, 2) medical bills, 3) prospective medical care, 4) penalties, and 5) attorney's fees. *See,* AX1.

Petitioner's testimony

Don Ott, (the "petitioner") testified that he was employed as a sprinkler fitter with Alliance Fire Protection (the "respondent"), for seven years prior to November 2011. Petitioner tested sprinklers, used ladders, hand tools, drills, threading machines and chain falls to install valves, pipes and fire pumps in overhead fire protection systems.

Petitioner also performed pump tests, inspections and repaired faulty systems as part of his duties with Alliance Fire Protection. Petitioner testified that the equipment used to install the fire protection systems weighed from a few pounds to over 100 pounds. In addition, the materials that were installed also weighed from a few pounds to several 100 pounds. Petitioner's testimony was confirmed by the job description received into evidence. PX7.

Petitioner is right-hand dominant and prior to November 1, 2011, he did not have any problems with either shoulder, nor had he received any previous medical treatment to them. Similarly, Petitioner reported that he never had prior problems with or treatment to his right elbow.

On November 1, 2011, Petitioner was performing a pump test with a coworker, Rick Krosher, at a high-rise building in downtown Chicago. While attempting to release a stuck valve by pulling on a pipe wrench, Petitioner injured his left shoulder. Petitioner testified he heard a pop in his left shoulder and felt immediate pain while pulling on a wrench. Petitioner testified that he took over-the-counter medication at the job site and completed the pump test, with the aid of the building engineer. After completing the test, he notified his employer of the accident and his injury and was directed to go to Little Company of Mary Hospital Urgent Care.

On November 1, 2011, Petitioner was evaluated at Little Company of Mary Hospital, complaining of sharp shooting pain in the left shoulder that occurred while trying to loosen a valve on big machinery. It was noted that Petitioner reported hearing a popping noise in his left shoulder. Petitioner was prescribed medication and taken off work. Petitioner testified that when he returned to work performing pump tests, he was working with an apprentice helper, who performed all of the physical tasks. PX1.

Petitioner's first IME

On November 7, 2011, Respondent sent Petitioner to Dr. Mark Levin, for a §12 evaluation. Dr. Levin performed an examination of Petitioner's left shoulder and ordered an MRI. Dr. Levin's notes from that visit indicate that while using a 24 inch wrench, Petitioner had pain in his left shoulder. PX2.

Medical records received into evidence reflect that Petitioner underwent an MRI on November 7, 2011 that revealed an acromion separation along with edema around the acromion. The radiologist diagnosed a separated shoulder involving the acromion joint. PX2.

Petitioner returned to Dr. Levin as instructed on November 8, 2011, to discuss the results of the MRI examination. Dr. Levin diagnosed an aggravation of underlying acromion joint degeneration and prescribed a cortisone injection as well as work restrictions of light duty below the shoulder and no overhead work, for the following two (2) weeks. PX2.

Petitioner returned to Dr. Levin as instructed on November 22, 2011. Dr. Levin's examination was positive for left shoulder impingement. At that time, a cortisone injection was performed and Dr. Levin instructed Petitioner to continue on light duty. One week later, on November 29, 2011, Dr. Levin again recommended Petitioner continued light duty work.

Petitioner testified he continued working for Alliance Fire Protection. In his regular job, i.e., performing pump tests and inspections. Petitioner explained that due to pain and limitations in his left shoulder, he began turning valves and instruments with his right arm. As a result, Petitioner began to feel pain in the right elbow.

On December 13, 2011, Petitioner returned to Dr. Levin complaining of pain in his right elbow due to overuse while doing inspections for Alliance Fire Protection. Dr. Levin diagnosed Petitioner with right elbow tendonitis and prescribed a Medrol dose pack and instructed Petitioner to continue on light duty. PX2.

Petitioner returned to Dr. Levin on January 10, 2012, complaining of increased left shoulder acromion joint pain, while working. Dr. Levin prescribed a regimen of physical therapy and instructed Petitioner to continue with restricted duty of no overhead work. Petitioner began physical therapy on February 6, 2012, at AthletiCo Physical Therapy. PX3.

Petitioner testified that Respondent was unable to accommodate his light duty restrictions and instead assigned him his regular tasks. Petitioner testified that his regular duties caused continued pain in his left shoulder and right elbow, prompting Petitioner to leave Alliance Fire Protection in February 2012 to work for Affordable Fire Protection, doing sales work. Petitioner explained he was still employed as a sprinkler fitter but worked in the office and was not required to go into the field performing installation, service or testing of sprinkler systems.

Petitioner returned to Dr. Levin on February 7, 2012, indicating that despite switching jobs and doing only sales work for Affordable Fire Protection, he continued to hear a click in his left shoulder. Dr. Levin prescribed a second cortisone injection of the left shoulder and instructed Petitioner to continue with physical therapy. PX2.

Petitioner returned to Dr. Levin at the conclusion of physical therapy, on March 12, 2012. At that visit, Petitioner continued to complain of increased pain with activity and Dr. Levin discussed surgical intervention. Dr. Levin prescribed medication, returned Petitioner to work full duty and instructed Petitioner that if there was no improvement, to return to his office.

Petitioner testified that the pain in his left shoulder continued, prompting him to return to see Dr. Levin on May 8, 2012. Dr. Levin's notes from May 8, 2012 indicated that Petitioner continued to complain of left shoulder pain and indicated that he continued to hear a clicking noise in his left shoulder. Dr. Levin noted that Petitioner wanted to hold off on surgery until absolute necessary and Dr. Levin prescribed a third cortisone shot for the left shoulder.

On July 10, 2012, Petitioner returned to Dr. Levin complaining of left shoulder pain while working, indicating that the effects of the previous cortisone injection had worn off. At that time, Dr. Levin diagnosed Petitioner with chronic acromion joint pain and again discussed an open distal clavicle resection of the left shoulder. Dr. Levin's notes indicated that Petitioner could not have surgery because of medical issues regarding his wife. Petitioner testified he deferred surgery because during this period, his wife was undergoing a series of back surgeries and Petitioner was assisting in her recovery. PX2.

On August 8, 2012, Petitioner was evaluated by a physician of his own choice, Dr. Guido Marra, who noted a history of left shoulder pain as a result of pulling on a wrench. Dr. Marra's examination was positive for impingement of the left shoulder. He reviewed the previous MRI film, diagnosed Petitioner with impingement of the left acromion joint and agreed with Dr. Levin's surgical recommendation. PX4.

Petitioner's second IME

On August 16, 2012 Petitioner was sent by Respondent to a second §12 examiner, Dr. Troy Karlsson.

On August 21, 2012, Petitioner returned to Dr. Levin complaining of acromion joint pain and Dr. Levin administered an additional cortisone injection and noted that Petitioner wanted to delay having surgery.

On October 16, 2012, Petitioner again returned to Dr. Levin complaining of acromion joint pain and Dr. Levin again recommended surgical intervention. PX2.

Petitioner was next seen by Dr. Marra on September 5, 2013, who performed another cortisone injection, as well as prescribed a right elbow brace. PX6, p. 9.

On September 11, 2014, Petitioner returned to Dr. Marra complaining of right elbow pain. Petitioner testified that his elbow pain had never resolved since the time it was first evaluated by Dr. Levin in

December 2011. Dr. Marra noted that Petitioner's wife had a series of surgeries accounting for the gap in visits. Dr. Marra concurred with Dr. Levin and also diagnosed Petitioner with lateral epicondylitis and prescribed an MRI of the right elbow. PX4.

On September 25, 2014, Petitioner returned to Dr. Marra. Dr. Marra's notes from that visit indicated he reviewed the results of the MRI that revealed a lateral tendon tear. Dr. Marra noted that Petitioner continued to have pain in his right elbow with activity and that his job duties aggravated his symptoms. Dr. Marra performed a cortisone injection and indicated that if the symptoms persist that the Petitioner would need an open surgical repair. PX4.

Petitioner testified that he left Affordable Fire Protection and began working at Ahern Fire Protection in November of 2014. His duties with Ahern did not require installing or repairing overhead fire protection system, only performing pump tests.

Petitioner's third IME

On December 1, 2014, Dr. Troy Karlsson performed a second §12 examination on Petitioner.

Petitioner returned to Dr. Marra on March 12, 2015. Dr. Marra noted that the Petitioner continued complaining of right elbow and prescribed an additional cortisone injection in the right elbow, indicating that Worker's Compensation failed to approve the recommended surgery. PX4.

Petitioner returned to Dr. Marra on August 13, 2015. At that visit, Dr. Marra performed an additional cortisone injection and remarked that Petitioner had continued pain in the right elbow and was awaiting approval for left elbow surgery.

Petitioner testified that his left shoulder pain has not improved since the date of the accident and he continues to have pain while doing any type of activity and he intends to proceed with the recommended surgical repairs of both the left shoulder and right elbow.

Deposition of Dr. Guido Marra dated October 16, 2015

Petitioner presented the testimony of Dr. Guido Marra, a board-certified orthopedic surgeon. Dr. Marra confirmed that Petitioner has left shoulder impingement syndrome, with acromion joint pain. Dr. Marra concurred with the surgical recommendation of Dr. Levin to repair the left acromion joint. Dr. Marra also confirmed that Petitioner's work activities, of pulling on a wrench on November 1, 2011, caused his injury and the need for subsequent surgery.

Dr. Marra also testified concerning the care and treatment that was rendered for Petitioner's right elbow. Specifically, Dr. Marra prescribed a brace for Petitioner's right elbow in September of 2013, as well as ordered an MRI that demonstrated the tear of the extensor tendon. Dr. Marra diagnosed

lateral epicondylitis of the right elbow and recommended cortisone treatment and surgery. PX6, pp. 4-37.
Dr. Marra confirmed that Petitioner's right elbow injury was the same injury that was originally was diagnosed by the Dr. Levin in December 2011. Dr. Marra noted that Petitioner's continued work activities as a sprinkler fitter after the November 1, 2011 left shoulder injury, contributed to his right epicondylitis.

Deposition of Dr. Troy Karlsson, dated May 4, 2015
Respondent presented the testimony of Dr. Troy Karlsson. Dr. Karlsson opined that Petitioner suffered a temporary aggravation of a pre-existing degenerative arthritic condition to his left shoulder that resolved as of November 22, 2011, at the time of Dr. Levin performed a cortisone injection. Dr. Karlsson disagreed with Respondent's original §12 examiner, Dr. Levin, that Petitioner needed to be placed on restricted duty after that initial injection. RX1, pp. 19-20.

With regards to the right elbow, Dr. Karlsson testified that the right epicondylitis was not related to overuse, as Petitioner did not complain of any symptoms, during his initial visit with Dr. Levin on November 7, 2011. RX1, pp. 29-30. Dr. Karlsson concurred with the surgical recommendations of Drs. Levin and Marra for both the left shoulder and right elbow. RX1, p. 53.

Conclusions of Law

F. Is the Petitioner's present condition of ill-being causally related to the injury?
A claimant has the burden of proving, by a preponderance of the evidence, all of the elements of her claim. It is the function of the Commission to judge the credibility of the witnesses and resolve conflicts in medical evidence. *See, O'Dette v. Industrial Commission,* 79 Ill. 2d. 249, 253, 403 N.E.2d 221, 223 (1980). In deciding questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses and assign weight to the witnesses' testimony. See, R*&D Thiel*, 398 Ill. App.3d at 868; *See also, Hosteny v. Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009).

For an employee's workplace injury to be compensable under the Workers' compensation Act, she must establish the fact that the injury is due to a cause connected with the employment such that it arose out of said employment. See, *Hansel & Gretel Day Care Center v. Industrial Commission*, 215 Ill. App.3d. 284, 574 N.E.2d 1244 (1991). It is not enough that Petitioner is working when accident injuries are realized; Petitioner must show that the injury was due to some cause connected with employment. See, *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill. 2d 207 at 214, 254 N.E.2d 522 (1969).

17IWCC0300

It is well-settled that an employee need only show that some act of employment was a causative factor, not the sole or, principal cause, of his injury. *Alderson v. Select Beverage, Inc.*, 06 I.W.C.C. 0095, 01 W.C. 33435 (2006). The fact that the employee had a preexisting condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. *Id.* The question is whether the evidence supports an inference that the accident aggravated or accelerated the process which led to the employee's current condition of ill-being. *Id.*

Proof of prior good health and change immediately following and continuing after an injury, may establish that an impaired condition was due to the injury. *Hopkins v. WSNS Telemundo*, 02 IIC 0946, 99 W.C. 42128 (2002). In determining that an employee was entitled to compensation for aggravation of a pre-existing injury in *Hopkins*, the Commission noted that petitioner was in good health prior to the fall, he had no restrictions prior to his fall; and following his fall he suffered a marked decrease in his health and ability to function at work.

The Arbitrator finds that Petitioner's accident on November 1, 2011, involving his left shoulder is causally connected to his work activities as a sprinkler fitter with Respondent. In addition, the Arbitrator finds that due to his left shoulder injury, Petitioner sustained an injury to his right elbow while working for Respondent. Specifically, the Arbitrator finds that Petitioner's work activities contributed to cause the left shoulder separation, acromial impingement and the right elbow tear and the subsequent need for the surgeries recommended by Drs. Levin, Karlsson and Marra.

Petitioner testified that prior to November 1, 2011, he did not have any problems with his left shoulder or right elbow. Both Drs. Marra and Karlsson acknowledged that Petitioner was without symptoms to his left shoulder or right elbow, prior to November 1, 2011. This was confirmed by the medical records submitted into evidence. Therefore, the Arbitrator finds Petitioner's testimony to be credible and that the November 1, 2011 wrenching accident, along with the repetitive twisting and turning required of his job duties, caused a left shoulder separation and impingement along with a right elbow tear. The Arbitrator finds the opinions of Dr. Marra to be the most persuasive.

The opinions of Dr. Karlsson are not persuasive. The Arbitrator notes that Dr. Karlsson's opinion was based on the faulty premise that Petitioner had symptomatic degenerative arthritis in the left shoulder prior to November 1, 2011; and that those complaints were temporarily aggravated after the work accident and resolved by November 22, 2011. The medical evidence clearly demonstrates that Petitioner's onset of shoulder complaints began on November 1, 2011 and never resolved. Prior to November 1, 2011, Petitioner was able to work, in a full duty capacity for Respondent, without restrictions. After November 1, 2011, Petitioner was placed on restricted duty and had to seek alternative employment when Respondent could not accommodate his restrictions. Having observed Petitioner's demeanor and testimony and upon review of all of the medical records, the Arbitrator finds Petitioner's current condition of ill-being is related to his work accident of November 1, 2011.

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

Petitioner submitted the medical expenses of Dr. Marra in the amount of $1,902.00, without objection concerning reasonableness and necessity. Based on the above, the Arbitrator finds Respondent responsible for the medical expenses of Dr. Marra.

K. Is Petitioner entitled to prospective medical care?

Both of Respondent's §12 examiner's recommended surgical repair of Petitioner's left shoulder and right elbow. Given the findings above, the Arbitrator finds Respondent responsible for prospective surgery and medical care for both Petitioner's left shoulder and right elbow.

M. Should penalties or fees be imposed upon Respondent?

Section 19(k) of the Illinois Workers' Compensation Act states that "(i)n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award.

Section 19(l) of the Act state that "(i)f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have seen so withheld or refused, not to exceed $10,000.00 A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

Section 16 of the Act states that "(w)henever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of paragraph (c) of Section 4 of this Act; or has been guilty or unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

Respondent relies on the opinions of Dr. Karlsson to deny causal connection, and conflicting medical opinion does not present an absolute defense to the imposition of 19(l) penalties. "The test is not whether there is some conflict in medical opinion to contest liability, is reasonable under all

circumstances presented. *See, Continental Distributing v. Industrial Commission*, 98 Ill.2d 407 (1983).

The Arbitrator notes that there are significant gaps in Petitioner's treatment and complaints, i.e., from October 16, 2012 to September 13, 2013 for the shoulder and elbow even accounting for the petitioner's care of his wife. Under these circumstances, the Arbitrator does not find Respondent's behavior in relying on Dr. Karlsson's opinions to rise to the level of vexatious or unreasonable. Therefore no penalties or attorney's fees are awarded, pursuant to the Act.

17IWCC0300

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
12WC37400
SIGNATURE PAGE

Signature of Arbitrator

February 4, 2016
Date of Decision

FEB 4 - 2016

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Julia Williams,
Petitioner,

vs.

NO: 15 WC 32023

17IWCC0301

State of 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 accident, causal relationship to the injury, temporary disability, notice, medical expenses and prospective medical treatment, Petitioner's objection to Section 12 exam 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).

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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 1, 2016 is hereby affirmed and adopted.

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

17IWCC0301

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 be remanded to the Arbitrator for further proceedings consistent with this Decision.

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: MAY 10 2017

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

o-04/05/17
jdl/wj
68

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

WILLIAMS, JULIA
Employee/Petitioner

Case# **15WC032023**

13WC010224

IL DEPT OF TRANSPORTATION
Employer/Respondent

17IWCC0301

On 6/1/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.47% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1846 BROWN & CROUPPEN
KERRY O'SULLIVAN
211 N BROADWAY SUITE 1600
ST LOUIS, MO 63102

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 MANAGEMENT
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JUN 1 - 2016

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Julia Williams
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # 15 WC 32023

Consolidated cases: 13 WC 10224

17IWCC0301

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, on **November 19, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0301

FINDINGS

On the date of accident, **10/29/12**, 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 **$31,020.08**; the average weekly wage was **$596.59**.

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

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

Respondent shall be given a credit of **$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 $$43,267.28, as set forth in PX 10, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner temporary total disability benefits of $397.69/week for 12 2/7 weeks, commencing 8/8/14 through 11/1/14, as provided in Section 8(b) of the Act.

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

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

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

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

Michael K. Nowak, Arbitrator

5/23/16
Date

ICArbDec19(b)

JUN 1 - 2016

FINDINGS OF FACT

Julia Williams is presently 41 years of age. She has been employed by Respondent since August 1, 2011. Petitioner testified that from August 1, 2011 through December 31, 2011, she worked in the materials lab testing soil and aggregate samples. From January 1, 2012 through March 1, 2012 she worked in a computer programming position. From April 2012 through December 31, 2012, she worked back in the materials lab testing samples. From December 31, 2012 through January 1, 2015, Petitioner rotated in and out of several departments. From January 3, 2015 through the time of trial, she has been a Roads and Bridges Technician, which is a permanent placement requiring computer programming work in a sedentary capacity.

Petitioner testified that her work in the lab required her to mark a bag of soil brought in from the field. The bags of soil weighed from ten to forty pounds. She poured the bags of soil into a splitter machine and then the soil would fall down each side of the splitter so she could weigh each side. She would pour an entire bag of soil into the splitter at a time. If the two samples the splitter created were vastly different weights, then the sample had to be re-poured back into the splitter. She estimated that she had to pour each bag of soil or aggregate into the splitter three times in order for the two newly created samples to be of even weight. She also took samples of soil and poured them onto a tray to put them in the oven to bake the moisture out in order to determine the dry weight, which was a process called "dry vac". The dry vac process allowed her to weigh a forty pound bag and determine the field weight and dry weight. Once she used the splitter then she would dry vac the soil samples. Petitioner also used sieves to perform a gradation process whereby she would pour samples of soil into sieves to then weigh them. Each sieve weighs about three pounds and the soil samples poured into the sieves weighed approximately four to five pounds. To complete one gradation, Petitioner took the ten to twenty pound sample and moved it from waist to chest level to pour it into the sieves, then the sieves went into a shaker and when they came out she had to begin again at the top. Per each gradation test, Petitioner would lift the ten to twenty pound sample four to five times. Respondent's Exhibit 10 shows that one hundred ninety seven gradations were completed between March 15, 2012 and December 31, 2012. Petitioner also performed a "soaking process" which required her to take a twenty pound bag of soil, place it in a container and cover it with water to remove sediment from the rock. She also performed plasticity tests by adding and removing water from the samples to determine how much moisture the samples contained. The bags of soil weighed from ten to thirty pounds and the bags of aggregate weighed up to forty pounds. Petitioner also performed proctor tests. The proctor tests required her to take the aggregate or soil, pour it into a drum to add water and find the liquid limit. Petitioner testified that she spent eight hours of her work day during April of 2012 through December 31, 2012 performing lab testing.

Petitioner testified that most of her work involved lifting thirty to forty pound bags from the floor to a height of about forty inches to pour the bags into the splitter. However, she also lifted 30-40 pound sample bags from floor to up at or above shoulder level to pour samples into the sieves to perform gradations. The sieves could sit on the floor, but she put the sieves on top of a rolling cart about the same height as a desk, so that she would not have to lift the heavy weight of all the sieves up from the floor level.

While working in the lab from April 2012 through December 2012, Petitioner began to notice pains shooting down her left arm. When she did lifting in the lab, she would experience shooting pains down her left arm and occasionally her left hand would turn blue.

Petitioner saw her family physician, Dr. Climaco, on September 19, 2012 with complaints of gradual onset of left shoulder pain. Dr. Climaco ordered an MRI of the left shoulder.

Petitioner then sought out the care of Dr. Aaron Chamberlain at Washington University. She saw Dr. Chamberlain on October 29, 2012, discussed her symptoms and her job duties and Dr. Chamberlain ordered a left shoulder MRI that same day. The left shoulder MRI was normal. Dr. Chamberlain noted that she had left shoulder pain for approximately one year but that same had worsened over the last three months while lifting. Dr. Chamberlain ordered physical therapy.

On November 29, 2012, Petitioner spoke with her supervisor, Amor Phil Ditter, about lifting in the lab and the shooting pains down her left arm. Phil suggested that she call the workers compensation number listed on a poster on the wall, so she did. Respondent's Exhibit 2 is a First Report of Injury reflecting that Petitioner called the State of Illinois CareSys line to report her work injury with an accident date of October 29, 2012.

Petitioner underwent physical therapy from October 29, 2012 through December 24, 2012 with no improvement. Dr. Chamberlain continued to treat Petitioner with a series of injections and an EMG. On January 28, 2013 he recommended diagnostic arthroscopy. Petitioner continued to be seen by Dr. Chamberlain through September 16, 2013 when he recommended that she be seen by a physiatrist.

Petitioner did not want to undergo diagnostic arthroscopy with Dr. Chamberlain, so she returned to her primary care physician, Dr. Climaco, who referred her to Dr. Thom for pain management. Petitioner saw Dr. Thom, a pain management specialist at Associated Physicians where she received physical therapy and an injection. Dr. Thom's physician assistant, asked that another physician, Dr. Davie, evaluate Petitioner. Together, the physician's assistant and Dr. Davie diagnosed thoracic outlet syndrome and ultimately referred her to Dr. Thompson.

Dr. Thompson saw Petitioner on November 14, 2013 and opined that an MRI of her cervical spine was normal. He reviewed the EMG on December 18, 2013 and felt that was normal also. Dr. Thompson provided a series of injections and when those failed ordered surgery. Petitioner underwent left supraclavicular thoracic outlet decompression including anterior and middle scalenectomy, brachial plexus neurolysis, resection of cervical rib and resection of first rib with left pectoralis minor tenotomy with Dr. Thompson on August 8, 2014. Dr. Thompson ordered Petitioner off work post operatively through November 1, 2014.

Petitioner continues to receive treatment from Dr. Thompson and her next appointment is scheduled in March 2016.

Petitioner testified that prior to surgery she had pain running down her left arm to her left hand, her left hand would turn blue, she could not lift her arm overhead for more than five seconds or she would have pain everywhere, she had severe neck pain with swelling, she had swollen trapezius muscle on the left side. Since the surgery, she has tightness in her chest and has trouble lifting anything heavy. She has residual numbness

and tingling in her left chest area. She cannot play with her 9 year old twins the way she used to. Cold weather bothers her left trapezius area and chest.

Petitioner candidly testified that she had some complaints with regard to her left shoulder for which she sought treatment in 2011 with her primary physician, Dr. Climaco. She testified that she had complaints of pain when it was cold outside or if she had a fan blowing on her shoulder in church. She testified that she was diagnosed with arthritis in the left shoulder. Petitioner testified that the pain that began during work in 2012 was different in that she was experiencing shooting pains down her arm. The pain in 2012 started at her chin and covered her entire left trapezius and chest and went down her arm into her left hand with hand discoloration.

Amor Phil Ditter testified on behalf of Respondent. Mr. Ditter has been the materials lab supervisor for nine years and worked in the lab for eighteen years. Mr. Ditter was Petitioner's direct supervisor. Mr. Ditter testified that Petitioner's job duties are varied and that if there was a day they were caught up then she would not have done any lifting. Mr. Ditter testified that if there was a lift of over forty pounds then the employee is supposed to request assistance. Mr. Ditter testified that Petitioner would lift a lot at chest level, but would only lift anything about chest level on rare occasions. Mr. Ditter identified Respondent's Exhibit 10 which was an email stating that Petitioner's job required "lifting cylinders weighing thirty to thirty-five pounds zero to ten times per day, lifting bags of aggregate forty pounds zero to ten times per day, lifting bags of asphalt forty-five to fifty pounds zero to ten times per day, sampling of miscellaneous materials one to forty-five pounds zero to ten times per day." Mr. Ditter also identified an email between himself and another employee which states that between March 15, 2012 and December 31, 2012 his lab performed on aggregates: one-hundred-ninety-seven gradations, twenty-five proctors, one specific gravity test and twelve plasticity indices. Within this same time frame his lab performed soil tests as follows: two-hundred-seventy-four moistures, fifty-four classifications, two gradations and twenty-one proctors. By contrast, during the entire year of 2011 thirty-five gradations were done, in the year of 2013 seventy gradations were done, and in the year of 2014 forty-six gradations were done. So more than two and a half times the number of gradations were completed on aggregates between March and December of 2012 than were completed during the entire year of 2014. In fact, more gradations were done during March through December of 2012 than during the entire years of 2011, 2013 and 2014 combined.

Mr. Ditter testified that all the proctor tests required splitting four bags of sample. The gradations, moisture and proctor tests all required lifting and splitting of the samples. Mr. Ditter testified that Petitioner would have also worked on cylinders. She would have broken cylinders on a daily basis. Cylinders weigh twenty-eight pounds and require splitting and lifting zero to ten times just to do one sample. To split a gradation he uses two forty pound bags of material which both get lifted and poured into the splitter. Typically, two forty pound bags were initially lifted, then split to mix three to five times per sample, once the two forty pound bags were split, there were then forty pounds on each side plus the weight of the pan. So, after mixing was finished half of the sample was taken out and put back in the bag which then had to be lifted and moved back to another test or it may need to be split again. The same samples are not used for the different tests. Mr. Ditter testified that it takes about eight lifts of up to forty pounds to complete a gradation. Mr. Ditter also testified that the job description in Respondent's Exhibit 10 was for a typical day in a typical year. Then he added that 2012 was not a typical year because they were very busy with aggregates, probably the busiest year they have had in his

eighteen years there. Mr. Ditter testified that Petitioner did not do much computer work with him. Most of her time was spent working on the samples.

Dr. Charles Carroll performed a record review at Respondent's request. Dr. Carroll opined in his August 2, 2015 report that Petitioner's diagnosis is unresolved neurogenic thoracic outlet syndrome. He opined that Petitioner's work duties did not cause or aggravate her condition. Dr. Carroll testified that he reviewed emails setting forth Petitioner's job duties and opined that her lifting at work was not chronic in nature and did not involve lifting forty pounds or more above chest level. Dr. Carroll opined that work above chest level involving sixty pounds or fifty pounds on a chronic basis which is 33-66% of the time can cause thoracic outlet syndrome. Dr. Carroll testified that the position and the weight play a role. Dr. Carroll testified that about 5% of his practice involves treating thoracic outlet syndrome. He does not perform the type of surgery that Petitioner underwent and conceded that he does not have the diagnostic or surgical experience that Dr. Thompson has in thoracic outlet syndrome. He has not authored any articles or books on the condition.

When given the same written job description that Dr. Thompson had, Dr. Carroll testified that the work could be a causative factor in the development of thoracic outlet syndrome. Dr. Carroll also testified that lifting fifty to sixty pounds above chest level 33-66% of the time as a causative factor in the development of thoracic outlet syndrome is simply a guideline and that those weights and frequencies could vary by individual.

Dr. Thompson, Petitioner's treating surgeon, provided deposition testimony as well. Dr. Thompson testified that he relied in part on a job description that was provided by Petitioner's counsel which is as follows and is set forth as Respondent's Ex 1 to the deposition transcript:

> She worked as an Engineer Technician 1 and she worked in a testing lab. She normally worked 40 hours per week. However, from June through August of 2012, she worked anywhere from 40 to 50 hours per week. Four to five times per day, she would lift 30-50 bags of rock or soil from the floor, to a counter; to document the bag, then she would pour the contents into a slitter to divide and weigh the contents. Sometimes this weighing procedure had to be performed three times per bag in order to ensure that weight was equal. Her job duties also consisted of lifting 6-7 bags, weighing 30 to 50 pound per bags, 2-3 times per day, 5 days per week to various testing stations. She would then remove rock or soil from the bags and pour it into pans. She would also move the pans, weighing approximately 5 pounds, approximately 3 times each to different testing stations. These bags were filled with aggregate (rock), or sand, field soil, or rip-rap (which are really large rocks such as those seen on the side of highways). These materials were brought in from the field and broken down for various testing to determine stability as a base for building upon them.

Dr. Thompson also relied on his conversations with Petitioner regarding her job duties. Dr. Thompson opined that Petitioner's job duties caused her thoracic outlet syndrome. Dr. Thompson is a board certified vascular surgeon who specializes in the treatment of thoracic outlet syndrome. Dr. Thompson leads the Thoracic Outlet Syndrome Center at Washington University. Dr. Thompson was the co-editor of a textbook

entitled *Thoracic Outlet Syndrome*. He has published many peer reviewed medical journals and manuscripts regarding this condition.

CONCLUSIONS

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner filed two applications for adjustment of claim. 13 WC 10224 alleges an accident date of 11/29/12. 15 WC 32023 alleges an accident date of 10/29/12.

The Illinois Supreme Court in *Peoria County Belwood Nursing Home vs. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987) held that the Workers Compensation Act would be best served by allowing compensation where the injury was caused by the performance of the job and developed gradually over a period of time, without requiring complete dysfunction.

The Illinois Supreme Court provided further guidance in *Durand v. Illinois Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (2006). In *Durand*, the employee first developed problems with her hands in October of 1997. She first sought medical help in August of 2000 and filed a workers compensation claim in January of 2001. The Supreme Court held that the manifestation date was not until the employee had been advised by her doctor of the medical condition and its causal relationship to work. In *Durand*, The Supreme Court clarified that a repetitive motion injury does not manifest until either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Id.*, at 929. The Supreme Court in Durand stated further that "We decline to penalize an employee who worked diligently through progressive pain until it affected her ability to work and require medical treatment." *Id.*, at 930. The Supreme Court in Durand also noted that because repetitive trauma conditions are progressive, the medical treatment, severity of the injury and how it affects the employee's performance are relevant in determining when a reasonable person would have plainly recognized the injury and its relation to work.

Dr. Thompson opined that Petitioner's thoracic outlet syndrome was caused by her work duties. Dr. Thompson has specialized in thoracic outlet surgery and manages the Thoracic Outlet Syndrome Center at Washington University, whereas Dr. Carroll treats this condition in only 5% of his practice. By Dr. Carroll's own admission, he has less expertise with regard to thoracic outlet syndrome than Dr. Thompson. Dr. Thompson had an accurate description of the Petitioner's job duties. Moreover, Dr. Carroll acknowledged that lifting can cause thoracic outlet syndrome and the weights and positions of the lifting would vary according to individual body habitus. The Arbitrator found the testimony and opinions of Dr. Thompson more persuasive in this case.

Petitioner saw Dr. Chamberlain on October 29, 2012. His notes of that date reflect that they discussed her history of pain worsening at work while lifting. Petitioner plainly recognized her injury and its relation to her work as reflected by the history contained in her treatment record of this date.

Petitioner credibly testified that she engaged in a conversation with her supervisor, Amor Phil Ditter on November 29, 2012 and advised him of her condition and its relationship to her work. He encouraged her to call the phone number listed on a poster to report the claim to the State of Illinois. The Employer's First Report of Injury confirms that on November 29, 2012, Petitioner reported her October 29, 2012 injury to the State of Illinois.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner met her burden of establishing that she sustained an accident which arose out of and in the course of her employment with Respondent and that her current condition of ill-being, which required surgical intervention by Dr. Thompson, is causally related to the accident. The Arbitrator further finds that October 29, 2012 is an appropriate manifestation date for Petitioner's injury and that the notice provided to Respondent on November 29, 2012 is proper notice under 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?

Petitioner's medical care has been reasonable and necessary to date. Both Dr. Thompson and Dr. Carroll agree that Petitioner has thoracic outlet syndrome and that her medical treatment has been reasonable and necessary to date.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Respondent shall pay reasonable and necessary medical services of $$43,267.28, as set forth in PX 10, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (L): What temporary benefits are in dispute?

Petitioner was ordered off of work by Dr. Thompson from the date of her surgery 8/8/14 through 11/1/14.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Respondent shall pay Petitioner temporary total disability benefits of $397.69/week for 12 2/7 weeks, commencing 8/8/14 through 11/1/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit for temporary total disability benefits that have been paid.

STATE OF ILLINOIS)	☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
WILLIAMSON		☐ PTD/Fatal denied
	☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT BROCK,

Petitioner,

17IWCC0302

vs. NO: 10 WC 00629

CENTURION INDUSTRIES, INC.A/K/A A-LERT,

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 temporary diability, wage differential, and maintenance and penalties and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Decision of the Arbitrator to vacate the awarded wage differential and remands this matter to the Arbitrator with instructions for Petitioner to be enrolled in a vocational rehabilitation program with a specific emphasis in returning Petitioner to a career in welding.

Petitioner, by virtue of training and experience, was an industrial welder prior to his December 18, 2009, accident to his left shoulder. The accident resulted in him undergoing a Type II labral repair, subacromial decompression, and bursectomy and eventually being returned to work at a medium physical demand level with a prohibition against lifting more than thirty pounds above shoulder level. These restrictions have, to date, precluded Petitioner from returning to his pre-accident career as an industrial welder.

Petitioner conducted what was ultimately an unsuccessful self-directed job search in which he sought employment as a welder both in and outside of Illinois. Failing to obtain such

employment, he has worked a succession of non-welding jobs and earning the prevailing minimum wage at each job. He currently works as a maintenance person at an apartment building.

Petitioner's attorney procured the services of June Blaine, a certified rehabilitation counselor, and owner of Blaine Rehabilitation Management, Inc. Ms. Blaine met with Petitioner on September 17, 2013, and obtained information concerning Petitioner's background, including a work history. After meeting with Petitioner and reviewing his medical records, she concluded Petitioner was precluded from returning to a career as an industrial welder but thought Petitioner was capable of working as a forklift operator, a trade Petitioner previously performed, and, with training, as a crane operator, a trade that interested Petitioner. She made passing reference to shop welding, noting only an estimated salary range. Ms. Blaine made no suggestion Petitioner attempt returning to work as a welder.

Respondent secured the services of Joseph Belmonte, the president of Vocamotive, Inc., and, as is Ms. Blaine, a certified rehabilitation counselor. Mr. Belmonte reviewed Petitioner's medical records and met with Petitioner, using that opportunity to obtain addition medical information as well as information about Petitioner's work history. He concluded Petitioner had not necessarily lost access to his pre-accident career as an industrial welder provided Petitioner worked within his imposed medical restrictions. He identified welding as a growing field in Illinois and found openings for welding jobs posted on the American Welding Society website.

Petitioner testified to believing that he is capable of performing shop welding and fabrication welding as these forms of welding are less strenuous than industrial welding and the Commission is persuaded by the testimony and vocational rehabilitation report of Mr. Belmonte that a viable market exists for Petitioner to be employed as a welder albeit with the assistance of a vocational rehabilitation counselor.

To provide Petitioner the best opportunity to return to work as a welder, the Commission compels Respondent to place Petitioner in a vocational rehabilitation program that will allow Petitioner to take advantage of his already-present skills and experience as a welder. Respondent is to pay Petitioner maintenance pursuant to Section 8(a) of the Act while Petitioner participates in the vocational rehabilitation program.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, dated August 24, 2016, is modified to vacate the wage differential benefits awarded under Section 8(d)1 of the Act effective the last day before vocational rehabilitation.

IT IS FURTHER ORDERED BY THE COMMISSION that this matter be remanded to the Arbitrator with instructions to order Respondent to authorize the enrollment of Petitioner in a vocational rehabilitation program with the objective being to return Petitioner to work as a welder.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent pay to Petitioner the sum of $775.72 per week for a period of 83-5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

17IWCC0302

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits of $775.72 per week for a period of 134-3/7 weeks, commencing August 1, 2012, through February 18, 2015, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits of $775.72 per week that is to commence the first day of vocational rehabilitation, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $7,341.00 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner penalties of $6,390.00 as provided for in §19(l) 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 in the amount of $60,727.79 for payments made to Petitioner under §8(b).

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: MAY 10 2017
KWL/mav
O: 03/14/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0302

BROCK, ROBERT H
Employee/Petitioner

Case# **10WC000629**

CENTURION INDUSTRIES INC A/K/A A-LERT
Employer/Respondent

On 9/6/2016, 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 0.48% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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

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

17IWCC0302

Robert H. Brock
Employee/Petitioner

v.

Centurion Industries, Inc., A/K/A - A-Lert
Employer/Respondent

Case # 10 WC 00629

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 **10/15/15**. 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 **12/18/09**, 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 **$60,506.16**; the average weekly wage was **$1,163.58**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$60,727.79** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$60,727.79**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $775.72/week for 83 5/7 weeks, commencing 4/27/10 through 10/13/11 (76 3/7 weeks) and 6/11/12 through 7/31/12 (7 2/7 weeks), as provided in Section 8(b) of the Act. Respondent shall be given a credit of $60,727.79 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner maintenance benefits of $775.72/week for 134-3/7 weeks, commencing 8/1/12 through 2/18/15, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $7,341.00, as set forth in Px. 13, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 2/19/15, of $583.22/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Respondent shall pay to Petitioner penalties of $6,390.00, as provided in Section 19(l) of the Act.

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

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

Signature of Arbitrator

8/24/16
Date

SEP - 6 2016

FINDINGS OF FACT

On December 18, 2009 Petitioner injured his left shoulder working for Respondent as an industrial welder. He came under the care of Dr. George Paletta, who recommended left shoulder surgery. Respondent disputed the case.

On February 11, 2010 and April 26, 2010, the matter proceeded to hearing on a 19(b) Petition. The Arbitrator held Petitioner proved accident and causation. The Arbitrator awarded TTD benefits, medical expenses, penalties and a left shoulder surgery. (Ax. 6). The Commission affirmed the Arbitrator's Decision on March 18, 2011. The Circuit Court affirmed the Commission Decision on September 8, 2011. The Fifth District Appellate Court affirmed the Commission Decision, other than vacating the award for penalties and attorneys' fees, on September 26, 2012. (Ax. 7-9). No further appeal was taken. This matter proceeds to hearing following remand from the Appellate Court. Respondent disputes medical bills, TTD benefits, maintenance benefits, Section 19(l) penalties and the nature and extent of the injury. (Ax. 1).

Petitioner worked for Respondent as an industrial welder when he injured his left shoulder on December 18, 2009. He passed a pre-employment physical. Petitioner was non-union and therefore the job required him perform both welding and labor duties. Petitioner described the work activities to include lifting material weighing up to 40-60 pounds above chest level and welding overhead. Welding overhead required holding both arms overhead between two and half to seven minutes at a time. Petitioner denied experiencing problems performing the work activities prior to December 18, 2009. Petitioner testified he previously worked for Trilium Construction and Zachary Construction as a non-union industrial welder performing the same work without restriction.

On May 26, 2011, Dr. Paletta performed a left shoulder surgery consisting of a type II labral repair, subacromial decompression and bursectomy. (Px. 1). Dr. Paletta kept Petitioner off work or placed restrictions that Respondent did not accommodate through October 13, 2011. (Px. 2 at 1-9). Respondent paid TTD benefits for this period.

Following surgery, Petitioner underwent physical therapy June 19 through October 6, 2011. (Px. 3). The therapist documented left shoulder weakness, inability to move the left arm into welding positions, feeling of the shoulder wanting to pop out, impaired abduction and atrophy. (Px. 3 at 3, 7-9, 17-18). Petitioner testified he noticed instability, limited range of motion and weakness of the left shoulder.

On October 14, 2011, Dr. Paletta felt Petitioner was doing reasonably well and noted Petitioner did not have work to return to. Dr. Paletta documented minimal rotational losses and full strength. He released Petitioner to return to work full duty and placed him at MMI. (Px. 2 at 8).

On November 1, 2011, Dr. Paletta, after reviewing the physical therapy records, ordered four weeks of work conditioning. (Px. 3 at 46-47). Petitioner underwent work conditioning from November 3 through December 2, 2011. The therapist documented continued limited abduction and weakness. (Px. 3 at 10-12, 19-20, 33-34, 36). On January 11, 2012, Dr. Paletta ordered a functional capacity evaluation. (Px. 2 at 11-12). The January 23, 2012 FCE demonstrated Petitioner could return to work in the medium physical demand level with modifications due to Petitioner's inability to perform overhead activities. The examiner concluded Petitioner provided maximal effort. (Px. 4 at 3-4). On June 4, 2012 Petitioner returned to Dr. Paletta. Dr. Paletta

recommended an MRI of the left shoulder. (Px. 2 at 19-20). The MRI, according to the radiologist, demonstrated the labral repair, but that a recurrent tear could not be excluded. (Px. 5 at 1). On July 31, 2012, Dr. Paletta reviewed the MRI and opined no further surgery was necessary. He also noted that the findings on his exam those documented by the functional capacity evaluator were inconsistent with regard to range of motion. Dr. Paletta therefore recommended either an IME or that Petitioner be placed at MMI with no restrictions. (Px. 2 at 21).

On June 11, 2012, Respondent sent Petitioner to Dr. James Strickland for a section 12 exam. Dr. Strickland documented 20-25% atrophy with moderate weakness in abduction. He opined the persistent weakness could be related to the 15 month delay between the accident and surgery. Dr. Strickland opined that at the current time Petitioner was limited to medium work level and should avoid extensive exercise over shoulder level. He opined Petitioner was incapable of returning to full duty at his pre-injury job. (Px. 7 at 4-5).

On November 26, 2012, Dr. Paletta reviewed Dr. Strickland's IME report, a welding job description and job video. He opined Petitioner required a permanent restriction of no lifting 25 pounds above chest level. (Px. 6 at 3).

Petitioner testified that since Dr. Paletta's original release October 14, 2011 he noticed atrophy and instability in the left shoulder with the inability to lift the left arm fully up to the side. The Arbitrator observed Petitioner's left arm could not get parallel with the shoulder to the side and was 85-90 degrees normal compared to the right when raising the left arm in the front.

Petitioner testified that based upon the medical restrictions and limited ability to raise his left arm he cannot return as an industrial welder because he would not pass an overhead weld test, or be able to perform overhead welding and lifting greater than 25 pounds above chest level, as is required. Petitioner testified that he is able to perform shop and fabrication welding because it is performed at a table and is not strenuous. Unfortunately he has been unsuccessful locating those jobs in Southern Illinois. It was noted that the pay rate of a shop/fabrication welder is significantly lower than his wage as an industrial welder.

Petitioner performed multiple job searches from October 2011 through December 2014. (Px. 10). Petitioner requested vocational rehabilitation from Respondent, including training for a crane operator certification, and provided Respondent the job searches since June 25, 2012. (Px. 11).

Petitioner was able to secure part time employment with Ridgeway Tree Services from January 21, 2012 through April 20, 2012. Petitioner testified the employer let him go because he could not perform the overhead work. Casey's employed Petitioner June 30, 2013 through November 16, 2013 on a part-time basis and paid him total of $3,651.23. Risenumburger Trucking employed Petitioner on a part-time basis January 19 through February 21, 2015 and paid him a total of $991.56. (Px. 12). Petitioner testified these jobs did not exceed his restrictions. On February 19, 2015, Petitioner started working as a maintenance person for Ridgeway Apartments. Petitioner averages 30 to 35 hours per week at $8.25 per hour.

Respondent submitted surveillance evidence that did not demonstrate Petitioner exceeding his work restrictions. (Rx. 6, 7).

On October 30, 2013, June Blaine performed a vocational assessment at the request of Petitioner's attorney. Ms. Blaine opined Petitioner could not return to his previous job as a welder and that he was an excellent candidate for retraining to obtain a crane operator certification. (Px. 9). In a report dated March 27, 2015, Ms. Blaine reaffirmed her opinion that Petitioner could not return to work as an industrial welder and without further training that he could earn up to $10.00-$11.00 per hour in the local area. (Px. 9).

On May 7, 2014, Joseph Belmonte performed a vocational assessment at Respondent's request. Mr. Belmonte opined that he "cannot definitively determine that [Petitioner] has lost access his customary line of occupation" based upon the physical restrictions of no lifting in excess of 25 pounds above shoulder level. (Rx. 3, at 16).

Petitioner deposed June Blaine June 4, 2015. She testified Petitioner's industrial welding job was within the heavy demand category, which requires 50 pounds of force occasionally and 25 to 50 pounds frequently. (Px. 9 at 15). She opined that Petitioner was incapacitated from returning to his usual and customary line of employment as an industrial welder because as a non-union welder he would have to lift 25 pounds above chest level. (Px. 9 at 16-17). Ms. Blaine testified Petitioner could perform shop welding positions, but they pay range in Southern Illinois is $11.00 to $13.00 per hour versus $29.00 to $30.00 per hour as an industrial welder. (Px. 9 at 17-20). As result, Petitioner suffered an impairment of earnings. (Px. 9 at 24-25). Ms. Blaine opined employers are currently offering more part time jobs and Petitioner's current job paying $8.25 per hour for 35 hours per week is consistent with his job search. (Px. 9 at 23-24).

Respondent deposed Joseph Belmonte July 22, 2015. Mr. Belmonte opined Petitioner is determined to have lost access to his usual and customary job as welder for Respondent, but that he was unable to definitively determine Petitioner lost access to his usual and customary line of occupation. (Rx. 4 at 9). He explained that the dictionary of occupational titles for the heavy demand does not specify lifting requirements for a welder are above chest level. (Rx. 4 at 9-11). He opined Petitioner could work welding jobs in the heavy demand level as long as the job did not require lifting 25 pounds above chest level. (Px. 9 at 13-14). He opined that Petitioner was not subject to radical wage loss based upon median wage earnings for welders. (Rx. 4 at 15). On cross examination, he admitted that Petitioner could not perform any welding jobs that require lifting more than 25 pounds above shoulder level. (Rx. 4 at 30). He did not know the physical demands of the job Petitioner performed for Respondent. (Rx. 4 at 31). He did not ask Petitioner whether his work for Respondent and prior employers required lifting 25 pounds over chest level. (Rx. 4 at 34). He never reviewed the job searches completed by Petitioner and did not know whether Petitioner applied for welding positions. (Rx. 4 at 54-58).

CONCLUSIONS

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

There is no evidence in this record to support Respondent's dispute regarding causal connection. The earlier decision of Arbitrator Dibble which was affirmed through the Appellate Court decided the issue in Petitioner's favor. The Arbitrator therefore finds Petitioner's current condition of ill-being is causally related to the accident.

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

Also without an evidentiary basis, Respondent disputes Petitioner's claim for medical benefits. Petitioner submitted medical bills totaling $7,431.00. (Px. 13). Based upon the Arbitrator's finding with regard to Issue F, and the record taken as a whole, Respondent shall pay reasonable and necessary medical services of $7,341.00, as set forth in Px 13, as provided in Sections 8(a) and 8.2 of the Act.

Issue (K): What temporary benefits are in dispute?

TTD Benefits

Petitioner claims entitlement to temporary total disability benefits of $775.72/week for 76-3/7 weeks, commencing 4/27/10 through 10/13/11 and for 7-2/7 weeks, commencing 6/11/12 through 7/31/12, as provided in Section 8(b) of the Act.

Although they have not been paid, Respondent agrees Petitioner is entitled to TTD benefits for the first period. In support of the second period, the Arbitrator relies on Respondent's Section 12 examiner Dr. James Strickland's opinion that Petitioner had not reached maximum medical improvement as of June 11, 2012 and required restrictions that prevented Petitioner from returning to work for Respondent. The Arbitrator notes that Respondent had terminated Petitioner by that time. (Px. 8). Petitioner reached maximum medical improvement July 31, 2012, when he returned to Dr. Paletta and had permanent restrictions ordered.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Respondent shall pay Petitioner temporary total disability benefits of $775.72/week for 76-3/7 weeks, commencing 4/27/10 through 10/13/11 and for 7-2/7 weeks, commencing 6/11/12 through 7/31/12, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $60,727.79 for temporary total disability benefits that have been paid.

Maintenance Benefits

Maintenance benefits have been awarded when a claimant undertakes a self-created job search and his own rehabilitation program. *See* Greaney v. Industrial Comm'n, 358 Ill.App.3d 1002 (1st Dist. 2005) citing Roper Contracting v. Industrial Comm'n, 349 Ill.App.3d 500 (2004).

In this case Petitioner had no choice but to undertake a self-directed job search. Dr. Strickland opined Petitioner could not return to his pre-injury job and Dr. Paletta placed permanent restrictions on July 31, 2012. Respondent did not accommodate those restrictions and Petitioner requested vocational rehabilitation on multiple occasions, including a specific request for enrolment in a crane operator certification program on December 18, 2012. (Px. 11 at 3-4). Respondent did not respond to the demand until it eventually secured a vocational opinion May 7, 2014.

The Arbitrator finds the opinions June Blaine more persuasive than those of Joseph Belmonte. Further, the medical evidence establishes that Petitioner cannot return to his pre-accident job as an industrial welder where he made $29.00 to $30.00 per hour. The welding positions Petitioner is physically capable of performing are at a significantly reduced wage.

Petitioner reached MMI July 31, 2012. His left shoulder condition prevented him from returning to his pre-accident work as an industrial welder which reduced his earning capacity; and the self-directed job search resulted in Petitioner finding substantial gainful employment February 19, 2015.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met his burden of establishing his entitlement to maintenance benefits.

Respondent shall pay Petitioner maintenance benefits of $775.72/week for 134-3/7 weeks, commencing 8/1/12 through 2/18/15, as provided in Section 8(a) of the Act.

Issue (L): What is the nature and extent of the injury?

Petitioner cannot return to his pre-injury job as an industrial welder. The Arbitrator relies on the opinion of Dr. Strickland that Petitioner could not return to his pre-injury position. Furthermore, Ms. Blaine opined Petitioner cannot work as an industrial welder because the job requires lifting 25 pounds above chest level, which is the restriction placed by Dr. Paletta. Mr. Belmonte's opinion is based on the nebulous statement that he "cannot definitively determine that [Petitioner] has lost access his customary line of occupation" based upon the physical restrictions of no lifting in excess of 25 pounds above shoulder level. This does not differentiate between welding in general and being an industrial welder. Mr. Belmonte admitted that Petitioner could not return to a welding job that required lifting 25 pounds above chest level and he did not know the physical demands of Petitioner's work as an industrial welder. Petitioner credibly described the lifting requirements of an industrial welder as distinguished from a shop welder.

In support of the conclusion Petitioner suffered an impairment of earnings the Arbitrator relies on the opinion of June Blaine. She opined that Petitioner could make up to $13.00 hour in a shop welding or fork driver position if it the positions were available. Petitioner engaged in an exhaustive job search and those positions are not available. Petitioner found employment averaging 35 hours per week at $8.25 per hour for $288.75 per week.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has proven entitlement to wage differential benefits because his current left shoulder condition prevents him from returning to his usual and customary employment as an industrial welder and he suffered an impairment of earnings. But for the injury, Petitioner could currently make the average weekly wage of $1,163.58. Petitioner is currently making $8.25 per hour on average 35 hours a week for $288.75. ($1,163.58 - $288.75 = $874.83 x 2/3= $583.22).

Respondent shall pay Petitioner permanent partial disability benefits, commencing 2/19/15, of $583.22/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Issue (M) Should penalties or fees be imposed upon Respondent?

Compensation authorized by section 19(l) is in the nature of a late fee. The statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment "without good and just cause." If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory. McMahan v. Industrial Comm'n, 183 Ill.2d 499, 515 (1998).

While the appeal of the earlier 19b hearing was proceeding, Respondent authorized Petitioner's surgery. Petitioner was paid TTD commencing on the date of the surgery. Respondent did not, however pay TTD

benefits between the date of the 19b hearing and the date of surgery. The Arbitrator finds that after the issuance of the Appellate Court Decision, Respondent had no reasonable basis to dispute TTD benefits covering April 27, 2010 (the day after the original Arbitration Hearing) through May 25, 2011 (the day before surgery) because Petitioner remained on work restrictions that Respondent did not accommodate. Petitioner sent Respondent five letters after the Appellate Court Decision demanding payment of TTD benefits for the afore-mentioned period. (Arb. Ex. 5). Respondent did not pay the benefits until six months later. Respondent never provided an explanation for the delay, much less an adequate justification for the delay.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner is entitled to penalties under section 19(l) of the Act. Respondent shall pay to Petitioner penalties in the amount of $6,390.00, as provided in Section 19(l) of the Act. This represents $30.00 per day for 213 days from 9/28/12, the date the parties received the Appellate Court Decision, through 5/1/13, the date of the TTD payment. (Arb. Ex. 5).

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tim Perry,
Petitioner,

vs. No. 11 WC 11984,
11 WC 11985

Pella Window Corporation,
Respondent.

17IWCC0303

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of: (1) dismissal of Petitioner's claims for want of prosecution on August 12, 2015, and (2) denial of Petitioner's Motion to Reinstate them on November 10, 2015, and being advised of the facts and law, affirms and adopts the Arbitrator's denial of the Petition to Reinstate. In support thereof, the Commission makes the following findings of fact and conclusions of law.

On March 28, 2011, Petitioner filed two Applications for Adjustment of Claim against Respondent, Pella Window Corporation: 11 WC 11984, alleging a work injury on September 19, 2008, and 11 WC 11985, alleging a work injury on February 20, 2011.

On March 28, 2014, these claims became three years old. On August 12, 2015 the claims came up before the Arbitrator on his status call, as well as for hearing on Respondent's Motion to Dismiss. No one appeared on behalf of Petitioner, and the Arbitrator dismissed the claims for want of prosecution. Petitioner's counsel gave no reason for his absence at the status call other than that he was, "unable to appear." At that time, the cases had been on file at the Commission for 4 years and 4 months.

Petitioner filed a timely Motion to Reinstate the claims, setting it for November 6, 2015. On that date, the motion was continued for hearing to November 10, 2015. Prior to the hearing, Petitioner's counsel notified the Arbitrator he would not be able to appear; no reason was provided. Petitioner made no request to reschedule his motion to a different date. The Arbitrator entered an order denying Petitioner's Motion to Reinstate on November 10, 2015.

Thereafter, Petitioner filed a timely Petition for Review before this Commission, alleging the Arbitrator erred in dismissing his claims and denying his Motion to Reinstate. Petitioner requested oral arguments, which the Commission set for April 4, 2017. However, on that date neither Petitioner nor Petitioner's counsel appeared. No explanation or reason was given for their failure to appear on that date.

The Arbitrator did not err in dismissing Petitioner's claims on August 12, 2015.

Petitioner argues the August 12, 2015 dismissal of his claims was improper because: Respondent had not filed a Motion for a Trial Date Certain; the claims weren't actually set for trial when they were dismissed; the Arbitrator failed to make a record of his reasons for dismissing the claims; and the claims should have been continued rather than dismissed on that date because Petitioner was still undergoing medical treatment for his alleged injuries.

The Commission finds Petitioner's arguments without merit. Commission Rule 50 Ill. Adm. Code 7020.60(b)(2)(C)(i) (2010), recodified to 50 Adm. Code 9020.60(b)(2)(C)(i), states that when a case has been on file with the Commission for three or more years, the parties or their attorneys *must* be present at each status call on which the case appears. The following subsection of Rule 7020.60(b)(2)(C) states that where a Petitioner or Petitioner's attorney fails to appear at such status calls, the case *shall* be dismissed for want of prosecution except upon a showing of good cause. See 50 Ill. Adm. Code 7020.60(b)(2)(C)(ii) (2010), recodified to 50 Adm. Code 9020.60(b)(2)(C)(ii). Petitioner herein did not show good cause.

Petitioner's cases were dismissed because he failed to appear at a status call when his claims were over four years old; not because the Arbitrator granted Respondent's Motion to Dismiss them. Commission Rules do not require, as a prerequisite to dismissals for want of prosecution, that parties file a written Motion for a Trial Date, or that the case be set for trial. Of note, Respondent filed at least eight Motions to Dismiss Petitioner's claims before August 2015. During that time, Petitioner took no action to prosecute his claims other than attempting to consolidate them with two other cases filed against a different employer.

The Commission finds no merit to Petitioner's argument that the Arbitrator should have made a record of the reasons why he dismissed the claims. Making a record was not necessary as it was evident the claims were dismissed because of a want of prosecution and Petitioner's failure to appear. The Commission's Notices of Case Dismissal further confirm that to be the reason. Whether or not Petitioner was still receiving medical treatment for his alleged work injuries at the time his cases were dismissed did not excuse him from appearing at the status call.

The Arbitrator did not err in denying Petitioner's Motion to Reinstate on November 10, 2015.

When Motions to Reinstate are brought, Commission Rules require that, "Both parties must appear at the time and place set for hearing." See 50 Ill. Adm. Code 7020.90(c), recodified to 50 Adm. Code 9020.90(c). The Commission finds the Arbitrator did not abuse his discretion by denying Petitioner's Motion to Reinstate, after Petitioner failed to appear and present it on November 10, 2015. Petitioner's attorney's excuse that he, "could not be in Peoria" that day, without further explanation, is insufficient given his long history of failing to appear at other

17IWCC0303

scheduled hearings and status calls related to these claims. The attorney's failure to appear for oral arguments in this case is another example of his failure to prosecute Petitioner's claims.

Petitioner's argument that the Motion to Reinstate should not have been denied because Respondent did not file written objections to it is likewise without merit. It is evident from the record that Respondent had been seeking dismissal of Petitioner's claims for considerable time prior to their ultimate dismissal. Lack of written objections by Respondent is not tantamount to acquiescence that the motion be granted.

The Commission finds that the Arbitrator did not err by ordering Petitioner's claims be dismissed for want of prosecution on August 12, 2015, or by denying Petitioner's Motion to Reinstate on November 10, 2015.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's August 12, 2015 order, dismissing Petitioner's claims 11 WC 11984 and 11 WC 11985 for want of prosecution, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's November 10, 2015 order, denying Petitioner's Motion to Reinstate Petitioner's claims 11 WC 11984 and 11 WC 11985, is hereby affirmed and adopted.

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

DATED: MAY 11 2017

Joshua D. Luskin

Charles J. DeVriendt

Stephen Mathis

o-04/04/17
jdl/mcp
68

17IWCC0304

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HECTOR COBARRUBIAS,

Petitioner,

vs.

NO: 15 WC 34073

D&M CUSTOM CARPENTRY,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, employer/ee relationship, medical expenses, and temporary total disability, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of employment relationship but attaches the Decision of the Arbitrator, which is made a part hereof, for the findings of facts, with the modifications noted below.

The Commission finds that Petitioner has proven that he was an employee of Respondent at the time of his alleged accident. Although there are credibility issues with all of the witnesses, we find that the most compelling testimony is that Respondent had a written independent contractor agreement with other individuals with whom he worked and required those individuals to show proof of workers' compensation insurance coverage. (T.102-103). Respondent testified that he only had an oral agreement with Petitioner. (T.137, 147, 166). Petitioner testified that he was never asked to carry or show proof of workers' compensation insurance to work at a particular job. (T.20).

The Illinois Supreme Court has identified a number of factors to assist in determining whether a person is an employee. Among those factors are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer compensates the person on an hourly basis; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; and (6) whether the employer supplies the person with materials and equipment. (Esquinca v. Ill. Workers' Comp. Comm'n, 2016 IL App (1st) 150706WC ¶47 *citing* Roberson v. Industrial Comm'n, 225 Ill.2d 159, 175 (2007)).

17IWCC0304

In this case, Respondent assigned Petitioner to a particular job site and went over the job to be performed. (T.17, 122). Respondent dictated Petitioner's schedule to the extent that Mr. Smith determined where and when Petitioner worked. (T.17) Respondent paid Petitioner based on the number of hours worked as recorded in a log provided by Respondent. (T.11-13). Respondent did not withhold income or taxes from Petitioner's compensation. (T.62-63). Respondent could discharge Petitioner at will. (T. 19, 24). Respondent provided all of the tools other than those that Petitioner carried on his tool belt. (T.16-17). Although Respondent did not withhold taxes or provide insurance to Petitioner, the manifest weight of the other evidence supports a finding that Petitioner worked as an employee rather than an independent contractor.

Nevertheless, we also find that Petitioner failed to prove that he sustained an accidental injury arising out of and in the course of his employment with Respondent on September 29, 2015. Although Petitioner testified that he hurt his back carrying a door at a job site and the medical records seem to also relay that version of events, Ed Couch testified that Petitioner told him, upon first arriving at the worksite, that Petitioner would be leaving early because he had hurt his back the day before. (T.95-99). Petitioner also told Dwight Smith, the owner of Respondent, that he hurt his back on the day before September 29, 2015, while trying to catch his grandson. (T.160). The Commission finds that the testimony of Mr. Couch and Mr. Smith are more persuasive on the issue of accident than Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's claim for benefits is denied as he has failed to prove that he sustained an accidental injury arising out of and in the course of his employment with Respondent.

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: MAY 16 2017

Charles J. DeVriendt

Joshua D. Luskin

Deborah L. Simpson

SE/
O: 4/12/17
49

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

COBARRUBIAS, HECTOR
Employee/Petitioner

Case# **15WC034073**

17IWCC0304

D&M CUSTOM CARPENTRY
Employer/Respondent

On 3/10/2016, 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:

1072 EPSTEIN LAW FIRM
JACK R EPSTEIN
4346 W 26TH ST SUITE 2000
CHICAGO, IL 60623

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT HARRINGTON JR
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)

17IWCC0304

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

HECTOR COBARRUBIAS
Employee/Petitioner

Case #15 WC 34073

V.

D&M CUSTOM CARPENTRY
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on February 1, 2016. After reviewing all of the issues, the stipulations of the parties and the evidence, it is hereby found and ordered as follows:

ISSUES:

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

B. ☒ Was there an employee-employer relationship?

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

D. ☒ What was the date of the accident?

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

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

G. ☒ What were the petitioner's earnings?

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

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

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

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

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

M. ☐ Is the respondent due any credit?

N. ☐ Prospective medical care?

FINDINGS

- Timely notice of this accident was given to the respondent.

- At the time of injury, the petitioner was 45 years of age, single with no children under 18.

ORDER:

- The petitioner's request for benefits is denied and the claim is dismissed.

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

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

Robert E. Williams

Signature of Arbitrator

March 10, 2016

Date

MAR 10 2016

FINDINGS OF FACTS:

The petitioner, a carpenter, sought medical care with Dr. Salgado at Balance Body Therapy for his low back and reported that on September 29, 2015, he unloaded equipment and a metal door from a truck to a third floor and that afterward while bending down, he felt paralyzing and intense back pain that immobilized him. The petitioner reported low back, hip, upper and lower leg and knee pain. Therapy modalities approximately three times a week were provided. EMG and NCV studies on October 15th revealed radiculitis affecting L4-S1, bilaterally. MRIs on October 16th revealed a left-sided herniation at L5-S1 and extensive ACL reconstruction changes, a subtle intrasubstance horizontal irregularity and a small joint effusion of his left knee. Dr. Abdellatif saw the petitioner on November 10th. The petitioner was given a lumbar epidural at L5, lumbosacral medial branch blocks bilaterally at L5-S1 and L3-4 and lumbosacral medial facet blocks bilaterally at L4-L5, L5-S1 and S1 on November 18th. The petitioner had additional injections from Dr. Abdellatif on December 10th and January 22, 2016. He continued his therapy with Dr. Salgado through January 26, 2016.

FINDING REGARDING WHETHER THE RESPONDENT WAS OPERATING UNDER THE ILLINOIS WORKERS' COMPENSATION ACT:

The petitioner proved that the respondent was operating under the Illinois Workers' Compensation Act on September 29, 2015. The respondent was a general contractor engaged in the remodeling and altering of structures under the automatic coverage provision of subsection 1 of Section 3 of the Act.

FINDING REGARDING WHETHER THERE WAS AN EMPLOYER/EMPLOYEE RELATIONSHIP BETWEEN THE PARTIES AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

The petitioner failed to prove that an employer/employee relationship existed between him and the respondent on September 29, 2015, and that he sustained an accident on September 29, 2015. The respondent is a general contractor in the business of remodeling. The respondent subcontracted their remodeling jobs to experienced tradesmen with specialized skills and training to complete the different phases of their remodeling job. The petitioner was a carpenter and tasked with using his carpentry and cabinet making skills to work only on that part of a project. He was not a general laborer that would be expected to work full time. He was paid by the hour and did not have a set number of work hours per day or per week. The petitioner kept track of the hours he worked and billed the respondent for those hours. No withholdings were deducted from the money paid to the petitioner. He used his own hand tools and provided his own transportation. It is noted that the petitioner's log of the hours and weeks that he worked is not consistent with or supported by the compensation reflected in his exhibit 8, the check issuer transactions. In fact, the check issuer transactions reflect only thirty-four weeks from September 26, 2014, through September 29, 2015, and only two forty-hour weeks at the $20 per hour rate the petitioner testified he was paid. It is apparent that the petitioner did not work five days a week or even every week during the year prior to his injury. The need for his services depended on the remodeling project and the petitioner determined how the carpentry was done in order to complete the task.

Also, the petitioner's claim of an employee-employer relationship with the respondent and his claim of an injury moving a door were rebutted by Edwin Couch, a

carpenter subcontractor for the respondent. Dwight Smith, respondent's owner, also testified that the petitioner attributed his back condition to his grandson jumping on him. Nor does the petitioner have the protection of a statutory employee relationship provided by Section 1(a)3 of the Act, since he was the subcontractor and not an employee of a subcontractor. The petitioner's request for benefits is denied and the claim is dismissed.

17IWCC0305

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MANUEL CHAIDEZ,

Petitioner,

vs.

NO: 09 WC 6490

HISTORIC HOME AND WINDOW
RESTORATION, INC.,
FRANK ROJAS, and
ILLINOIS STATE TREASURE AS *EX OFFICIO*
CUSTODIAN OF THE INJURED WORKERS'
BENEFIT FUND,

Respondent,

DECISION AND OPINION ON REVIEW

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

The Commission reduces the permanent partial disability award under §8(e) of the Act to 15% loss of use of the right hand. On November 5, 2008, Petitioner sustained a right, non-displaced scaphoid wrist fracture for which he received conservative treatment. This accident occurred prior to September 1, 2011, so the five factors for determining permanent partial disability under §8.1b of the Act do not apply.

Petitioner testified that he last received treatment for his injuries in March, 2009. The record from Petitioner's final visit on March 20, 2009, indicates that his range of motion had significantly improved but he still had some "persistent soreness" at the extremes of motion. On examination, his wrist range of motion was near full, lacking only a few degrees of flexion and extension when compared to the contralateral side. Pronation and supination were full. There was no residual tenderness to palpation at the carpus or within the scaphoid. Sensory and motor functions were intact distally without peripheral edema.

Petitioner testified that he obtained gainful employment two to three months afterwards and is earning "more or less" the same amount that he was prior to his accident. Petitioner testified that the "window work" he did for Respondent is not the same kind of work he does today. He testified

17IWCC0305

that he currently builds the house, walls, roofs and ceilings, which is harder than what he was doing at the time of his accident. However, Petitioner testified that he pretends to be using his strength to lift up the walls with his other co-workers.

Based on all of the above and a review of the record as a whole, we find that Petitioner is entitled to 15% loss of use of the right hand.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $320.00 per week for a period of 19.4 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 $320.00 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 5% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $320.00 per week for a period of 30.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 15% loss of use of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $13,882.16 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $38,000.00. 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: MAY 16 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

SE/
O: 4/12/17
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHAIDEZ, MANUEL
Employee/Petitioner

Case# **09WC006490**

HISTORIC HOME & WINDOW RESTORATION
IWBF FRANK ROJAS
Employer/Respondent

17IWCC0305

On 10/27/2015, 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 0.15% 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:

0243 JAMES E GUMBINER & ASSOCIATES
EDUARDO SALGADO
180 N MICHIGAN AVE SUITE 2100
CHICAGO, IL 60601

0000 HISTORIC HOME & WINDOW
RESTORATION INC
215 W PARK AVE
AURORA, IL 60506

5204 ASSISTANT ATTORNEY GENERAL
FLETCHER, CHRITOPHER
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

17IWCC0305

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

Manuel Chaidez
Employee/Petitioner

v.

Historic Home And Window Resotoration, IWBF, Frank Rojas
Employer/Respondent

Case # **09** WC **6490**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **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 **Was notice properly sent? Is the IWBF liable?**

FINDINGS

On **November 5, 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 **$23,400.00**; the average weekly wage was **$450.00**.

On the date of accident, Petitioner was **42** years of age, *married* with **3** dependent children.

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

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

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

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

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $320.00/week for 19.4 weeks, commencing 11/6/2008 through 03/20/2009, 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, for all dates of services rendered at Mercy Medical Center $10,393.16 and $3,489.00 to Dreyer Medical Center, as provided in Sections 8(a) and 8.2 of the Act. ($13,882.16).

Permanent Partial Disability -Person as a whole:
Respondent shall pay Petitioner permanent partial disability benefits of $320.00/week for 25 weeks, because the injuries sustained caused the 5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $320.00/week for 51.25 weeks, because the injuries sustained caused 25% loss of use of the Petitioner's right hand, as provided in 8(e) of the Act.

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

RULES REGARDING APPEALS

17 I W CC0305

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

STATEMENT OF INTEREST RATE

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

10/21/2015
Date

OCT 2 7 2015

17IWCC0305

STATE OF ILLINOIS)
)
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MANUEL CHAIDEZ,

Petitioner,

vs.

HISTORIC HOME & WINDOW RESTORATION, THE ILLINOIS STATE TREASURER , AS EX OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND, AND FRAN ROJAS,

Respondent.

No. 09 WC 6490

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

Petitioner, Manuel Chaidez, through his attorneys, James Ellis Gumbiner and Associates, filed an application for adjustment of claims under the Illinois Workers' Compensation Act ("Act") seeking relief from the Respondent Historic Home and Window Restoration and the Injured Workers' Benefit Fund ("IWBF") for a work accident occurring on November 5, 2008. At the time of the reported accident Historic Home and Window Restoration did not maintain workers' compensation insurance. (Petitioner's Exhibit 2).

On August 5, 2015 the parties appeared before Arbitrator Kurt Carlson in order to try Petitioner's claim. Prior to the trial date on July 7, 2015, the parties, including Frank Rojas as representative for Historic Home and Window Restoration, met with the Arbitrator and were

personally provided with the August 5, 2015 trial date. On August 5, 2015 Frank Rojas appeared on behalf of Historic Home and Window Restoration but was not represented by an attorney. Attorney Eduardo Salgado from James Ellis Gumbiner and Associates appeared on behalf of the Petitioner and Christopher Fletcher with the Illinois Attorney General's office was present on behalf of the Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund. Furthermore, a language translator was present at trial in order to assist the Petitioner with their testimony.

On November 5, 2015, Petitioner was 42 years old, married with 3 children all under the age of 18.

Petitioner began working for Historic Home and Window Restoration approximately 4 to 6 months before his accident on November 5, 2008. Petitioner further testified to walking by a project site of Historic Home and Window Restoration when he decided to inquire about a position. Petitioner testified to speaking with owner-president of Historic Home and Window Restoration Frank Rojas, regarding employment. Petitioner indicated that he was hired to provide assistance refurbishing and restoring windows for the Respondent. The kind of work Petitioner described consisted of climbing tall ladders, sanding window exteriors as well as fixing the inner workings of old and warn out windows. While working for Respondent, Petitioner was paid $450.00 a week. Petitioner was paid $450.00 a week regardless of whether or not he worked a 40-hour workweek. Petitioner was paid using business checks as evidence by Petitioner's exhibit 3. Historic Home and Window Restoration did not withhold taxes or provide any benefits.

According to the testimony provided by Frank Rojas, the Petitioner was instructed by either himself or a supervisor when and where to report for work. Furthermore, the Petitioner was told what tasks he was to perform while at work and when he was allowed to finish and leave for the

day. Moreover, when asked who procured all the business for Historic Home and Window Restoration Mr. Rojas indicated that he was responsible for obtaining all of the company's work projects.

On November 5, 2008, Petitioner informed the court that he was instructed to report to work at a commercial building in Illinois at approximately 10:00 a.m. Petitioner indicated that the days tasks required him to refurbish an exterior window located on the second floor of a commercial building. To accomplish said task, Petitioner placed one foot on the top step of a stepladder and the other on the windowsill. Petitioner then had to reach out to the outside of the building in order to sand the exterior of the window. While sanding said window, Petitioner testified he lost his balance and fell forward out of the second story window. On his way down, Petitioner stated that he first fell through the building's awning prior to striking the concrete floor below. Petitioner testified his coworkers including the project supervisor, Frank Rojas' sister, helped him off the ground and brought him inside. An ambulance was not called, but instead the Petitioner was driven home prior to finishing his shift.

Once home the Petitioner consulted with this wife and decided to seek emergency medical attention. Petitioner was admitted into Presence Mercy Medical Center on November 5, 2008 and hospitalized until November 7, 2008. (Petitioner's Exhibit 5). At that time the Petitioner was diagnosed with a right wrist fracture as well as a pubic rami fracture of Petitioner's pelvis. *Id.* In order to treat Petitioner's injuries Presence Mercy Medical Center hospitalized the Petitioner and conducted x-rays of Petitioner's right wrist and pelvis, prescribe various pain medications like morphine, as well as casted Petitioner's wrist. *Id.*

After being discharged from Presence Mercy Medical Center, the Petitioner sought treatment with Dreyer Medical Clinic. The Petitioner began his treatment on November 12, 2008.

(Petitioner's Exhibit 6). At this appointment the provider verified that the Petitioner was suffering from a loss of range of motion in the right wrist. *Id.* The medical records further indicate the Petitioner could ambulate even with the pelvis fracture, but could only do so with difficulty. *Id.* Petitioner's wrist/thumb was also immobilized with a spica splint. On Decmeber 31, 2008, Petitioner was again seen at Dreyer Medical Clinic. The medical provider indicated Petitioner's pelvis was healing well but Petitioner continued to suffer from right wrist pain. *Id.* At this time Petitioner's wrist was recasted and told to return for a follow up in one month. On January 30, 2009, Petitioner returned for a follow up. During Petitioner's appointment he was informed that the radiographs showed an acceptable alignment of his fractures. As a result he was recommended he start occupational therapy to help regain his range of motion in his wrist. *Id.* According to Petitioner's testimony, he began physical therapy with Dreyer Medical Center shortly thereafter on February 11, 2009. Petitioner underwent four formal sessions of Physical therapy before concluding his treatment with Dreyer Medical on March 20, 2009. *Id.* On said date, Dryer Medical Center indicated Petitioner's range of motion was nearly intact, but still lacked full range of motion. *Id.* Given these results, Petitioner was recommended to gradually increase his activity with the right hand as tolerated and could also begin to perform weight bearing exercises as tolerated. *Id.* As of March 20, 2009, Petitioner indicated that he has not continued with further medical treatment for either his right wrist or his pelvis. The Arbitrator notes that the medical records end on March 20, 2009.

Petitioner is claiming TTD benefits for November 6, 2008 to March 20, 2009 representing 19.4 weeks.

Petitioner testified that he never returned to work with Historic Home and Window Restoration. Petitioner said he was able to find new employment elsewhere at or around May of 2009 working for a roofing company at approximately the same rate of compensation.

II. CONCLUSIONS OF LAW

In deciding this matter the Arbitrator notes Petitioner has the burden of proving all disputed issues of his case by a preponderance of the evidence. Chicago Rotoprint v. Industrial Comm'n, 157 Ill.App.3d 996, 1000 (1987). Petitioner must prove each element of his claim without reliance on speculation or conjecture. Airlines v. Comm'n, 991 N.E.2d 458, 463 (2013).

Upon considering Frank Rojas' as well as the Petitioner's testimony and reviewing all the evidence, the Arbitrator finds no reason to question the credibility of the Petitioner. Accordingly, this decision relies heavily on Petitioner's credible testimony and the evidence provided in making the following conclusions of law:

a. Respondent was operating under and subject to the Illinois Workers' Compensation Act.

The Arbitrator finds the evidence tendered and both Petitioner's and Respondent's testimony to be credible and hereby holds Historic Home and Window Restoration was operating under and subject to the Illinois Workers' Compensation Act.

The Petitioner informed the court that he was injured on November 5, 2008, at a jobsite located in the state of Illinois. Petitioner further indicated that all subsequent medical care occurred within the state of Illinois. Moreover, Petitioner testified that he worked in an extra hazardous business that engaged in the maintaining, remodeling, and altering of historic homes and windows. Given that the Petitioner was engaged in construction work, which required him to climb ladders to reach tall heights and work in front of open windows, Section 3 of the Illinois

Workers Compensation Act shall be applied.

b. An Employee-Employer relationship does exist between Petitioner and Respondent –Employer.

The Arbitrator relies on the testimony of the Frank Rojas of Historic Home and Window Restoration in finding an Employee-Employer relationship existed on November 5, 2008 between the Petitioner and Historic Home and Window Restoration.

Frank Rojas, Owner/President of Historic Home and Window Restoration, testified to hiring the Petitioner to perform general carpentry work and other tasks as required. Mr. Rojas testified that he controlled all major aspects of Petitioner's employment with Historic Home and Window Restoration. In fact, Mr. Rojas indicated that he instructed the Petitioner what to do at the start of each individual job, controlled Petitioner's work schedule, instructed the Petitioner on when he was allowed to end for the day, and provided Petitioner's equipment to perform his tasks.

c-d. An accident occurred on November 5, 2008, which arose out of and in the course of Petitioner's employment.

The Arbitrator holds that Petitioner sustained an accident on November 5, 2008, which arose out of and in the course of Petitioner's employment. In reaching this conclusion the Arbitrator relies on Petitioner's credible description of the mechanism of injury, falling out of a second story window, and the medical evidence that was submitted into evidence. Furthermore, the Arbitrator notes that the testimony provided by Frank Rojas of Historic Home and Window Restoration did not refute the Petitioner's accident occurred.

e. Petitioner gave Respondent-Employee timely notice of the November 5, 2008 accident.

The Arbitrator finds that subsequent the work accident of November 5, 2008 Petitioner gave timely notice to both his supervisor as well as Frank Rojas, owner of Historic Home and Window Restoration.

On direct examination the Petitioner indicated that after falling out of the second story window on November 5, 2008, he was assisted by his coworkers and the project site supervisor inside the building where work was being done. Furthermore, Frank Rojas confirmed that at the time Petitioner was brought inside, he received a phone call from the project site supervisor notifying him of Petitioner's fall. After a review of this uncontested evidence, it is clear that Historic Home and Window Restoration was provided with immediate verbal notice of Petitioner's accident on the date of accident via the project site supervisor's call to Frank Rojas.

f. Petitioner's current condition of ill-being is casually related to his November 5, 2008 injury.

The Arbitrator finds that Petitioner's current condition of ill-being is related to the work accident of November 5, 2008.

According to the Petitioner, he sought medical attention with Presence Mercy Medical Center on November 5, 2008. The medical records from Presence Mercy Medical Center indicate that Petitioner suffered a right wrist fracture as well as a pubic rami fracture of Petitioner's pelvis. (Petitioner's Exhibit 5). Given that Petitioner's account of the mechanism of injury is well founded and given the medical treatment relates to said accident, Petitioner's current condition is related to the work accident of November 5, 2008.

g. Petitioner earned $450.00 per week during his employment with Historic Home and Window Restoration.

According to Petitioner's credible and uncontested testimony on direct examination, his yearly earnings preceding the injury were $23,400.00 with a corresponding average weekly wage of $450.00. Furthermore, when asked how he was compensated for his work, Petitioner stated that Historic Home and Window Restoration paid a total of $450.00 a week. Based on Petitioner's credible testimony, his average weekly wage is $450.00 with a corresponding rate of $320.00 for TTD and PPD based on the state minimum rate for four claimed dependents.

h-i. Petitioner was Petitioner was 42 years old, married with 3 children all under the age of 18.

At trial the Petitioner testified to being 42 years of age on November 5, 2008, when he was injured while working for Historic Home and Window Restoration. Petitioner further testified that at the time of the accident he had three minor children all under the age of 18. (Petitioner's Exhibit 4).

j. Any and all medical services provided by Presence Mercy Medical Center and Dreyer Medical Center were reasonable and necessary.

The medical records submitted into evidence are consistent in showing the care and treatment provided to the Petitioner was reasonable and necessary. Not only do the records adequately document the mechanism of injury, but they also provide a clear causal connection between Petitioner's treatment and his accident at Historic Home and Window Restoration. Furthermore, a review of the records show that the Petitioner had x-rays taken, prescribed pain medication, and performed several sessions of physical therapy for a well-documented wrist fracture prior to being released from care.

Regarding payment of the aforementioned treatment, the Petitioner testified credibly that the Respondent, Historic Home and Window Restoration, did not pay any of his medical bills. Rather the Petitioner was forced to make out of pocket payments for all of his necessary medical

treatment. Accordingly, the Arbitrator awards all medical bills entered into evidence, which includes bills from Presence Mercy Medical Center and Dreyer Medical Center, and orders the Respondent pay said bills in accordance with section 8.2 of the "Act". (Petitioner's Exhibit 5, 6).

k. Respondent owes Petitioner TTD benefits as a result of the injuries sustained on November 5, 2008.

After reviewing the medical records in evidence and considering Petitioner's testimony, the Arbitrator finds the Respondent owes Petitioner 19.4 weeks in TTD benefits. The medical records reviewed indicate the Petitioner was off work or provided with restrictions that the Respondent failed to accommodate from November 6, 2008 through March 20, 2009. It is important to note that Frank Rojas, Owner/President of Historic Home and Window Restoration, did not dispute the Petitioner was unable to work as a result of his accident on November 5, 2008. As a result the Petitioner is awarded $6,208.00 representing 19.4 weeks of TTD at a rate of $320.00.

l. Petitioner has sustained partial and permanent disability due to the injuries sustained at work.

Based upon the evidenced presented the Arbitrator finds that the Petitioner is permanently partially disabled to the extent of 5% person as a whole, under Section: 8(d)2 of the "Act" for Petitioner's undisplaced pelvic fracture and an additional 25% loss of the use of the Petitioner's hand for his right wrist and navicular fracture.

o. Notice to the Respondent was proper and the Respondent IWBF liable for all awarded workers' compensation benefits to the Petitioner.

A review of the facts indicate that the Respondent was properly provided with notice of the November 5, 2008.

In the case at hand, Respondent was present on the July 7, 2015 trial date. At that time Mr. Frank Rojas as well as a representative of from the Attorney General's office met with the Arbitrator and were

provided with the final August 5, 2015 trial date. On August 5, 2015 all parties were present before the Arbitrator, including Frank Rojas from Historic Home and Window Restoration.

Given that the record clearly shows that Frank Rojas as representative of Historic Home and Window Restoration attended the trial date of August 5, 2015, this court finds that the Respondent was provided with proper notice and required under the "Act".

With regards to the liability of Illinois Worker's Benefit Fund, a review of the record shows that a certificate from the National Council on Compensation Insurance was tendered into evidence (Petitioner's Exhibit 2). A review of the certification shows that on November 5, 2008 Historic Home and Window Restoration, Inc. was operating without worker's compensation insurance as required by the state of Illinois [Petitioner's Exhibit 2]. As a result of Respondent's lack of insurance coverage, James Ellis Gumbiner & Associates named the IWBF as a named party to Petitioner's filed Application for Adjustment of Claims.

Given that IWBF was properly named on Petitioner's filed Application for Adjustment of Claims for date of accident November 5, 2008, and given the lack of worker's compensation insurance coverage by Historic Home and Window Restoration, Inc. at the time of the accident, this court finds the IWBF liable for providing Petitioner with workers' compensation benefits.

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 Causal connection	☐ Second Injury Fund (§8(e)18)
REMAND FROM CIRCUIT COURT	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Juan C. Hipolito,

Petitioner,

vs. NO: 11 WC 44490

Dezurik Apco Valve & Primer, Inc.,

Respondent.

17IWCC0306

DECISION AND ORDER ON REMAND FROM THE CIRCUIT COURT

This matter had previously been heard and the Decision of Arbitrator Williams had been filed May 7, 2015. The Arbitrator found that Petitioner proved accident that arose out of and in the course of employment, and established a causal connection between these accidental work related injuries and his condition of ill-being. The Arbitrator found that on November 7, 2013 Petitioner reinjured his back after falling and that that accident superseded the initial injury of February 22, 2011. Accordingly the Arbitrator denied all requests for benefits after November 7, 2013. The Arbitrator found that Petitioner was entitled to an award of 5 weeks of temporary total disability benefits (2/23/11-3/8/11 & 3/22/11-4/11/11) at a rate of $314.87 per week under §8(b) of the Act ($1,574.35 total TTD). The Arbitrator found that medical care rendered to petitioner through November 7, 2013 was reasonable and necessary and awarded the bills associated to that care pursuant to the medical fee schedule. The Arbitrator found that Respondent was to receive credit for amounts paid towards bills including through §8(j) and to hold petitioner harmless. The Arbitrator denied Petitioner's request for prospective medical care and penalties and attorney fees. The matter was presented on Petitioner's Review and the Commission affirmed the Arbitrator's decision. Thereafter, Petitioner went before the Circuit Court of Cook County who reversed the decision, finding an ongoing causal connection and remanded the case back to the Commission for determination of further benefits consistent with

17IWCC0306

their decision. The Commission, herein, remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or medical expenses, prospective medical care, or of compensation for permanent disability.

- Petitioner testified at the hearing before Arbitrator Williams. Petitioner was a 40 year old employee of Respondent, who described his job as a laborer. Petitioner testified that at about 9:00am, on February 22, 2011, (he started that day at 7:00am) he was cleaning pieces at work that could be painted. Petitioner stated that when he was working with a piece he turned the piece around to clean it on the other side and the piece got stuck on the skid. Petitioner stated that in an attempt to get the piece unstuck he lifted up the piece and that was when he fell and was injured. Petitioner stated that it was a metal, iron piece. He injured his lower back then. Petitioner indicated from the time he started working until that incident he did not have any back problems. Petitioner did not finish work that day as they took him to Northwest Community Hospital and they sent Petitioner home. Petitioner began treating with Dr. Patel at the hospital from February 22, 2011 through March 8, 2011 and during that time Petitioner was on light duty restrictions. On March 8, 2011 Petitioner was sent back to work with no restrictions. Petitioner returned to Dr. Patel March 22, 2011; he stated that when he returned to work at his regular job he worked and finished the day but ended up having a lot of pain. Petitioner stated that the problem was when he woke up, he could not move out of bed. On March 22, 2011, Dr. Patel referred Petitioner for physical therapy and put Petitioner back on light duty. Petitioner underwent therapy at Northwest Community Hospital from March 25, 2011 through April 20, 2011. After therapy Petitioner saw Dr. Thota at Northwest Community Hospital on May 6, 2011. Dr. Thota referred Petitioner for an MRI and kept Petitioner on light duty restrictions. Petitioner did not recall if he returned to light duty prior to the MRI. Petitioner believed he may have worked light duty from April 12, 2011 until 2012. Petitioner indicated Respondent moved him from the area they cleaned the parts to a machine that cleaned the parts. In that initial area Petitioner had to bend his back do the cleaning, however on the machine he just had to be stand up and put his hands inside the machine; those were smaller parts.

- Petitioner recalled being sent to Dr. Bernstein on October 10, 2011. He recalled not seeing a doctor for about five months in 2011; he was working during that time at the machine with the smaller parts. Petitioner returned to see Dr. Patel (his doctor) in October 2011. Petitioner recalled seeing Dr. Mark Lorenz in January 2012. Petitioner stated that Dr. Lorenz referred Petitioner for another MRI for his back and prescribed some medication. Petitioner saw Dr. Lorenz several times in 2012 with the last being about August 8, 2012. Petitioner saw Mr. Pittman February 4, 2013 at Dr. Lorenz office and was then referred for pain management where Petitioner had two injections. Petitioner indicated one injection helped him for that day and the other lasted for two to three days; he was not sure how long he had the relief. Petitioner recalled the last time he saw the pain doctor was October 7, 2013. Petitioner then started seeing a different Dr. Patel at

17IWCC0306

Elgin Medical & Dental Center in February 2014 was then referred for a neurosurgical evaluation in January 2015. Petitioner saw Dr. Matthew Ross on March 11, 2015 who recommended a discogram. Petitioner stated that he wanted that discogram as he needed to get better from the pain.

- Petitioner testified that he feels the pain in his lower back and his legs down to his feet. He stated he also feels like a burning under his butt and sometimes, not very often, his legs and butt get shaky and he gets numbness with his legs from his butt down to his feet. Petitioner is still taking medication prescribed by Dr. Patel. Petitioner was working until October 24, 2014. Petitioner stopped working on October 25, 2014. Petitioner stated he had been working but he could not do the job duties they told him to do; Respondent stopped him from working with the restrictions. Petitioner stated he told them it was hurting a lot and the supervisor and a guy from human resources told Petitioner to go to the doctor. Petitioner stated he did not have insurance. Petitioner stated he went to Dr. Patel and Respondent said they did not have any more work for Petitioner with the restrictions. Petitioner stated that the restrictions were no bending, or twisting. Petitioner testified that he had not worked anywhere since October 25, 2014 and other than Dr. Patel or Dr. Ross Petitioner had not seen any other doctors since October 25, 2014. Petitioner testified that he had no injuries or accidents prior to February 22, 2011 and he stated he had no new accidents or injuries since he stopped working regarding his low back.

- On Review, Petitioner argued that the evidence established that Petitioner's present condition of ill-being is causally related to his accidental injuries of February 22, 2011. Petitioner noted the Arbitrator found the injury of November 7, 2013 superseded his initial injury. Petitioner argued the he suffered an injury February 22, 2011 that resulted in a disc herniation and annular tear and Dr. Lorenz opined he required surgical repair, fusion. Petitioner argues no medical opinion is present that opines the November 7, 2013 was the sole cause of Petitioner's current condition of ill-being and symptoms. Petitioner requested the Commission reverse to find Petitioner's current condition of ill-being is causally related to the February 22, 2011 undisputed accident. Petitioner argued that the evidence clearly established Petitioner's condition had not yet stabilized and he was entitled to temporary total disability (TTD) beyond November 7, 2013. Petitioner requested the Commission modify the Arbitrator's decision and award TTD benefits. Petitioner argued that the evidence clearly established that the medical treatment Petitioner received was reasonable and necessary and Petitioner requested the Commission modify the decision to award medical expenses after November 7, 2013. Petitioner argued that the evidence clearly established that Petitioner is entitled to prospective medical care and requested the Commission find the lumbar discogram pain study prescribed by Dr. Ross is reasonable and necessary in an attempt to alleviate Petitioner's condition of ill-being. Petitioner argued that the evidence clearly established that Petitioner is entitled to penalties and attorney fees and requests the Commission modify to award said benefits.

17IWCC0306

- On Review, Respondent requested the Commission affirm the Arbitrator's decision in its entirety

- On Review, the Commission found that there is no indication of any prior low back condition or treatment. Petitioner had clearly suffered an injury at work and as a result of that he was on permanent restrictions as he did not want to proceed with surgical intervention. Petitioner has the records documenting his ongoing complaints since the accident but had not been under continuous medical care since this accident February 2011, so Petitioner's testimony is somewhat rebutted in that he was released at MMI by the treating doctors, on permanent restrictions as Petitioner did not want surgery. Records also indicate that Petitioner had a slip and fall injury to his back November 7, 2013 as a subsequent injury. Petitioner had indicated that he had incurred no subsequent injuries since he left Respondent (Petitioner stopped working for Respondent in 2014), but Petitioner made no mention of the November 2013 fall on his back that the Commission found raised some question of credibility. It was not clear what, if any, medical treatment was rendered after the subsequent injury other than the indication in records of him going to the emergency room (ER) later that day. The Commission found Petitioner was declared at maximum medical improvement (MMI) as to surgical intervention and with no ongoing care, the subsequent slip and fall onto his back to have been a further aggravation of the underlying condition whereby breaking causal relationship to Petitioner's condition of ill being. Therein, the Commission affirmed the decision of the Arbitrator that Petitioner failed to meet the burden of proving an ongoing causal relationship to his current condition of ill-being with the evidence presented; and denial of prospective medical care, and TTD, and penalties.

- The Circuit Court found the Commission decision regarding no ongoing causal connection was against the manifest weight of the evidence. The Circuit Court stated that using the *National Freight* factors, with the facts of the matter presented there that Petitioner's symptoms, pathology did not change regarding his low back after the second accident so therefore the causal chain was not broken from the initial injury and his condition of ill-being. The Circuit Court stated Petitioner's "...ability to work did not change until almost a year after the second accident, when he was given greater work restrictions". The Circuit Court noted at that time Respondent could not accommodate those restrictions. The Circuit Court stated that 'The record clearly shows Plaintiff's original injury remained after the second accident. It also clearly shows that all recommended treatment after the second accident focused on the lower back. The original injury of February 22, 2011 therefore is clearly "a causative factor in producing either the subsequent injury or subsequent disability" ' per *International. Harvester*. The Circuit Court stated that the "record does not support a finding that the second accident of November 7, 2013 broke the chain of causality between the original injury and Plaintiff's current condition of ill-being." The Circuit Court noted Petitioner experienced new symptoms of the upper back and neck pain after the second accident, but the records

showed the original injury as a causal factor to his condition of ill-being. The Circuit Court stated, "The record does not support a finding that Plaintiff's second injury is the sole cause of his current state of ill-being", therefore the Commission decision was against the manifest weight of the evidence.

The Commission notes that the Circuit Court found the subsequent accident did not break the causal connection so Petitioner's condition of ill-being is still causally related to the initial accident. With the Circuit Court finding as to causal connection, the Commission, herein, reverses the prior decision to find an ongoing causal connection (no break in the causal chain) and remands the matter to the Arbitrator for further determination of the remaining issues.

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

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

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

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

DATED: MAY 17 2017
d-3/23/17
DLG/jsf
045

David S. Gore

David Gore

Stephen J. Mathis

Stephen Mathis

Deborah L. Simpson

Deborah Simpson

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

HIPOLITO, JUAN C
Employee/Petitioner

Case# **11WC044490**

DEZURIK APCO VALVE AND PRIMER INC
Employer/Respondent

17IWCC0306

On 5/7/2015, 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 0.07% 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:

5317 CASTANEDA & STIBERTH PC
JOHN J CASTANEDA
47 DuPAGE COURT
ELGIN, IL 60120

0210 GANAN & SHAPIRO PC
JULIE M SCHUM
210 W ILLINOIS ST
CHICAGO, IL 60654

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

JUAN C. HIPOLITO
Employee/Petitioner

Case #11 WC 44490

v.

DEZURIK APCO VALVE AND PRIMER, INC.
Employer/Respondent

17IWCC0306

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on April 21, 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. ☒ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☒ Prospective medical care?

FINDINGS

- On February 22, 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.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $24,560.12; the average weekly wage was $472.31.
- At the time of injury, the petitioner was 40 years of age, single with one child under 18.
- The parties agreed that the respondent paid $1,594.20 in temporary total disability benefits.
- The respondent agreed that the petitioner is entitled to temporary total disability benefits from February 23, 2011, through March 8, 2011, and from March 22, 2011, through April 11, 2011, (5 weeks).

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $314.87/week for 5 weeks, from February 23, 2011, through March 8, 2011, and from March 22, 2011, through April 11, 2011, which are the periods of temporary total disability for which compensation is payable. The amount due the petitioner is reduced by the $1,594.20 in benefits previously paid to him by the respondent. The petitioner's request for temporary total disability benefits after November 7, 2013, is denied.
- The medical care rendered the petitioner for his lumbar spine through November 7, 2013, was reasonable and necessary and is awarded. 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.

- The petitioner's request for prospective medical care, penalties and fees is denied.

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

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

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

Robert E. Williams

Signature of Arbitrator

May 7, 2015
Date

MAY 7 - 2015

FINDINGS OF FACTS:

On February 22, 2011, the petitioner, a laborer, felt lower back pain while lifting and dislodging a heavy object from a skid. He received medical care at Northwest Community Hospital with Dr. Manoj Patel, whose assessment was low back strain for which medication and light duty were prescribed. X-rays of his back were negative for fractures or disc space narrowing. The petitioner had three follow-ups through March 8th, at which time he reported feeling much better with only a small bit of tightness in his left lower back. The doctor noted a full range of motion and no radicular symptoms and released him without restrictions.

On March 22nd, he returned to Dr. Patel and reported that his back pain increased over time and that the previous day he bent over while cleaning some parts and felt a sudden pinch in his back and worsening back pain. Dr. Patel prescribed physical therapy, medication and light-work duty. The petitioner reported improvement at follow-ups but on May 7th reported sharp pain radiating down his left buttock. Dr. Newberg opined at a follow-up on May 13th that an MRI revealed a very mild bulging disc at L4-5 and L5-S1 with no encroachment. The diagnosis was sacroiliitis bilaterally and bulging discs from L4-S1. On October 21st, the petitioner saw Dr. Shashikant Patel at the Elgin Medical & Dental Center for severe back pain that began the day before that prevented him from getting out of bed. The diagnosis was chronic lumbar pain and he recommended a second orthopedic opinion.

On January 5, 2012, the petitioner saw Dr. Lorenz at Hinsdale Orthopaedics and reported an increase in back pain in October 2011. An MRI on January 16th revealed disc space narrowing and desiccation at L4-5 and L5-S1, a shallow protrusion at L4-5 and a

left paracentral disc protrusion/annular tear at L5-S1. On February 8th, Dr. Lorenz opined that the MRI revealed disc herniation at L4-5 and L5-S1 with axial back pain. The petitioner requested conservative care and was placed on medication and work restrictions. He reported continuing back pain at follow-ups with Dr. Lorenz on March 12th and April 4th, at which time the doctor noted that the petitioner was a surgical candidate. Dr. Lorenz noted complaints of severe back pain with bilateral radiation, left greater than the right, on May 24th. Dr. Pittman at Hinsdale Orthopaedics opined on August 8th that an MRI showed spondylosis central disc herniation at L4-5 and L5-S1 and an annular tear at L5-S1 and that a discogram was concordant for pain at L4-5 and L5-S1. The doctor discussed a lumbar fusion with the petitioner.

On February 4, 2013, the petitioner declined the surgery and was discharged with a permanent lifting restriction of ten pounds. The petitioner saw Dr. Dasgupta of Premier Pain Specialist on June 3, 2013, who gave him a lumbar epidural steroid injection on August 6th. On August 26th, the petitioner reported complete relief for two days and an overall relief of 50%. The petitioner received lumbar transforaminal injections on the right and left at L5-S1 on September 9th. He reported on October 7th that the injection provided a 40% relief of his leg pain.

On February 20, 2014, the petitioner returned to Dr. Shashikant Patel and reported back pain from an injury on February 22, 2011, and a second injury on November 7, 2013. A cervical MRI on April 4th revealed bulging discs at C3-4, C4-5 and C5-6. A thoracic MRI on April 7th was unremarkable. Dr. Tom Stanley of Midwest Bone & Joint released the petitioner with a five-pound lifting restriction for his back on May 5, 2014. He followed up with Dr. Patel for back pain on May 13th, June 5th and July 18th. On July

22, 2014, the petitioner was evaluated by Dr. Candido at the request of the respondent. Dr. Candido opined that there was symptom magnification and positive Wadell's signs and that the petitioner was at MMI and could work at a medium duty level. He followed up with Dr. Patel for back pain on October 25th and December 19th.

At his last follow-up with Dr. Patel on January 27, 2015, the petitioner requested a referral to a neurosurgical specialist. On March 11, 2015, the petitioner saw Dr. Ross and reported his initial injury and a slip-and-fall on November 7, 2013. He reported experiencing low back, bilateral leg and neck pain after his second incident. The petitioner had full range of motion in his neck and a 45-degree limit of forward flexion of his lumbar spine. Dr. Ross opined that the petitioner's symptoms suggested cervical, thoracic and lumbar strains and possible L4-5 and/or L5-S1 nerve impingement for which he recommended a discogram.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for his lumbar spine through November 7, 2013, was reasonable and necessary and is awarded. The medical care rendered the petitioner after November 7, 2013, 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 through November 7, 2013, was causally related to the work injury. Since his initial injury on February 22, 2011, the petitioner has re-injured and aggravated his lumbar spine several times that has resulted in a progressive worsening of his lumbar spine condition. The petitioner's initial diagnosis at Northwest

Community Hospital was a low back strain. He had no radicular symptoms. His back pain and range of motion improved with therapy and medication and he was released without restrictions. The petitioner reported a sudden pinch in his back and worsening back pain after bending over to Dr. Patel on March 21, 2011. The MRI at that time revealed a very mild bulging disc at L4-5 and L5-S1 with no encroachment. On October 21, 2011, the petitioner reported to Dr. Shashikant Patel severe back pain that began the day before. On January 5, 2012, the petitioner reported to Dr. Lorenz an increase in back pain in October 2011 while lifting. An MRI on January 16, 2012, revealed disc space narrowing and desiccation at L4-5 and L5-S1, a shallow protrusion at L4-5 and a left paracentral disc protrusion/annular tear at L5-S1. After lumbar epidural steroid injections on August 6 and October 7, 2013, the petitioner reported 50% relief of his back pain and a 40% relief of his leg pain. On November 7, 2013, the petitioner re-injured his back after falling and complained to Dr. Patel of significant low back, bilateral leg and neck pain. The petitioner's injury on November 7, 2013, supersedes his initial injury on February 22, 2011. The petitioner's request for benefits after November 7, 2013, is denied.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

The petitioner is entitled to temporary total disability benefits from February 23, 2011, through March 8, 2011, and from March 22, 2011, through April 11, 2011. The petitioner worked from April 12, 2011, through October 24, 2014. The petitioner's request for temporary total disability benefits after November 7, 2013, is denied.

The respondent shall pay the petitioner temporary total disability benefits of $314.87/week for 5 weeks, from February 23, 2011, through March 8, 2011, and from

March 22, 2011, through April 11, 2011, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

FINDING REGARDING PROSPECTIVE MEDICAL:

The petitioner failed to prove that any prospective medical care is reasonable medical care necessary to relieve the effects of the February 22, 2011, work injury. The petitioner's request for prospective medical care is denied.

FINDING REGARDING PENALTIES AND FEES:

The petitioner's request for penalties and fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jamileh Toolo-Shams,
Petitioner,

vs.

NO: 11 WC 38604

Northshore University Health System,
Respondent,

17IWCC0307

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 reinstatement and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator. The Arbitrator's decision reinstating the claim is Interlocutory in nature and therefore the Commission has no jurisdiction to consider the matter at this time.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 26, 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.

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

DATED: MAY 18 2017
o033017
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

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

John Weber,
Petitioner,

vs.
SOI/IDOT,
Respondent,

NO: 15 WC 09496

17IWCC0308

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 what is the nature and extent of Petitioner's permanent disability, Petitioner's objection to §12 exam-Granted, Respondent's Motion to Reconsider-Denied, whether or not the date is correct 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 13, 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.

No bond or summons required for State of Illinois cases.

DATED: MAY 18 2017

L. Elizabeth Coppoletti
L. Elizabeth Coppoletti

Charles J. DeVriendt
Charles J. DeVriendt

Joshua D. Luskin
Joshua D. Luskin

LEC/mas
o:5/17/17
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WEBER, JOHN
Employee/Petitioner

Case# **15WC009496**

17IWCC0308

SOI/IDOT
Employer/Respondent

On 10/13/2016, 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 0.49% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1727 LAW OFFICES OF MARK N LEE LTD
KEVIN MORRISON
1101 S SECOND ST
SPRINGFIELD, IL 62704

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

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSTION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

OCT 13 2016

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

17IWCC0308

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

John Weber
Employee/Petitioner

v.

SOI/IDOT
Employer/Respondent

Case # **15** WC **009496**

Consolidated cases: **N/A**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **12/3/15**. By stipulation, the parties agree:

On the date of accident, **1/20/15**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$73,578.50**, and the average weekly wage was **$1,414.97**.

At the time of injury, Petitioner was **53** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of **$26,683.64** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$N/A** for other benefits, for a total credit of **$26,683.64**.

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 **$735.37**/week for **62.5** weeks because the injuries sustained caused the **12.5%** loss of a person as a whole, as provided in Section 8(d)2 of the Act.

Per Stipulation of the parties, all TTD has been paid and none is owed.

Respondent shall pay all unpaid related medical bills pursuant to the fee schedule.

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

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

Michael K. Nowak, Arbitrator

9/6/16
Date

ICArbDecN&E p.2

OCT 13 2016

FINDINGS OF FACT

Petitioner has worked for Respondent for 16 years. He is currently employed as a Highway Maintainer. Petitioner described that his job is heavy labor, which requires a great deal of heavy lifting. He is responsible for placement of highway signs.

Petitioner testified he was working for the Respondent on 1/20/2015 when, while lifting large wooden posts, he felt pain in his right shoulder. Petitioner saw Dr. Karl S. Rudert on 1/22/2015 with pain in his right shoulder that radiated down the arm. An MRI of the right shoulder was taken on 2/4/2015 that revealed a small tear along the bursal surface of the arm, with no evidence of a full-thickness tear.

Petitioner was then referred to Dr. Gurtler. On 2/26/2015, Petitioner was seen by Dr. Gurtler and recounted a similar history to what was told to Dr. Rudert's office. Dr. Gurtler gave the assessment that Petitioner suffered a probable rotator cuff tear and wanted to review the MRI.

Petitioner returned to Dr. Gurtler's office 4/14/2015 with complaints of cervical problems which resulted in his right shoulder surgery being delayed. Dr. Gurtler then rescheduled surgery on the right shoulder.

On 5/18/2015, Petitioner underwent a right shoulder arthroscopic exam and open rotator cuff repair. The post-operative diagnosis was of a right shoulder rotator cuff tear. A small tear was identified in the operative notes. On 5/28/2015, Petitioner returned for a 10 day post-surgery follow up. Dr. Gurtler reported that the small tear was repaired and then ordered physical therapy.

Petitioner testified that on 8/14/2015 his HR representative came to his door and told him that he needed to return to work on August 17th or be terminated from his employment. He then returned to Dr. Gurtler's office on August 18th to be released to full duty and to save his job. The doctor's note from that date states that Petitioner had nearly full ROM and no pain. It is noted that Petitioner requested to go back to work full duty. Dr. Gurtler released him with no restrictions the following day and instructed him to be careful with his shoulder.

Petitioner testified that he currently has trouble with full motion of his right shoulder, that while he has returned to work full duty he has modified his job duties so he can still work. He also testified that he has trouble sleeping due to pain and usually only gets around 3 hours of sleep per night. Petitioner testified he has trouble riding horses and requires a step now to mount the horse and hasn't tried golfing because of his right shoulder. Petitioner testified that he is considering retiring early, in part, due to his right shoulder condition and the pain he suffers from.

Petitioner testified that on or around July 29th, 2015, he was working on his property mowing grass with his tractor which he claimed he was cleared to do. He stated he never used his right arm when he did these activities. Petitioner testified that when he had physical things to do he had a farm hand, his wife, or two young men who lived near him to help do the lifting. He had two horses for personal use and maintained 10 acres of land to grow feed for them.

Petitioner's farm hand, George Dean Warfel, testified that he helped on the farm and never saw Petitioner use his right arm during the summer of 2015. He also confirmed that Petitioner's wife would do the majority of the work taking care of the horses.

Respondent called Greg Kellerman who observed and videotaped Petitioner on his farm from July 29th, 2015-July 31st, 2015. Mr. Kellerman testified that he prepared the report entered into evidence as Respondent's Exhibit 1 and was the one who filmed Respondent's Exhibit 2 which was edited and entered into evidence.

The Arbitrator reviewed the video tape marked as Respondent's Exhibit 2. The Arbitrator observed that Petitioner was taped towing a ski boat, driving a blue tractor, a golf cart, and towing a large trailer full of bailed hay. The Arbitrator noted that Petitioner rarely was taped using his injured right arm when doing any of these activities. The Arbitrator finds the Respondent's video of Petitioner to be of little probative value in that it does not appear to show Petitioner exceeding his restrictions or using his injured arm in any significant way.

CONCLUSIONS

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an AMA rating. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes Petitioner continues to work as a highway maintainer. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 53 years old at the time of his injuries. Petitioner has diminished healing capacity and a low threshold for future injury as a result thereof. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. Petitioner is 54 years old, has a heavy labor job which requires a great deal of lifting. He testified that he has modified work activities to accommodate his right shoulder and it may impact his decision on when he will retire. The injury has also impacted his personal life as he is no longer able to mount a horse without a step, and he is afraid to try golfing. He also has trouble sleeping due to pain in his shoulder and has loss of full motion with his right shoulder. The Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 12.5% loss of use of the person as a whole pursuant to §8(d)2 of the Act.

Per Stipulation of the parties, all TTD has been paid and none is owed.

Respondent shall pay all unpaid related medical bills pursuant to the fee schedule.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Philip Hammers,
Petitioner,

vs.

The American Coal Company,
Respondent.

17IWCC0309

NO: 10 WC 28066

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 6, 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: MAY 19 2017
o5/11/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0309

HAMMERS, PHILIP
Employee/Petitioner

Case# **10WC028066**

THE AMERICAN COAL COMPANY
Employer/Respondent

On 8/6/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

1662 CRAIG & CRAIG
KENNETH F WERTS
PO BOX 1545
MT VERNON, IL 62864

17IWCC0309

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

PHILIP HAMMERS
Employee/Petitioner

v.

THE AMERICAN COAL COMPANY
Employer/Respondent

Case # **10** WC **028066**

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 **January 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 **Exposure, Sections 1(d)-(f) and 6 of the Occupational Diseases Act**

17IWCC0309

FINDINGS

On **August 24, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$50,530.48**; the average weekly wage was **$971.74**.

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

Petitioner claims no medical.

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

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

ORDER

Because Petitioner failed to prove by a preponderance of the evidence that he suffered from an occupational disease which arose out of and in the course of his employment, that his condition of ill-being is causally related to the injury, and failed to prove a timely disablement as defined in Section 1(e), 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

7/22/15
Date

AUG 6 - 2015

FINDINGS OF FACT

Petitioner was 60 years old at the time of arbitration. He graduated from West Frankfort High School. He worked for 33 years in underground coal mining. During his coal mining career, in addition to coal dust, he was exposed to silica dust, roof bolting glue fumes, diesel fumes and smoke from coal fires.

Petitioner's last day of work was August 24, 2007, for Respondent at its Galatia mine. He was 52 years old on that date and his job classification was continuous miner operator, but he was on modified duty on that last day of employment. Petitioner sustained an injury to his right shoulder in the mine in October 2006. He never worked underground again after that date. He had surgery on his shoulder on December 11, 2006. He was on modified duty from the time of his injury until he was released to work with permanent restrictions. On his last day of employment his modified duty was working in the washhouse cleaning, dusting and sweeping. The washhouse is the area where the men go after their shift to shower and get back into their street clothes. Petitioner testified that there is a lot of dust kicked up in that area. He also swept up the coal dust that was on the ground which would kick up dust. He also spent some minimal time working in the safety department and in dispatch. He testified that there was coal dust everywhere in the area where he was working on modified duty. He testified that he was exposed to and breathed coal dust on his last day of employment. August 24, 2007, was his last day of employment because that was the date that he was released from shoulder treatment to go back underground with permanent restrictions and Respondent could not accommodate those physical restrictions. Petitioner testified that he has not worked since then.

Petitioner testified that he noticed breathing problems at work over a period of time and that they just kind of progressed. He noticed difficulty in breathing including shortness of breath and that things got more difficult. He testified that he could walk a block on level ground at a normal pace or climb one flight of stairs before becoming short of breath. Petitioner testified that from the time he first noticed difficulties with his breathing in the mine until he left the mine, the problems got worse. Petitioner testified that his breathing problems have gotten worse since he left the coal mine.

Petitioner testified that he uses a Tudorza inhaler. He takes one puff twice a day. He testified that because of his breathing difficulties his normal daily activities are not as easy as they used to be. He does not push mow his lawn, and he does not walk the dog around the neighborhood. He testified that he does not ride a bike anymore because it is too hard to do it. Petitioner testified that he spends his days taking care of his wife. He does not do anything for recreation or entertainment.

Petitioner's treating doctor for his respiratory problems is Dr. Istanbouly. He was referred to Dr. Istanbouly by his primary care physician, Dr. Dennon Davis. Petitioner testified that he has talked to these doctors about his breathing difficulties. He denied requesting that Dr. Davis refer him to Dr. Istanbouly. Petitioner testified that he has never smoked.

Petitioner testified that from time to time while employed as a coal miner he underwent chest x-ray screenings for black lung. Once the chest x-ray was performed, he would receive a letter telling him what the film revealed. He did not bring any of those letters with him to arbitration. Petitioner testified that when he was working underground he wore a respirator most of the time. He testified that he started using the inhaler a couple of years ago and that it was prescribed by Dr. Istanbouly.

Hugh James Robinson testified on behalf of Petitioner. When Mr. Robinson left mining, he was working for Respondent at the same mine where Petitioner worked. He testified that he was familiar with that mine. He testified that he was familiar with the areas where Petitioner was working on the surface. He testified that those areas get dusty from people bringing the dust in on their clothes. He testified that a person would be exposed to coal dust and silica dust in the surface areas.

Mr. Robinson teaches mining technology and is familiar with the Mine Safety Health Administration. He testified that they require dust sampling at the mine. He testified that they do not do dust sampling in the areas where Petitioner worked. He testified that they do noise sampling there because of the concern about exposure to noise in that area.

Michael Grant was called to testify on behalf of Respondent. He has worked at Respondent for 16 years. He is the facility supervisor which means he takes care all of the building maintenance, housekeeping and new construction. All of this work is on the surface. Mr. Grant testified that Petitioner worked on the surface for a period of time before he left the mine forever. He worked at the Galatia North Portal doing custodial work. Mr. Grant testified that Petitioner worked in the bathhouse, staging area and the offices for the management people at that portal. He testified that those areas get a little bit dusty. Mr. Grant testified that there is no comparison between the environment where Petitioner was working above ground after he injured his shoulder and where he was working underground. Mr. Grant agreed that the continuous miner operator would be one of the dustier jobs.

At Petitioners attorneys request Petitioner was examined by Dr. Glennon Paul. Dr. Paul testified that the pulmonary function testing of Petitioner showed a severe restrictive lung disease. (Px 1, p. 13) He went on to say that with such significant restrictive lung disease it is possible that Petitioner also suffers from COPD. (Px 1, p. 13) Dr. Paul also gave an opinion that Petitioner suffered from coal workers pneumoconiosis and that it was caused by the coal dust environment in which he worked. Dr. Paul gave the opinion that Petitioners COPD was caused by the coal dust he ingested. (Px 1, p. 14) Dr. Paul went on to say that Petitioner suffers from Chronic Bronchitis, which is caused by the coal dust environment. Dr. Paul testified that Petitioner has both clinically significant pulmonary impairment in the form of pulmonary symptoms and complaints and radiographically apparent pulmonary impairment. (Px 1, p. 16) Dr. Paul testified that by definition by Petitioner having coal workers pneumoconiosis it is true that he has some impairment in the function of the lung at the site of the scarring whether or not it can be measured by spirometry. (Px 1, p. 19) Dr. Paul testified that coal workers pneumoconiosis is considered a progressive disease that can be life threatening. (Px 1, p. 23) He went on to testify that there is no cure for coal workers pneumoconiosis and even after leaving the exposure to the coal mine it can still progress. (Px 1, p. 24)

Dr. Paul is board certified in internal medicine and asthma, allergy and immunology (Px 1, p. 9). Dr. Paul testified that he reads 100 chest x-rays a week and interprets the same number of pulmonary function tests (Px 1, pp. 7-8). Dr. Paul is not an A or B-reader. (Px 1, p. 40).

According to the history taken by Dr. Paul, Petitioner had shortness of breath and some wheezing. He never smoked. Dr. Paul testified that on physical examination of Petitioner's chest, he had bilateral rales on forced inspiration. Dr. Paul testified this finding is seen in conditions such as heart failure or pulmonary

fibrosis. In Petitioner's case, Dr. Paul attributed the finding to coal workers' pneumoconiosis with developing fibrosis. (Px 1, p. 12). Dr. Paul testified that on pulmonary function testing, Petitioner showed severe restrictive lung disease and a decreased carbon monoxide diffusing capacity. Dr. Paul did not know the date of the chest x-ray that he reviewed. He did not know whether the opacities that he saw on the film were round or irregular. Dr. Paul did not assign a profusion rating to the film that he reviewed. (Px 1, pp. 39-40). Dr. Paul testified that simple pneumoconiosis is unlikely to progress once the exposure ceases. He testified that Petitioner did not have simple pneumoconiosis. He testified that Petitioner had clinically significant pneumoconiosis, not just a finding on an x-ray. Dr. Paul testified that Petitioner had symptoms of pneumoconiosis including shortness of breath, wheezing and coughing. (Px 1, pp. 40-41). Dr. Paul testified that there is no such thing as complicated pneumoconiosis. (Px 1, p. 41). Dr. Paul testified that Petitioner had a component of COPD which was being masked by the severity of his restriction. Dr. Paul testified that his COPD would be caused by coal dust. (Px 1, p. 14). Dr. Paul testified that in light of his examination. Petitioner's clinical presentation and complaints, Petitioner could have chronic bronchitis which would be caused by coal dust. In light of the diagnosis of COPD and his symptoms of cough, wheezing, shortness of breath and labored breathing on exertion, Petitioner could not have any further exposure to the environment of the coal mine without endangering his health. (Px 1, pp. 15-16).

Dr. Dennon Davis, Petitioners treating physician, testified that Petitioner has been seen at his clinic since 2007. (Px 2 p. 6) Dr. Davis testified that he had reviewed a chest x-ray and opinions of Dr. Istanbouly by way of a pulmonary consultation. He went on to say that based on the findings from Dr. Istanbouly and his history of being a coal miner and his symptoms that have persisted he would diagnose Petitioner with coal workers pneumoconiosis. (Petitioners Exhibit 2 p. 8) Dr. Davis went on to state that a lot of the problems that Petitioner had with cough, wheezing, shortness of breath and labored breathing on exertion were either caused or aggravated by his exposure to coal dust. (Petitioners Exhibit 2 pgs. 9-10) Dr. Davis also testified that he felt that Petitioners chronic bronchitis was either caused, at least in part or aggravated and made worse by his work as a coal miner. (Px 2 p. 11)

Dr. Davis testified that he referred Petitioner to Dr. Istanbouly, a black lung doctor, on November 13, 2012, which was one week after he met with Petitioner's counsel to discuss his black lung case. Dr. Davis made the referral because Petitioner asked him to refer him to Dr. Istanbouly. (Px 2, pp. 39-40). Petitioner was seen on November 13, 2012, to specifically talk about breathing problems. On that date he told Dr. Davis that he had been diagnosed with black lung. He brought x-rays and a positive B-reader report with him. (Px 2, pp. 41-42). On that date Petitioner related wheeze, shortness of breath, labored breathing on exertion and chronic cough. Dr. Davis testified that was the first time that he heard about those symptoms. Petitioner related to Dr. Davis that his cough was sometimes productive. (Px 2, p. 43). Dr. Davis testified that the diagnosis of chronic bronchitis requires a patient to have symptoms of chronic cough for three months. He testified that the definition he uses for chronic bronchitis does not require sputum production. (Px 2, pp. 43-44). On this date, Dr. Davis' examination of the chest revealed decreased breath sounds at the bases and rhonchi. This was the first time that he had ever found any irregularities on examination of Petitioner's lungs. On that date he added coal miner's pneumoconiosis to his assessment. Dr. Davis testified that he did not read Petitioner's chest x-ray. He does not hold himself out to be an expert in reading films for black lung. The diagnosis that Dr. Davis made on that date was based upon the positive B-reading report that Petitioner brought with him. (Px 2, pp. 45-46).

Dr. Davis testified that a chest x-ray was taken on March 22, 2013, and interpreted by Dr. Justin Hodge, a radiologist. Dr. Hodge found Petitioner's lungs to be clear. (Px 2, pp. 47-48). Petitioner next presented on May 2, 2013, for management of cholesterol, hypertension and thyroid. Physical examination on that date revealed his lungs clear to auscultation bilaterally without wheeze, rhonchi or rales. (Px 2, pp. 48-49). When Petitioner was seen on April 2, 2014, he denied shortness of breath. Physical examination of the chest revealed the lungs to be clear to auscultation bilaterally without wheeze, rhonchi or rales. (Px 2, pp. 50-51). Petitioner underwent another chest x-ray on April 4, 2014. Dr. Hodge found the lungs to be clear. (Px 2, p. 51). Dr. Davis testified that there was only one office note where Petitioner had any complaints of respiratory problems and only one office note where Dr. Davis found any abnormalities on examination of the lungs. (Px 2, p. 51).

Dr. Suhail Istanbouly is a physician specializing in pulmonary medicine. He is board certified in internal medicine, pulmonary medicine and critical care. (Px 3, pp. 4-5). In his practice he has occasion to treat coal miners and former coal miners. He has been performing black lung examinations for the Department of Labor since 2004. (Px 3, p. 5). Dr. Istanbouly first saw Petitioner in December 2012 and has seen him three or four times for follow up since then. The last visit was on April 4, 2014. Dr. Istanbouly performed three pulmonary function tests and baseline spirometry tests. (Px 3, p. 6). Petitioner was referred by his primary care physician, Dr. Dennon Davis. Dr. Istanbouly testified that at the initial evaluation, Petitioner reported that he was a retired coal miner. He was not a cigarette smoker. (Px 3, p. 7). Dr. Istanbouly testified that Petitioner does have COPD which was caused or aggravated by his exposures as a coal miner. He testified that in light of the COPD, if Petitioner were to have further exposure to the environment of a coal mine, he would present a risk to his health in the form of an increased potential for progression of his COPD. Dr. Istanbouly testified that if he considered COPD a form of coal workers' pneumoconiosis, then Petitioner had coal workers' pneumoconiosis caused by his exposures as a coal miner. (Px 3, pp. 8-9). Dr. Istanbouly testified that Petitioner had allergic rhinitis which was caused or aggravated by his exposures as a coal miner. (Px 3, p. 10). Dr. Istanbouly testified that Petitioner's need for oxygen could be related to his coal mine exposures, at least partially. (Px 3, pp. 11-12). Dr. Istanbouly testified that Petitioner cannot go back to work in the coal mine. (Px 3, p. 12).

Dr. Istanbouly is not an A-reader or a B-reader. He testified that he has fair experience reading chest x-rays for black lung, but he would not claim that he is an expert. He always asks for a B-reader interpretation when he performs exams for the Department of Labor. (Px 3, p. 26). When Petitioner first met with Dr. Istanbouly his medications included Lisinopril which is an ace inhibitor that has a known side effect of cough. Petitioner did not relate to Dr. Istanbouly ever having taken a breathing medication. (Px 3, pp. 27-29).

Dr. Istanbouly conducted a physical examination of Petitioner's lungs. There were decreased bilateral breath sounds. The lungs were clear to percussion and there were no adventitious sounds. He had no wheezes and his respiratory effort was normal. (Px 3, pp. 29-30).

At the office visit on December 13, 2012, Dr. Istanbouly started Petitioner on Symbicort and on Beclomethasone. The nasal spray was for runny nose and the inhaler was for obstructive lung disease. (Px 3, pp. 34-35). When Petitioner saw Dr. Istanbouly on March 22, 2013, he did not complain of cough or sputum production. (Px 3, pp. 33-34). On examination that date, Petitioner's lungs were clear to percussion. He had bilateral decreased breath sounds but no wheezing. (Px 3, p. 35).

At Petitioners request, B-reader, Dr. Henry Smith, who reviewed a grade one chest x-ray dated September 30, 2009. (Px 5) Dr. Smith found an interstitial fibrosis of classification p/s, bilateral upper, middle and lower zones involved, of a profusion 1/0 there were also slightly accentuated subpleural fat deposits laterally in both mid to lower lungs. There were also mildly thickened interlobar fissures. His impression was findings consistent with coal workers pneumoconiosis with interstitial fibrosis of classification p/s, all zones involved, of a profusion 1/0/ (Px 5)

B-reader, Michael S. Alexander also reviewed a grade one chest x-ray dated September 30, 2009 at Petitioner's request. (Px 6) Dr. Smith found lung volumes to be normal. He saw a small round opacities were present bilaterally, consistent with pneumoconiosis, category p/p, 1/1. There was no chest wall pleural thickening or pleural classifications. His impression was coal workers pneumoconiosis, category p/p, 1/1, a8a.

Dr. Henry K. Smith, board certified radiologist and NIOSH certified B-reader, interpreted chest x-ray dated September 30, 2009, as positive for pneumoconiosis, category 1/0 with P/S opacities in all lung zones. (Px 5). Dr. Michael Alexander, B-reader and board certified radiologist, interpreted the same chest x-ray as positive for pneumoconiosis, category 1/1 with P/P opacities in all lung zones. (Px 6).

Dr. Jerome F. Wiot, board certified radiologist and B-reader, interpreted chest x-ray of Petitioner dated September 30, 2009. Dr. Wiot noted the film to be quality 1 and found no abnormalities consistent with pneumoconiosis. Dr. Wiot has served on the American College of Radiology Task Force on Pneumoconiosis since 1969. (Rx 4). Dr. B. T. Westerfield, who is board certified in pulmonary medicine and is a B-reader, interpreted chest x-ray dated September 30, 2009, as completely negative for pneumoconiosis. Dr. Westerfield noted the film was quality 1 (Rx 5).

Records from NIOSH were admitted into evidence. Two B-readers interpreted chest x-ray of August 11, 2006, as negative for pneumoconiosis. (Rx 6).

Dr. Cristopher Meyer reviewed chest x-rays of Petitioner dated August 11, 2006, September 30, 2009, and April 25, 2013. Dr. Meyer testified that the films were of diagnostic quality. (Rx 1, p. 40). Dr. Meyer found the August 11, 2006, examination was quality 2 due to poor contrast and digitized hard copy. The September 30, 2009, chest film was quality 1. Dr. Meyer noted that the April 25, 2013, chest x-ray was quality 2 due to underinflation, which means that the individual did not take a deep breath. Dr. Meyer testified that underinflation will actually crowd the normal lung markings, particularly the pulmonary vessels and may simulate linear interstitial lung disease. (Rx 1, p. 41). Dr. Meyer did not find any radiographic findings of coal workers' pneumoconiosis on the chest x-rays. The lungs were clear. (Rx 1, p. 42).

Dr. Jeff Selby examined Petitioner on April 25, 2013, at the request of Respondent's counsel. (Rx 2, p. 7). Dr. Selby has been board certified in internal medicine and pulmonary disease since 1980 and 1984, respectively. (Rx 2, p. 3). He sees and treats patients who have lung disease on a daily basis. (Rx 2, pp. 4-5). Dr. Selby has occasion to see individuals who have the disease process coal workers' pneumoconiosis. (Rx 2, p. 5).

Petitioner related to Dr. Selby that he was short of breath and wheezed. He reported getting short of breath after walking one to two blocks. He told Dr. Selby that he wheezes at night while sleeping which wakes

up his wife. Petitioner has been diagnosed with obstructive sleep apnea. (Rx 2, pp. 8-9). Dr. Selby's examination of Petitioner's chest showed clear breath sounds with good airflow. (Rx 2, p. 9). A chest x-ray of April 25, 2013, showed a grade 1 quality film. Dr. Selby testified there were no parenchymal or pleural abnormalities consistent with pneumoconiosis. He interpreted the film as negative for coal workers' pneumoconiosis. (Rx 2, p. 10). Dr. Selby reviewed chest x-ray for Petitioner dated September 30, 2009. He found same negative for coal workers' pneumoconiosis. (Rx 2, Deposition Exhibit No. 3). Petitioner underwent pulmonary function testing. Dr. Selby testified that the overall interpretation was normal spirometry with no change post bronchodilator. Petitioner had normal lung volumes and normal diffusion capacity. (Rx 2, pp. 10-11). Petitioner also underwent exercise testing which demonstrated normal power output and normal oxygenation at peak exercise, indicating no pulmonary or cardiac impairment or disability. (Rx 2, pp. 11-12).

With regard to Petitioner's pulmonary function testing, Dr. Selby testified that the flow volume loops were all over the board. He testified that there was no consistency. and it demonstrated less than maximal effort on most, if not all, of the curves. (Rx 2, p. 13). Dr. Selby testified that from the results he had, he knew that Petitioner could do at least that good but did not know what more he could do. Dr. Selby testified that the FEV1/FVC ratio is the hallmark for determining whether an obstruction is present. (Rx 2, p. 14). The spirometry did not reveal the presence of an obstruction in Petitioner. Dr. Selby testified that Petitioner's diffusion capacity did not reveal any impairment or scarring in the alveolar capillary membrane. Dr. Selby measured Petitioner's lung volumes, and they were normal. Dr. Selby testified that there was no evidence of restriction. He testified that if there is a reduction in lung volumes due to scarring from lung disease that is permanent. (Rx 2, p. 17).

Dr. Selby concluded that Petitioner does not suffer from any respiratory or pulmonary abnormality as a result of coal mine dust inhalation or coal mine employment. Petitioner does not suffer from coal workers' pneumoconiosis. Dr. Selby testified that from a pulmonary standpoint, based upon his examination and testing, there is no reason why Petitioner would be restricted in terms of what he could lift. (Rx 2, pp. 24-25).

Medical records of Harrisburg Medical Center were admitted into evidence. Petitioner underwent a chest x-ray on January 23, 1996. Dr. T. K. Youssef's impression was negative chest with classification category 0/0. (Rx 8, p. 33). Dr. Youssef made an identical interpretation of chest x-ray dated December 30, 1996. (Rx 8, p. 32). Petitioner underwent a chest x-ray on December 17, 2001. Dr. Hisham Youssef's impression was mild emphysematous configuration of the chest with no acute pulmonary process. He found the film to be category 0/0. (Rx 8, p. 31). Dr. Hisham Youssef interpreted chest x-ray of February 13, 2002 as negative. Lungs were clear. (Rx 8, p. 22). Petitioner underwent another chest x-ray on August 11, 2006. Dr. Hisham Youssef interpreted chest x-ray as negative with a classification of 0/0. (Rx 8, p. 10).

CONCLUSIONS OF LAW

Issue (O): Was Petitioner exposed to the hazards of an occupational disease on August 24, 2007, in his last day of employment with Respondent?

Petitioner worked underground in the coal mine until he sustained a workplace injury to his right shoulder on October 20, 2006. After the injury to his shoulder, he did modified duty on the surface. On his last day of employment Petitioner's modified duty was working in the washhouse cleaning, dusting and sweeping.

Petitioner testified that there is a lot of dust kicked up in that area. Petitioner testified that there was coal dust everywhere in the area where he was working on modified duty. Petitioner testified that he was exposed to and breathed coal dust on his last day of employment. Hugh James Robinson testified that he was familiar with the areas where Petitioner was working on the surface. He testified that those areas get dusty and people bring the dust in on their clothes. He further testified that a person would be exposed to coal dust and silica dust in the surface areas. Michael Grant, facility supervisor for Respondent, also testified at arbitration. He testified that Petitioner worked in the bathhouse, staging area and the offices for the management people. He testified that those areas would be a little bit dusty, but it was nothing really to speak of. He testified that there was no comparison between the environment where Petitioner was working above ground after he injured his shoulder and where he was working underground. Mr. Grant testified that MSHA does not require dust sampling in any of the buildings where Petitioner was working after his shoulder injury.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he was exposed to the hazards of an occupational disease on August 24, 2007, his last day of employment with Respondent.

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

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

The Arbitrator finds the x-ray interpretations by Drs. Wiot, Meyer, Selby and NIOSH to be more persuasive than the interpretations by Drs. Paul, Istanbouly, Smith and Alexander. Drs. Smith and Alexander only reviewed one chest x-ray for Petitioner. They both reviewed the chest x-ray of September 30, 2009, and their findings were not consistent. Dr. Smith found the chest x-ray positive, category 1/0 while Dr. Alexander interpreted the same film as positive for pneumoconiosis, category 1/1. Chest x-rays dated August 11, 2006, September 30, 2009, and April 25, 2013 were reviewed by Dr. Meyer. Dr. Meyer did not find any radiographic evidence of coal workers' pneumoconiosis on these chest x-rays. Dr. Meyer's reading of the August 11, 2006, chest x-ray was confirmed by two independent NIOSH B-readers. The Arbitrator finds the NIOSH readings to be persuasive as well. Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner failed to prove that he has coal workers' pneumoconiosis.

Dr. Paul testified that on the pulmonary function testing performed as part of his examination, Petitioner showed severe restrictive lung disease and a decreased carbon monoxide diffusing capacity. Dr. Paul further testified that Petitioner had a component of COPD which was being masked by the severity of his restriction. Up to and through his employment with Petitioner on November 2, 2012, Dr. Davis had not diagnosed Petitioner with chronic bronchitis, black lung or COPD. Petitioner had not related to Dr. Davis any symptoms up to that point in time on which he could base a diagnosis of chronic bronchitis, black lung or COPD. Petitioner was seen on November 13, 2012, one week after his attorney had met with Dr. Davis to discuss his claim to specifically talk about breathing problems. On that date Petitioner related wheeze, shortness of breath, labored breathing on exertion and chronic cough. Petitioner related to Dr. Davis that the cough was sometimes productive. Dr. Davis testified that the diagnosis of chronic bronchitis required a patient to have symptoms of chronic cough for three months but did not require sputum production. On examination on November 13, 2012, Dr. Davis noted decreased breath sounds at the bases and rhonchi. This was the first time that Dr. Davis found

any irregularities on examination of Petitioner's lungs. On that date Dr. Davis added coal miner's pneumoconiosis to his assessment. He testified that this diagnosis was based on the positive B-reading report that Petitioner brought with him to the appointment. On subsequent visits Petitioner denied shortness of breath and physical examination of the chest was normal. Dr. Davis testified that there was only one office note where Petitioner had any complaints of respiratory problems and only one office note where Dr. Davis found any abnormalities on examination of the lungs. Dr. Istanbouly testified that the way to know if someone has a restriction is to do lung volumes. Dr. Selby testified that the overall interpretation of the testing performed at his examination was normal spirometry with no change post bronchodialator. Petitioner had normal lung volumes and normal diffusion capacity. The spirometry did not reveal the presence of an obstruction in Petitioner. Dr. Selby testified that there was no evidence of restriction. Dr. Paul testified that in light of his examination, Petitioner's clinical presentation and complaints, Petitioner could have chronic bronchitis caused by coal dust. Dr. Selby testified that the American Thoracic Society definition of chronic bronchitis is cough and spit daily for three months in any two consecutive years. The Arbitrator finds the testimony of Dr. Selby more persuasive. Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner has failed to prove the presence of COPD or chronic bronchitis by a preponderance of the evidence.

Although Petitioner testified that he had breathing problems while working in the mine, the medical records from those periods of time do not corroborate Petitioner's testimony. Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that his breathing complaints are causally related to his coal mine dust exposure. Petitioner has failed to prove that his current condition of ill-being is causally related to his employment with Respondent.

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

Section 1(e) of the Act defines disablement as an impairment or partial impairment, temporary or permanent, in the function of the body or any member of the body or the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease. Petitioner's counsel stated at arbitration that he was not claiming disability from earning full wages. Petitioner's counsel stated that all they were claiming is that Petitioner has a functional impairment.

Petitioner testified that he first noticed breathing problems at work over a period of time and that they just progressed. He testified that his problems have continued to worsen since leaving the coal mine. Petitioner did not relate to Dr. Davis any complaints of respiratory problems other than one office visit which was six years after he was last employed in the coal mine. Dr. Istanbouly testified that cardiopulmonary exercise testing is useful in determining an individual's exercise capacity. Petitioner underwent exercise testing as part of Dr. Selby's examination. The testing demonstrated normal power output and normal oxygenation at peak exercise, indicating no pulmonary or cardiac impairment or disability.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner has failed to prove a timely disablement as defined in Section 1(e) of the Occupational Diseases Act. Petitioner's claim for compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sheila Stockton,

Petitioner,

17IWCC0310

vs.

NO: 12 WC 44498

Illinois American Water,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 25, 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.

17IWCC0310

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: MAY 19 2017
o5/11/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

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

17IWCC0310

STOCKTON, SHELIA
Employee/Petitioner

Case# **12WC044498**

ILLINOIS AMERICAN WATER
Employer/Respondent

On 4/25/2016, 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 0.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1775 JOHN H HUSTAVA PC
ANDREW NALEFSKI
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17IWCC0310

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

SHEILA STOCKTON
Employee/Petitioner

v.

ILLINOIS AMERICAN WATER
Employer/Respondent

Case # 12 WC 44498

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 **Christina Hemenway**, Arbitrator of the Commission, in the city of **Collinsville**, on **February 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **10/24/12**, 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 **$54,028.52**; the average weekly wage was **$1,039.01**.

On the date of accident, Petitioner was **64** 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 **$N/A** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$N/A** for other benefits, for a total credit of **$N/A**.

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

ORDER

As explained in the Arbitration Decision, Petitioner failed to prove by a preponderance of the evidence that her current condition of ill-being is causally related to the accident at work on October 24, 2012. Petitioner reached maximum medical improvement on January 11, 2013. All benefits after that date are denied.

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

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

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

Signature of Arbitrator

April 20, 2016
Date

ICArbDec19(b)

APR 25 2016

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

17IWCC0310

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

SHEILA STOCKTON
Employee/Petitioner

v.

Case #: 12 WC 44498

ILLINOIS AMERICAN WATER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The parties stipulated that on October 24, 2012, Petitioner sustained an accident which arose out of and in the course of her employment. The parties further stipulated that Respondent is entitled to a credit for medical bills previously paid, including those paid pursuant to Section 8(j), and that Petitioner is not currently entitled to any period of temporary total disability.

On the date of accident, Petitioner was 64 years old, married, with no dependent children. She was employed as a meter reader for Respondent, and had been so employed for about seven years. Her duties included walking from house to house to read meters, changing out meters, and occasionally removing water from the meter pit. On October 24, 2012, Petitioner sustained two separate incidents, injuring her low back in each. In the first incident she was walking down a hill which was wet from rain, and slipped on slick fallen leaves. She did not fall down but caught herself and twisted in the process. Later in the same day she stepped out of her vehicle and into a ditch which was covered with leaves and deeper than anticipated. When she stepped down, she jarred her back and felt an electrical shock sensation in her low back. She reported the incidents to Respondent that day. Petitioner testified that prior to this date she had never injured her low back to the point of needing medical care.

Petitioner sought medical treatment from Midwest Occupational Medicine, where she reported she had pain in her low back and left leg. She was prescribed medication, physical therapy, and ice. She followed up on October 29, 2012, at which time her symptoms remained the same. In addition, she reported she had some bladder leakage when she went forward. She was taken off work at that time and an MRI was ordered. Petitioner testified she was told by the doctor's office that based on the MRI findings, she should see a specialist.

Petitioner testified that Respondent told her to go see Dr. Chabot, which she did on November 2, 2012. She gave him the same history of accident and also filled out an intake form (RX4, Dep.PX3). On the form she reported that she had sharp aching back pain with electrical shooting that radiated into her legs. She also indicated she had some loss of bladder control. She completed a pain diagram and indicated she had pain down her low back that went down to the left knee. Dr. Chabot kept her off work and recommended injections and physical therapy. He also indicated to her that he did not think she had a compression fracture, which had been noted on the MRI. She returned to Dr. Chabot on November 19, 2012. His office note from that visit indicated that the pain in her left leg had resolved, and that she had resolving low back strain, back pain and sacroiliitis. Petitioner testified, however, that none of those statements are accurate, and that she was not getting better with physical therapy. She was released to return to work with a restriction of no lifting over twenty pounds, which Respondent accommodated.

Petitioner returned to Dr. Chabot on December 12, 2012. His office note from that date again indicated she had resolving back pain. Petitioner testified this is not an accurate statement, and that she continued to have pain in her low back and left leg. She was released to return to work full duty at that time.

Petitioner testified that Dr. Chabot did not explain to her why he put in his report that she never had complaints of pain radiating into her hip, complaints of bladder incontinence problems, or complaints of sharp, aching, and electrical pain in her leg. The last time Petitioner saw Dr. Chabot was January 11, 2013. At that time he put in his office note that Petitioner was doing very well and that her low back strain and sacroiliitis had totally resolved. Petitioner again testified that this is not accurate, and that she continued to have pain in her low back and down her legs. She testified that Dr. Chabot told her that was expected at her age, and that she should join the YMCA.

A few days later Petitioner contacted Dr. Gornet's office for an appointment, which took place on February 14, 2013. She testified that Respondent approved the appointment. Dr. Gornet took her off work, ordered a new MRI, recommended injections, and eventually did a myelogram. Petitioner underwent injections, a nerve branch block, and radiofrequency ablations. She testified they gave her some relief in the beginning, but not long-lasting relief.

Petitioner retired in July 2013, which was something she had planned. Dr. Gornet recommended surgery in July, but it has not been authorized by Respondent so has not taken place. Petitioner testified she currently has low back pain with shooting pain, like electrical shock. There are times her leg goes numb and "won't go", and she gets numbness on the sides of both hips, like a tingling or cold water running down the sides of her hips. She testified she has difficulty doing things, such as turning over in bed, fishing, going on vacation, lifting or carrying heavy objects in the kitchen such as pots and pans that are full. These things cause pain in her back and legs. She is no longer able to walk in the park because she gets too sore and starts hobbling. She does not sleep well, and is up and down through the night, which has caused her husband to sleep in the other room. Petitioner testified that Dr. Gornet released her to work full duty because he knew she was retired.

On cross-examination, Petitioner acknowledged that when she first saw Dr. Chabot in November 2012 she was not having right-sided symptoms to speak of, and that it was mostly her left side. She testified that if Dr. Chabot's records indicated she told him she was getting better, the records are not accurate. She further testified that if the physical therapy records indicated she was getting better, she would disagree with those records as well. Petitioner testified she was honest with her medical providers when she told them about the complaints she was having.

Petitioner had an MRI on October 29, 2012, but testified that the facility did not tell her what the MRI showed, or that she had arthritis or degeneration in her spine. Dr. Chabot, however, did tell her that she had arthritis in her spine. When she last saw Dr. Chabot, on January 11, 2013, he told her that at her age, she was as good as she was going to get. She had been back to work without restrictions for about a month at that point, having returned in mid-December 2012. After she was released by Dr. Chabot she called Dr. Gornet on January 18, 2013, upon recommendation of her cousin. She was not referred to Dr. Gornet by another physician. Dr. Gornet did another MRI, but Petitioner did not know why. He also referred Petitioner to Dr. Boutwell for injections. Petitioner acknowledged that by June 2013 she told Dr. Gornet that she had significant relief from Dr. Boutwell's treatment. Dr. Gornet treated her from February 2013 through July 1, 2013, when she retired. He did not restrict her work activities at all during that period of time.

Petitioner testified that Dr. Gornet recommended surgery in July 2014, to lift one disc from another and keep it from pressing on nerve endings. He indicated it would help with her pain and improve her quality of life. The surgery had not yet taken place.

Petitioner testified she was examined by Dr. deGrange in September 2014, at Respondent's request. She admitted she also fell at home in September 2014 and injured her right shoulder, which required surgery. She denied that the fall injured her low back and stated she did not have a change in symptoms in her low back after the fall.

Petitioner agreed she had had four MRI's since her accident, but testified Dr. Gornet did not tell her why he wanted her to have so many. She testified Dr. Gornet told her there were differences between the four MRI's and that it was getting worse, due to her injury and her arthritis. He told her she had some natural degeneration in her spine, due to getting older.

Petitioner acknowledged that between the time she returned to full duty work in December 2012 and the time she retired in July 2013, she was able to do her job as a meter reader without restrictions. She missed some work time for treatment, but was not taken off work. She admitted that during that time she never advised a supervisor that she could not do her job, nor did she ever ask for a change in job duties. Petitioner testified she had not reviewed Respondent's Exhibits 7, 8, and 9, which show her sick hours, overtime hours, and work hours from December 1, 2012, through July 2013. Petitioner testified she has been retired almost three years and that her low back symptoms have not changed at all since her retirement. She continues to notice pain in her back.

Petitioner acknowledged that when she first saw Dr. Chabot, and completed the pain diagram, she had symptoms only on the left side. She first noticed the right-sided symptoms

"later down the line a little bit", but not in the first three months after the incident. She last saw Dr. Gornet on November 19, 2015, and has not seen any physician since then. He does not prescribe any medication for her back, nor does any other medical provider. He has not placed any restrictions on any of her activities.

On re-direct, Petitioner confirmed Dr. Gornet's note of September 16, 2013, which stated that her pain had slowly returned after the ablations and injections, and that this was the first time the pain was on her right side.

Respondent's witness Gabe Kuykendall testified he has worked for Respondent for about nine years. He is a field operations supervisor and is responsible for the day to day operations of the Alton water distribution system, which includes all meter reading and main breaks. He oversees about 15 people. In October 2012 he was Petitioner's supervisor and assigned her the day to day work of reading meters. He reviewed Respondent's Exhibits 7, 8, and 9, and testified they accurately reflect Petitioner's sick time, off work time, and work hours. He testified that between the time Petitioner returned to work full duty in December 2012 and her retirement in July 2013, she never reported to him that she was having difficulty doing her job, never asked for a modification of her job duties, and never asked for time off work because her back was bothering her. On cross-examination, Mr. Kuykendall acknowledged that Petitioner did complain of low back pain between the time she returned to work and the time she retired. He also acknowledged that there was a "standing joke" that Petitioner had said she was going to work until she was 77, but that she retired at 65. However, his understanding was that she had planned her retirement, and he testified that Petitioner never told him she was retiring because she was having problems with her low back.

Following her accident, Petitioner presented for treatment at Midwest Occupational Medicine on October 24, 2012, and was seen by Nurse Practitioner Lynn Brown. She gave a consistent history of the two incidents occurring at work. She complained of mid to lower back pain which had increased that day to the point of having trouble lifting her left leg. She had some fleeting sharp that radiated from her low back down to her left mid-posterior thigh. She had no numbness or tingling in her leg, no saddle numbness, and no bowel or bladder incontinence. On exam, she was in obvious pain as she moved and changed positions and had significant pain in her left mid to lower back. Her gait was antalgic, slow, and very guarded. All movements were guarded and she had very mild tenderness to palpation to her lower lumbar spine at L5. She was mildly tender along her lower thoracic and lumbar paravertebral muscles and was tender at the left sacroiliac (SI) area. NP Brown diagnosed Petitioner with a thoracolumbar strain and prescribed medications, ice pack, and sedentary work. PX1.

Petitioner followed up with NP Brown on October 29, 2012, at which time she related she had continued difficulty lifting her left leg when getting in and out of a vehicle, due to pain. She complained of severe pain, mainly at her lower back, but stated when it became more severe it would radiate up into her left thoracic area. She stated the pain would sometimes radiate down into her left lower leg, but it was not constant. NP Brown noted Petitioner had a history of urinary stress incontinence with coughing or sneezing and she continued to have that, but that there was no change in the episodes. On exam she was sore to palpation mainly at the left SI and left buttock area, but had some tenderness in the left lumbar musculature. Her range of motion

was very limited and painful and her gait was very antalgic and slow. NP Brown's diagnosis was low back pain with radicular symptoms. She ordered a lumbar MRI and advised to continue with ice and heat, as well as medications. She was taken off work, pending the MRI. PX1.

On October 29, 2012, Petitioner had a lumbar MRI which revealed mild to moderate diffuse degenerative changes and minimal compression of L5. Specifically, (1) L1-2 and L2-3 were unremarkable; (2) L3-4 showed mild degenerative changes in discs and facets, mild to moderate canal stenosis, moderate bilateral foraminal compromise with left worse than right; (3) L4-5 showed significant facet disease with mild spondylolisthesis and mild to moderate bilateral foraminal compromise; (4) L5-S1 showed degenerative changes and a broad-based disc bulge indenting the thecal sac and displacing the S1 roots; and (5) significant signal intensity abnormality in the body of L5 and the inferior aspect of L4, likely representing a minimally displaced acute L5 fracture. PX2.

On October 30, 2012, NP Brown reviewed the MRI results and called Petitioner to discuss same. She advised Petitioner needed to be referred to an orthopedic specialist and further advised she should remain off work until she was evaluated by the specialist. PX1.

On November 2, 2012, Petitioner presented for treatment with Dr. Michael Chabot. At that time she completed a Spine Questionnaire, on which she marked that she had sharp, aching, and electric/shocking pain in her low back. She indicated the pain radiated to her legs, but that she did not have any numbness in her legs. She further indicated she had some loss of bowel or bladder control. As part of the questionnaire, Petitioner also completed two pain diagrams. The first diagram was titled "Pain Level Shortly After The Injury", and Petitioner marked sharp pain originating in her low back and radiating up to the left thoracic area and down the inside of the left leg to about the knee. She rated her pain as 6-10/10. The second diagram was titled "Pain Level Today", and Petitioner marked aching pain across her low back at about the belt line, radiating down into the left buttock. She rated her pain as 3/10. RX4, Dep.PX3. (The Arbitrator notes that while this exhibit was referred to during the deposition and included in the deposition transcript, it was not actually admitted into evidence at the time of the deposition. However, it was part of the deposition transcript that was entered into evidence at trial, without objection from Respondent, and is therefore considered by the Arbitrator.)

During the examination with Dr. Chabot, Petitioner complained of moderate left lumbosacral back pain, aggravated by turning, twisting, lifting, and bending. She denied any radiation of symptoms into her legs and denied any bowel or bladder dysfunction. On examination, Dr. Chabot noted Petitioner moved about the room in a cautious manner but did not walk with a limp. She had full range of motion of her hips, but bilateral hamstring tightness was noted. There was mild tension in the lumbar paraspinal muscles. Range of motion revealed forward flexion to 60 degrees, extension to 20 degrees, and side bending to 50 degrees. Her lumbosacral area was tender to palpation, with left side worse than right. Neurologic exam of the lower extremities was normal. Dr. Chabot reviewed Petitioner's lumbar x-rays, which revealed diffuse spondylosis in the lumbar spine, advanced facet sclerosis at L3-4 and L4-5, Grade I degenerative spondylolisthesis at L3-4 and L4-5, and no evidence of segmental instability or obvious fracture. He reviewed Petitioner's lumbar MRI, which revealed multi-level disc desiccation at L3-4, L4-5, and L5-S1, and Grade I degenerative spondylolisthesis of L3 on

L4 and L4 on L5. He found no evidence of significant signal increase involving the vertebral body of L5, but did find degenerative changes. Dr. Chabot diagnosed Petitioner with a back strain, back pain, and sacroiliitis. He indicated Petitioner was not at MMI and needed additional treatment. He administered injections into her bilateral SI region, recommended continued physical therapy, and kept her off work. RX10

Petitioner presented to physical therapy on November 6, 2012, at which time she complained of constant pain in her low back, and rated her pain at 5/10, with it being 10/10 at its worst. She reported she initially had a lot of pain and weakness in her left leg and continued to have radicular symptoms at times in her right and left legs. On examination, she was guarded with ambulation and with transfers from a sitting position to standing or laying back. She was tender at the SI joint and her range of motion was limited. She returned to therapy on November 16, 2012, and reported continued low back pain with walking or forward bending. She was only able to walk or stand for about ten minutes before the pain increased. She reported her radicular symptoms had lessened in intensity and frequency. She reported her pain at 2/10, with it being 6/10 at its worst. It was noted she was guarded with ambulation and with transfers from sitting to standing or supine, but not as much as on her previous visit. PX3.

Petitioner returned to Dr. Chabot on November 19, 2012, at which time she reported that the pain radiating into her left lower extremity had resolved and that she was doing better. She was attending therapy and using pain medications every 12 hours. On examination, she moved about the room without difficulty and did not walk with a list or limp. Lumbar exam revealed minor tension; her range of motion had improved to 100 degrees on forward flexion, 35 degrees on extension, and 45 degrees on side bending. Lumbosacral exam revealed little or no tenderness in the SI region. Dr. Chabot recommend Petitioner continue to use pain medication, attend therapy, and perform home exercises. He indicated she could work limited duty of no lifting over twenty pounds. RX10

Petitioner attended physical therapy on December 6, 2012, and reported her current level of pain to be 0/10. Her worst pain was reported as 3/10. She complained of low back pain with transfers from supine to sitting, or from kneeling to standing. She denied any radicular symptoms. She reported she took Ibuprofen as needed and that she was active at work but still had pain during and after her work shift. It was noted she ambulated normally but did have apprehension and pain when transferring from sitting to supine and vice versa. Her range of motion had improved from 50% to 75% of normal. It was noted continued therapy would benefit her, to improve her range of motion and lessen pain with transfers. PX3, RX11.

On December 12, 2012, Petitioner returned to Dr. Chabot and reported she was doing better. She was working with lifting limitations, and avoided performing vigorous or lifting activities. On examination, she had no tenderness to palpation and no muscle spasm in her lumbar, thoracic, or cervical regions. She had full range of motion of her lumbar and cervical spine. She had minimal tenderness to palpation in the lumbosacral area, and her neurologic exam was normal for both the upper and the lower extremities. Dr. Chabot's assessment was resolving back strain, back pain, and sacroiliitis. He recommended she continue therapy and medication, and advance her home exercises. She was released to her regular work duties. PX3.

Petitioner returned to physical therapy on January 10, 2013, and reported her pain increased when she did not use the pain patch, up to 8/10. She continued to work, and to take pain medication and use ice. She reported pain in the lower back and sacral region, radiating down both legs. She ambulated normally and continued to have pain and apprehension transferring from supine to sitting and vice versa. It was noted her range of motion was at 75%, but there were no measurements actually recorded. PX3.

On January 11, 2013, Petitioner again followed up with Dr. Chabot, and stated she was doing very well. She was working her regular job duties and used pain medication only occasionally. On examination, she moved about the room without difficulty and with no list or limp. She had no spasm, no tenderness to palpation in her cervical, thoracic, or lumbar region and no tenderness in her SI region. Range of motion of her lumbar spine revealed flexion to 110 degrees, extension to 35 degrees, and side bending to 45 degrees. Neurological exam of her lower extremities was normal. Dr. Chabot's assessment was resolved back strain and sacroiliitis. He placed Petitioner at maximum medical improvement and released her from care. RX10.

On February 14, 2013, Petitioner presented to Dr. Matthew Gornet at The Orthopedic Center of St. Louis. She completed a Medical Information Form and a Pain Drawing. On the Pain Drawing she marked aching in the front and back of both thighs to the calf, pins and needles in the left buttock down to just below groin level, pins and needles in both feet and ankles, and stabbing across her low back and down her left buttock. She rated her pain as 8/10. Her chief complaints to Dr. Gornet were low back pain to both sides, left greater than right, pain to her left hip down, pain down both legs to the lateral thigh and anterolateral calf, and numbness and weakness of the left foot. She related that physical therapy gave her no relief and that she was currently working but in constant pain. Upon examination, she was barely able to bend and forward flex, due to significant back pain. Dr. Gornet interpreted Petitioner's lumbar x-rays, as showing degenerative spondylolisthesis at L3-4 and L4-5, with L4-5 being most significant. He interpreted her lumbar MRI as showing a significant facet cyst at L3-4 on the left, which he opined correlated with her left leg weakness, as well as bilateral facet arthropathy at L3-4. He opined that Petitioner's symptoms were causally related to her work accident. He recommended steroid injections and facet blocks bilaterally at L3-4, a transforaminal left injection at L3-4, and a new MRI. He stated Petitioner was not at MMI and could continue to work full duty. PX4.

On February 20, 2013, Petitioner saw Dr. Kaylea Boutwell upon referral by Dr. Gornet. She underwent bilateral L3-4 median branch blocks, with a diagnosis of bilateral lumbar facet arthropathy. On March 6, 2013, she returned to Dr. Boutwell for left L3-4 epidural injection, with a diagnosis of left lumbar radiculopathy. PX5.

Dr. Gornet issued an off work slip on March 12, 2013, covering that day and March 13, and allowing Petitioner to return to work on March 14. There is no corresponding office note for with this off work slip, nor any explanation on the note as to why she was unable to work. PX4.

On April 9, 2013, Petitioner completed and signed an "Intent to Retire", verifying she would be retiring on July 1, 2013. It was signed by her supervisor on April 10, 2013. RX5.

Petitioner underwent a lumbar MRI on April 18, 2013. It was noted her complaint was low back pain with left leg pain. The MRI showed (1) Grade I anterolistheses of L3 and L4 on L4 and L5, likely degenerative; (2) L2-3 mild left foraminal disc protrusion and mild left stenosis; (3) L3-4 mild diffuse annular disc bulge, left facet arthropathy, and mild left stenosis; (4) L4-5 mild diffuse annular disc bulge and bilateral face arthropathy without stenosis; and (5) L5-S1 diffuse annular disc bulge without stenosis. PX6.

Following the MRI on April 18, 2013, Petitioner followed up with Dr. Gornet the same day. He indicated the MRI showed spinal stenosis and lateral recess stenosis, with the greatest being at L3-4. He noted there was still a facet cyst present. Petitioner related she had good temporary benefit from the facet blocks at L3-4 and L4-5, and based on that Dr. Gornet recommended facet rhizotomies. He indicated if Petitioner did not improve with them, consideration could be given to a spinal fusion. He noted Petitioner was still working but that the pain and symptoms were affecting her life and quality of life. PX4.

On May 6, 2013, Petitioner underwent left L3-4 and L4-5 radiofrequency ablation for the diagnosis of left lumbar facet arthropathy. She was taken off work for that day and the following day, and was given restrictions of no lifting over twenty pounds and no lifting over ten pounds repetitively for one week following return to work, then full duty thereafter. On May 20, 2013, Petitioner underwent right L3-4 and L4-5 radiofrequency ablation for the diagnosis of right lumbar facet arthropathy. PX5.

Petitioner returned to Dr. Gornet on June 17, 2013, at which time she reported the rhizotomies had given her significant relief. She was working full duty. Dr. Gornet recommended continued observation, with follow up in three months to assess progress. PX4.

Petitioner testified that she retired on July 1, 2013.

On September 16, 2013, Petitioner followed up with Dr. Gornet. She completed an updated Medical Information form and stated she was not currently disabled. She reported to Dr. Gornet that her pain had slowly returned to her low back, bilateral buttocks, bilateral hips, and even in her legs. Dr. Gornet noted she had excellent results with the first set of rhizotomies over four months prior, and recommended trying another set. He stated if Petitioner continued to have pain and symptoms consideration could be given to surgery, after obtaining a CT myelogram and possibly a new MRI. Dr. Gornet's "working diagnosis" was facet pain, lateral recess stenosis, and some central stenosis at L3-4, and to a lesser extent at L4-5. PX4.

On October 7, 2013, Petitioner underwent left L4-5, L5 dorsal median nerve branch block by Dr. Boutwell. Diagnosis was left lumbar facet arthropathy. On October 21, 2013, she underwent radiofrequency ablation to right L3-4, L4-5, and L5 dorsal ramus, as well as to left L3-4. Diagnosis was lumbar facet arthropathy. PX5.

Petitioner was next seen by Dr. Gornet on March 6, 2014. She completed an updated Medical Information form and stated she was currently disabled. Dr. Gornet noted Petitioner was retired and that her symptoms continued to be a problem in her life, particularly with pain in her left buttock and left leg. He recommended a CT myelogram. He believed Petitioner had

facet pain and noted that rhizotomies had helped to some extent but that she was slowly regressing. He did not believe she was a candidate for a "large procedure", and questioned whether a simple procedure such as a simple decompression would give her enough benefit to have a reasonable quality of life. PX4.

On May 12, 2014, Petitioner underwent lumbar myelogram and post CT. "Clinical Data" was listed as low back pain down right leg. Results revealed (1) L3-4 diffuse annular disc bulge, moderate central stenosis, moderate bilateral lateral recess stenosis, and bilateral foraminal exit stenosis with left worse than right; (2) L4-5 anterolisthesis of L4 on L5, likely degenerative, minimal diffuse annular disc bulge, no central stenosis, and mild bilateral neural foraminal exit stenosis; (3) L5-S1 moderate diffuse annular disc bulge, endplate osteophytosis, no central canal stenosis, bilateral facet arthropathy, and mild bilateral neural foraminal exit stenosis. PX7.

Petitioner was seen by Dr. Gornet that same day, and he noted the CT myelogram revealed fairly severe facet arthropathy at L3-4, and to a greater extent at L4-5, particularly to the right. He noted she had had radiofrequency ablations at bilaterally at L3-4 and L4-5 but continued to have pain and symptoms. Dr. Gornet discussed different surgical options and questioned whether she would be a candidate for simple decompression with non-segmental fixation, or whether she would require a fusion. With regard to a fusion, he stated he would be reluctant to move forward with a "big, large formal fusion" but would consider a microfusion or a stabilization. He asked Petitioner to provide an assessment of her overall life and quality of life, and whether this was something severe enough to warrant surgical intervention. PX4.

Petitioner returned to Dr. Gornet on July 10, 2014. She stated she felt her pain and symptoms affected all aspects of her life and her quality of life, and advised she wanted to move forward with some type of treatment, as long as it was reasonable. Dr. Gornet noted his plan was L4-5 decompression bilaterally with non-segmental fixation at L4-5, as well as L3-4 laminotomy on the right. Dr. Gornet noted surgery would be "purely again to try and improve her function and quality of life". PX4.

On September 15, 2014, Petitioner underwent a lumbar MRI, which was compared to the one taken on April 18, 2013. Clinical Data was listed as low back pain with bilateral leg pain and numbness. Findings were (1) Grade I listhesis of L3-4 and L4-5 due to facet arthropathy, disc bulging, central stenosis worse at L3-4, foraminal narrowing at both levels; (2) L5-S1 degenerative disc with small right posterior annular tear, and no central stenosis. PX8.

Petitioner was examined by Dr. Gornet that same day. He reviewed the MRI as showing a "cascading" spine at L3-4 and L4-5, degenerative spondylolisthesis at L4-5, and bilateral facet arthropathy. Dr. Gornet noted Petitioner had bilateral pain, but that the right side seemed to be more significant for her now than the left. He further noted that originally it was more on the left. Dr. Gornet noted his plan was still a decompression with non-segmental fixation at L4-5 and right laminotomy at L3-4. Petitioner was to follow up in three months. PX4.

On September 17, 2014, Petitioner was evaluated by Respondent's Section 12 examiner, Dr. David deGrange. She gave a consistent history of the accident, and of being treated by Drs. Chabot and Gornet. She stated Dr. Chabot told her she had arthritis in her back and that her

symptoms were related to that. She further stated Dr. Gornet told her she had arthritis but that the work incident was the reason for her symptoms and need for treatment. She reported she had cortisone injections and radiofrequency ablations, which gave "some help", and that Dr. Gornet was now recommending a "very small, minute surgery". Her current complaint was low back pain at the lumbosacral junction. She stated the pain used to go to the left, but now went to the right. She reported occasional numbness and tingling in both legs and feet. Her symptoms were present on a daily basis and were characterized as frequently mild, and occasionally moderate with prolonged sitting or standing or with repeated bending or twisting or with lifting over fifteen to twenty pounds. She had nightly symptoms. She denied bowel or bladder complaints, but gave a history consistent with neurogenic claudication. RX3.

Upon examination, Petitioner had no obvious gait abnormalities and arose slowing from a seated position. She had mild tenderness to palpation throughout the lumbosacral area, but no palpable spasm. Her forward flexion was 25 degrees, with normal being 50. Her extension was 15 degrees, with normal being 30. She could heel and toe walk without difficulty. Straight leg raise was negative bilaterally, she had no focal motor deficits in either lower extremity, and there were no sensory deficits at L1 through S2. RX3.

Dr. deGrange reviewed medical records from Drs. Dusek, Moor, Chabot, Gornet, and Boutwell, FNP Lynn Brown, and Alton Physical Therapy. He also reviewed lumbar MRI's of October 29, 2012, and April 18, 2013. Based upon Petitioner's history, her examination, and review of medical records, Dr. deGrange diagnosed a lumbar strain, degenerative disc disease at L3-4 and L4-5, and L5 nondisplaced minimal vertebral body fracture without stenosis. RX3.

Dr. deGrange opined that Petitioner's self-described mechanism of the injury was consistent with a lumbar strain. This was superimposed upon a pre-existing, long-established, and evolving degenerative condition, most notably degenerative spondylolisthesis at L4-5. He opined that the second incident on October 24, 2012, when Petitioner stepped into a deep hole, likely caused her minor compression fracture of L5. Her clinical course of treatment seemed to be consistent with that. Dr. deGrange noted that when Petitioner saw Dr. Chabot on January 11, 2013, she had completed a course of physical therapy and medication, was doing very well by her own report, and was working regular duties. He opined that whatever effects of the work incidents there were, they had been appropriately treated, and had resolved approximately three months post-injury, which he noted was a reasonable timeframe. RX3.

Dr. deGrange noted that Petitioner had recently seen Dr. Gornet and now had some different symptoms, which involved the lower extremities, that apparently were either not reported or not documented by Dr. Chabot or NP Lynn Brown. He opined NP Brown's note of October 24, 2012, documented left thigh discomfort, which would be consistent with a fracture, but no radiculopathy or neurogenic claudication, which were Petitioner's current complaints. He therefore concluded, within a reasonable degree of medical certainty and based upon his evaluation and review of records, that Petitioner's current condition was not medically causally related to her incident of October 24, 2012, nor was the proposed treatment by Dr. Gornet. He further opined that Petitioner was at maximum medical improvement when she was released by Dr. Chabot in January 2013, without the need for further diagnostic testing or treatment, and that she could work full duty. RX3.

On December 15, 2014, Petitioner returned to Dr. Gornet, and presented him with a copy of Dr. deGrange's report of September 17, 2014. Dr. Gornet commented in this office note on both Dr. deGrange's report and Dr. Chabot's records. Dr. Gornet agreed with Dr. DeGrange that Petitioner's symptoms had evolved over time, and had progressed. While he did not agree that Petitioner ever had a compression fracture, he did agree that if one had been present it had healed. With regard to Dr. Chabot's notes, and in particular his first office note of November 2, 2012, Dr. Gornet stated it was "particularly curious (that) Dr. Chabot's description that she denies any pain into her lower extremities is directly conflicting with the pain diagram that the patient filled out on the same day." Dr. Gornet commented further that the pain diagram was consistent with the one she filled out in his office three months later. He opined that there were discrepancies between what Petitioner perceived her symptoms to be, the symptoms documented in his office, and the symptoms documented by Dr. Chabot's office. He went on to comment that NP Brown documented that Petitioner had aching in her back and legs. The Arbitrator notes it is more accurate to state that NP Brown's notes reflect Petitioner complained of low back pain which sometimes radiated down into her left leg, rather than both legs. Dr. Gornet opined that Petitioner's current symptoms had progressed, were related to her accident, and needed treatment. PX4.

Petitioner returned to Dr. Gornet on April 16, 2015, at which time she complained of low back pain to both sides, left greater than right, left hip pain, and left leg pain with weakness in her left leg "and now numbness". Her exam was unchanged and Dr. Gornet continued to recommend surgery. Petitioner next returned to Dr. Gornet on August 17, 2015. He continued to recommend surgery and noted that Petitioner understood surgery would not completely relieve all her symptoms, but he believed it would improve her quality of life and her function. He reiterated that Petitioner could work full duty with no restrictions. PX4.

On November 19, 2015, Petitioner underwent lumbar CT at the request of Dr. Gornet. The CT scan was compared to the one taken on May 12, 2014, and it revealed (1) L3-4 worsening annular disc bulge with facet arthropathy and developing Grade I anterolisthesis, and worsening moderate central canal stenosis and bilateral foraminal stenosis; (2) Grade I anterolisthesis and annual disc bulge and facet arthropathy at L4-5 and L5-S1 which were stable in appearance, and unchanged bilateral lateral recess stenosis and mild bilateral foraminal stenosis; (3) L2-3 annular disc bulge and moderate bilateral foraminal stenosis, unchanged. PX9.

On November 19, 2015, Petitioner underwent a lumbar MRI at the request of Dr. Gornet. The MRI was compared to the one taken September 15, 2014, and it revealed (1) L5-S1 central posterior 5 mm protrusion with large bilateral far lateral herniations, left-sided herniation which was "very large, up to 15 mm in diameter", resulting in impingement of the exiting L5 root, and also contact with the exiting right L5 root in a right far lateral position; (2) degenerative Grade I anterolisthesis at L3-4, L4-5, and L5-S1; (3) L3-4 annular disc bulge, moderate central canal stenosis, and moderate bilateral foraminal stenosis; (4) L1-2 central broad-based protrusion and mild bilateral L1-2 foraminal stenosis, and L2-3 annular disc bulge with dural displacement but no central canal stenosis; and (5) abnormal marrow signal in the left sacral wing, possibly reactive and due to the large left-sided far lateral L5-S1 disc protrusion. PX10.

On November 19, 2015, Petitioner was seen by Dr. Gornet. He interpreted the CT as showing diffuse osteopenia with near ankylosing of the segment at L5-S1, fairly significant facet arthropathy at L3-4, and more significantly at L4-5 with osteoporosis. He interpreted the MRI as showing mild disc degeneration at several levels, moderate lateral recess stenosis and facet hypertrophy at L3-4, and much more significant facet hypertrophy at L4-5. He commented that L5-S1 showed moderate facet changes. The Arbitrator notes he did not comment regarding the radiologist's finding of a "large" central herniation and a "very large left-sided herniation" at L5-S1. Dr. Gornet continued to recommend surgery for Petitioner, and stated that "while she has been working full duty, her symptoms emanate from this injury". PX4.

Dr. deGrange testified by way of deposition on January 26, 2016. He is a board certified orthopedic surgeon who is fellowship trained in spinal surgery. His specialty is orthopedic surgery, with a subspecialty in spinal surgery. His practice is 99.99% disorders of the adult spine He sees 50 to 65 private patients per week and performs an average of two surgeries per week, all of which are spinal surgeries. Approximately eight to nine percent of his practice is for medical-legal examinations. He conducts on average two to three such exams per week, and gives two to three depositions per month. RX4.

Dr. deGrange testified he examined Petitioner on September 17, 2014, and that he reviewed the medical records listed in his report. He reviewed the actual diagnostic films, as well as the radiology reports if they were in the records. He testified that in his private practice he does not rely on the radiologists' reports because there is a wide spectrum of training among radiologists, in that some are general and some are musculoskeletally trained, whereas he is a surgeon. If he sees something egregiously out of line in a report, he will make note of it in his report; however, he generally does not do so. In his private practice he does review and rely upon the records of other medical providers, much more so than radiologists' reports. RX4.

Dr. deGrange testified to the history of the accidents, as provided by Petitioner, and noted she denied any prior back pain or any history of significant chronic or recurrent low back pain prior to the incidents, and denied ever seeking treatment for low back pain prior to the incidents in October 2012. He testified Petitioner complained of pain in her low back, in the area referred to as the lumbosacral junction, just above the buttock area. She told him the pain used to go down her left side and now was going down her right side, a little below the back. She also complained of having occasional numbness and tingling in both legs and feet. She related that her symptoms were present daily. Dr. deGrange testified that based on her description, he characterized her pain as frequently mild, and occasionally moderate with prolonged sitting and standing, repeated bending and twisting, or lifting more than fifteen to twenty pounds. She denied a history of problems with bowel or bladder complaints. She did give a history of neurogenic claudication, which he explained means the legs feel heavy, painful, or weak with walking. Petitioner stated a brief break from walking usually helped these symptoms, and then she could continue on with walking again. RX4.

Dr. deGrange testified that examination of Petitioner revealed she had a normal gait but she did arise slowly from the chair. She had some mild tenderness to palpation but did not have any spasm. Her range of motion in both flexion and extension was decreased by about fifty percent. Nerve tests to determine any sciatic nerve irritation were negative. Faber testing, which

involves loading the sacroiliac joint to try and provoke symptoms, was also negative. There was no weakness or numbness, and her reflexes were symmetric. RX4.

Dr. deGrange testified he reviewed Petitioner's MRI films from October 2012 and April 2013. On the first MRI, immediately after the injury, it appeared there was probably a minor compression fracture of L5. Dr. deGrange confirmed this on the two images referred to as T1 and T2, which are the same anatomic area, but there are signal characteristics that can help determine if a finding is new or acute within the last six months. Apart from this finding, there were normal degenerative changes, which he testified were appropriate from someone of Petitioner's age. She had some mild degeneration at L3-4, L4-5, and L5-S1. He testified the second MRI was essentially unchanged, except that the acute signal changes seen at L5 had resolved, indicating the fracture had healed. RX4.

Dr. deGrange testified that based on the patient's mechanism of injury on October 24, 2012, he diagnosed a lumbar strain, a nondisplaced vertebral body fracture, and preexisting degenerative condition at L3-4 and L4-5. He had no treatment recommendations, as she had reached maximum medical improvement and no further treatment was needed beyond Dr. Chabot's last treatment. He did not recommend any restrictions on Petitioner's activities, as regards her injury, and testified she could do all her job duties without modifications. RX4.

With regard to Petitioner's MRI of October 29, 2012, Dr. deGrange testified he treats patients every day in his private practice with the types of findings seen. These findings do not always cause someone to have symptoms, but when they do it is typically back pain, and not any type of radicular pain, numbness, or tingling. The symptoms generally are treated with activity modification, physical therapy, and very sparing use of medication. In his review of the MRI, Dr. deGrange testified he did not find evidence of a facet cyst at L3-4. He does encounter facet cysts in his practice, in about two to three percent of surgeries. More often than not they are outside the spinal canal and do not require specific treatment. Dr. deGrange testified that a facet cyst is a degenerative finding that arises from the synovium that is part of the facet, and that it is just about always, with extremely rare exceptions, an arthritic process. There can be cystic degeneration in other joints in the body as well, such as the hip, shoulder, or knee. About five to ten percent of people with arthritis will have arthritic cysts emanating from that joint. He testified he did not see anything on Petitioner's MRI of October 29, 2012, that would have required surgical intervention, and did not seen any evidence of a traumatic injury other than the fracture previously discussed. RX4.

Dr. deGrange testified he reviewed Dr. Chabot's record of November 2, 2012, in which Dr. Chabot diagnosed Petitioner with back strain, back pain, and sacroiliitis. He testified these diagnoses match up with Petitioner's subjective complaints that day. He testified that sacroiliitis is inflammation of the sacroiliac joint, usually seen in very specific autoimmune conditions such as ankylosing spondylitis, but is sometimes used to describe back pain in the area of the sacroiliac joint which may or may not have anything to do with the sacroiliac joint. RX4.

Dr. deGrange reviewed Dr. Chabot's treatment note of January 11, 2013, which indicated Petitioner had been performing her regular work duties, was walking without difficulty or limp, had no tenderness or spasm, had good range of motion, and had a normal lower extremity exam.

Dr. Chabot's impression was resolved back strain and sacroiliitis. Dr. deGrange testified that these objective findings matched up with Petitioner's subjective complaints noted that day. He agreed with Dr. Chabot's assessment that Petitioner had reached maximum medical improvement as of that date. RX4.

Dr. deGrange testified that some of Petitioner's treating records referenced an assessment of facet arthropathy, a term he is very familiar with. He testified it is a radiologic finding and is the same thing as facet arthritis. Arthropathy means there is pathology with the joint. He testified this is an arthritic condition, and only in the vast minority of cases would it be the result of a traumatic event, as it takes many years to develop. RX4.

On cross-examination, Dr. deGrange disagreed with NP Brown's characterization of Petitioner's thigh as being the leg, and explained that the pain that was documented was pain from her back into her thigh, which was not the same thing as her lower leg. He agreed that when a person has disc involvement, they can have pain down the left part (of the back), down the buttock and into the left leg, and down the back of the leg. Dr. deGrange agreed that if NP Brown's notes indicated she could not perform the straight leg raising test due to Petitioner's extreme pain, he reviewed same. He acknowledged that if an MRI showed a broad-based disc bulge indenting the thecal sac and displacing the SI root, the patient could have radiating pain down the buttock and down the back of the thigh. He testified that the MRI interpretation in his report is his own interpretation, and not that of the radiologist. RX4.

Dr. deGrange conceded that he did not have Petitioner's intake forms that she completed in Dr. Chabot's office on November 2, 2012, and he reviewed same at the time of the deposition. He agreed that on page three of the form Petitioner indicated she had pain in her back that radiated to her legs, and she marked that her pain was severe, sharp, aching, and electric/shocking. Dr. deGrange was familiar with a pain chart that shows the human body, which he referred to as a symptom diagram. He agreed that page five of the intake forms was a symptom diagram for "Pain Level Shortly After The Injury", and that Petitioner marked that she had sharp pain at the belt line and down the left buttock cheek into the back of the left leg. He further agreed that was consistent with what Petitioner told NP Brown, but did not know what she had told Dr. Gornet with regard to same. Dr. deGrange testified there was a difference in what Petitioner put on the first symptom diagram, for pain level shortly after the injury, and what she put on the second symptom diagram, for "Pain Level Today", the day of the examination with Dr. Chabot. He testified that the complaints Petitioner had upon examination by Dr. Chabot matched those she put on the second symptom diagram, for her pain level "today". The second diagram showed pain going down into the buttock area only, which is consistent with the complaints noted in Dr. Chabot's report. RX4.

Dr. deGrange testified that Petitioner's complaints to Dr. Gornet were not consistent with her complaints to Dr. Chabot, as documented in Dr. Chabot's records. The Arbitrator notes that when asked about the complaints Petitioner wrote on her pain diagram, that being pain down her buttock and into her leg, Petitioner's counsel was referring to her "pain level shortly after the injury", whereas Dr. deGrange was referring to her "pain level today". With regard to Dr. Gornet's recommendation for surgery, Dr. deGrange testified he did not agree with it. RX4.

Dr. deGrange testified that Dr. Chabot's treatment record of November 19, 2012, documented that Petitioner stated that day that the pain radiating into her left lower extremity had resolved and that she was doing better. He was unaware that Petitioner had had an SI joint injection prior to this visit, and acknowledged that such injections are administered to relieve pain that is well localized around the buttock. He further testified that none of Dr. Chabot's records reference any right-sided radiculopathy complaints, or left foot complaints. RX4.

CONCLUSIONS OF LAW

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

The parties stipulated that Petitioner sustained an accident which arose out of and in the course of her employment on October 24, 2012, and that she injured her low back as a result.

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

It has long been recognized that, in preexisting condition cases, recovery will depend on the employee's ability to show that the work-related accidental injury aggravated or accelerated the preexisting disease, such that the employee's current condition of ill-being can be said to have been causally connected to the work injury and not simply the result of a normal degenerative process of the preexisting condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 204-206 (2003).

A claimant has the burden of proving by a preponderance of the credible evidence all elements of the claim, including that any alleged state of ill-being was caused by a workplace accident. *Parro v. Industrial Commission*, 260 Ill.App3d 551 (1993). The existence of health problems of an employee prior to a work-related injury neither deprives the employee of a right to benefits nor relieves the employee of the burden of proving a causal connection between the employment and the subsequent health problems. *Neal v. Industrial Comm'n*, 141 Ill.App.3d 289 (1986).

The Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that her current lumbar spine condition is causally related to her work accident of October 24, 2012. In so concluding, the Arbitrator finds significant the chronological chain of events and Petitioner's own statements to her medical providers.

It is undisputed among the physicians in this case that Petitioner has extensive degeneration and arthritis in her low back, which were present on the first lumbar MRI taken October 29, 2012, five days after the accident. In her initial visit with NP Brown on October 24, 2012, Petitioner complained of low back pain that radiated to the back of her left thigh, but she denied any numbness or tingling in the leg. She had the same complaint when she followed up five days later. However, when she saw Dr. Chabot on November 2, 2012, she denied any

radiation of symptoms into her lower extremities, though she did continue to complain of low back pain.

A great deal of emphasis was made by Petitioner during Dr. deGrange's deposition, and by Dr. Gornet in his note of December 15, 2014, regarding the pain diagrams contained within Dr. Chabot's record of Petitioner's initial examination on November 2, 2012. Dr. Gornet said he found it "particularly curious" that Dr. Chabot's description that Petitioner denied any pain into her lower extremities was directly in conflict with the pain diagram the patient filled out on the same day. Petitioner made the same point with Dr. deGrange in his deposition. However, it is clear to the Arbitrator that in both instances the pain diagram being referred to was the diagram titled "Pain Level Shortly After The Injury". In that diagram, it is clear that Petitioner was noting she had sharp pain in her left low back which radiated down the back of her left thigh, to the knee. She rated the pain after the injury at 6/10 at its least, to 10/10 at its worst. However, on the second pain diagram completed the same day, titled "Pain Level Today", Petitioner clearly marked that she had stabbing pain in her left low back and down into her left buttock, but there were no marks into her thigh, to her knee, or anywhere else on the front or back of the either leg. She rated her current pain at 3/10.

The Arbitrator finds no inconsistency in what was reported by Petitioner in her pain diagrams and what was reported by Dr. Chabot in his office note of November 2, 2012. Likewise, Dr. deGrange found no inconsistency. The Petitioner was simply, by her own account, getting better. As such, the Arbitrator is not persuaded by Dr. Gornet's comments in his note dated December 15, 2014.

The Arbitrator notes that Dr. Gornet's record of December 15, 2014, is a full page in length. With the exception of three to four short sentences regarding Petitioner's unchanged status and treatment plan, the entire record is spent discussing Dr. DeGrange's IME report and records of Dr. Chabot and NP Brown, and giving his opinion on those records. In light of this fact, and in light of the inaccuracies contained therein, the Arbitrator gives no weight to this note.

The record is clear that Petitioner's acute condition continued to improve. On November 19, 2012, Dr. Chabot noted, "She states that the pain radiating into her left lower extremity has resolved. She is doing better." On December 12, 2012, Dr. Chabot noted, "She presents today stating that she is doing better." Examinations on both of those days revealed improving movement, improving range of motion, and improving tenderness and pain. On December 6, 2012, the physical therapist noted that Petitioner rated her pain at 0/10 and that she denied any radicular symptoms. As well, on January 11, 2013, Dr. Chabot noted, "She presents today stating that she is doing very well." Her examination that day was essentially normal, and Dr. Chabot declared her to be at maximum medical improvement.

During her testimony, Petitioner denied telling Dr. Chabot at any of her exams that she was doing well, and further denied telling him that her radicular symptoms had resolved. She also denied telling the physical therapist that she was doing well. However, Petitioner presented no evidence as to why these records would include this information if it was incorrect. The Arbitrator is not persuaded by Petitioner's testimony, and relies instead upon Petitioner's

statements made contemporaneous with her treatment, as well as the objective medical evidence found in the records of her treating providers.

Approximately four weeks after being told she was at maximum medical improvement, Petitioner presented to Dr. Gornet with a plethora of complaints. She completed a pain chart wherein she marked she was having aching down the entire front and back of both legs, from the hips to the ankles. She also marked she was having pins and needles in both feet and ankles, as well as pins and needles in the lower part of the left buttock and into the back of the left thigh. As was noted by Dr. deGrange, these were all new complaints, not previously expressed to prior treaters, not noted in any of her records, and not marked on either of the prior pain diagrams that she completed herself. The only complaint marked on this diagram that had previously been reported was stabbing pain across the low back and into the left buttock. The Arbitrator finds this stark difference in reported complaints to be suspect.

In light of Petitioner's clearly documented recovery and her significant change in complaints to Dr. Gornet, the Arbitrator is not persuaded that Petitioner's treatment beyond January 11, 2013, is related to her work accident of October 24, 2012. In addition, the record clearly shows that Petitioner's degenerative and arthritic conditions continue to worsen, nearly three years after retiring from Respondent's employ. The preponderance of the objective medical evidence in this case reflects that Petitioner's current subjective complaints are the result of a normal degenerative process of the preexisting conditions, and not aggravated or accelerated by the work injury.

The Arbitrator therefore finds that Petitioner reached maximum medical improvement on January 11, 2013, and that her current condition of ill-being is not related to her work accident of October 24, 2012.

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

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill.App.3d 463 (4th Dist. 2011) (citing *University of Illinois v. Industrial Comm'n*, 232 Ill.App.3d 154 (1st Dist. 1992)).

In light of the Arbitrator's finding above that Petitioner was at maximum medical improvement on January 11, 2013, the Arbitrator finds that any and all bills for medical services rendered beyond that date are denied. Specifically, the Arbitrator finds that Respondent is not liable for medical bills from Dr. Matthew Gornet, The St. Louis Spine and Orthopedic Surgery Center, Pain and Rehab Specialists of St. Louis, MRI Partners of Chesterfield, CT Partners of Chesterfield, and Quest Diagnostics. The Arbitrator finds that Respondent is liable for medical

bills from Midwest Occupational Medicine, Imaging Center of Alton, Dr. Chabot at Orthopedic Specialists, and Alton Physical Therapy.

The parties stipulated and the Arbitrator finds that Respondent is entitled to a credit for medical benefits previously paid, including those paid through its group medical plan, for which credit is allowed under Section 8(j) of the Act.

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

In light of the Arbitrator's finding above with respect to issue (F), the Arbitrator finds that Petitioner is not entitled to ongoing medical care for her lumbar spine.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Holtkamp,

Petitioner,

17IWCC0311

vs.

NO: 14 WC 31497

Warren G. Murray
Developmental Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, jurisdiction 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 9, 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

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

17IWCC0311

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: MAY 19 2017
o5/11/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

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

17IWCC0311

HOLTKAMP, MARY
Employee/Petitioner

Case# **14WC031497**

WARREN G MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

On 6/9/2016, 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 0.43% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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0502 STATE EMPLOYEES RETIREMENT
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SPRINGFIELD, IL 62794-9255

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

JUN 9 = 2016

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

17IWCC0311

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)/8(a)

MARY HOLTKAMP
Employee/Petitioner

v.

WARREN G. MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

Case # 14 WC 31497

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Herrin**, on **March 9, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **July 23, 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 **$44,610.38**; the average weekly wage was **$857.89**.

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

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

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

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

ORDER

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of her employment with the Respondent on July 23, 2014. The Arbitrator further finds that the Petitioner's current right knee condition was and remains causally related to the July 23, 2014 accident.

Respondent shall pay the reasonable and necessary medical expenses contained in Petitioner's Exhibit 7, as provided in Sections 8(a) and 8.2 of the Act.

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

Pursuant to Section 8(a) of the Act, the Arbitrator finds that the total knee replacement surgery recommended by Dr. Houle is reasonable and necessary treatment in this case, and the Respondent shall authorize same.

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.

17IWCC0311

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

Signature of Arbitrator

June 3, 2016
Date

ICArbDec19(b)

JUN 9 - 2016

STATEMENT OF FACTS

On 7/23/14, Petitioner a support service worker for Respondent. The job involved sorting, washing, folding, and putting away the clothes of the developmentally disabled residents at the Respondent's facility. On that date, Petitioner was pushing a full laundry cart from the dryer room into the folding area when she experienced a popping sensation in her right knee with pain. She testified that the laundry cart was approximately 4' x 5', about 3' high, and weighed about 75 pounds when full. At the time her knee popped, she indicated her right knee was forward and flexed as she was exerting effort to push the cart. She testified that she felt immediate pain in her knee, but worked the last hour or so of her shift before leaving work to go to the dentist. At the dentist's office, when getting out of the dentist chair, the Petitioner could barely walk. The next day, she drove to work, saw her supervisor outside and told the supervisor that she could barely walk. The incident was reported, paperwork was completed and Petitioner was sent to the Work Safety Center for an evaluation.

Before this incident, Petitioner testified that she had never experienced pain or swelling in her right knee and she had never sought treatment related to her right knee. At the time of the accident, Petitioner was working full duty with no physical restrictions related to her right knee. She also testified that she never had any problems with her left knee. Prior to 7/23/14, no doctor had ever told her that she had arthritis in her right knee.

At the Work Safety Center at St. Mary's. (Px1), the Petitioner reported feeling a pop in the lateral aspect of the right knee with pain while pushing a laundry cart. She reported having pain ever since the injury with trouble flexing the knee due to the pain. Roger Young, a certified nurse practitioner, noted that Petitioner's symptoms included right lateral knee pain with mild swelling and stiffness, and that standing, walking, rising after sitting and any weight bearing aggravated Petitioner's symptoms. CNP Young also noted that Petitioner had no prior knee problems. Following exam, she was diagnosed with a right knee sprain, medication and a knee brace were prescribed and x-rays were ordered. She was released to return to work with restrictions, and Petitioner testified the restrictions were accommodated by the Respondent. (Px1).

On 7/31/14, CNP Young reported that Petitioner had continued pain, though bracing and medication helped some. There was no obvious effusion, but range of motion remained decreased due to pain. The x-ray report indicated soft tissue swelling, joint effusion, and tricompartmental osteoarthritic changes: mild in the lateral compartment, moderate in the medial compartment, and moderate to severe in the patellofemoral compartment. Physical therapy was prescribed and light duty was continued. (Px1; Px2). Physical therapy was performed at St. Mary's. (PX4).

By 8/24/14, the Petitioner was not doing any better despite four physical therapy visits, and she reported that the popping in her knee was more frequent and painful with the feeling of instability. She had good range of motion with some tenderness on the lateral aspect of the right knee. CNP Young ordered an MRI and continued physical therapy, medications, and light duty restrictions. (Px1).

The 9/11/14 right knee MRI revealed severe tricompartmental osteoarthritis, patellofemoral and lateral compartment predominant, as well as severe medial and lateral meniscal degeneration with probable complex tear posterior horn lateral meniscus and severe truncation of the anterior horn of the lateral meniscus. There were no contusions or bone marrow edema, with moderate joint effusion and a Baker's cyst. On 9/15/14, CNP Young diagnosed a meniscus tear and severe right knee degenerative joint disease and referred Petitioner for an orthopedic evaluation. (Px1; Px3).

Petitioner initially saw orthopedic surgeon Dr. Houle on 9/24/14. The report noted a consistent history of the accident, and Petitioner reported complaints of sharp aching pain associated with periods of swelling, popping, grinding, weakness, locking, catching and giving way. She rated her pain as 7 out of 10. Dr. Houle noted that Petitioner had been wearing a brace and taking Aleve and Tramadol without much relief, and had completed therapy two weeks prior. Physical examination revealed very limited range of motion. Dr. Houle opined the MRI indicated that the meniscal damage appeared to be more degenerative in nature. He assessed Petitioner as follows: "She appears to have worsening right knee osteoarthritis secondary to an injury suffered at work." He gave Petitioner a cortisone injection and continued Petitioner's light duty work restrictions. (Px5).

On 10/22/14, Dr. Houle noted that Petitioner had an unusual reaction to the injection ("she felt as though she wanted to claw her knee off with her nail and an unusual feeling otherwise"). He discussed the pros and cons of surgery with the Petitioner, and recommended a Synvisc injection since he felt there was a worsening of the underlying arthritis, and he didn't know if arthroscopic surgery would help her, and could make her worse. Light duty restrictions were again continued, and the Synvisc injection was performed on 11/19/14. (Px5).

On 12/4/14, Petitioner underwent a Section 12 evaluation with board certified orthopedic surgeon Dr. Choi at the request of the Respondent. (Rx7). Following examination and review of Petitioner's medical records and diagnostic testing, Dr. Choi diagnosed Petitioner with severe right knee tricompartmental degenerative joint disease. In his opinion, the underlying osteoarthritis is not causally related to the 7/23/14 work incident. Based on the x-ray and MRI findings, the Petitioner clearly had pre-existing severe degenerative disease that had occurred over a period of years. Dr. Choi stated: "the incident that occurred may have exacerbated the underlying condition with an inflammatory flare-up that has been treated with conservative treatments to date including cortisone and visco supplementation injections." Dr. Choi further opined that the work incident did not aggravate or alter the natural course of the osteoarthritis. He was surprised that Petitioner had no issues with her right knee prior to the work-related incident. He opined that the MRI findings are consistent with a degenerative process rather than something acute in nature. He did agree that the Petitioner's subjective complaints are supported by the objective findings on MRI and x-ray. Petitioner was appropriately treated and diagnosed to date including a cortisone injection and the Synvisc injection as well as physical therapy, and Dr. Choi opined that the Petitioner had reached maximum medical improvement and is capable of working without restrictions as a result of the work-related injury. (Rx7)

At her 1/19/15 follow up with Dr. Houle, the Petitioner reported her pain was still at a 5 out of 10, that the Synvisc injection did not help her, and that she had fallen twice since she last saw him due to the knee buckling. Physical examination indicated mild effusion and Dr. Houle assessed Petitioner with "pain in the right knee secondary to the osteoarthritis that has been aggravated by this injury." He wanted to wait a full three month period to determine if the injection would eventually work. (Px5).

A 2/17/15 letter from the Respondent indicated that, following Dr. Choi's evaluation, it was determined that her claim would no longer be covered under workers' compensation. On 2/18/15, Dr. Houle noted that Petitioner was still reporting substantial pain and soreness, and he recommended a knee replacement surgery as the only option, noting repeat x-rays showed bone-on-bone wear in the lateral compartment. Given that the claim was now disputed, Petitioner testified that she sought, and received, a full duty release. This testimony is supported by Dr. Houle's 2/25/15 note. Dr. Houle noted that when people have underlying arthritis and have an injury that worsens the underlying arthritis, he considers that to aggravate the underlying condition of arthritis. He further noted that he does not agree with any physician that states, after months of no pain relief, the injury the worker sustained did not worsen the arthritis. (Px5).

Dr. Houle is a board certified orthopedic surgeon specializing in sports medicine and knee surgery, and he testified by way of deposition on 1/6/16 (Px6). As to causation regarding the Petitioner's preexisting degeneration, he testified as follows: "I feel compelled to tell people that when they have an injury, I do not agree that an injury happens and then there is no further damage from that injury. I suspect that the acute symptoms in the first three months abate but the injury itself progresses over that period of time." He further testified that: "I don't see how getting injured you should expect to be 100% without having any sequelae from the injury." Dr. Houle testified that the injury is like the tip of the iceberg, but what happens underneath the tip continues after the fact. (pp.12-13). Dr. Houle indicated that the effusion seen in 9/11/14 x-rays pointed towards a flare up of her condition, as it is a reaction to an injury and can indicate an acute finding. He also noted that Petitioner's pain never went away after the accident. Dr. Houle testified that the mechanism of injury Petitioner reported is the type that can aggravate preexisting arthritis. Dr. Houle's final diagnosis was underlying arthritis that was aggravated by and worsened by the injury suffered at work. He opined that the injury at work was a factor in creating the worsening of her arthritis. (pp. 14, 19). He further opined that all the treatment that he has provided was reasonable and necessary to treat Petitioner's condition, and provided his opinions as to the likely post-operative course the Petitioner would undergo. (p. 15).

On cross-examination, Dr. Houle testified that his understanding was the Petitioner was pushing a full laundry cart when she felt the right knee pop, but he didn't know the weight of the cart. (Px6, p. 16). Regarding his opinion that the accident aggravated the Petitioner's arthritis: "she felt her right knee pop so she probably – not probably, she had likely her knee flexed at that time and pushed on it and that's what I feel exerted some force through the knee and caused the knee to be sore and to aggravate the arthritis." (p. 17). Dr. Houle agreed the Petitioner had bone-on-bone arthritis before the accident, and that he didn't know what her work duties were when she had been released to light duty. If sedentary, he would have expected some relief of her symptoms. (pp. 17-18). Dr. Houle testified that, based on the x-rays, the Petitioner would have needed a knee replacement at some point down the road even if there had been no accident, but that there also was really no way to predict when such surgery would be needed because it is performed in large part based on the patient's pain level. Here, the Petitioner indicated no prior right knee pain. (pp. 18-20).

Dr. Choi testified via deposition on 7/8/15. (Rx8). He noted the Petitioner said she was of pushing a cart full of clothes to a drying area and felt a popping sensation in the right knee, His diagnosis was end stage arthritis of the right knee, meaning the Petitioner had severe osteoarthritis objectively and had failed to improve with conservative measures clinically. A noted Baker's cyst was irrelevant to her symptoms. He opined that the arthritis was longstanding and preexisting, and was not caused by the work-related incident. Her valgus alignment was consistent with significant lateral compartment arthritis. Dr. Choi acknowledged that Petitioner may have sustained a temporary flare-up of the preexisting osteoarthritis, or a "slight irritation" of the arthritis, but that the painful popping sensation was not a traumatic event in and of itself. However, the incident was not the direct cause or a significant contribution to the underlying arthritis. Dr. Choi noted that Petitioner did not experience a twisting injury nor did she have a ground-level fall, and thus the meniscal tears indicated on MRI were not due to the work injury. Because the lateral compartment was essentially bone on bone, there was significant truncation of the lateral meniscus as a result, which is expected. Dr. Choi testified that Petitioner reached maximum medical improvement with regard to anything related to the accident as of December 4, 2014, and that given she had the arthritis prior to the accident as well, she should be able to work her regular job duties. (Rx8).

Dr. Choi's understanding of an aggravation of a preexisting condition means that there has to be some sort of a traumatic event that changes the natural course of the patient's underlying condition. (Rx8).

Based on the degree of arthritis noted, Dr. Choi would have expected the Petitioner to have symptoms, but "that doesn't mean that she has to absolutely have pain in her knee", and he had no reason to believe the Petitioner was lying about her symptoms. (Rx8, p. 23). On cross-examination, Dr. Choi agreed that he had reviewed no evidence indicating the Petitioner had right knee problems or symptoms that predated the 7/23/14 accident, and that the Petitioner's stated history was that she did not have prior symptoms. Dr. Choi explained that, as to the mechanism of injury, he assumed that Petitioner was in a standing position when she felt the pop. (Rx8). Dr. Choi was further asked the following:

Q: Now, we can agree, then, that based on her history, the July 23, 2014 workplace incident that she described, triggered her right knee pain in this case.
A: She developed pain after the workplace accident, yes. (Rx8, p. 28)

Dr. Choi was unable to answer why Petitioner experienced pain after her knee popped. Dr. Choi further testified as follows:

Q: And so based on your report . . . we can agree that the incident may have exacerbated the underlying condition?
A: Certainly possible, yes. (Rx8, p. 32).

Dr. Choi agreed that, per her history, the Petitioner's pain progressively worsened after the accident, and he couldn't say why her pain did not resolve after the incident. Dr. Choi agreed that the workplace accident was a factor in causing her pain leading to the conservative treatment that she received, but does not believe that the continuing pain is a causative factor for the knee replacement. Dr. Choi did acknowledge that, for a physician to recommend surgery, a patient's symptoms have to be sufficient and there must be subjective findings of pathology that surgery can address. Dr. Choi acknowledged that, in this case, if there is a recommendation for a knee replacement, it would be to address Petitioner's pain. (Rx8) Dr. Choi further testified as follows:

Q: . . . and so the pain portion of the preconditions for surgery in this case based on history began with this workplace incident?
A: To the best of my knowledge. (Rx8, pp. 38-39)

Dr. Choi initially testified that swelling and/or effusion, as documented in some of Petitioner's medical records, could be a chronic or acute finding. He stated that it is possible and probable that Petitioner had a joint effusion and soft tissue swelling even before this incident, but agreed he does not know that for a fact in this case. Dr. Choi agreed that stressing the knee while pushing a laundry cart could be a factor in causing the swelling and joint effusion. He agreed that after two months, the edema and contusion within a knee may have resolved. (Rx8) Dr. Choi further testified as follows:

Q: In Ms. Holtkamp's situation, do you have an opinion, to a reasonable degree of medical certainty, as to when a temporary exacerbation in this case would have stopped and her preexisting arthritis – arthritic condition would have, I guess, overtaken the temporary aggravation as being the cause of her pain?
A: Yes, and that's a good question. I just don't have a good answer because I don't think a good answer exists. I mean, if I were to speculate, I would expect anywhere between 10 days up to a month.
Q: But that would be speculation?
A: Yes.
Q: It's really an arbitrary task to try to figure out exactly when it would change from one to the other, fair?

A: Sure, that's a fair assessment. (Rx8,p. 49)

CONCLUSIONS OF LAW

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

The Petitioner has sustained her burden of proof that she sustained an injury which arose out of and in the course of her employment. The defense presented in this case is more specifically applicable to the "arising out of" aspect of this determination. The Arbitrator finds that the Petitioner's testimony was credible that she felt a pop and developed pain in her right knee while pushing a cart full of laundry. The public generally does not push 75 pound carts full of laundry back and forth. Not only that, but it appears that the transporting of both wet and dry clothing was one of the central aspects of her job. The evidence also indicates she had been doing and able to do this job for five years prior to the accident date. No evidence was provided by the Respondent which would support this activity as being so light in effort that it would not differ from a person simply walking, or that would indicate that the weight of the cart was less than 75 pounds.

The Arbitrator believes the Petitioner's development of a pop within the knee while pushing a 75 pound laundry cart qualifies as a compensable accident under the Act, particularly where she described that the knee was flexed to push when the pop happened.

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

It is clear in this case that degenerative arthritis in the Petitioner's right knee preexisted the 7/23/14 accident. When a preexisting condition is present, a claimant must show that the work related accident 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 the normal degenerative process. *St. Elizabeth's Hospital v. IWCC*, 864 N.E.2d 266 (2007). Additionally, the accident need not be the sole, or even the primary, causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665 (2003). Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Commission*, 723 N.E.2d 846 (2000). It is axiomatic in Illinois that employers take their employees as they find them. Per *Sisbro*, whether a claimant's disability is attributable solely to a preexisting degenerative process or to an aggravation or acceleration of the process by an accidental injury is a factual determination for the Arbitrator and Commission. *Sisbro* at 673.

The Supreme Court's decision in *Sisbro* indicated that even though a claimant has a preexisting condition that 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 a causative factor. The Court held that where a work-related injury is shown to be an actual causal factor in bringing about a worker's condition, recovery should not be denied simply because a normal daily activity could have brought on the condition. The Court "wisely cautioned against the conclusion that injuries sustained while an employee performs work he or she was instructed to perform by an employer are not compensable because members of the general public might perform similar tasks outside of the workplace." The Court noted that there is no "normal daily activity exception" to causation once it has been deemed that causation exists; rather: "that whether 'any normal daily activity is an

overexertion' or whether 'the activity engaged in presented risks no greater than those to which the general public is exposed' are matters to be considered when deciding whether a sufficient causal connection between the injury and the employment has been established in the first instance." Sisbro at 676.

Illinois case law has also established that a 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. Industrial Commission*, 530 N.E.2d 1135 (1988).

The Arbitrator believes that the facts of this case are very similar to the facts presented in the *Sisbro* case in terms of a claimant having a significant preexisting condition that nevertheless was aggravated and accelerated by a work accident. Regardless of how bad her degeneration may have been, there is no evidence that the Petitioner in this case had any prior symptoms or problems with her right knee. Her testimony in this regard is unrebutted, and the Arbitrator finds her credible. She had an accident while pushing a heavy laundry cart as part of her duties with Respondent. Per her testimony, at the time, the right knee popped while flexed and exerting force. The mechanism of injury was sufficient to cause a sprain that exacerbated her underlying, and previously asymptomatic, arthritis in her knee. Dr. Houle testified that Petitioner's mechanism of injury can aggravate preexisting arthritis. Dr. Choi essentially agreed that stressing the knee while pushing a laundry cart could be a factor in causing the pain, swelling and joint effusion. Dr. Choi opined that the incident exacerbated Petitioner's underlying condition, with the inference that the exacerbation was temporary.

The Arbitrator concludes that the accident was a causal factor in aggravating and/or accelerating Petitioner's condition and need for surgery. First, the chain of events provides a causal nexus in this case. The record evidence shows that Petitioner had no pain in her right knee before the accident and, after the accident, the pain never resolved, leading to the surgery recommendation.

Dr. Houle opined that the work accident aggravated Petitioner's arthritis and the need for surgery is causally related to that aggravation. Dr. Houle's opinion is credible since a degenerative condition would manifest itself gradually, rather than immediately after a work related act or movement.

Dr. Choi admitted that Petitioner's accident was a factor in causing the pain that led to the treatment that she received, including the Synvisc injection, which is a treatment modality designed to lubricate the knee joint, not to address a muscle sprain. In other words, Dr. Choi admitted that the accident was a factor in causing treatment related to the aggravation of the underlying arthritis. If the Synvisc injection is causally related to the accident, one must conclude that the knee replacement procedure is also related, as both address the pre-existing arthritis. Dr. Choi testified that, in most cases, the aggravation caused by this type of injury resolves after about a month. However, that is not the case with Petitioner and, as noted above, Respondent must take Petitioner as it finds her. Dr. Choi's testimony regarding his belief that Petitioner had swelling and joint effusion before the accident is not supported by the record and makes his testimony less persuasive.

Dr. Choi's opinion is essentially that, while the Petitioner may have exacerbated her symptoms on 7/23/14, the incident did not "aggravate or alter the natural course of her arthritis." However, under Illinois law, a permanent aggravation of symptoms qualifies as a compensable aggravation of a preexisting condition, pursuant to the *Sisbro* case, because it caused the symptoms which have not resolved since the accident date. His testimony also indicated that the Petitioner, based on her preexisting level of right knee degeneration, was likely to require a knee replacement regardless of the work accident at some point in the future. However, he also made it clear that there was no way to determine when that might be, and thus any attempt to determine when this may have occurred had there been no work accident is speculative. It is possible she could have continued to work for

many years before developing symptoms which led to such surgery. The accident in this case appears to the Arbitrator to be a clear delineation point which triggered the symptoms that have led to the surgical recommendation. Thus, the Arbitrator finds that the evidence supports that the accident accelerated the right knee condition.

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:

For the reasons set forth under Issues (C) and (F), the Arbitrator finds that the Respondent shall pay the reasonable and necessary medical expenses pursuant to the medical fee schedule (Sections 8(a) and 8.2 of the Act) that are contained in Petitioner's Exhibit 7.

The submitted bills clearly indicate that payments have been made on them. As such, the Respondent is entitled to credit for any bills previously paid prior to the hearing, and, if applicable, is entitled to 8(j) credit for bills paid pursuant to that Section, so long as the Respondent holds the Petitioner safe and harmless with regard to the previously paid bills from claims by providers or their agents for payment.

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

The Arbitrator finds that the 7/23/14 accident was a causative factor in the need for the knee replacement surgery recommended by Dr. Houle. Based on this finding, and the Arbitrator's finding that the recommended surgery is reasonable and necessary under the Act, the Respondent shall authorize the surgery pursuant to Sections 8(a) and 8.2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mohamed Yousif,
Petitioner,

vs.

Tyson Foods, Inc.,
Respondent,

NO: 14 WC 08651

17IWCC0312

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, is the duration of the disability correct, what is the nature and extent of petitioner's permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $16,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 22 2017

L. Elizabeth Coppoletti

LEC/mas
o5/17/17
43

L. Elizabeth Coppoletti

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

YOUSIF, MOHAMED
Employee/Petitioner

Case# **14WC008651**

17IWCC0312

TYSON FOODS INC
Employer/Respondent

On 2/29/2016, 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 0.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2208 CAPRON & AVGERINOS PC
NICK J AVGERINOS
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

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

17IWCC0312

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mohamed Yousif
Employee/Petitioner

v.

Tyson Foods, Inc.
Employer/Respondent

Case # 14 WC 08651

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 Rock Island, on February 2, 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 June 28, 2013, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $17,897.40; the average weekly wage was $458.91.

On the date of accident, Petitioner was 44 years of age, married with 4 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $2,017.58 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $2,017.58.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $330.00 per week for five and six-sevenths (5 6/7) weeks, commencing January 31, 2014, through March 12, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $330.00 per week for 50 weeks because the injuries sustained caused the 10% loss of use 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.

William R. Gallagher, Arbitrator

February 24, 2016
Date

FEB 29 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 June 28, 2013. According to the Application, Petitioner pushed meat with his right arm and sustained an injury to his right upper extremity (Arbitrator's Exhibit 2). There was no dispute that Petitioner sustained a work-related injury and, at trial, the disputed issues were the period of time Petitioner was entitled to payment of temporary total disability benefits and the nature and extent of permanent partial disability (Arbitrator's Exhibit 1).

In regard to the disputed temporary total disability benefits, Petitioner claimed that he was entitled to 39 weeks of benefits commencing January 31, 2014, through October 29, 2014. Respondent paid Petitioner temporary total disability benefits for six and five-sevenths (6 5/7) weeks at the rate of $300.49 per week, commencing January 31, 2014, through March 18, 2014. However, Respondent claimed that Petitioner was only owed temporary total disability benefits from January 31, 2014, through March 12, 2014, a period of five and six-sevenths (5 6/7) weeks (Arbitrator's Exhibit 1; Respondent's Exhibit 3).

Petitioner was hired by Respondent in 2006 and worked as a laborer. Earlier that same year, Petitioner had immigrated to the United States from Sudan. Prior to that time, Petitioner graduated from a University in Libya in 1995 and subsequently taught history in a high school from 2002 to 2006.

In regard to the accident of June 28, 2013, Petitioner testified that he was in the process of pulling meat with his left hand and then using a knife in his right hand to cut the meat. Petitioner began to have right shoulder symptoms shortly afterward.

Petitioner stated he had a prior right shoulder injury on November 14, 2009. This was a work-related injury which required surgery that was performed by Dr. Edward Connolly, an orthopedic surgeon. Petitioner stated that following the medical treatment he received for the prior right shoulder injury he was able to return to work to his regular job. Respondent's counsel tendered into evidence the approved settlement contract for the prior injury (Respondent's Exhibit 2).

Subsequent to the accident of June 28, 2013, Petitioner received treatment at the Respondent's medical department; however, those records were not tendered into evidence at trial. On September 4, 2013, Petitioner was evaluated by Dr. Connolly (the same physician who previously treated him). At that time, Petitioner informed Dr. Connolly that he injured his right shoulder at work on June 28, 2013, and had received physical therapy, but that his right shoulder symptoms had worsened. Dr. Connolly gave Petitioner's right shoulder an injection and recommended additional physical therapy (Petitioner's Exhibit 2; pp 2-4).

Dr. Connolly saw Petitioner on October 16, 2013. At that time, Petitioner had received additional physical therapy, but still has significant pain symptoms in his right shoulder. Dr. Connolly ordered an MRI arthrogram (Petitioner's Exhibit 2; pp 5-6).

The MRI arthrogram was performed on October 30, 2013. According to the radiologist, the diagnostic study revealed extensive labrum pathology and an acromioclavicular joint arthropathy, but the rotator cuff appeared to be intact (Petitioner's Exhibit 4; p 1).

Dr. Connolly subsequently saw Petitioner on November 6, 2013, and reviewed the MRI arthrogram. Dr. Connolly's impression was torn labrum, rotator cuff tendinopathy, impingement syndrome and degenerative arthritis of acromioclavicular joint. Dr. Connolly recommended that Petitioner undergo right shoulder surgery (Petitioner's Exhibit 2; pp 7-8).

Dr. Connolly performed arthroscopic right shoulder surgery on January 31, 2014. The procedure consisted of biceps tenotomy, labral debridement, debridement of a partial thickness rotator cuff tear, subacromial decompression and an open distal clavicle excision (Petitioner's Exhibit 3; pp 29-30).

Following surgery, Dr. Connolly saw Petitioner on February 2, 2014. Dr. Connolly ordered physical therapy and imposed work/activity restrictions (Petitioner's Exhibit 2; p 17).

Dr. Connolly subsequently saw Petitioner on March 13, 2014, and opined that Petitioner's condition had improved, but that further physical therapy was appropriate. Dr. Connolly's record of that date noted his completion of a "Workmans' Comp Rapid Response" form and that appropriate restrictions were provided for Petitioner. The record did not specifically state what the restrictions were; however, the physical therapy note of the following day, March 14, 2014, stated that Petitioner was allowed to return to work on light duty, not using his right upper extremity (Petitioner's Exhibit 2; pp 19-20; Petitioner's Exhibit 6; p 51).

On March 18, 2014, Petitioner was seen by a nurse at Respondent's Health Services Department. At that time, Petitioner provided her with a copy of a note from Dr. Connolly dated March 13, 2014, that specified his work restrictions.

Latisha Davis, a Registered Nurse employed by Respondent, testified on behalf of Respondent at trial. Davis stated that on March 18, 2014, she met with Petitioner and he provided her with the light duty release that indicated he could work but with no use of the right arm. Davis testified that she offered Petitioner a light duty job of tracking cardboard vats. Davis stated that this position was an inventory control job that would have required Petitioner to count cardboard vats and make tally marks on a piece of paper. She further stated that this job conformed to the work restrictions imposed by Dr. Connolly.

Davis testified that Petitioner refused the light duty job. At the time of Petitioner's refusal, Davis referred him to Respondent's Human Resources Department and had no further contact with him afterward. Davis also stated that if she had received Petitioner's light duty release on March 13, 2014, that she would have been able to offer the same light duty job to Petitioner.

Petitioner did not return to work for Respondent. Respondent later terminated Petitioner's employment because of his failure to return to work.

Petitioner continued to be treated by Dr. Connolly. When Dr. Connolly saw Petitioner on April 28 and June 11, 2014, Petitioner's condition had improved (Petitioner's Exhibit 2; pp 21, 24-25). Dr. Connolly saw Petitioner on October 28, 2014, and Petitioner informed him that his pain symptoms had resolved and that he had returned to normal activities, although he was not employed. Dr. Connolly's findings on examination were normal and he authorized Petitioner to return to work without restrictions (Petitioner's Exhibit 2; p 28).

At trial, Petitioner testified that in December, 2015, he obtained a Commercial Driver's License (CDL) and that he has sought employment as a truck driver. Petitioner testified that he has not been able to obtain employment as a truck driver because of his lack of experience. He did not offer any evidence that his inability to obtain a job as a truck driver was because of his right shoulder injury.

Dr. Connolly again saw Petitioner on June 17, 2015. At that time, Petitioner complained of right shoulder pain which he associated with heavy lifting and use of his right shoulder. Dr. Connolly's findings on examination were benign; however, he gave Petitioner a prescription for ibuprofen and recommended Petitioner continue with his strengthening exercises (Petitioner's Exhibit 2; pp 30-31). Petitioner has not sought any medical treatment since that time.

At the direction of Respondent, Petitioner was examined by Dr. Nikhil Verma, an orthopedic surgeon, on September 30, 2015. In connection with his examination of Petitioner, Dr. Verma reviewed medical records provided to him by Respondent. On examination, Dr. Verma noted that Petitioner had mild pain over the AC joint and no pain over the biceps. The range of motion and strength of the right shoulder was normal as was the neurological examination. Dr. Verma opined Petitioner had an AMA impairment rating of 11% of the upper extremity which was the equivalent of seven percent (7%) of the whole person (Respondent's Exhibit 1).

At trial, Petitioner testified that he still has pain in his right shoulder primarily when he does lifting. As aforestated, Petitioner was not employed at the time of trial.

Conclusions of Law

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

The Arbitrator concludes that Petitioner is entitled to payment of temporary total disability benefits for five and six-sevenths (5 6/7) weeks commencing January 31, 2014, through March 12, 2014.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner was temporarily totally disabled during the aforestated period of time. The disputed issue was whether Petitioner was entitled to payment of temporary total disability benefits afterward.

When Petitioner was seen by Dr. Connolly on March 13, 2014, he was released to return to work on light duty. However, Petitioner did not inform Respondent of this fact until five days afterward, on March 18, 2014. Petitioner did not provide any reason for this delay.

Latisha Davis credibly testified that she offered Petitioner a light duty job that conformed to the restrictions imposed by Dr. Connolly when she met with Petitioner on March 18, 2014, but that Petitioner refused to even attempt to return to work. Further, Davis credibly testified that if Petitioner had met with her on March 13, 2014, she would have also offered a light duty position that conformed to the restrictions imposed by Dr. Connolly.

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

The Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of 10% loss of use of the person as a whole.

In support of this conclusion the Arbitrator notes the following:

Dr. Verma opined that Petitioner had an impairment of seven percent (7%) of the whole person based on the AMA guidelines. The Arbitrator gives this factor moderate weight.

Petitioner was a laborer at the time of the accident and was later released to return to work without restrictions. The Arbitrator gives this factor no weight.

Petitioner was 44 years old at the time of the accident. There was no evidence that Petitioner's age had any effect on the injury he sustained. The Arbitrator gives this factor no weight.

Petitioner was unemployed at the time this case was tried and was seeking employment as a truck driver. As noted herein, Petitioner refused Respondent's offer of light duty work and his employment was subsequently terminated by Respondent. There was no evidence that Petitioner's unemployment was because of the injury he sustained. The Arbitrator finds the Petitioner's injury did not have any impact on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

Petitioner's medical records clearly indicated that he sustained an injury to his right shoulder which ultimately required surgery. Petitioner's treating physician, Dr. Connolly, released Petitioner to return to work without restrictions. At trial, Petitioner had some complaints of pain when he was lifting. The Arbitrator gives this factor moderate weight.

William R. Gallagher, Arbitrator

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

Candace Randolph,
Petitioner,

vs.

Southwestern CUSD #9,
Respondent.

17IWCC0313

NO: 12 WC 19152

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 11, 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: MAY 23 2017
o5/11/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0313

RANDOLPH, CANDACE
Employee/Petitioner

Case# **12WC019152**

SOUTHWESTERN CUSD #9
Employer/Respondent

On 8/11/2015, 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 0.24% 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:

4463 GALANTI LAW OFFICES
LESLIE N COLLINS
PO BOX 99
EAST ALTON, IL 62024

1337 KNELL LAW LLC
MATTHEW A BREWER
504 FAYETTE ST
PEORIA, IL 61603

17IWCC0313

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

Candace Randolph
Employee/Petitioner

v.

Southwestern CUSD #9
Employer/Respondent

Case # 12 WC 19152

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 **June 16, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 23, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$15,600.00**; the average weekly wage was **$300.00**.

On the date of accident, Petitioner was **60** 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

See Attached

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

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

Signature of Arbitrator

7/31/15
Date

AUG 11 2015

Candace Randolph v. Southwestern CUDS #9
12 WC 19152

The Arbitrator finds the following facts:

The Petitioner, Candace Randolph, worked as a substitute teacher for the School District. The Petitioner also worked as a volleyball official for approximately 18 years.

On January 23, 2012, Petitioner was officiating a volleyball game at Medora Elementary School which is part of Southwestern School District.. Petitioner was working as the top official, meaning she was on the platform at the net. Petitioner testified as she was climbing up on the platform, the board flipped. The platform is approximately 4 feet off the floor. Petitioner fell from the platform and landed on her feet. Petitioner testified she had immediate pain but completed her officiating duties that day. The Petitioner had pain in both knees, left hip, and right foot and ankle.

Petitioner began treating with her primary care physician, who referred her to Dr. Joson. Dr. Joson recommended physical therapy, which the Petitioner underwent at Jersey Community Hospital. In March of 2012, Petitioner underwent bilateral knee MRI's.

Petitioner ultimately sought treatment from Dr. Paletta. Dr. Paletta performed arthroscopic surgery on the Petitioner's knees. The Petitioner's left knee was scoped on April 19, 2013. Petitioner's right knee was scoped on May 21, 2013. Petitioner participated in post surgical physical therapy at Dr. Paletta's recommendation. Subsequently, the Petitioner continued to have complains and did undergo a synvisc injection with Dr. Blake. Dr. Paletta released the Petitioner from his care on May 21, 2014.

Petitioner testified she remained symptomatic up through her release by Dr. Paletta. Petitioner's knee would buckle and she continued to take ibuprofen approximately every 4 hours. Petitioner testified she had constant knee pain. As such, Dr. Paletta referred Petitioner to Dr. Lux, another physician within Dr. Paletta's practice.

Petitioner further testified that she had no pain prior to her accident and had never had any injuries to her knees. Petitioner did describe having a bone spur, which has caused pain prior to her accident, but she never underwent treatment for it. Petitioner testified this did not keep her from working.

Once the Petitioner established care with Dr. Lux, he recommended and performed total knee replacements. These knee replacements were performed on October of 2014, and in December of 2014. Petitioner testified she was released from Dr. Lux in March of 2015. Petitioner does have one follow-up scheduled in September of 2015 with Dr. Lux, for a checkup.

Petitioner testified, as of the date of trial, her knees felt fantastic. She has no pain and is recently able to walk upstairs without the assistance of a cane. Petitioner's only complaint is she is a little stiff when she wakes. Petitioner testified she can do more things now than she could

before her total knee replacements. Petitioner confirmed on cross examination as of trial, she is in a better position than she was prior to her surgeries.

Petitioner confirmed that her last visit with Dr. Paletta was on May 21, 2014. Petitioner's diagnosis was end-stage osteoarthritis of the bilateral knees. Petitioner was 62 years old at that time. As of that date, Dr. Paletta released the Petitioner from care, placed her at maximum medical improvement, and released her to return to work without the need for any work restrictions. Dr. Paletta's record of May 21, 2014, states "the Petitioner's symptoms are the progression of her underlying oseoarthritic condition. It represents the natural history of the progression of that condition."

Dr. Lux testified on behalf of the Petitioner in this case. Dr. Lux testified he believed there was a casual connection between the Petitioner's January 23, 2012 accident, and the eventual need for the total knee replacements he recommended, and later performed. Dr. Lux is a Board Certified Orthopedic Surgeon. Dr. Lux specializes in knee replacements and hip replacements. Dr. Lux had a complete history of Petitioner's treatment. Dr. Lux also had an opportunity to review all medical records relating to Petitioner's care and treatment.

Dr. Lux testified that Petitioner suffered from degenerative joint disease in both knees. Dr. Lux testified he did believe that Ms. Randolph's degenerative joint disease pre existed her fall in 2012. Dr. Lux further testified that people with degenerative joint disease can be asymptomatic. It was Dr. Lux's opinion that Petitioner's mechanism of injury caused the degenerative joint disease to become symptomatic. (PX 11 pg. 9) Dr. Lux testified that he believed within a reasonable degree of medical and surgical certainty that Petitioner's current condition, the need for her knee replacements, was caused or aggravated by her fall in January of 2012. Dr. Lux testified that the significant fall she took exacerbated the underlying osteoarthritis leading to her need for bilateral knee replacements.(PX 11 at 10) On cross examination, Dr. Lux testified regarding Dr. Paletta placing Petitioner at Maximum Medical Improvement. Dr. Lux testified that a doctor normally placed a patient at maximum medical improvement when he or she has finished treating that patient for the condition for which they treated him or her. (PX 11 at 21) With regard to the degenerative joint disease, Dr. Lux testified that Petitioner was not at maximum medical improvement on May 21, 2014. Further, Dr. Lux testified about Dr. Paletta's statement that Petitioner's condition was a natural history of the progression of her condition. Dr. Lux testified that when you remove part of the meniscus, you increase the force across the knee. Specifically, he testified, "If you take 10% of the meniscus, you increase the force across the knee 50%. If you take half of the meniscus you increase the force 150%. So by taking away the meniscus you remove the mechanical symptoms and that was what he was referring to in his note but you do not necessarily cure the problem. So now you have knee, that because of a work related injury, you had to remove the meniscus and now the arthritis becomes symptomatic and now the arthritis progresses because you removed the shock absorber. That is something well known and I feel within reasonable degree of medical certainty applies to her case." (PX 11 pg. 23)

On cross examination, Dr. Lux agrees with Dr. Paletta, that the Petitioner's problems following her arthroscopic surgery were related to the progression of her underlying osteoarthritis condition. (Dr. Lux dep. P.18).

Dr. Petkovich also testified in this matter as an independent medical examiner. Dr. Petkovich saw the Petitioner for an Independent Medical Exam on April 9, 2012. Dr. Petkovich believed that the Petitioner required the arthroscopic procedures, and that there was a causal connection between the Petitioner's accident and need for those surgeries. Dr. Petkovich also prepared supplemental report indicating that the Petitioner did require post-operative care, including the synvisc injection, which was subsequently performed by Dr. Blake.

Dr. Petkovich prepared a third independent medical examination report addressing the need and causal relationship between the Petitioner's total knee replacements and the accident. Dr. Petkovich agreed with Dr. Paletta's release of the Petitioner from care, as of May 21, 2014, without the need for any work restrictions. Dr. Petkovich also agreed with Dr. Paletta's placement of the Petitioner at maximum medical improvement at that time. Dr. Petkovich did not believe that the Petitioner's need to undergo bilateral knee replacements was related to the accident in question. The need for total knee replacements was due to the Petitioner's degenerative osteoarthitic condition, which had not been aggravated, or accelerated by the accident in question.

On cross examination Dr. Petkovich did admit that Petitioner was not having any significant pain in her knees prior to the incident. Dr. Petkovich was not aware Petitioner having any medical treatment relating to her knee prior to this incident.

Petitioner testified that she was unable to work for the period October 20, 2014 through November 14, 2014 and December 15, 2014 through January 13, 2014 representing 8 4/7 weeks. Petitioner testified that this was the time period subsequent to her knee replacement surgery and she was advised she could not drive.

Based on the foregoing the Arbitrator reaches the following conclusions:

1. Petitioner's current condition of ill-being is causally related to the Petitioner's January 23, 2012 accident.
2. Respondent shall be responsible for and pay all medical bills pursuant to the fee schedule for all treatment relating to Petitioner's right and left knees, including the care and treatment rendered by Dr. Lux for the bilateral knee replacements.
3. Respondent shall pay Petitioner TTD Benefits of $220 a week for the time period October 20, 2014 through November 18, 2014 and December 15, 2014 through January 13, 2015, representing 8 4/7 weeks.
4. The Respondent shall pay the Petitioner permanent total disability benefits of $220 a week for 86 weeks, because the injuries sustained caused the 40% loss of use of the Petitioner's right leg, as provided in section 8(e) of the act.
5. The Respondent shall pay the Petitioner permanent partial disability benefits $220 a week for 86 weeks, because the injuries sustained caused the 40% loss of use of the Petitioner's left leg, as provided in section 8(e) of the act.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tracy L. Reyes,
Petitioner,

vs.

Wahl Clipper,
Respondent.

17IWCC0314

NO: 10 WC 45987

DECISION AND OPINION ON REVIEW

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

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

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

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

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

DATED: MAY 23 2017
o5/11/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0314

REYES, TRACY L
Employee/Petitioner

Case# **10WC045987**

10WC045988
13WC024575
13WC024576

WAHL CLIPPER
Employer/Respondent

On 6/18/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

2841 REESE & REESE
TODD S REESE
200 W MARKET
TAYLORVILLE, IL 62568

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
PO BOX 1288
ROCKFORD, IL 61107

17IWCC0314

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TRACY L. REYES
Employee/Petitioner

v.

WAHL CLIPPER
Employer/Respondent

Case # **10** WC **45987**

Consolidated cases: **10 WC 45988; 13 WC 24575; 13 WC 24576**

An *Application for Adjustment 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 **Rock Island**, on **May 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **6/29/10** 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 accidents.

In the year preceding the injury, Petitioner earned **$30,560.40**; the average weekly wage was **$587.70**. AWW is for all four consolidated claims.

On the date of accident, Petitioner was **49** 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 weekly benefits paid during the period of compensable temporary disability, referenced below.

Respondent is entitled to a credit **for medical bills paid in connection with treatment of the Petitioner's bilateral carpal tunnel syndromes and left lateral epicondylitis, as those conditions are found to be causally related to the Petitioner's employment, through its group medical plan,** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $391.80/week for 28-5/7 weeks, commencing 1/6/11 through 7/25/2011, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of for all medical treatment related to the Petitioner's bilateral carpal tunnel syndromes and left lateral epicondylitis, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $352.62/week for 104.575 weeks, because the injuries sustained caused the 17.5% loss of the left hand (35.875 weeks), 15% loss of the right hand (30.75 weeks) and 15% loss of the left arm (37.95 weeks), 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.

D. Dylan McCarthy

Signature of Arbitrator

June 15, 2015

Date

JUN 18 2015

Findings of Fact

The Petitioner has filed four claims which are referenced in the caption of this decision and which have been consolidated for arbitration. The claims all involve alleged repetitive trauma injuries to the Petitioner while she was employed by the Respondent. While four separate decisions will be issued, the Arbitrator will use one set of facts for all four decisions.

The Petitioner, Tracy Reyes, testified that she started working for Wahl Clipper around July of 2006. Wahl Clipper is a manufacturer of hair clippers for humans and pets. Petitioner testified that she was employed as an assembler and packager of the hair clippers. She testified that she worked 10 hours a day for 5-6 days a week. Petitioner receives one twenty minute break in the morning and a thirty minute lunch break.

Petitioner testified that she is left handed and as an assembler she would assemble two different kinds of trimmers: an 8900 model and a Detailer. Petitioner prepared a written job description for the assembly of the trimmers and the packing position. The written job descriptions are included in the record as exhibits in the evidence depositions in Petitioner's Exhibits 53 & 54. (PX 53, deposition Exhibit 3; PX 54, deposition Exhibit 4). Petitioner identified the written job description and testified that it accurately described the work duties as an assembler and packager. Petitioner also testified that she would use an overhead screwdriver as an assembler. She testified that the screwdriver usually would not drive the screws all the way into the clipper and she would have to use it manually to finish the process, pushing with force until the screws secured all the way down. Petitioner also testified that on any given day she would usually not rotate between the jobs, but would stay in the position she started for her entire ten hour shift. She did usually rotate positions from one day to the next. She also said that she worked as a packer more than as an assembler, estimating that she packed 60 to 80 % of the time. Her supervisor, Ms. Winters, confirmed that fact, stating that she packed more because she was better and faster in that position. She further said that the packers packed 500 to 600 trimmers every shift.

Respondent entered into evidence two videos showing co-workers of the Petitioner performing all of the job duties she referred to in her written job descriptions. The assembly job for each trimmer was performed while sitting at a desk or table. The various tools and parts used by the assembler were located within an arms reach. Both hands were used. Both the first and second operator used the overhead screwdriver; the second operator using it to place more screws into the trimmer. The videos show the job to be very hand intensive, requiring a lot of pinching, pulling and pushing of small parts into the trimmers. The Petitioner testified without rebuttal that assemblers were required to produce between 15.5 and 17 trimmers an hour. The videos demonstrated that the job was done at a fast pace. Workers were also seen packing trimmers into either small boxes or plastic containers, referred to as blisters. They used both hands to quickly put trimmers, instructions and accessories into each container. They had to push together the blister handles, requiring pinch and finger force. Once they were packed, the packers would place them into larger boxes for shipping; tape or seal the boxes and stack them on a nearby pallet. The videos only showed pallets stacked one or two boxes high. The Petitioner testified that sometimes she would stack boxes above her head level. Ms. Winters, the Petitioner's supervisor, testified that the boxes were stacked only to a height of five feet.

Petitioner testified that the only problems that she has experienced with her hands prior to June 29, 2010 was back in 2000 or 2001 when she had some discoloration to her hands and went to the emergency department at CGH Medical Center. The CGH Medical Center records are included in the record as RX 6. Petitioner testified that she noticed the discoloration while handling cold objects. The records reflect that she was diagnosed with acute bilateral hand discoloration. Petitioner testified that she had no further treatment and no ongoing problems with her hands.

Petitioner testified that a few months prior to June 29, 2010, she began to have burning pain in her left hand and left elbow as she performed her work duties. She is left hand dominant and tried to use her right hand more than her left. As she began using her right hand more to compensate for the left, the right side began to hurt worse than the left. She hoped that it would go away and she tried to work through it. On June 29, 2010, she noticed her hands were tingling and painful when picking things up. The next morning, she took some Aleve and tried to use a wrist brace that one of her children had. She reported to work and told her supervisor, Ms. Winters, about the burning pain that she was having. Petitioner was then sent to the plant nurse and the nurse sent her to the company clinic at Now Care to see Dr. Grubb. Dr. Grubb's records are included in the record as PX 1.

On June 30, 2010, the Petitioner reported right wrist pain and right elbow burning. Dr. Grubb examined both of Petitioner's arms and gave her a tennis elbow splint as well as an anti-vibratory glove. Dr. Grubb ordered physical therapy and returned her to full duty work. Dr. Grubb's diagnoses were lateral epicondylitis and myofascial strain of the forearm soft tissues. Petitioner testified that when she returned to work her right arm and hand were in a lot of pain so she began using the left hand and arm more and then both arms and hands were painful again.

On July 14, 2010, she report pain in both elbows, with radiation from the wrists up to the shoulders. Dr. Grubb continued the same treatment regimen.

On August 11, 2010, Dr. Grubb examined both arms, stopped physical therapy and recommended that she continue to wear the splints. He noted palpable tenderness of the right elbow, but could not correlate his exam findings with her complaints of pain all the way up the right arm. Petitioner asked for a referral to Dr. Shawn Hanlon at the Sterling Rock Falls Clinic. She continued to work full duty.

On August 24, 2010, Petitioner presented to the Sterling Rock Falls Clinic (name subsequently changed to CGH Main Clinic) and was seen by Dr. Hanlon's physician's assistant, Joshua Wade. The records for Sterling Rock Falls Clinic / CGH Main clinic are included in the record as PX 3. Petitioner described her work duties and the repetitive nature of her work. She described the pain and discomfort she was experiencing in both of her wrists, her left elbow and both shoulders. She was not experiencing any relief from the treatment provided by Dr. Grubb. On September 2, 2010, an EMG was obtained and revealed moderate to severe bilateral carpal tunnel syndrome. Bilateral carpal tunnel surgery was recommended and Petitioner was scheduled to see Dr. Shawn Hanlon to discuss proceeding with surgery. Petitioner had continued to work her full duties through July, August, September and October of 2010.

On October 11, 2010, Petitioner, at the request of the employer, was scheduled for a Section 12 examination with Dr. Jay Pomerance. Dr. Pomerance prepared a report for the October 11, 2010 examination and prepared multiple supplemental reports (10/11/10, 11/10/10, 7/22/10 and 10/5/14). Dr. Pomerance's examination produced a diagnosis of bilateral carpal tunnel syndrome, bilateral lateral epicondylitis and a left wrist ulnar impaction. (RX 3 at 13)

On October 22, 2010, (10 WC 45988) Petitioner testified that she had continued working full duty and her left elbow became more swollen and painful than it previously had been. She hoped that the pain and swelling would go away, but after a week she reported the problem to her supervisor, Shelly Winters, on November 4, 2010. The supervisor sent Petitioner to the plant nurse and Petitioner was again sent to the company clinic, Now Care.

On November 4, 2010, Petitioner saw physician's assistant Dan Williams at Now Care. (PX 1). Petitioner described her work duties and the complaints with her left elbow. She was diagnosed with lateral

epicondylitis. A tennis elbow splint was again recommended and work restrictions were indicated for no repetitious lifting with left hand. Petitioner was also prescribed Prednisone.

Petitioner testified that the employer moved her into a light-duty job called comb bagging. Petitioner testified that she would sit at a table with bins of parts stacked three high on each side of her. These bins contained different size combs and other parts that would be put into a bag in front of her. She would extend her arms out to both sides of her, reach in the bottom bin and grab a part, then reach in the middle bin and grab a part, then reach in the top bin and grab a part, and finally extend her arms in front of her to place all the parts in a plastic bag. Petitioner repeated this process for the entire shift. She said that she only used her right arm to perform the job because her left arm was painful. She further said that after working in that manner, her right shoulder began to bother her.

On November 11, 2010, Petitioner was seen again by Dan Williams at Now Care. She continued to have the same left elbow complaints, despite the light-duty work restrictions. Mr. Williams noted that the appearance of the left forearm was abnormal, there was forearm tenderness to palpation on the radial aspect, forearm muscle spasm was noted, forearm pain was elicited by motion and supination and she had positive lateral epicondylitis. Mr. Williams also noted that she was still extending her arms at work and the work restrictions were not being followed. Mr. Williams administered a tendon injection and stated, "Discussed this is clearly workman's comp injury from repetitive motion." (PX 1). Petitioner was to continue wearing the elbow brace and restart physical therapy.

On November 23, 2010, Petitioner was examined for the first time by Dr. Hanlon at the Sterling Rock Falls Clinic. (PX 3). Petitioner testified and the records reflect that she described her work duties and the complaints she was having with her bilateral hands/wrists, left elbow and left shoulder. Dr. Hanlon noted that all of her complaints were aggravated by the type of work that she was doing. On examination, she had positive Tinel's sign over the median nerve at both wrists and positive Phalen's signs bilaterally. Dr. Hanlon's assessment states, "Bilateral carpal tunnel syndrome as well as overuse injury to both upper extremities consisting of left shoulder pain and left lateral epicondylitis." Dr. Hanlon further stated, "Is likely that her carpal tunnel has some relation to her work activities either in aggravating her condition if it were present prior to her work at Wahl Clipper or in causing the condition." (PX 3, 11/23/10 office entry).

Petitioner remained under Dr. Hanlon's care from November 23, 2010 through April 2, 2012. (PX 3). On December 17, 2010, an MRI of the left elbow was obtained and revealed findings consistent with lateral epicondylitis. On January 6, 2011, Dr. Hanlon performed carpal tunnel surgery on Petitioner's left hand/wrist. On February 9, 2011, Dr. Hanlon performed carpal tunnel surgery on Petitioner's right hand/wrist. On April 7, 2011, Dr. Hanlon performed a lateral epicondylectomy and tennis elbow release on Petitioner's left elbow. On August 4, 2011, an MRI of the left shoulder was obtained, which revealed a full-thickness tear of the supraspinatus tendon at its humeral attachment and a small avulsion fragment attached to the anterior end of the tendon, as well as joint effusion and slight spurring off the acromion. On September 27, 2011, Dr. Hanlon performed a subacromial decompression and mini-open rotator cuff repair on Petitioner's left shoulder.

Petitioner was off work from January 6, 2011 through January 2, 2012. On January 3, 2012, Petitioner returned to work with restrictions of no use of the left hand above chest level, fifteen pound lift limit and a forty hour work week. Petitioner returned to the comb-bagging job. On January 24, 2012, Dr. Hanlon lessened the restrictions to forty hours per week. On April 2, 2012, Dr. Hanlon released Petitioner from care. In approximately May of 2012, Petitioner was moved to an assembly line. She would stand at a table where bins of parts were stacked in front of her at the back of the table. She would have to reach into the bins to get the parts and then pack the parts into blisters, a plastic form that the parts fit in. The bins she was working with would be at or above shoulder height and she would perform this work the entire shift. She was also required to

retrieve extra parts from another location as needed and would do this approximately four to five times per day. The boxes of parts were on metal shelves above her head.

Petitioner testified that her right hand and shoulder continued to bother her while she performed her work duties. Petitioner testified that on June 26, 2012, (13 WC 24575), she returned to see Dr. Hanlon with complaints of right hand weakness and right shoulder pain similar to what she had experienced with the left shoulder previously. Dr. Hanlon recommended rotator cuff therapy and a strengthening program, which she already had instructions for the left shoulder. Dr. Hanlon placed work restrictions on Petitioner of a forty-hour work week until further notice.

On October 31, 2012, (13 WC 24576), Petitioner returned to Dr. Hanlon with increased right shoulder pain over the past two months. On examination, she had full range of motion but with exception of some mild limitation of internal rotation. She also had positive impingement signs. In light of the left shoulder full-thickness tear, Dr. Hanlon ordered an MR arthrogram of the right shoulder. On November 6, 2012, an MR arthrogram of Petitioner's right shoulder was obtained, which revealed a full-thickness tear of the supraspinatus tendon with subcortical cystic change. Dr. Hanlon referred Petitioner to his partner in the clinic, Dr. DeFranco, indicating that she had done well with the previous mini open repair in the left shoulder but an arthroscopic repair would be preferable.

On November 16, 2012, Petitioner first saw Dr. DeFranco. (PX 3). Petitioner described the complaints with her right shoulder and the past history of treatment. On examination, she had tenderness over the proximal biceps tendon, positive Speed's sign, positive O'Brien's sign and range of motion was diminished compared to the left. She also had pain with forward flexion, as well with abduction and internal rotation. X-rays were obtained and revealed no degenerative joint disease. Dr. DeFranco assessed Petitioner with right shoulder pain and weakness, rotator cuff tear, biceps tenosynovitis and possible labral tear. Petitioner remained under Dr. DeFranco's care from November 16, 2012 through January 14, 2014 and underwent a functional capacity evaluation (PX 13) on June 4, 2014 by direction of Dr. DeFranco, which revealed limitations of lifting from floor to waist, lifting from waist to crown and elevated work. On January 10, 2013, Dr. DeFranco performed an arthroscopic rotator cuff repair, subacromial decompression, extensive intra-articular debridement and an open subpectoralis biceps tenodesis. Petitioner was off work following her right shoulder surgery from January 10, 2013 through January 1, 2014.

The Respondent introduced the evidence depositions of their Section 12 examiner, Dr. Jay Pomerance (RX 3 and RX 4). Dr. Pomerance did not relate Petitioner's conditions of ill being to the work activities. Dr. Pomerance indicated that the job duties were repetitive, but he believed that the employees moved between multiple work stations. (RX 3, p. 40 lines 2-9). Dr. Pomerance has not personally visited the employer's plant and witnessed the work activity. (RX 4, p.14 lines 8-11). Dr. Pomerance also testified that he believed Petitioner's complaints started with the non-dominant right upper extremity, instead of the left extremity. (RX 4, p. 10 lines 7-20). However, Dr. Pomerance confirmed Petitioner's diagnoses of: bilateral lateral epicondylitis, ulnar impaction of the left wrist and bilateral carpal tunnel syndrome. (RX 3, p.13, lines 13-18). Dr. Pomerance also agreed that the treatment Petitioner received was reasonable and necessary. (RX 3, p. 34 line 25, p. 35 lines 10-23) (RX 4, p. 15 lines 23-24).

Petitioner presented the evidence deposition of Dr. Shawn Hanlon. (PX 53). Dr. Hanlon is board certified in orthopedic surgery. Dr. Hanlon treated and took Petitioner to surgery for her bilateral hand conditions, left elbow condition and left shoulder condition. Dr. Hanlon was familiar with Petitioner's place of employment and had personally toured Respondent's plant and witnessed the work activities first hand. (p. 39, lines 16-23). Dr. Hanlon causally related Petitioner's bilateral carpal tunnel syndrome, left lateral epicondylitis and left rotator cuff tear. (pp. 32- 36).

Petitioner presented the evidence deposition of Dr. Michael DeFranco. (PX 54). Dr. DeFranco is board certified in orthopedic surgery. Dr. DeFranco treated and took Petitioner to surgery for her right shoulder condition. Dr. DeFranco causally relates Petitioner's right shoulder conditions to her work activities. (p. 14 lines 7-11, p. 26 lines 9-16, p. 27 lines 4-11).

Petitioner testified as to what she currently notices about herself. She indicated that she has problems with both of her thumbs cramping two to three times a week as she does her work activity. She continues to experience jolts of pain in her right wrist on occasion. She experiences hand weakness with extended use. She experiences difficulty and pain in her left elbow when she is extending the arm. Both shoulders cause a lot of pain at night and she is not able to sleep on either side. She has had to learn how to sleep on her back. She also has difficulty with overhead activities, carrying groceries or a gallon of milk and experiences symptoms with weather changes.

Conclusions of Law

On the issues of accident and causation, the Arbitrator makes the following conclusions of law:

The evidence clearly shows that the Petitioner engaged in repetitive work as an assembler of two types of trimmers and as a packer. Her work was hand intensive, as evidenced by the two job videos introduced by the Respondent. Her testimony and written job description, provided to her treating surgeons, essentially matched what was seen on the videos. While the written description was entitled "8900 Trimmer", it clearly described her job duties as both an assembler and packer. The Arbitrator thus finds the Petitioner credible with respect to her testimony that she used her hands and arms in a repetitive manner on both of her jobs.

On the other hand, the videos and written job description do not support the Petitioner's claim that she repeatedly used her arms while working at or above shoulder level, causing her to develop shoulder pathology. While she did reach forward repeatedly to grab her screwdriver while working in assembly, she was working at a desk and did not appear to raise her arm through the use of her shoulder. Instead, she simply reached for the tool by extending her elbow, and the tool provided no resistance when being grabbed. As a packer, she claimed to repetitively stacking boxes of clippers onto pallets at shoulder height and above. Her supervisor, however, testified that the boxes weren't stacked higher than five feet above ground. Either way, stacking the pallets at the higher levels which possibly could impact the shoulder was not done often enough to be considered repetitive. Before reaching the higher levels, the Petitioner would stack the boxes from floor level on up, as seen in the videos. Finally, the Petitioner claimed that her light duty job of comb bagging, which she did on and off after January 2012, put stress on her shoulders. First of all, her supervisor testified that comb bagging was considered light duty and was not performed on an incentive rate basis. Secondly, neither the Petitioner's job description nor the videos referenced comb bagging, providing no corroboration to her claim that the job required repetitive over the shoulder reaching.

Dr. Hanlon's opinions on causation with respect to carpal tunnel and left lateral epicondylitis are persuasive. When he first saw the Petitioner on November 23, 2010, he diagnosed the conditions and said they were causally related to her repetitive production and packing work for the Respondent. It should also be noted that he could not explain her pain above the elbow level, as expressed in his office note of February 21, 2011. While he did not have the opportunity to view the job videos, he did read and rely on her job description which, as stated above, accurately described what was seen on the videos. He cited the repetitiveness of the assembly work, noting the quotas the workers had to maintain. He relied on the force required in the hands forcing springs into the clippers and other work duties to establish his opinions on causation. He said that if a person performed that job for very long, they might develop overuse injuries. (PX 53 at 33,34)

Dr. Pomerance was not as persuasive when it came to carpal tunnel and lateral epicondylitis. His opinions in all of his reports and two depositions seemed to focus mostly on the shoulders. He said that the Petitioner would have to have been lifting 25 pounds or more regularly before he would consider the work causative. He said he reviewed the videos, but he never commented whether the obviously hand intensive work would have anything to do with the Petitioner's wrist and elbow injuries. He also assumed that the Petitioner rotated jobs during her shift, a fact not shown by the evidence. The Petitioner testified that on most days, she stayed on one job. Both her and her supervisor testified that the majority of her work involved packing.

In contrast, the Arbitrator finds Dr. Pomerance more persuasive than either Dr. Hanlon or Dr. DeFranco on causation with respect to the shoulders. Both treating doctors assumed the Petitioner was repetitively reaching and lifting boxes overhead, an assumption not borne out by the evidence. (See PX 53 at 35 and PX 54

at 14) Dr. Pomerance opined that neither the videos nor the Petitioner's job description would support the proposition that her work was a causative factor in the development of rotator cuff injuries. (RX 4 at 9)

Accordingly, the Arbitrator finds that the Petitioner has proven an accident arising out of her employment on June 29, 2010 causally related to her bilateral carpal tunnel syndromes and left lateral epicondylitis, while failing to prove an accident involving either of her shoulders.

The Arbitrator incorporates his above findings with respect to the Respondent's liability for medical bills. The Respondent is ordered to pay to the Petitioner amounts for the medical related to the care, diagnosis and treatment of her bilateral carpal tunnel and left lateral epicondylitis injuries, pursuant to the Fee Schedule. Respondent is not liable for treatment of the Petitioner's shoulder injuries. Respondent is entitled to credit for medical under Section 8 (j) for bills paid on the parts of the body found compensable.

With respect to temporary total disability benefits, it appears from the evidence and Dr. Hanlon's notes that his active treatment of the Petitioner's bilateral carpal tunnel and left lateral epicondylitis ended on or about July 25, 2011. From that point forward, her care involved her shoulders. Accordingly, the Respondent is liable for TTD payments from January 6, 2011 through July 25, 2011, a period of 28 5/7 weeks. Respondent is entitled to credit for non occupational weekly benefits paid during the above time frame.

The Arbitrator notes that Petitioner is a 54 year old female who works in a very repetitive position as an assembler and packager in a factory that produces hair clippers.

Petitioner testified that she has problems with both of her thumbs cramping two to three times a week as she does her work activity. She continues to experience jolts of pain in her right wrist on occasion. She experiences hand weakness with extended use. She experiences difficulty and pain in her left elbow when she is extending the arm and when she bags combs on a frequent basis.

Following her shoulder surgeries, she was released to regular work as of May 1, 2012. On June 26, 2012, she complained to Dr. Hanlon that her right hand was weak. His office note of that date says that hand weakness is a residual of carpal tunnel and inherent in her job. (PX 3)

Bilateral Hands. The Arbitrator finds Petitioner has sustained a loss of use of 17.5% of the dominant left hand and 15% loss of use of her right hand as a result of this injury.

Left Arm/elbow. The Arbitrator finds Petitioner has sustained a loss of use of 15% of her dominant left arm as a result of this injury.

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tracy L. Reyes,
Petitioner,

vs.

17IWCC0315
NO: 10 WC 45988

Wahl Clipper,
Respondent.

DECISION AND OPINION ON REVIEW

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

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

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

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

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

DATED: MAY 23 2017
o5/11/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0315

REYES, TRACY L
Employee/Petitioner

Case# **10WC045988**

10WC045987
13WC024575
13WC024576

WAHL CLIPPER
Employer/Respondent

On 6/18/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

2841 REESE & REESE
TODD S REESE
200 W MARKET
TAYLORVILLE, IL 62568

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
PO BOX 1288
ROCKFORD, IL 61107

17IWCC0315

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TRACY L. REYES
Employee/Petitioner

v.

Case # 10 WC 45988

Consolidated cases: 10 WC 45987; 13 WC 24575; 13 WC 24576

WAHL CLIPPER
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Rock Island**, on **May 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. ☒ 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 _____

17IWCC0315

FINDINGS

On **October 22, 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 **$30,560.40**; the average weekly wage was **$587.70**.

On the date of accident, Petitioner was **49** 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 for other benefits. See Decision filed in Case 10 WC 45987.

Respondent is entitled to a credit under Section 8(j) of the Act. See Decision filed in Case 10 WC 45987.

ORDER

The Arbitrator notes that on November 5, 2013, Petitioner's application for adjustment of claim as filed in case number 10 WC 45988 (d/a 10/22/10) was consolidated with case numbers 10 WC 45987 (d/a 6/29/10), 13 WC 24575 (d/a 6/26/12) and 13 WC 24576 (d/a 10/31/12).

The Arbitrator has filed his decision in claim number 10 WC 45987 and incorporates his findings of fact and decision in this claim.

While finding in the Petitioner's favor on the issue of accident in this claim, the Arbitrator finds the Petitioner's subsequent injuries and treatment to be causally related to the original accident of June 29, 2010. As such, no benefits are due and owing from this claim.

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

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

D. Dylan McCarthy
Signature of Arbitrator

June 15, 2015
Date

JUN 18 2015

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

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tracy L. Reyes,
Petitioner,

vs.

Wahl Clipper,
Respondent.

17IWCC0316

NO: 13 WC 24575

DECISION AND OPINION ON REVIEW

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

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

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

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

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

DATED: MAY 23 2017
o5/11/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0316

REYES, TRACY L
Employee/Petitioner

Case# **13WC024575**

10WC045987
10WC045988
13WC024576

WAHL CLIPPER
Employer/Respondent

On 6/18/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

2841 REESE & REESE
TODD S REESE
200 W MARKET
TAYLORVILLE, IL 62568

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
PO BOX 1288
ROCKFORD, IL 61107

17IWCC0316

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TRACY L. REYES
Employee/Petitioner

v.

WAHL CLIPPER
Employer/Respondent

Case # **13** WC **24575**

Consolidated cases: **10 WC 45987**
10 WC 45988
13 WC 24576

An *Application for Adjustment 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 **Rock Island**, on **5/14/2015**. 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. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **6/26/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was*** 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 **$30,560.40**; the average weekly wage was **$587.70**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **1** dependent child.

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

Respondent ***has partially*** 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 Petitioner failed to establish accident and causal connection. The Arbitrator incorporates is findings of fact and conclusions of law from Case Number 10 WC 45987 into this decision. 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.

D. D. McCarthy
Signature of Arbitrator

June 15, 2015
Date

JUN 18 2015

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tracy L. Reyes,
Petitioner,

vs.

Wahl Clipper,
Respondent.

17IWCC0317

NO: 13 WC 24576

DECISION AND OPINION ON REVIEW

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

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

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

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

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

DATED: MAY 23 2017
o5/11/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0317

REYES, TRACY L
Employee/Petitioner

Case# **13WC024576**

10WC045987
10WC045988
13WC024575

WAHL CLIPPER
Employer/Respondent

On 6/18/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

2841 REESE & REESE
TODD S REESE
200 W MARKET
TAYLORVILLE, IL 62568

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
PO BOX 1288
ROCKFORD, IL 61107

17IWCC0317

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TRACY L. REYES
Employee/Petitioner

v.

WAHL CLIPPER
Employer/Respondent

Case # **13** WC **24576**

Consolidated cases: **10 WC 45987**
10 WC 45988
13 WC 24575

An *Application for Adjustment 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 **Rock Island**, on **5/14/2015**. 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. ☒ 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 _____

17IWCC0317

FINDINGS

On **10/31/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$30,560.40**; the average weekly wage was **$587.70**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **1** dependent child.

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

Respondent ***has partially*** 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 Petitioner failed to establish accident and causal connection. The Arbitrator incorporates his findings of fact and conclusions of law from Case Number 10 WC 45987 into this decision. 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.

D. D. McCarthy
Signature of Arbitrator

June 15, 2015
Date

JUN 18 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rochelle Myrick,
Petitioner,
vs.
Tru Vue,
Respondent,

NO: 13WC 36633

17IWCC0318

DECISION AND OPINION ON REVIEW

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

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

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

MAY 25 2017

DATED:
MJB/bm
o-5/16/17
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MYRICK, ROCHELLE
Employee/Petitioner

Case# **13WC036633**

TRU VUE
Employer/Respondent

17IWCC0318

On 6/29/2016, 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 0.34% 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:

2553 McHARGUE, JAMES P LAW OFFICE
BRENTON M SCHMITZ
123 W MADISON ST SUITE 1000
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
DANIEL CODY
ONE N LASALLE ST SUITE 900
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Rochlle Myrick
Employee/Petitioner
v.
Tru Vue
Employer/Respondent

Case # 13 WC 36633

Consolidated cases:

17IWCC0318

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago** on **January 13, 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 ____

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROCHELLE MYRICK, Petitioner, vs. TRU VUE, INC., Respondent.	)	No. 13 WC 36633

17IWCC0318

STATEMENT IN SUPPORT OF ARBITRATOR'S DECISION

In support of his decision, the Arbitrator notes as follows:

STATEMENT OF FACTS

Petitioner, Rochelle Myrick, testified that on October 3, 2013, she worked for Tru Vue Glass Company as an order picker and shipper. She worked as a laborer picking glass of different sizes and weight. On October 3, the petitioner claims she was loading a box, measuring 48 inches by 96 inches and weighing approximately 75 to 100 pounds, onto a forklift when she heard her knee pop. She claims in order to put the product onto her pallet she was required to bend over and move each end forward shifting it onto the pallet, going from side to side. After feeling the pop she claimed she went down a little, rested and got back up and continued to work. She noticed pain and swelling about 10 minutes later. She then testified the swelling began when she was going home.

The petitioner testified that this occurred at about 12:30 a.m. because it was shortly before her first break. She further stated that after returning from her first break, her knee was getting still(stiff?) and as she was walking upstairs to return to work, the gentleman behind her noticed and asked what was wrong. She stated the gentleman's name was Myron, a fellow employee. She stated she finished off her shift and went home at her normal time of 7:00 a.m.

She further testified that although she was in pain for the rest of her shift, she did not tell anyone at work what had happened because she just heard a pop and didn't know what was going on. She stated she was observed on her lunch break hopping and was questioned by her supervisor, Rodney, but told him nothing was wrong. She stated she was off the next night, Friday, October 4th and Saturday October 5th as this was her weekend. She testified she was in pain during the day on Friday and decided to go to the doctor on Saturday. She again testified that she didn't tell anyone at Tru Vue about what happened. It was not until the 7th of October that she spoke with Bob Kozak regarding the light duty off work. The petitioner testified that Bob Kozak asked her what date the injury happened, and because she did not have a calendar she was unable to tell him and couldn't really remember so she said it was the 1st of October but testified it really was the 3rd.

She stated that she went to New Life for physical therapy and eventually an MRI was ordered of her left knee, which was taken on October 14, 2013 and they referred her to Dr. Levi. She saw Dr. Levi who recommended surgery on her left knee, which was eventually performed in September of 2014. She stated the delay in surgery was due to Dr. Levi refusing her group insurance insisting it was work related and wanting them to pay for it. She stated following the surgery in September of 2014 she was sent back to physical therapy at New Life until November of 2014. She was eventually discharged by Dr. Levi in March of 2015. She testified that she was terminated from Tru Vue due to contractual obligations between the Union and TruVue. After she was terminated from Tru Vue, she started driving for Uber after her therapy and currently works at Weather Tech on the production line. She testified that while standing on the production line she would feel her knee pop like the first time and it gets stiff. She stated that she still has problems with her knee during cold weather and with bending. She denied any

problems with her left knee before October, 2013. She acknowledged a prior broken ankle in 2001 or 2002 and a swollen leg and foot in August 2013 for which she was sent to Mount Sinai emergency room for suspicion of blood clots. She specifically denied any knee problems were reported to Mount Sinai Hospital. She further specifically denied any pain in her left knee prior to the alleged date of loss.

On cross-examination, the petitioner acknowledged she was scheduled to work Sunday night on October 6 but didn't call and didn't show up. She didn't go to Tru Vue until Monday morning after her weekend. She couldn't recall if she had called in sick the Sunday night the week before either. She acknowledged initially reporting the date of injury as October 1st to Mr. Kozak. She further admitted not telling anyone about the accident at the time it allegedly occurred and further that she would attend pre-shift meetings every day where work injuries were discussed if any occurred. She further acknowledged that she knew there was a requirement to report injuries as soon as they occurred.

Ms. Myrick testified that she gave a recorded statement to Cheryl Stenstrom and admitted indicating a date of injury of October 1st. She further admitted stating that she was picking an order of 4896 and as she was standing she heard her knee pop. She further admitted stating during the statement that she did not report it to anyone on October 1 because she didn't think it was that serious. She further admitted stating that October 1 was a Tuesday and she worked the rest of the week. She further admitted stating that she "worked all the way up until Friday." She denied stating that she had made her chiropractor appointment on that Thursday. She admitted that she didn't tell her supervisor about the injury because "you pop your bone, you hear pops pop they pop all the time. I didn't think it was nothing really serious."

The petitioner admitted to leaving questions surrounding the initial injury and onset of pain blank when filling out forms at her initial chiropractor visit. She further denied telling her chiropractor that she had any previous issues with her knee. She specifically stated that she would disagree with any records from Lawndale Christian Health Center that showed a long-standing problem with her left knee. She denied telling her chiropractor about any incident on August 26 of stepping off a forklift and could not explain why her chiropractor completed a form indicating such. She further denied the accuracy of Mount Sinai Hospital ER records from August 26, 2013 indicating she was experiencing knee pain and denied that she received an x-ray of the knee that day. She denied telling her chiropractor that the event was not impacting her ability to work. When questioned about whether or not the pain and swelling she reported was causing her to limp she said that occurred on the next day she came in. She then tried to explain that this was later that shift on Friday morning and further testified that that's when she started feeling the pain and swelling when she got off at 7 AM. The petitioner denied limping prior to the alleged work event.

She testified that she attended 60 sessions with her chiropractor for physical therapy at New Life. She also stated that these sessions helped despite the fact that there was no improvement noted in the medical records and she testified that she would not disagree with those records regarding that issue. She then testified that the surgery provided improvement but there was some help with swelling and pain. She disagreed with the chiropractic reports indicating that there had been no change in her condition after the surgery from when she last treated there in February. She then later stated that she did tell the male chiropractor that.

The petitioner further testified that she asked both New Life and Dr. Levi to use her group insurance and they refused. She agreed that it was inappropriate for her to wait a year to

get her surgery but admitted she did not seek care through any other provider. She also admitted that during that year she was provided disability benefits from Tru Vue. She further admitted that Dr. Levi felt her condition was worsening because of the delay in surgery but still delayed it another couple months. She testified that this was because Dr. Levi refused to do the surgery without it being paid under workers compensation. She further testified that within six weeks of the surgery she was allowed to go back to work.

On re-direct, the petitioner stated that she reported the injury date of October 1st to Bob Kozak because she didn't have a calendar and was confused. She further stated that when she spoke with Cheryl with Sedgwick on October 9th, 2013, the injury date of October 1st was suggested by Cheryl and she simply agreed because she was just stepping out of physical therapy and did not have a calendar to confirm the date. The petitioner further testified that she stopped her work conditioning because she was in too much pain but Dr. Levi told her to trust him and what he had done. She further admitted that at no time during her treatment at New Life that they provided her any home exercises.

The respondent called Rodney Furnace who was the Production Supervisor at Tru Vue. Mr. Furnace testified the company procedure was for any employee that got hurt to immediately report it to their direct supervisor or any supervisor. He testified that he first learned that the petitioner was claiming a back injury after he was called to the office by Mr. Kozak. He further testified that in his capacity as a supervisor he keeps shift reports listing injuries sustained by any employee while working. Mr. Furnace identified his reports for the week of October 1 and noted that no injuries were reported that week. He further testified that even personal health issues would be included if an employee reported those to him but his reports failed to report any such issues that week. Mr. Furnace testified regarding the pre-shift meetings and the failure of the

petitioner to ever report an injury to him that week. He further testified that his co-supervisor would've discussed any injuries with him but no such conversation took place during that week. On cross-examination the witness admitted that if no one reported an accident it would not have been on his Daily Shift report.

The respondent called Robert Kozak, the Safety Manager for the Tru Vue factory. He testified regarding attendance records from Tru Vue that show the petitioner had a personal emergency day off on September 29 and worked September 30 through October 3. He further identified a picklist for the shift ending October 1 that showed the work that Ms. Myrick did. The pick list indicated that the only 48 x 96 product was the first item on the list that weighed 38 ½ pounds. Mr. Kozak identified the Parts Master List indicating that weight for that particular product. Mr. Kozak was shown a First Aid Log from the Tru Vue factory and indicated that any injuries that were reported would be recorded on this log. He then reviewed the list between September 30 and October 5, 2013. Upon review, there was only one entry on October 3rd for a splinter of the right thumb.

He went on to state that safety meetings are conducted before shifts begin, which all employees must attend. He went on to discuss specifics of the meeting including how employees are reminded if they are injured while working they should report it immediately. Mr. Kozak testified that any injuries would be reported to himself and another individual and during the week from September 30 through the morning of October 4 he received no reports of any injuries.

Mr. Kozak testified that on October 7, 2013, he was called by the shipping manager right after 8:00 a.m. seeking permission for restricted duty for Rochelle for a personal injury. He indicated that he met with the petitioner at 11:20 that morning to discuss the restrictions or light

duty she was requesting. The petitioner brought in a doctor's note requesting light duty stating that she had an industrial injury. He asked the petitioner about it and she indicated she was injured picking up a 48 x 96 box in the early hours of October 1. She further admitted that she had not reported the injury at the time or any time during the week she worked.

Mr. Kozak testified that after he learned that the petitioner was claiming an injury he pulled security video from the plant that covered the time clock. He noted the cameras were focused on the time clocks where individuals would punch in and that there was no security video where the petitioner was working. He noted he pulled video from September 24-25 and September 30 through October 4. Several segments of the video were played at trial from September 24 through October 4. This footage showed the petitioner walking in and out of the building at different times during her shift and showed her walking with a limp both before and after the alleged October 1 or October 3 dates.

On cross-examination, Mr. Kozak testified as to the weights of two other items that could be listed as 4896 on the Tru Vue pick list. He stated that one of the other two items weighs approximately 1,500 to 2,000 pounds and the other is a pallet containing five boxes weighing approximately 140 pounds each but would have been moved as one unit. He then commented on the First Aid Log stating that injuries are listed on the First Aid Log and usually discussed at the daily MDI meetings. He further stated that small injuries such as splinters and paper cuts are not discussed at the MDI meetings.

Respondent called Myron Goodlow. Mr. Goodlow testified that he did know Ms. Myrick and that she helped with his training. He testified that he would interact with the petitioner on a daily basis speaking and talking as they would drive back and forth. They would also take smoke breaks or lunch together. He was then referred back to the week of September 30, 2013. He

testified that she mentioned her knee had been bothering her for quite some time prior to the alleged date of injury. He went on to discuss learning of a recent trip she had taken with her husband to Las Vegas. He stated that after she returned from the trip she had been limping. He stated he questioned her about her knee and she told him there had been quite a bit of walking on her trip and he took for granted that was making her knee worse. This was before the week of September 30. He also testified the petitioner had mentioned that her knee was bothering her and she had thought about some surgery if needed. He testified that she never mentioned any work injury. On cross-examination, Mr. Goodlow testified that the conversation regarding petitioner's contemplation of surgery took place after she had gotten out of her car and he noticed her limping. He testified that she thought she may have to take some time off and have surgery.

Respondent called Anthony Van Gorp. Mr. Van Gorp testified he works for Investigative Solutions and Consulting Services, which conducts insurance investigations for insurance corporations, including surveillance on individuals. He testified that his company obtained surveillance of Ms. Myrick on October 11 and 14th of 2013. He testified that the discs he had brought with him contained the video surveillance obtained.

The petitioner submitted into evidence medical records from several medical providers. These included Lawndale Christian Health, Mount Sinai Hospital, Rush University Medical Center, Illinois Orthopedic Network, New Life Medical Center, and Orthopedic and Rehabilitation Centers. The respondent also submitted medical records from Lawndale Christian Health Center and New Life Medical Center.

The medical records from Lawndale Christian Health Center note that the petitioner had bilateral knee complaints and arthritis. Rx 14, page 1. The records reflect that on August 30, 2010 the petitioner was complaining of left knee pain which she referred to as chronic but had

been worse lately. Rx 14, page 31. She was diagnosed with arthritis and advised to lose weight. On October 20, 2012 she received a referral for bilateral x-rays due to knee pain for three months. Rx 14, page 122. She then followed up with her family doctor on October 31, 2012 and reported that she had been walking a lot trying to lose weight and had increased knee pain. She denied any trauma or injury. Rx 14, page 73. She followed up again on October 5, 2012 for her knee pain. Rx 14, page 83. On August 26, 2013 she again saw her doctor for lower left leg pain including pain behind the knee. Her leg was noticeably swollen and she was referred for a venous Doppler to rule out DVT. Rx 14 page 86. The trial exhibit reflects that the petitioner did not seek any treatment at this facility after her alleged work accident in October 2013.

The medical records submitted from Mount Sinai Hospital note in the Emergency Department History and Physical Exam Worksheet of August 26, 2013, that the petitioner was seen for swelling of her lower extremity for a month without pain with ambulation. It noted that the petitioner had chronic knee pain, GERD and obesity. Px 2. The triage nurse assessment for that date indicated that the petitioner was complaining of pain to the left knee and swelling was noted. She was not aware of any injury and the nurse noted that she was walking with impaired range of motion. Px 2, August 26 Triage Nurse Assessment. X-rays of her left leg showed mild diffuse edema which the radiologist was uncertain if it was chronic or an acute inflammatory or infectious process. Px 2, August 26 Radiology report. The petitioner was discharged home to return the following day for a Doppler study. The records reflect that this occurred and the Doppler was negative. Px 2.

The medical records submitted by New Life Medical Center included a narrative prepared on October 5 by chiropractor Irene Ma. It noted that the petitioner reported an injury while at work on October 1 while employed at Tru Vue. It noted that the petitioner had reported

this injury in writing while at work after feeling a pop and sharp pain in her knee. The petitioner was reporting pain at 10 out of 10. Rx 15, page 4. The narrative goes on to state in the Reasons for the Opinion that the history was a specific injury occurring on October 1, 2013. Page 6. On the Patient Information form, the petitioner failed to complete the question regarding when the pain began and whether it occurred suddenly or gradually. Page 8. On the Consultation sheet it indicated that the pain began in September 2013. Page 9. It indicated that the petitioner was currently working full time and that the injury was not affecting her work. It also noted that the petitioner did have same or similar symptoms in the past. A Workers' Compensation Form completed on October 5, 2013 refers to a date of injury of August 26, 2013. It alleges that the petitioner was working with a forklift and doing repetitive motion with the pedal when she stepped down and was pulling pallets to the forklift when she put too much weight on her left knee. She noted she decided to go to the emergency room because of pain and went to Mount Sinai Hospital. Page 12. The petitioner denied any such event occurred. The medical records indicate that the plan was for chiropractic care three times a week for four weeks and the medical records reflect that the petitioner began that treatment program. Page 19-20. The medical records reflect that the petitioner then had 46 visits to her chiropractor through February 24, 2014. Rx 15 and 16. The daily notes report little change in the petitioner's pain complaints over that time. The records then resumed treatment on September 24, 2014 with an evaluation (Rx 16, page 80) and then treatment from October 6 through November 17, 2014. The records then show the petitioner had work conditioning on February 10 and 11th but then she did not follow up with any additional treatment. Rx 16 Page 32 – 36.

The medical records from Illinois Orthopedic Network note that the petitioner began seeing Dr. Levi on October 23, 2013 for an injury "which occurred on October 1, 2013." She

reported lifting a 75 pound box when she felt a pop in her knee. He recommended an arthroscopy to address a meniscus tear and therapy three times a week. He authorized her off of work at the time. The medical records showed that the petitioner would periodically see Dr. Levi who continually recommended surgery but did not proceed with same because he was seeking worker's compensation approval. The medical records indicate that on July 15, 2014 he felt the condition was worsening because of the delay in surgery. Px 4. The medical records reflect that the petitioner did undergo surgery on September 22, 2014 for a left knee arthroscopic, partial lateral meniscectomy and a synovectovy (sic) and the postoperative diagnosis was a left knee lateral meniscus tear with synovitis in all three compartments. Px 4. Records further reveal that on November 14, 2014 Dr. Levi would have allowed the petitioner to return back to her employment but noted that she had been terminated. He then continued to treat her through March 10, 2015 and again indicated she was able to work her regular duties. She was released to follow up as needed at that time. Px 4.

The respondent also submitted the Records Review of Dr. Kevin Walsh. Rx 12. Dr. Walsh opined that the petitioner's medical records showed a well-documented pre-existing condition to the petitioner's left knee despite her assertions to the contrary in her testimony. Dr. Walsh further pointed out the inconsistencies between the physical examination conducted by Dr. Ma, the chiropractor, and the orthopedic surgeon as well as the inconsistent physical findings with an acute lateral meniscus tear. He further noted that the MRI showed findings consistent with pre-existing conditions and osteoarthritis but that the meniscal maceration was the result of arthritic change and not at all likely caused by a single event. He further opined that the proposed surgery was for the degenerative condition that was not caused, aggravated or accelerated by the alleged work related injury. Rx 12.

CONCLUSION

With respect to Issues C and D – Did an accident occur that arose out of and in the course of petitioner's employment by respondent? and What is the date of the accident? the Arbitrator finds as follows:

The evidence showed that the petitioner had reported initially an injury date of October 1, 2013 which would have been a Tuesday. She reported this to her chiropractor, to her orthopedic surgeon, to the Safety Manager at Tru Vue and to the insurance company representative. She further admitted telling the insurance company representative that the accident happened on a Tuesday. Her testimony at trial that the accident actually happened on Friday, October 4 in the early hours of the morning during her third shift, is simply not credible. The Arbitrator would have to disbelieve all of the other sources which consistently indicated that the petitioner initially alleged an accident date of October 1.

The Arbitrator notes that the petitioner indicated that her limping did not start until she came back the next day but then later tried to rehabilitate herself indicating it was later that day but on Friday even though she was alleging, during her testimony, that the accident occurred on Friday. This attempt to rehabilitate herself regarding when the limping started was actually inconsistent with her earlier testimony on direct examination that Myron Goodlow observed her limping after returning from her first break. During the attempt to rehabilitate her statement that the limping began the day after, she then stated that the limping began at 7 AM when she was getting off her shift.

During redirect, her counsel nobly tried to rehabilitate his client's testimony by suggesting that it was Mr. Kozak and Ms. Stenstrom that suggested October 1 as the date of loss only because she did not have a calendar. This attempt, however, belies the fact that the

petitioner had seen her chiropractor two days before and the report from the chiropractor that was completed at the time of the visit on Saturday, October 5, clearly indicates that the petitioner reported an accident on October 1. The petitioner clearly testified that she had notified no one at work of any incident prior to meeting with Mr. Kozak on October 7, two days after advising her chiropractor of the accident date alleged.

This Arbitrator further finds unpersuasive petitioner's testimony that she injured her knee while at work on third shift duties regardless of the date of the alleged event. Petitioner did work for this employer for a significant period of time and was performing to the employer's satisfaction. She did attend daily safety meetings and knew about the requirement to report work injuries immediately. Despite this, the petitioner admits she did not report the injury until several days after the alleged occurrence. The petitioner's testimony that she did not report it because her knee popped all the time and that she didn't think anything of it is inconsistent with her other testimony that she felt immediate pain, that the leg began swelling and that she was limping noticeably enough that a co-worker commented about her limping when coming back from her first break on the shift beginning October 3 and ending on Friday morning October 4. The reports of her symptoms certainly suggest a much more significant injury than the petitioner's attempt to explain why she did not immediately report anything to anyone at Tru Vue.

The petitioner's credibility is further damaged by her denial of any prior knee problems. The medical records from Lawndale Christian Health Center show the petitioner complained of left knee pain stating it was chronic as far back as August of 2010. These records indicate the petitioner has a history of chronic bilateral knee pain. The medical records from Mount Sinai

Hospital also note that the petitioner had a chronic knee problem when seen on August 26, 2013. Additionally, when seen that day she was reporting left knee pain along with left lower leg pain.

The petitioner specifically claims that Myron Goodlow noticed her limping on the date of accident and asked her what happened. Upon examination, Mr. Goodlow denied this allegation, stating he had noticed the petitioner limping the weeks before the alleged accident date. He further testified that the petitioner had discussed possible surgery for her knee when she was limping as she got out of her car one day, prior to the week of the alleged accident. He further testified that the petitioner had been on a trip with her husband to Las Vegas the month before and it noticeably increased her limp since that time despite the petitioner's allegations that she had not had any prior left knee problems. The Arbitrator notes that Mr. Goodlow is an independent witness and does not stand to gain anything by either outcome in the case.

If we were to give the petitioner the benefit of the doubt and accept October 1 as the actual date given all of the different parties to which she first reported that date, despite her testimony to the contrary, then the petitioner is not able to explain why she continued to work the rest of the week without any accommodations, medical care or reporting the accident to anyone at Tru Vue. This is possibly one explanation as to why the petitioner later changed her testimony to allege the accident happened on her last day worked that week, to get around the problem of having worked an entire week without making any mention of this alleged work injury. Additionally, if we were to accept October 1 as the actual accident date, the work list of the petitioner that was admitted into evidence shows that she did not move any product that day that weighed 75 to 100 pounds as she alleged to her doctor. This again might explain why the petitioner was changing her story later on.

Additionally, the security video evidence showed Ms. Myrick walking with a limp both before and after the alleged accident dates. It also showed her moving around without a limp both before and after either of the alleged accident dates. The surveillance video taken of the petitioner when she did not realize she was being observed on October 11 and 14th of 2013 showed that she was moving about without difficulty despite reporting extreme pain to her chiropractor around that time. There was little change in the petitioner's gait from the security footage before the alleged accident dates, security footage after the alleged accident dates and the surveillance video on October 11 and 14th.

The Arbitrator finds that there are simply too many inconsistencies in the petitioner's story to find her credible. Finding her credible would mean disbelieving testimony from three other witnesses and disregarding her own two treating doctor's medical records. It further would require disbelieving her primary care doctor's pre-existing records and those of the emergency room at Mount Sinai Hospital. Based on all the evidence, the Arbitrator finds that the petitioner did not meet her burden in showing that she sustained any accident at work either on October 1 or October 3, 2013.

With respect to Issue F – Is petitioner's current condition of ill-being causally related to the injury? The Arbitrator finds the following:

The Arbitrator hereby incorporates his findings with respect to Issue C and D above finding no accident. Additionally, the Arbitrator finds that the petitioner has not met her burden of proof to show that her current condition of ill-being and disability are causally connected to her employment. The petitioner alleges an injury was sustained while at work.

The petitioner relies on the medical records of her chiropractor and the orthopedic surgeon. The chiropractor records note two different dates of loss, one of which was completely

denied by the petitioner. Additionally, the petitioner denied any pre-existing conditions to her surgeon and therefore any opinions by the orthopedic doctor are not based upon the facts and therefore are not credible. The Arbitrator also notes that the petitioner was not moving any 75 to 100 pound 48 x 96 product as she told her doctor during the first week of October, 2013 regardless of which date we use. On October 1 she was moving one product that was 48 x 96 and that only weighed 38 pounds. Later in the week objects moved that measured 48 x 96, the measurement of the product to which the petitioner testified, were hundreds of pounds and therefore the doctor did not have an accurate history upon which to base any causal connection. The Arbitrator further notes that the doctor was willing to delay the petitioner's surgery for several months despite the availability of group insurance and the petitioner's own request to proceed with group insurance. This persisted even after the doctor opined that the delay in surgery was worsening the petitioner's condition and yet he still was not willing to proceed under group insurance to the detriment of his patient's own health. This brings into serious question the objectivity of Dr. Levi's opinions regarding the causal connection to any event that may or may not have occurred in October 2013. The petitioner even admitted that she was unhappy with Dr. Levi and blamed him for the loss of her job when the surgery was delayed for so long that, under union contract, she lost her position after being out for more than a year.

The Arbitrator notes that respondent's expert, Dr. Kevin Walsh, had all of the information, including the pre-existing condition records with which to formulate an opinion as to the impact of any event that may have occurred the first week of October 2013. The Arbitrator finds more credible this opinion that the physical findings were inconsistent with any acute injury and more consistent with the petitioner's well-documented pre-existing condition.

Based on all of the evidence presented, the Arbitrator finds that the petitioner failed to meet her burden of proof to show that any incident that may have occurred during the first week of October, 2013 had any impact on her physical condition and therefore failed to show any causal connection between her treatment, time off or ongoing complaints and any work incident of October, 2013.

With respect to Issue J – Were the medical services that were provided to the petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services? – The Arbitrator finds the following:

The Arbitrator hereby incorporates his findings with respect to Issues C, D and F above as if more fully set out herein. The Arbitrator has found that there was no accident. The Arbitrator notes the petitioner's medical bills were not the result of a work-related injury but a pre-existing condition with no connection to her employment. Based on this, the respondent is not liable for the medical bills incurred by the petitioner.

With respect to Issue K – What temporary benefits are in dipsute – the Arbitrator finds as follows:

The Arbitrator hereby incorporates his findings with respect to Issues C, D, F and J above as if more fully set out herein. The Arbitrator further notes that once the petitioner underwent surgery that was delayed only because the doctor chose to pursue workers compensation benefits rather than proceeding under group insurance, the petitioner was able to return back to her full duty in six weeks. During this time the petitioner continued to collect short and long-term disability provided by her employer. The Arbitrator finds no just reason for delay and that the medical services and disability was greatly exaggerated because of the petitioner's chosen orthopedic doctor to delay surgery.

With respect to Issue L – What is the nature and extent of the injury – the Arbitrator finds as follows:

The Arbitrator hereby incorporates his findings with respect to Issue C, D, F, J, and K above as if more fully set out herein. Having found no accident and no causal connection, the Arbitrator awards no permanency to the petitioner.

With respect to Issue N – Is Respondent due any credit? – the Arbitrator finds as follows:

The Arbitrator hereby incorporates his findings with respect to Issue C, D, F, J, K and L above as if more fully set out herein. The Arbitrator notes that the petitioner stipulated to disability benefits in the amount of $24,657.51 in non-occupational indemnity disability benefits for which a credit is allowed under Sec 8(j) of the Act.

Arbitrator Kurt Carlson

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James E. Rickleff,

Petitioner,

vs. NO: 11WC 46661

Beery Heating & Cooling Inc.,

Respondent,

17IWCC0319

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 and medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 16, 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.

17IWCC0319

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 $18,100.00. 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: MAY 25 2017
MJB/bm
o-5/16/17
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

RICKLEFF, JAMES
Employee/Petitioner

Case# **11WC046661**

BEERY HEATING & COOLING INC
Employer/Respondent

17IWCC0319

On 6/16/2016, 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 0.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0147 CULLEN HASKINS NICHOLSON ET AL
JOSE M RIVERO
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

2284 COZZI & GOGGIN-WARD
MARK ZAPF
27201 BELLA VISTA PKWY #410
WARRENVILLE, IL 60555

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
19(b) ARBITRATION DECISION

JAMES RICKLEFF,
Employee/Petitioner

v.

BEERY HEATING & COOLING, INC.
Employer/Respondent

Case # **11** WC **46661**

Consolidated cases:

17IWCC0319

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the City of **Elgin**, on **08/12/15**. 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?
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 _____

17IWCC0319

FINDINGS

On **2/11/2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did not* sustain an accident to his right hip, but *did* sustain an accident to his low back, that arose out of and in the course of employment.

Petitioner's current condition of ill-being of his right hip *is not* causally related to the accident, but his current condition of his low back *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$65,033.28**; the average weekly wage was **$1250.64**

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

ORDER

THE ARBITRATOR CONCLUDES THAT PETITIONER FAILED TO PROVE THAT HE SUSTAINED A WORK-RELATED INJURY TO HIS RIGHT HIP DURING THE COURSE OF PHYSICAL THERAPY, AND FURTHER CONCLUDES THAT PETITIONER FAILED TO PROVE THAT THE CURRENT CONDITION OF ILL-BEING OF HIS RIGHT HIP IS CAUSALLY RELATED TO THE ACCIDENT OF 2/11/2011. THE ARBITRATOR DENIES PROSPECTIVE MEDICAL CARE FOR THE RIGHT HIP AS WELL AS OUTSTANDING MEDICAL BILLS FOR TREATMENT TO THE RIGHT HIP AND THE MRI OF THE LEFT HIP.

The Arbitrator concludes that Petitioner has proved that that he sustained an injury to his low back as a result of pelvic obliquity and further concludes that the current condition of ill-being of Petitioner's low back is causally related to the accident of February 11, 2011.

Respondent shall pay Petitioner an amount equal to the sum of the outstanding medical bills for the reasonable and necessary medical services for Petitioner's right leg (knee) and low back, or $18,012.35, in accordance with Section 8(a) and subject to Section 8.2 of the Act.

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

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

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

Signature of Arbitrator

6-15-2016
Date

JUN 16 2016

Attachment to Arbitration Decision

James E. Rickleff
Employee/Petitioner

Case No. **11WC046661**

v.

Beery Heating & Cooling, Inc.
Employer/Respondent

17IWCC0319

FINDINGS OF FACT

Petitioner's Testimony:

Petitioner, James Rickleff, worked as an HVAC specialist for Respondent, Beery Heating & Cooling, Inc. On February 11, 2011, he sustained an accident while he was in the process of installing 4-5 heat exchanges on top of a roof. The injury occurred when he was he was moving a number of mechanical fasteners. He was on his knees in a crouched position with his buttocks on his feet. While in this position, he turned around, then leaned forward and felt a popping sensation in his right knee.

Petitioner further testified that he first sought treatment with Dr. Asselmeier.

Petitioner continued to work.

Petitioner testified that on March 7, 2011, he tripped over a drain scupper as he was walking on a flat roof while carrying a box of filters. The trip occurred when he kicked the scupper with his right leg and fell to the ground.

On March 23, 2011, Petitioner sought treatment from Dr. Reilly. Dr. Reilly administered an injection to Petitioner's right leg.

Dr. Reilly released Petitioner to return to work on May 9, 2011.

Petitioner returned to Dr. Reilly in June 2011.

Dr. Reilly recommended another injection to his right leg in August 2011.

On March 17, 2011, Petitioner presented to Dr. Markarian for Respondent's IME. Dr. Markarian recommended surgery for Petitioner's right knee condition. Petitioner decided to receive treatment from Dr. Markarian.

On January 19, 2012, Dr. Markarian performed surgery on Petitioner's right knee.

On January 23, 2012, Petitioner began a course of physical therapy. Such physical therapy started very gradually: no weights for the first six weeks, just stretches, massages, hot and cold packs. After six weeks, the physical therapy "became more aggressive." They prescribed a device called a flexinator. It had straps and a bench.

Petitioner's Counsel showed Petitioner Px.10, which purports to be an image of a flexinator.

Petitioner testified that the idea behind the flexinator is to stretch or hyperextend the hamstring so that he could lock his right knee. He would place the heel of his foot on the front pad and then would secure a strap around the lower thigh. Air is pumped into a bubble and the bubble forces the knee to greater flexion. Petitioner testified that he utilized the flexinator at home; he used it three times a day for ten minutes at a time. While he was using the flexinator at home, he participated in physical therapy at the direction of Dr. Markarian.

Petitioner testified that the flexinator brought about pain in his knee and hamstring. He testified that the pain "was like it was radiating from the knee joint up into the hip area." At Dr. Markarian's direction, Petitioner performed a similar hyperextension exercise. They set up the device on a chiropractic table. Petitioner rested his right heel on a foam roll that was four inches in diameter. They secured a strap around his knee that also went around the bottom of the table. Then, the table was electrically raised up while his right leg remained stable. Petitioner testified that he then felt excruciating pain in the right hip. This exercise lasted ten minutes. Petitioner characterized this type of treatment as "medieval."

Petitioner received an injection. Petitioner had MR images taken of his lower spine.

Petitioner testified that he was referred to Dr. Benjamin Domb. Dr. Domb recommended a right hip MRI and a left hip MRI.

At the request of Respondent, Petitioner presented to Dr. James Cohen at Illinois Bone & Joint Institute. Dr. Cohen's examination lasted 1-1¼ hours. Petitioner had a one-on-one conversation with Dr. Cohen that lasted 10-15 minutes. Dr. Cohen asked him questions. Petitioner talked to him briefly about the physical therapy that he was undergoing.

Petitioner's activities of daily living ("ADLs") include walking, riding his bike, sitting and reading the newspaper and mowing the lawn.

Petitioner testified that he did not have any problems with these ADLs prior to the physical therapy that followed the January 19, 2012 right knee surgery. Petitioner testified that he has walked his entire life and he has ridden a bicycle since the age of six. He uses both legs to walk and to ride a bike. Before the physical therapy, he did not have any symptoms. As he did the physical therapy, he rode his bike for pleasure. Walking was painful during that time.

Petitioner further testified that before the knee operation, he used to walk the river walk in Naperville, which is a 4.6-mile circuit.

There are uneven surfaces on the river walk and one must walk up and down hills. This aggravated his leg.

Dr. Markarian recommended total knee surgery. He referred Petitioner to Dr. Freedberg. Dr. Freedberg performed the total knee surgery and released Petitioner in August 2014.

Petitioner further testified that following the total knee surgery, he performed the first regimen of physical therapy at Dr. Freedberg's office, during which time he suffered a hernia.

On July 14, 2014, Petitioner underwent an FCE. Soon thereafter, Dr. Freedberg released him to return to work with permanent restrictions. Dr. Freedberg issued a restriction with regard to above-the-shoulder work, but not for Petitioner's right leg injury.

Since Dr. Freedberg released him in August 2014, Petitioner has participated in a vocational rehabilitation program. He worked as a professor for a while. He is still enrolled in the vocational rehabilitation program and has been receiving benefits.

Petitioner further testified that, currently, his right knee is really good. However, during work hardening, he strained his MCL and still has pain. He thinks it was a partial tear. Petitioner testified that he is always careful when he is walking up the stairs. He always uses a handle. He finds uneven ground to be challenging in that it aggravates his hip. Furthermore, with regard to his right hip, Petitioner does not go on extended walks anymore because the impact of the walk – the uneven surfaces and the hills – aggravates the hip. His hobbies include fishing, wine collecting and sampling, and bike riding. He goes out on his son's fishing boat, which has chairs. He compensates by standing at times.

There has been a recommendation for hip surgery.

Petitioner testified that he wishes to proceed with the surgery that Dr. Domb has recommended.

On cross-examination, Petitioner testified that the initial injury occurred while he was leaning down on his buttocks. He was leaning forward, but it was a lean and a reach motion.

With regard to the flexinator, the physical therapist did say that if he feels pain, he should stop. But for some of the exercises, Petitioner continued, the physical therapist was persistent. When Petitioner was on the flat board at Dr. Marcarian's office, he was in excruciating pain. When Petitioner told "them" that he was having excruciating pain with the flexinator, "they said 'no pain, no gain.'"

With regard to the condition of his MCL, Dr. Freedberg told him about it. Dr. Freedberg did not treat him for his MCL.

Petitioner further testified that at the time of the knee accident, he was not having hip pain or low back pain. These symptoms developed later.

Petitioner testified that the exercises he performed in physical therapy caused his hip to be symptomatic.

Petitioner testified that he did not treat for low back pain. Petitioner testified that he did not sustain a low back injury and did not report a low back injury.

Petitioner testified that he did not recall telling his providers that he had hip pain before the physical therapy.

Dr. Domb diagnosed avascular necrosis of the right hip. He has recommended surgery for the right hip. Dr. Domb also diagnosed avascular necrosis of the left hip, which was confirmed on the MRI.

On redirect examination, Petitioner testified that he has no symptoms in his left hip.

Petitioner testified that he uses his left hip to walk, and that he has always used his left hip to walk.

Summary of the Medical Records/Reports:

On February 23, 2011, Petitioner first treated for his right knee with Marc A. Asselmeier, M.D., an orthopedic surgeon who is associated with DuPage Medical Group. (Px.2, p. 6) After taking a history and conducting a physical examination, Dr. Asselmeier diagnosed Petitioner with the following: pain in knee, medial meniscus tear, osteoarthritis, localized, knee, chondritis, chondromalacia of patella, Derangement of posterior horn of medial meniscus, and primary localized osteoarthrosis, lower leg. (Px.2, p. 7) The doctor ordered x-rays, discussed the possibility of a cortisone injection and an MRI, and released Petitioner to return to work. (Px.2, p. 7) The following day, the radiographic images revealed the following: "Right knee series shows moderate medial compartment osteoarthritis, right-greater-than-left knee." (Px.2, p. 8)

On March 23, 2011, Petitioner presented to John L. Reilly, M.D., an orthopedic surgeon who is associated with M & M Orthopaedics, Ltd., for an evaluation of his right knee. Dr. Reilly took a history, interpreted the x-ray films and conducted a physical examination. Upon examination, Dr. Reilly found that the right knee flexes no more than 120° to 125°, whereas the left knee flexes past 140°. He found that when he flexed Petitioner's right knee, it seemed to cause more pain posteromedially or posterior than anywhere else, but it was not point tender. Dr. Reilly further found that right hip motion does not cause any groin pain. He flexed Petitioner's hip up to 90° and internally and externally rotated it to at least 45° and it did not duplicate knee pain and did not cause any significant groin pain. Upon reviewing the x-rays, Dr. Reilly found significant the bone-on-bone condition in the far medial aspect of the medial compartment of the right knee. Dr. Reilly's impression was "Right knee osteoarthritis." The doctor prescribed anti-inflammatory medication, recommended a cortisone injection, instructed

Petitioner to return to the clinic in 3 weeks and released him to return to light-duty work. (Px.4, pp. 12-16)

In a letter to Respondent dated April 11, 2011, Dr. Reilly opined that Petitioner aggravated the pre-existing osteoarthritic condition of his right knee while he was at work. (Px.4, pp. 16-17)

Petitioner followed up with Dr. Reilly on April 14, 2011. Upon examination, Dr. Reilly found, *inter alia*, that Petitioner flexes his hip 120° or slightly greater and that when he does this, he has some discomfort. Extension of the hip is just about full and there may be possible flexion contracture. Hip motion does not cause pain. Dr. Reilly also examined and injected Petitioner's right knee. (Px.4, pp. 11-12)

On April 28, 2011, Petitioner followed up with Dr. Reilly. He reported to the doctor that he felt the injection helped, but that he still has some soreness. Given the arthritic changes that are evident, Dr. Reilly opined, he expected that Petitioner would have some soreness. Dr. Reilly stated that future options include a repeat injection and/or Synvisc. Long-term, the doctor continued, he might need a knee replacement. Dr. Reilly released Petitioner to return to work as long as he is careful about his overall mechanics. Return p.r.n. (Px.4, pp. 11-12)

On June 9, 2011, Petitioner returned to Dr. Reilly. He advised the doctor that he had been approved for workers' compensation. He reported that he still has achiness in his knee but that the injection helped dramatically, as did the anti-inflammatory medication. Upon examination, Dr. Reilly noted, *inter alia*, that hip motion causes no complaints. (Px.4, pp. 9-10)

Dr. Reilly assessed Petitioner with osteoarthrosis, unspecialized whether generalized or localized, of the lower leg. The doctor again released Petitioner to regular-duty work and instructed him to return to the clinic in three months. (Px.4, pp. 9-10)

Petitioner returned to Dr. Reilly on August 11, 2011, with recurrent complaints of right knee achiness with greater activity. Dr. Reilly opined that Petitioner is a candidate for a Synvisc-One injection, and made arrangements for such injection. (Px.4, pp. 7-8)

On September 27, 2011, Petitioner presented to Gregory G. Markarian, M.D., who is associated with Orthopedic Associates of Naperville, for a Section 12 examination. Dr. Markarian took a history and noted that Petitioner had a prior knee arthroscopy "that is remote," of his right knee. Petitioner complained of 3-4 pain (on a 1-10 pain scale) in his right knee that is constant. He complained of difficulty going up stairs or ladders. Dr. Markarian wrote: "He is here because he does not want a total knee replacement. He is here because he does not want injections or viscosupplementation. He is here for an independent medical evaluation because he is anxious to get back to work." After conducting a physical examination and reviewing the x-rays, Dr. Markarian assessed Petitioner with joint arthrosis without subchondral collapse. Dr. Markarian answered questions that had been posed to him. The doctor recommended that Petitioner undergo an arthroscopy and a resurfacing of the right medial femoral condyle and possibly the patellofemoral joint based on the arthroscopic findings. (Px.5, pp. 194-195)

Petitioner opted to treat with Dr. Markarian and to undergo the arthroscopy and resurfacing procedure.

Dr. Markarian performed surgery on Petitioner on January 19, 2012 that consisted of an arthroscopy and open resurfacing of the trochlear notch using a 3x2 patella and a 6x3 medial femoral condyle implants. (Px.5, p. 247)

The physical therapy records in Dr. Markarian's records, Petitioner's Exhibit #5, indicate that Petitioner commenced a course of physical therapy on January 23, 2012. He told physical therapist Amy Weber, M.P.T., who is associated with Orthopedic Associates of Naperville, that he saw the doctor, that he does not have to wear the brace anymore, but that he cannot put any weight on the leg. (Px.5, p. 188)

On February 17, 2012, the physical therapist noted that Petitioner is 4 weeks post-op and is able to tolerate progression of exercises without onset of pain symptoms. She assessed Petitioner with stiffness, pain and effusion in the joint of the right lower leg, and weakness in the muscle. (Px.5, p. 175)

On February 27, 2012, the physical therapist advised Petitioner to follow up with the doctor as soon as possible as she anticipated that Petitioner would begin weight bearing and progression of exercises at 6 weeks post-op per protocol. She continued to assess Petitioner with stiffness, pain and effusion in the joint of the right lower leg, and weakness in the muscle. (Px.5, p. 171)

On March 12, 2012, the physical therapist noted that Petitioner still demonstrates knee tightness and an antalgic gait but overall is improving. She continued to assess Petitioner with stiffness, pain and effusion in the joint of the right lower leg, and weakness in the muscle. (Px.5, p. 159)

On March 14, 2012, in the course of her physical therapy re-evaluation, the physical therapist conducted a thorough examination at which time she found, *inter alia*, Petitioner's right hip flexion to be 4+/5, his right hip abduction to be 4+/5, and his right hip extension to be 4+/5. One of the physical therapist's long-term goals was to increase Petitioner's right hip and knee strength to 5/5. (Px.5, p. 156)

On March 19, 2012, the physical therapist wrote that Petitioner complained to her of increased pain along the side of the leg and the hamstring. He stated that he is having difficulty sleeping due to the pain and has continued to use the home stretching device. The physical therapist advised Petitioner to decrease the intensity of the home stretching due to increased pain symptoms. The physical therapist found that Petitioner had increased tightness and tenderness of the ITB and lateral hamstring. She continued to assess Petitioner with stiffness, pain and effusion in the joint of the right lower leg, and weakness in the muscle. (Px.5, p. 153)

On March 20, 2012, the physical therapist noted that Petitioner said his knee is feeling better since he did not use the machine for a couple of days. The physical therapist found that Petitioner had improved symptoms and decrease in pain in the medial knee joint. She continued

to assess Petitioner with stiffness, pain and effusion in the joint of the right lower leg, and weakness in the muscle. (Px.5, p. 152)

On March 23, 2012, the physical therapist noted that Petitioner is still having some pain on the inside of the knee and the hamstring. With palpation, the physical therapist found moderate tenderness and tightness of the right ITB and hamstring, which persists. She also found decreased reports of pain with single leg balance. She continued to assess Petitioner with stiffness, pain and effusion in the joint of the right lower leg, and weakness in the muscle. (Px.5, p. 149)

On March 27, 2012, the physical therapist noted that Petitioner saw his doctor today who recommended continued physical therapy. Petitioner stated that he has less pain when he does not use his home stretching machine. The physical therapist continued to assess Petitioner with stiffness, pain and effusion in the joint of the right lower leg, and weakness in the muscle. (Px.5, p. 145)

On April 23, 2012, in the course of her physical therapy re-evaluation, the physical therapist conducted a thorough examination at which time she found, *inter alia*, Petitioner's right hip flexion to be 5/5, his right hip abduction to be 5/5, and his right hip extension to be 4+/5. One of the physical therapist's long-term goals was to increase Petitioner's right hip and knee strength to 5/5. (Px.5, p. 156)

On April 24, 2012, when Dr. Markarian examined Petitioner, he found that Petitioner was doing well, 0-130, and that he still has some medial hamstring tendinitis. (Px.5, p. 132)

On May 2, 2012, the physical therapist noted that Petitioner had tenderness to palpation at the medial joint line of the right lower leg, as well as persistent tightness of the ITB, quad and hamstring. Overall, he has improved. She continued to assess Petitioner with stiffness, pain and effusion in the joint of the right lower leg, and weakness in the muscle. (Px.5, p. 127)

On May 4, 2012, the physical therapist noted that Petitioner complained of occasional shooting pain in the knee, and also pain in the hip. The physical therapist concluded that Petitioner continues with pain on the medial side of the knee and has pain in the hip, but was able to do the full therapeutic exercises with no complaints. The physical therapist assessed Petitioner with stiffness and effusion in the joint of the right lower leg, as well as weakness in the muscle. (Px.5, p. 126)

On May 11, 2012, the physical therapist recorded that Petitioner stated that the hip and knee are still sore. The physical therapist found tenderness to palpation at the medial joint line as well as persistent tightness of the ITB, quad and hamstring. The physical therapist concluded that Petitioner still demonstrates hip and knee soreness and that he lacks full knee extension but continues with passive knee stretches to improve knee mobility. The physical therapist continued to assess Petitioner with stiffness and effusion in the joint of the right lower leg, as well as weakness in the muscle. (Px.5, p. 126)

On May 21, 2012, in the course of her physical therapy re-evaluation, the physical therapist, Amy Weber, M.P.T., conducted a thorough examination at which time she found, *inter alia*, Petitioner's right hip flexion to be 5/5, his right hip abduction to be 5/5, and his right hip extension to be 5/5. One of the physical therapist's long-term goals was to increase Petitioner's right hip and knee strength to 5/5. (Px.5, p. 119)

On May 22, 2012, Dr. Markarian examined Petitioner. Petitioner complained to him of sharp pain in the right knee. Dr. Markarian also wrote:

> "James is here for followup evaluation. He is status post right knee resurfacing. he still has some hamstring weakness and also has some gluteus medius weakness. He has an abductor lurch and a Trendelenburg gait with gait. We need to improve on that significantly.
>
> PLAN: We are going to continue with physical therapy. His range of motion is excellent with respect to his knee. We just need to address his gluteus medius and his hamstrings. We will see him back in 4 weeks, at which time we will re-evaluate his progress." (Px.5, p. 118)

On June 4, 2012, the physical therapist noted that Petitioner states his knee is starting to feel better. She assessed Petitioner with stiffness, pain and effusion in the joint of the right lower leg, and weakness in the muscle. (Px.5, p. 112)

On June 11, 2012, the physical therapist recorded that Petitioner stated that his hamstring continues to be sore and tight and that he is stretching at home. She wrote: "Continuing on prolong (sic) knee extension stretch with discomfort but gradually improving with knee rom." The physical therapist assessed Petitioner with stiffness and effusion in the joint of the right lower leg, as well as weakness in the muscle. (Px.5, p. 109)

On June 18, 2012, in the course of her physical therapy re-evaluation, the physical therapist conducted a thorough examination at which time she found, *inter alia*, Petitioner's right hip flexion to be 5/5, his right hip abduction to be 5/5, and his right hip extension to be 4+/5. One of the physical therapist's long-term goals was to increase Petitioner's right hip and knee strength to 5/5. The physical therapist noted that Petitioner told her that he has been having sharp pain on the inside of his knee when he is walking, especially when he is on uneven ground, but he can ride his bike without pain. He has difficulty with stairs, especially walking downstairs. (Px.5, p. 105)

On June 19, 2012, Dr. Markarian examined Petitioner. He wrote that Petitioner complained to him of sharp pain and stiffness in his right knee. Dr. Markarian also wrote that Petitioner has right knee medial hamstring tendinitis. The doctor injected Petitioner with Lidocaine and Betamethasone along the medial hamstring and indicated that "[w]e are going to treat his hamstring tendinitis." He noted that Petitioner may need plasma rich protein injections in that area. (Px.5, p. 104)

On June 27, 2012, the physical therapist wrote that Petitioner cancelled therapy yesterday because he had a sharp pain in his right groin, which subsided after several hours and that he denies any symptoms now and states his knee is feeling better. Petitioner was able to complete his full therapeutic exercises on June 27, 2012 without reports of pain. He continues to be challenged by the step-downs and tightness of the hamstring and ITB persists. The physical therapist assessed Petitioner with pain and stiffness in the joint of the right lower leg, as well as weakness in the muscle. (Px.5, p. 100)

On July 3, 2012, the physical therapist noted that Petitioner told her that he had an onset of pain in the femoral nerve area again on Friday and that it has now resolved. He has increased pain on the inside of his knee and also has a bruise there. The physical therapist did not know what caused the bruise. She administered ultrasound and Petitioner completed his exercises despite increased soreness. The physical therapist assessed Petitioner with pain, stiffness and effusion in the joint of the right lower leg, as well as weakness in the muscle. (Px.5, p. 98)

On July 17, 2012, Dr. Markarian examined Petitioner. He wrote that Petitioner complained to him of shooting pain and stiffness in his right knee. Dr. Markarian also wrote that Petitioner's right knee is doing well, that he has a full range of motion and no swelling, but that he does have some weakness. Dr. Markarian recommended that Petitioner continue with the therapy. (Px.5, p. 91)

On August 2, 2012, the physical therapist recorded that Petitioner stated that his hamstrings are still tight and that his knee buckles sometimes. She continued to address his tightness and improve quadriceps strength. The physical therapist assessed Petitioner with pain and stiffness in the joint of the right lower leg, as well as weakness in the muscle. (Px.5, p. 82)

On August 17, 2012, the physical therapist wrote that Petitioner reported no changes – the back of the knee is still very tight and sore – and that the pain sometimes goes up to his right buttock. (Px.5, p. 75)

On August 21, 2012, Dr. Markarian examined Petitioner. He wrote that Petitioner complained of pain in the right knee that he described as sharp, dull and stiff. Dr. Markarian also wrote the following:

> "James is here for followup evaluation. He is status post right knee resurfacing. He still has hamstring issues. I think it is from his pelvic obliquity. He is tender over the right SI joint and he is oblique. This has altered his length-tension relationship of his hamstring. These are all cumulative affects (sic) of not being treated for almost a year with his knee and his antalgic gait. He has developed all these issues preoperatively. His knee right now is good. He has good range of motion. His strength is good, but he has significant hamstring issues secondary to pelvic obliquity and SI joint dysfunction.
>
> PLAN: We are going to schedule him for an injection of his SI joint to be followed by trunk and pelvic stabilization and SI joint dysfunction treatment. He understands and wishes to proceed."

Other Problems: PAIN IN JOINT, PELVIS/THIGH, SCIATICA, PAIN IN JOINT, LOWER LEG." (Px.5, p. 72)

A consultation note dated August 28, 2012 from Demetrios Louis, M.D., at Chicago Pain and Orthopedic Institute, indicates that the Petitioner's chief complaint was right lower back pain. The low back diagnosis included right sacroiliac pain, right sacroiliitis, myofascial pain, and facet arthropathy. The treatment recommendations were all focused on the low back. A right sacroiliac joint injection was recommended as well as a lumbar MRI. (Rx.1)

Petitioner received injections from Dr. Louis on September 5, 2012. The procedure performed was a right SI joint injection via the Dreyfus technique with an L5 medial branch block and, and S1, S2 and S3 lateral branch blocks with fluoroscopy and monitored anesthesia. (Px.5, pp. 215-216)

In Dr. Cohen's report, he noted from his review of the records that Petitioner received 50-60% pain relief following the September 5, 2012 SI joint injection by Dr. Louis. (Rx.5, Dep. Ex. 2, p. 5)

On September 14, 2012, in the course of her physical therapy re-evaluation, the physical therapist took the following history:

"SUBJECTIVE: Patient reports when he saw the doctor he was referred to a pain management doctor for his continued pain in the hamstring and the hip. Patient states the doctor feels he has some issues with his SI joint. Patient states he saw the pain management doctor and had injections in his SI joint about 1 week ago. Patient states his pain going from sit to stand is improved but otherwise has not noticed much change since the injections. Feels he is also walking a little bit straighter. Patient states after having surgery on his knee when he started doing more activity with walking and stairs is when he started to have pain in his (R) hip and his hamstring. Patient denies having any pain in the hip and hamstring when he rides his bike but walking even less than ½ mile causes increased pain. He also has increased pain after sitting for a period of time. Patient states the pain wakes him up during the night."

The physical therapist, on September 14, 2012, conducted a thorough examination at which time she found, *inter alia*, Petitioner's right hip flexion to be 5/5, his right hip abduction to be 5/5, and his right hip extension to be 4+/5. One of the physical therapist's long-term goals was to increase Petitioner's right hip and knee strength to 5/5. (Px.5, p. 61)

On September 18, 2012, Dr. Markarian examined Petitioner. He wrote that Petitioner presents with a hamstring strain that was described as dull, stiff pain at a level of 2-3/10. Dr. Markarian also wrote the following:

> "James is here for followup evaluation. He is status post right knee resurfacing. He is doing well. He still has some hamstring issues that I think are related to his pelvis. He has had the SI joint injections and did get some relief, but we need to address the pelvis in therapy. These are all conditions that are related to his compensating for his knee pain for over a year. We are now correcting that. His knee has full range of motion. There is no pain.

PLAN: We will continue with physical therapy.

Other Problems: PAIN IN JOINT, LOWER LEG, SCIATICA." (Px.5, p. 58)

On September 19, 2012, the physical therapist noted that Petitioner would benefit from the addition of core stabilization exercises to improve proximal stability and decrease lower back pain. (Px.5, p. 56)

On September 24, 2012, the physical therapist noted that Petitioner complained of numbness in his right kneecap. (Px.5, p. 54)

Petitioner underwent a lumbar MRI on September 28, 2012. The interpreting radiologist, Neil Gupta, M.D., offered the following impression of such images:

"Multifactorial, multilevel degenerative changes of the lumbar spine as discussed above greatest at L5-S1 where there is mild spinal canal stenosis. Moderate bilateral L4-5 neural foraminal stenosis as discussed above." (Px.5, pp. 209-210)

In Dr. Cohen's report, he noted from his review of the records that Petitioner received 75-80% pain relief following a repeat injection on October 3, 2012 by Dr. Louis. Dr. Louis, who is certified in anesthesia and pain management, diagnosed Petitioner with right SI joint pain, right sacroiliitis, myofascial pain, facet arthropathy, lumbago, lumbar spondylosis, lumbar degenerative disk disease, and lumbar disc bulge at L4-L5 and L5-S1. An epidural injection was discussed but not performed. (Rx.5, Dep. Ex. 2, pp. 5-6)

On October 8, 2012, the physical therapist wrote that Petitioner states he is having a bad day today. Since yesterday, he has been having increased pain in the right hip and groin region. He feels like his right leg is going to give out on him. He states his knee is feeling good. The physical therapist found that Petitioner required reduced intensity of therapeutic exercises secondary to right hip and groin pain, that Petitioner demonstrates increased antalgic gait and Petitioner felt some relief after hip stretching and press ups. (Px.5, p. 48)

On October 16, 2012, Dr. Markarian examined Petitioner. He wrote that Petitioner presents with dull knee pain 2/10. Dr. Markarian also wrote the following:

"James is here for followup evaluation. He is status post hamstring, SI joint. He is having difficulty with respect to his SI joint.

PHYSICAL EXAM: On exam today, he is almost at full extension. He has full flexion. Good strength with respect to the knee.

PLAN: We are going to wait until he gets better with respect to his back. I am going to wait on getting an FCE because I do believe that the SI joint and low back are all interrelated to him compensating for his knee for 11 months. We will continue with treatment for his back. When he is cleared for his back, then we will go ahead with the functional capacity evaluation. Other Problems: SCIATICA, PAIN IN JOINT, LOWER LEG, WEAKNESS,

MUSCLE." (Px.5, p. 45)

On October 19, 2012, the physical therapist wrote that Petitioner is without new reports. She noted that Petitioner continues to be challenged with previous program and that he completed the therapeutic exercises but continues with reports of right side hip/lower back pain. (Px.5, p. 143)

On November 6, 2012, the physical therapist wrote that Petitioner stated that the lower back, hip and hamstrings are bothering him. Petitioner still demonstrated tightness and pain, but completed the exercises with fatigue. (Px.5, p. 36)

On November 8, 2012, Petitioner first presented to Benjamin Domb, M.D.

Dr. Domb is a board-certified orthopedic surgeon who is Assistant Clinical Professor at Loyola University Medical Center. He is double-fellowship-trained in sports medicine/arthroscopic surgery and hip arthroscopy/joint restoration. Dr. Domb founded the American Hip Institute. (Px.3, Dep. Ex. 1, Px.3, pp. 4-5)

On November 8, 2012, Dr. Domb recorded Petitioner's History of Present Illness:

> "This patient presents with Right hip pain since Jan. 2012 after having a knee resurfacing. Pain is localized to the lateral hip and hamstring. Described as burning radiating down the posterior thigh. Patient states the lateral hip pain is 60%-70% of the problem and the hamstring are (sic) 30-40%. Aggravated by walking, sitting. Relieved by rest. Past treatments include: physical therapy without relief. Lumbar spine injection which gave him 50% relief and SIJ injection with 80% relief."

In his Review of Systems, Dr. Domb records the following for Musculoskeletal:

> "Complains of joint pain, trouble walking. Denies back pain, joint swelling, muscle cramps, muscle weakness."

Upon examination, Dr. Domb found, *inter alia*, 5/5 strength in the hip flexors, hip extensors, abductors, adductors, hamstrings and quadriceps. The anterior impingement test was positive. The gait was antalgic. X-rays of the hip were interpreted by Dr. Domb. Dr. Domb then offered the following Assessment:

1. Status post right knee resurfacing procedure with good resolution of his pain. Unfortunately, he developed a slight flexion contracture of 5-10 degrees which led to his hamstring and hop problems.
2. Right hip intra-articular source of the pain. He says this is 60-70 percent of the problem.
3. Right proximal hamstring tendinitis versus partial tear. He said this pain is 30-40 percent of his problem.

Dr. Domb then sent Petitioner for a special type of MRI of the right hip and set him up for an ultrasound-guided diagnostic injection of the hip joint. (Px.5, pp. 202-205)

On November 9, 2012, the physical therapist wrote that Petitioner "states he still has pain in the (L) groin, hamstring and hip, pain is worse when walking." Petitioner had some relief of symptoms with addition of flexion based stretching for the low back. Initiated IFC for the lower back to address pain symptoms radiating to the glut and hip. (Px.5, p. 34)

At the request of Respondent, and pursuant to Section 12 of the Act, Petitioner presented to Julie Wehner, M.D., for an examination. Dr. Wehner authored a report that is dated November 12, 2012. (Rx.6, Dep. Ex. 2) Dr. Wehner's testimony was taken, via deposition, on January 16, 2015. (Rx.6)

Dr. Wehner is a board-certified orthopedic surgeon. She was fellowship trained in spine surgery and approximately 90% of her practice is spine related. (Rx.6, pp. 4-5)

On November 15, 2012, Dr. Domb injected Petitioner's right and left hips with 10 cc. of 1% plain Lidocaine. After the injections, Petitioner had 90% pain relief in both hips. Pain was significantly decreased with the diagnostic injections. The pain was gone with all motions and movements. (Rx.4)

On November 26, 2012, Dr. Domb assessed Petitioner with right hip large stage 2 AVN (avascular necrosis). This doctor opined that the work injury caused an aggravation of the symptoms of the AVN, which was itself a pre-existing condition. (Rx.4)

On November 27, 2012, Dr. Markarian examined Petitioner. He wrote that Petitioner presents with dull knee pain 3/10. Dr. Markarian also wrote the following:

> "James is here for followup evaluation. He just saw Dr. Dam (sic) who diagnosed him as having avascular necrosis in the right hip. His right knee resurfacing looks good.
>
> PLAN: We need to know his weight bearing status. I feel at this point he is maxed out in terms of his therapy. He needs to just maintain his strength. The main issue is his avascular necrosis in his right hip. He understands and wishes to proceed.
>
> Other Problems: SCIATICA, PAIN IN JOINT, LOWER LEG, PAIN IN JOINT, PELVIS/THIGH." (Px.5, p. 45)

On December 13, 2012, Dr. Domb assessed the December 3, 2012 noncontrast MRI of the hips. He interpreted the images as showing right hip severe AVN involving most of the femoral head, and in the left hip, perhaps a small focus less than 1 cm. superolaterally of AVN in the femoral head. After a discussion with Petitioner of the surgical options, Petitioner preferred to proceed with a right hip replacement. (Rx.4)

On December 27, 2012, in the course of her Assessment & Plan for PAIN IN JOINT, PELVIS/THIGH, SCIATICA, WEAKNESS, MUSCLE, the physical therapist took the following history:

"SUBJECTIVE: CHIEF COMPLAINT: Patient reports onset of (R) hamstring pain since about April of this year. Had (R) knee resurfacing in January 2012. Gradually the (R) hip and (R) glut started hurt (sic) also. Patient states when he started to add more weight and stretching for the physical therapy on the (R) knee the pain in the (R) hamstring, hip and glut became worse. Patient saw a pain management doctor and had injections for the low back and SI joint in September and October. Patient states the first set of injections helped for about 3 days and the second set helped for about 2 weeks. Patient states he was then referred to a hip specialist to assess his symptoms. Patient states he had an x-ray and an MRI with contrast. Patient states he was told he had avascular necrosis of the (R) hip. Patient states the doctor recommended a hip decompression and bone graft or a hip replacement. Patient states they decided on a hip replacement. Patient states he is waiting to have the surgery scheduled. Patient states both the hip doctor and Dr. Markarian recommended therapy for the (R) hip until the surgery is scheduled.

DATE OF INJURY: Onset of pain approx April 2012." (Px.5, p. 27)

Dr. Markarian and Orthopedic Associates of Naperville provided additional physical therapy through February 11, 2013. (Px.5, pp. 9-27)

At the request of Respondent, and pursuant to Section 12 of the Act, Petitioner presented to James C. Cohen, M.D., on January 4, 2013, for an examination. (Rx.5, Dep. Ex. 2) Dr. Cohen's testimony was taken, via deposition, on October 22, 2013. (Rx.5)

Dr. Cohen is a board-certified orthopedic surgeon who is Associate Clinical Professor at University of Illinois at Chicago. He was fellowship-trained in joint replacement surgery. Dr. Cohen has performed approximately 50 hip surgeries or hip replacements per year. (Rx.5, Dep. Ex. 1, Rx.5, p. 6)

On October 28, 2013, Howard I. Freedberg, M.D., performed a total knee replacement of Petitioner's right knee. (Px.7) Subsequently, Petitioner participated in physical therapy and work conditioning programs. (Px.7, Px.8)

Selected Portions of the Deposition Testimony:

Benjamin G. Domb, M.D.

Dr. Domb, Petitioner's treating orthopedic surgeon, testified to the following:

Q: You have an opinion on whether this is related to the work injury; is that correct?

A: Yes.

Q: Could you state what that opinion is?

A: My opinion is that the AVN pre-existed his work injury. He experienced a worsening of his pain - - or actually - - strike that. He experienced an onset of pain after the work injury, to my understanding, during physical therapy for the knee; and therefore if that is the case, it would be my opinion that he had asymptomatic AVN prior to the physical therapy and work injury and as a result of the injury and/or physical therapy, the AVN became symptomatic.

Q: Okay. So just to clarify, the twisting injury that Petitioner claims he suffered and the subsequent physical therapy that he underwent could not have caused AVN?

A: It would probably be too firmly stated to say it could not have caused AVN, but in his case I don't suspect that it was the cause of his AVN.

Q: Are you familiar with the type of physical therapy that is typically conducted following arthroscopic resurfacing such as the one that was conducted in this case?

A: Yes.

Q: Okay. Doctor, you also examined the Petitioner's left hip for AVN?

A: Yes.

Q: Do you recall what the outcome was on that?

A: He has a small focus, less than one centimeter in diameter, superior laterally of AVN in the femoral head, and I recommended repeating an MRI in three months to make sure there was no progression of AVN, and I also mentioned that we might observe it closely and consider a core decompression at some point.

Q: Doctor, can we talk about alcohol use and its relationship with AVN. Does it - - could it cause AVN?

A: Yes.

Q: Okay.

A: I should say it's a known risk factor for AVN. It's not well-known if it is a cause of AVN or why it would be a cause of AVN. And I make the distinction between an association and a cause because many things can be associated or correlated to problems without being the cause of the problem. So, in other words, correlation does not equal causation. But it is known there's a correlation between alcohol use and AVN. (Px.3, pp. 8-10)

Then on cross-examination, Dr. Domb testified to the following:

Q: Sure. Is it your testimony that the work injury itself which occurred on February 11th, 2011, or thereabouts, caused his condition to become symptomatic, or is it your opinion that the physical therapy caused his condition to become symptomatic?

A: I don't have a strong opinion one way or the other. Either it could have caused his hip to become symptomatic or the patient feels that the symptoms - - symptom onset was in physical therapy, to my understanding, so then if that were the - - I don't have that well-documented in my notes one way or the other. But if it were the case that his onset of symptoms was during the physical therapy, then my opinion would be that the physical therapy caused the onset.

Q: And if the converse of that is true **** (Px.3, pp. 10-11)

A: So if I - - I'll restate your question to make sure I understood it. The question was if he did not have symptoms at the time of the work-related injury, does that mean that the work-related injury was not the cause of the painful condition of his hip; correct?

Q: Yeah, I'm talking about the specific incident he reported in February of 2011 kneeling and twisting his knee.

A: Right. So if that were - - that specific injury were the direct cause of aggravation of his hip causing the symptoms, then I would expect onset of symptoms to be sometime within one to two weeks after that injury.

Q: Okay. And, Doctor, you first saw him on November 26th, 2012?

A: November 8th, 2012.

Q: November 8th, 2012. Do you have a copy of that record in front of you? I don't have that one.

A: Yes.

(Document tendered)

Q: Thank you. He reported to you that he's had pain since January of 2012 in your initial office visit on November 8th, 2012; correct?

A: Yes.

Q: So as far as you know, he didn't have any hip - - right hip pain reports - - reports of pain before January 2012?

A: As far as I know. (Px.3, pp. 11-13)

****

Q: What specifically happened in physical therapy that was traumatic to cause the joint to become symptomatic?

A: Well, to be clear, I don't think that his avascular necrosis was caused by anything in physical therapy. I think that it probably pre-existed the onset of pain and perhaps even pre-existed the work injury of February 2011. I haven't discussed extensively with the patient what happened in physical therapy that caused it to become painful, so I don't know that I can elaborate very much on that.

Q: Okay. Have you reviewed any physical therapy notes that show the development of pain during the course of physical therapy?

A: No.

Q: And what is your basis for your knowledge that he developed pain in the hip during physical therapy?

A: Patient informed me of that. His attorney also informed me of that.

Q: Okay. Can you tell me what office record you have that notes that the patient informed you of that?

A: I don't see it recorded in my notes.

Q: So that's just from your independent recollection?

A: Yes. (Px.3, pp. 15-16)

****

Q: Doctor, with regard to the AVN of the right hip, Doctor, is it true that the condition could become symptomatic even without the physical therapy had the condition progressed that far?

A: AVN certainly could become symptomatic independent of physical therapy.

Q: Okay. And I guess at the stage that you're seeing his AVN in the MRI, could normal activities of daily living cause it to become symptomatic?

A: It's possible.

Q: Okay. Doctor, are you aware of any kind of medical history with regard to alcohol abuse for this patient?

A: I am aware that he used alcohol.

Q: Okay. To an excessive amount or just simply a social drinker?

A: I don't think I quantified it well enough to say. I did discuss alcohol use with him, and it sounded like he drank a fairly moderate amount of alcohol. (Px.3, p. 17)

****

Q: Okay. Doctor, from a layman's perspective what is it that causes the blood supply to stop going to the hip

A: The explanations remain largely theoretical. A few are known. For example, it's known that in a femoral neck fracture, the fracture actually disrupts the blood supply to the femoral head, and that can cause AVN. In something like the association between alcohol use and AVN, there really is no great explanation or theory to explain why alcohol would cause a decrease in blood supply.

Q: And he didn't have a fracture to his hip at the time of the workplace accident; is that correct?

A: Correct. (Px.3, p. 19)

Dr. Domb also testified on cross-examination that he thought he reviewed some of the records of Dr. Markarian. Dr. Domb testified that he injected Petitioner's right hip, but that he has not treated his left hip. Dr. Domb also testified that it is not uncommon to see somebody develop a subsequent medical condition as a result of having physical therapy for a different condition. Dr. Domb did not think he could know the percentage of people he sends to physical therapy who end up having pain in a different joint than the joint for which he sent them to physical therapy. Dr. Domb also testified that the MRI of the right hip showed AVN as well as a labral tear, but he did not have any way of knowing whether Petitioner's pain was coming from the AVN or the labral tear or both. Dr. Domb highly suspected that such pain was coming from a combination of both conditions. An MRI of the left hip did not show a labral tear. (Px.3, pp. 13-17)

James Cohen M.D.

Dr. Cohen, Respondent's Section 12 orthopedic surgeon, testified that he examined Petitioner on January 4, 2013. (Rx.5, p. 6) Dr. Cohen took a history from Petitioner, reviewed voluminous medical records, and conducted an examination. He noted that the Petitioner did not have hip pain at the time of the original workplace injury (February 11, 2011). (Rx.5, p. 12) Dr. Cohen opined that the medical treatment following the workplace accident did not cause or aggravate the AVN of right hip.

Dr. Cohen indicated that AVN, or avascular necrosis, is essentially a lack of a blood supply to femoral head of the hip bone. (Rx.5, p. 12) Dr. Cohen testified the Petitioner has grade 2 to 3 AVN, per the changes that were seen on the MRI reports. (Rx.5, p. 13) In his practice, 50% of the AVN he treats are from an unknown origin and that alcohol use is a predisposing factor for the development of the condition. He referred to Dr. Reilly's March 23, 2011 note in which Dr Reilly indicated that the patient drank possibly six drinks a week or more. (Rx.5, pp. 14-15)

Dr. Cohen disagreed with Dr. Domb's opinion that physical therapy caused the hip AVN to become symptomatic and thus, aggravated the condition. (Rx.5, p. 16) He noted that just because two things occur at the same time does not mean that they are related. (Rx.5, p. 16) He opined that stretching the hamstring would in no way increase the stress on the surface of the hip bone to such a degree that it would become symptomatic. (Rx.5, p. 16) Dr. Cohen explained that the hip is a ball in a round socket and that stretching a hamstring would in no way increase the stress on the surface of the bone to such a degree that it would collapse and become symptomatic. (Rx.5, p. 16) Moreover, Dr. Cohen noted that Petitioner quit working due to his right knee injury and therefore he had less overall physical activity since the date of the accident. (Rx.5, p. 17) Therefore, he was putting less stress on the hip at the time it became symptomatic. (Rx.5, p. 17)

Dr. Cohen testified that the physical therapy exercises put far less stress on the hip joint than the activities of daily living. (Rx.5, p. 21) He noted Petitioner weighed 230 pounds and that walking, squatting, and walking upstairs would put more stress on the hip than physical therapy. (Rx.5, p. 18) Dr. Cohen opined that Petitioner's AVN is not attributable to physical therapy, but rather to the natural history of a large area of dead bone in the hip. (Rx.5, p. 18)

Dr. Cohen testified that the fact Petitioner has the condition in his opposite left hip is evidence that there is a metabolic condition that caused him to develop AVN bilaterally. He pointed out that Petitioner had no hamstring stretching of the left hip, yet the Petitioner has the condition on that side. (Rx.5, pp. 19-20) Dr. Cohen noted that Petitioner had diagnostic hip injections in both hips, which gave him 90% relief of pain in both hips. (Rx.5, p. 19)

On cross-examination, Dr. Cohen testified that there is no level of stress in the physical therapy exercises that could bring about symptomatology with respect to AVN. Dr. Cohen further testified that he is not saying there is no stress in physical therapy, but that there is far less stress than the activities of daily living with regard to stress on the hip joint. Dr. Cohen testified that no physical therapy exercise could have brought about any pain with respect to AVN. It would not aggravate the underlying avascular necrosis more so than one could have pain "with walking or something else like that." Dr. Cohen further testified that it would not surprise him if Petitioner would be experiencing symptoms in his left hip. Dr. Cohen could not state with certainty that the left hip AVN was more advanced than the right hip AVN. Dr. Cohen reiterated that there would be more stress in day-to-day activities than would result from hamstring stretching, and such day-to-day activities, such as walking, would affect both hips equally. (Rx.5, pp. 20-25)

Julie Wehner, M.D.

On November 12, 2012, Dr. Wehner examined Petitioner at the request of Respondent, and later testified via deposition. Petitioner made no complaints to Dr. Wehner at that time of low back pain. (Rx.6, p. 8) After conducting a physical examination of Petitioner's lumbar spine, Dr, Wehner did not identify any abnormal findings. (Rx.6, pp. 9-10) When she reviewed the MR images of the lumbar spine, she noted that they showed disc desiccation from L3 to S1 with moderate loss of L3-4 and severe loss of L4-5 and L5-S1 intervertebral space segments with discogenic degenerative changes. (Rx.6, p. 12) Dr. Wehner opined that all of the findings on the MRI were of a degenerative nature, and there was no specific herniated disc or impingement of the nerves. (Rx.6, p. 13) Dr. Wehner concluded that Petitioner did not have a back problem and

he did not complain of back pain. He could touch his toes during the clinical exam and his neurological exam was normal. (Rx.6, p. 13) The problems that Petitioner demonstrated to her, Dr. Wehner testified, were related to the knee and had no relationship to the back. (Rx.6, p. 13) She testified that clearly Petitioner had a problem with hamstring tightness. (Rx.6, p. 13)

On cross-examination, Dr. Wehner testified that she was asked to see Petitioner because it was thought by someone, other than Petitioner, that he was suffering from a back problem. (Rx.6, p. 20) Dr. Wehner testified that the hip involves the iliac bone, which is the bone that is connected to the sacrum by the SI joint. (Rx.6, p. 16) She further testified that she evaluates everybody for a hip problem when they come in to see for a back problem because "the hip and back are very closely linked." (Rx.6, p. 18) Dr. Wehner testified that she does not do hip replacements. (Rx.6, p. 18)

CONCLUSIONS OF LAW

In support of the his decisions with regard to issues (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 concludes as follows:

Petitioner testified that he felt excruciating pain in the right hip when he utilized the flexinator, which is a hamstring stretching machine. Petitioner testified that each time he used the flexinator, he would do the hamstring-stretching exercise for 10 minutes. He testified that he would do such stretching exercise 3 times a day at home.

Petitioner further testified that prior to the physical therapy regimen he participated in after the January 19, 2012 right knee surgery, he did not have any problems with his activities of daily living ("ADLs").

On cross-examination, Petitioner testified that the exercises he performed in physical therapy caused his hip to be symptomatic.

On March 19, 2012, Amy Weber, M.P.T., wrote that Petitioner complained to her of increased pain along the side of the leg and the hamstring. Petitioner told her that he is having difficulty sleeping due to the pain and has continued to use the home stretching device. The physical therapist advised Petitioner to decrease the intensity of the home stretching due to increased pain symptoms. The physical therapist found that Petitioner had increased tightness and tenderness of the ITB and lateral hamstring. She continued to assess Petitioner with stiffness, pain and effusion in the joint of the right lower leg, and weakness in the muscle.

The Arbitrator notes that in Amy Weber's March 19th, 20th, and 21st entries, she mentions the stretching machine, but makes no mention of right hip pain. Petitioner testified that he used a similar hamstring-stretching device at Dr. Markarian's office (Orthopedic Associates of Naperville). Again, there is no mention of right hip pain during or after Petitioner used the device.

Moreover, no doctor has causally related Petitioner's complaints of hamstring pain or iliotibial band ("ITB") pain with pain emanating from a necrotic hip.

Furthermore, Dr. Cohen opined that it is unlikely that hamstring stretches could put enough stress on the hip to cause the condition to become symptomatic. Dr. Cohen explained that the hip is a ball in a round socket and that stretching a hamstring would in no way increase the stress on the surface of the bone to such a degree that it would collapse and become symptomatic.

The photographs in Px.10 show the subject sitting in a chair with his right leg extended. The subject is not standing and loading his hip joints with his body weight.

In Dr. Domb's chart notes and at his deposition, he makes no mention of a flexinator or a stretching machine.

The Arbitrator finds Dr. Cohen's opinion that it is unlikely that the hamstring stretches put enough stress on the hip to cause the condition to be symptomatic to be reasonable and persuasive.

Dr. Domb testified that he is familiar with the type of physical therapy that is typically conducted following arthroscopic resurfacing such as the one that was conducted in this case. He further testified that to his understanding, symptom onset was in physical therapy, and if that were the case, although he did not have it well documented in his notes one way or the other, if it were the case that Petitioner's onset of symptoms was during the physical therapy, then his opinion would be that the physical therapy caused the onset.

On cross-examination, Dr. Domb testified that he did not review the physical therapy notes and could not say what happened in physical therapy to make Petitioner's right hip become symptomatic. Dr. Domb testified that he became aware that Petitioner developed right hip pain during physical therapy because Petitioner told him and Petitioner's lawyer told him. However, when Respondent's Counsel asked him to identify the chart note wherein Petitioner reported to him that physical therapy caused his right hip to become symptomatic, Dr. Domb was unable to do so.

On February 28, 2012, following the January 19, 2012 right knee surgery, Petitioner began to perform weight-bearing exercises. So, in addition to ultrasound, electrical stimulation, manual massage and non-weight-bearing therapeutic exercises, Petitioner performed single leg balancing exercises and step downs. He also utilized the retro treadmill and the elliptical machine. Additionally, on March 14, 2012, Amy Weber first indicated that one of her long-term goals for Petitioner is "to increase (R) hip and knee strength to 5/5."

Ms. Weber noted on one occasion that Petitioner was challenged by the step downs.

Petitioner testified that his physical therapy people told him "no pain, no gain."

Petitioner's first documented complaints of right hip pain occurred on May 4, 2012.

Dr. Cohen testified that the physical therapy exercises put far less stress on the hip joint than the activities of daily living. He noted that Petitioner weighed 230 pounds and that walking, squatting, and walking upstairs would put more stress on the hip than physical therapy. Dr. Cohen testified that no physical therapy exercise could have brought about any pain with respect to AVN. He further opined that the physical therapy exercises would not aggravate the underlying avascular necrosis more so than one could have pain "with walking or something else like that." Dr. Cohen testified that there is no level of stress in the physical therapy exercises that could bring about symptomatology with respect to AVN. Dr. Cohen further testified that he is not saying there is no stress in physical therapy, but that there is far less stress than the activities of daily living with regard to stress on the hip joint.

Petitioner specified that the flexinator was the device and hamstring stretching was the exercise that brought about right hip pain after the January 19, 2012 right knee resurfacing surgery. Petitioner failed to identify any other device, machine or exercise that brought about pain in his right hip. Neither Dr. Domb nor Dr. Cohen discussed specific weight-bearing exercises or machines.

Dr. Cohen put forth that just because the condition became symptomatic during physical therapy does not mean that physical therapy caused or aggravated the AVN. Dr. Cohen testified that somewhere in the neighborhood of 50% of his AVN cases are from an unknown origin.

Dr. Domb testified that Petitioner's right hip AVN could have become symptomatic independent of physical therapy.

The Arbitrator notes that in the SUBJECTIVE section of the September 14, 2012, physical therapy re-evaluation record of Orthopedic Associates of Naperville, Amy Weber wrote:

"... Patient states after having surgery on his knee when he started doing more activity with walking and stairs is when he started to have pain in his (R) hip and his hamstring. Patient denies having any pain in the hip and hamstring when he rides his bike but walking even less than ½ mile causes increased pain. He also has increased pain after sitting for a period of time. Patient states the pain wakes him up during the night."

But, then, on December 27, 2012, which was *after* Petitioner received a diagnosis of right hip AVN and *after* Dr. Domb recommended a right hip arthroplasty, Petitioner conveyed a history to Amy Weber of a gradual onset of right hip and right glut. pain during physical therapy. (Italics added.)

The Arbitrator cannot ignore Petitioner's lack of credibility. The Arbitrator cites 3 significant inconsistencies:

(1) When Dr. Domb initially saw Petitioner on November 8, 2012, he recorded, in pertinent part, the following: "This patient presents with Right hip pain since Jan. 2012 after having a knee resurfacing."

Yet, 4 days after the knee resurfacing surgery, Petitioner began a long course of physical therapy during which time she frequently met with Amy Weber, M.P.T. It was not until May 4, 2012, that Physical Therapist Weber first documented a complaint by Petitioner of right hip pain.

(2) Petitioner testified he never sustained a low back injury and never had low back pain during the course of treatment for his right knee. He denied treatment for his low back.

Yet, Petitioner's testimony in this regard is contradicted by his own medical records. The records of Chicago Pain & Orthopedic Institute indicate that on August 28, 2012, Petitioner complained of right lower back, right hip and right leg pain. Demetrios Lewis, M.D., diagnosed Petitioner with right sacroiliac pain, right sacroiliitis, myofascial pain and facet arthropathy. Dr. Louis administered a right SI joint injection via the Dreyfus technique with an L5 medial branch block, and S1, S2 and S3 lateral branch blocks with fluoroscopy and monitored anesthesia. Petitioner reported to his doctor that he received 50-60% pain relief following the September 5, 2012 SI joint injection by Dr. Louis and received 75-80% pain relief following the October 3, 2012 repeat injection by Dr. Louis.

Apparently, Petitioner's theory is that treatment for his low back was initiated in order to rule out a low back condition and thereby identify a right hip condition. Dr. Wehner did testify that often times she evaluates hips because "the hip and back are very closely linked." Yet, the medical records are clear that Petitioner received pain relief from the L5 medial branch block and the S1, S2 and S3 lateral branch blocks. Moreover, the September 28, 2012 MR images of the lumbar spine were interpreted as follows:

"Multifactorial, multilevel degenerative changes of the lumbar spine as discussed above greatest at L5-S1 where there is mild spinal canal stenosis. Moderate bilateral L4-5 neural foraminal stenosis as discussed above."

(3) Petitioner testified that he has had no pain in his left hip.

However, in the November 15, 2012, record of Hinsdale Orthopaedics, Dr. Domb's impression was *bilateral hip pain*. Petitioner received diagnostic injections to his right and left hips. Petitioner reported a 90% relief of pain in *both* hips. (Italics added.)

MR images of the left hip were taken on December 3, 2012, which revealed early stage AVN.

The Arbitrator gives weight to the fact that Petitioner also developed AVN in the left hip. Dr. Cohen opined that this was proof that Petitioner's development of AVN was the result of a metabolic process.

Both Dr. Domb and Dr. Cohen agree that Petitioner's avascular necrosis pre-existed the January 19, 2012 surgery and likely pre-existed the February 11, 2011 accident date. They also agree that the AVN and was not caused by the accident. Dr. Cohen stated that AVN is a chronic disease. The MRI of the right hip revealed "severe" AVN involving most of the humeral head.

Dr. Cohen pointed out that during the course of the treatment for his right knee, Petitioner would have been less active since he was not working.

Dr. Cohen opined that alcohol use is a pre-disposing factor with regard to avascular necrosis (AVN) and that Dr. Reilly's records show that Petitioner stated he consumed possibly 6 drinks a week or more. Petitioner testified that one of his hobbies is wine collecting and sampling.

Dr. Domb testified that alcohol use is correlated with the development of AVN.

The Arbitrator gives great weight to the fact that at the time Petitioner first developed pain in his right hip, there is no concurrent medical record in which Petitioner attributes such complaints to any of the activities he performed in physical therapy, including the hamstring-stretching exercises he performed while using the flexinator. Petitioner testified that he experienced excruciating pain is his right hip when he used the flexinator. However, such testimony is not supported by the treating records.

The Arbitrator questions Dr. Cohen's opinion that no physical therapy exercise could have brought about symptomatology with respect to AVN. After all, Petitioner began performing weight-bearing exercises on February 28, 2012. Such exercises included single leg balancing exercises and step downs as well as the use of the retro treadmill and the elliptical machine. Moreover, one of Amy Weber's long-term goals, as stated on March 14, 2012, was to increase Petitioner's right hip and knee strength to 5/5.

Yet, the Arbitrator finds that Petitioner lacks credibility.

Therefore, the Arbitrator concludes that Petitioner failed to prove that that he sustained an injury to his right hip while he was undergoing physical therapy for his right knee and further concludes that the current condition of ill-being of Petitioner's right hip is not causally related to the accident of February 11, 2011. Accordingly, the Arbitrator denies Petitioner's claim for prospective medical care as it relates to the right hip and further denies Petitioner's claim for past, unpaid medical expenses as such expenses relate to the right hip.

With regard to Petitioner's low back condition, the Arbitrator finds:

On August 21, 2012, Dr. Markarian examined Petitioner and then wrote, *inter alia*, the following:

> "James is here for followup evaluation. He is status post right knee resurfacing. He still has hamstring issues. I think it is from his pelvic obliquity. He is tender over the right SI joint and he is oblique. This has altered his length-tension relationship of his hamstring. These are all cumulative affects (sic) of not being treated for almost a year with his knee and his antalgic gait. He has developed all these issues preoperatively. His knee right now is good. He has good range of motion. His strength is good, but he has significant hamstring issues secondary to pelvic obliquity and SI joint dysfunction."

On November 12, 2012, Dr. Wehner examined Petitioner. By the time Petitioner saw Dr. Wehner, he made no complaints of low back pain. Dr. Wehner opined that all of the findings on the MRI were of a degenerative nature, and there was no specific herniated disc or impingement of the nerves. Dr. Wehner concluded that Petitioner did not have a back problem and he did not complain of back pain. He could touch his toes during the clinical exam and his neurological exam was normal. The problems that Petitioner demonstrated to her, Dr. Wehner testified, were related to the knee and had no relationship to the back. She testified that clearly Petitioner had a problem with hamstring tightness.

The September 5, 2012 and October 3, 2012 injections to Petitioner's sacral and lumbar spine provided some measure of pain relief.

On December 27, 2012, Amy Weber noted that Petitioner has bilateral *genu varum*.

The Arbitrator finds the opinions of Dr. Markarian to be more persuasive than those of Dr. Wehner.

Therefore, the Arbitrator concludes that Petitioner has proved that that he sustained an injury to his low back as a result of pelvic obliquity and further concludes that the current condition of ill-being of Petitioner's low back is causally related to the accident of February 11, 2011.

In support of his decision with regard to issue (J) "Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?", the Arbitrator concludes as follows:

The Arbitrator finds that, in accordance with Section 8(a) and subject to Section 8.2 of the Act, Petitioner is entitled to an amount equal to the sum of the outstanding medical bills for the reasonable and necessary medical services for Petitioner's right knee and low back. Accordingly, Respondent is liable to Petitioner for medical expenses related to services rendered by Joliet Radiological S.C. in the amount of $325.00, Naperville Medical Imaging for $2,284.00, Accredited Ambulatory for $14,096.35, and Windy City Anesthesia for $1,307.00, in accordance with Section 8(a) and subject to Section 8.2 of the Act.

The Arbitrator specifically denies the medical bills for treatment to Petitioner's right hip. Such bills include:

(1) The $4,992.00 bill of Dr. Domb/Hinsdale Orthopaedics for office visits of November 8, 2012, November 26, 2012 and December 13, 2012, as well as for the November 15, 2012 diagnostic injections via ultrasonically guided needles to the right and left hips. (PX6)

(2) The $5,752.00 bill for physical therapy treatment for Petitioner's right hip at Orthopedic Associates of Naperville after December 27, 2012 (DOS 1/3/13 – DOS 2/13/13).

Brian Cronin, Arbitrator

6-15-2016
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jason Loftis,

Petitioner,

vs.

NO: 11 WC 12670

17IWCC0320

Euro-Tech Cabinetry,

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, appellate court remand, 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 14, 2015, is hereby affirmed and adopted.

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

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

17IWCC0320

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

DATED: MAY 25 2017
TJT:yl
o 5/16/17
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LOFTIS, JASON
Employee/Petitioner

Case# **11WC012670**

EURO-TECH CABINETRY
Employer/Respondent

17IWCC0320

On 10/14/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2531 BRUGGEMAN HURST & ASSOC
ALAN R BRUGGEMAN
20012 WOLF RD SUITE 200
MOKENA, IL 60448

1120 BRADY CONNOLLY & MASUDA PC
MATTHEW P SHERIFF
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

17IWCC0320

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JASON LOFTIS
Employee/Petitioner

v.

EURO-TECH CABINETRY
Employer/Respondent

Case # 11 WC 12670

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica A. Hegarty**, Arbitrator of the Commission, in the city of **Geneva**, on **June 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. ☒ 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 **11/23/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$35,000.00**; the average weekly wage was **$600.00**.

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 **$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 the Petitioner failed to prove by a preponderance of the credible evidence that his current condition of ill-being relative to his low back and knee are causally related to the accident of November 23, 2010. This finding was previously made by Arbitrator O'Malley when the case was tried before him and affirmed by the Illinois Workers' Compensation Commission, Circuit Court of DuPage County, and Illinois Appellate Court. Therefore, the Petitioner's claim for compensation is denied and no benefits are awarded.**

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

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

Signature of Arbitrator

10-12-15
Date

OCT 14 2015

BEFORE THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

JASON LOFTIS,	)	
	)	
Petitioner,	)	17IWCC0320
	)	
vs.	)	**No. 11 WC 12670**
	)	
EURO-TECH CABINETRY,	)	
	)	
	)	
Respondent.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

History of the Case

This case was initially tried before Arbitrator O'Malley in Wheaton, Illinois on August 8, 2012. The Arbitrator rendered a Decision awarding no benefits to the Petitioner finding that the Petitioner failed to prove that his current conditions of ill-being relative to his low back and right knee were causally related to the November 23, 2010 work accident.

The Petitioner appealed the Arbitration Decision to the Illinois Workers' Compensation Commission who affirmed and adopted the Arbitrator's decision on November 30, 2012. (RX. 2.)

The Petitioner appealed the Commission Decision to the Circuit Court of DuPage County who affirmed the Commission Decision.

The Petitioner then appealed the Circuit Court's decision to the Appellate Court of Illinois. The Second District held that decision finding that Petitioner's current condition of ill-being was not causally related to the accident of November 23, 2010, was not against the manifest weight of the evidence and was therefore affirmed. (RX. 1.)

The case was remanded by the Appellate Court to the Arbitrator for "further proceedings regarding any additional TTD benefits and to determine the nature and extent of the claimant's permanent injuries, if any." (Id.) The Arbitrator notes that the initial hearing did not address those issues specifically as the case was initially tried on a Section 19(b-1) basis.

At the arbitration hearing held on June 10, 2015, the Petitioner testified that since the previous hearing, he obtained several positions through Dependable Staffing and was able to satisfy the work requirements, though sometimes "slowly," and was terminated from each position when the employer "found out about" his prior injury. (T. at pages 44-46.)

The Petitioner also introduced evidence, including medical treatment records regarding his treatment with Dr. Templin since the previous hearing, and also a deposition transcript regarding Dr. Templin's testimony that was taken on April 17, 2015. (PX. H.)

The opinions expressed by Dr. Templin in his testimony via deposition was that the Petitioner requires surgery for his low back condition, the same opinion that he rendered at the initial hearing of this matter that was subject to the prior Decisions of Arbitrator O'Malley, Illinois Workers' Compensation Commission, Circuit Court of DuPage County, and Appellate Court of Illinois.

The deposition transcript of the respondent's examining expert, Dr. Avi Bernstein, was also entered into evidence. (RX. 3.) Dr. Bernstein testified to the contents of his report that were in evidence at the arbitration hearing, namely that the Petitioner may have suffered some sort of back strain from the original incident, but it was not the cause of any continuing problems or necessitated by any additional treatment.

Conclusions of Law

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

Arbitrator O'Malley found that Petitioner failed to prove by a preponderance of the credible evidence Petitioner's current condition of ill-being relative to his low back and right knee were causally related to the accident of November 23, 2010. (RX. 2.) Accordingly, the Petitioner's claim for compensation was denied and no benefits were awarded.

The arbitration decision was appealed to the Illinois Workers' Compensation Commission who unanimously affirmed Arbitrator O'Malley's Decision with regard to the lack of causal connection. (RX.2.)

Following an affirmation of the Commission's Decision by the Circuit Court of DuPage County, the Petitioner appealed the case to the Appellate Court of Illinois. The Appellate Court rendered a Decision which was filed on July 7, 2014, unanimously affirming the Decision of the lower court made by Judge Bonnie Wheaton as well as the Decisions of the Arbitrator and Illinois Workers' Compensation Commission.

It is well-settled that the Petitioner has the burden to prove each and every element of the claim in order to receive benefits. *A.M.T..C. of Illinois, Inc. v. Industrial Commission*, 77 Ill.2d 482, 392 N.E.2d 884 (1979). In this instance, as noted above, the Petitioner had multiple opportunities to convince the Arbitrator, Commission, Circuit Court, and Appellate Court that a causal connection existed between the accident and the Petitioner's current complaints. The Petitioner was unable to convince any of these bodies of that fact.

The Arbitrator finds that since an essential element of the case was not proven by the Petitioner, an award of benefits with respect to permanency is not appropriate. In addition, it is not appropriate for the issue of causal connection to be reopened after it has already been tried before an Arbitrator, the Illinois Workers' Compensation

Commission, the Circuit Court, and the Appellate Court. Therefore, the Arbitrator finds that the Petitioner failed to prove a causal connection between his current condition and the accident of November 23, 2010.

K. What temporary benefits are in dispute? (TTD)

As noted above, the Arbitrator has found that there is no causal connection between the Petitioner's current complaints and the incident of November 23, 2010. Because the Petitioner has failed to provide an essential element of this case, no temporary total disability benefits are awarded.

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

As noted above, the Arbitrator has found that there is no causal connection between the accident of November 23, 2010, and the Petitioner's current complaints. Because an essential element of the case failed to be proven by the Petitioner, no award of benefits is appropriate.

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

Esequiel Iracheta,
Petitioner,
vs.

17IWCC0321

NO: 09 WC 20467
14 WC 10550

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 28, 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.

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

DATED: MAY 25 2017
KWL/vf
O-5/16/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0321

IRACHETA, ESEQUIEL
Employee/Petitioner

Case# 09WC020467

14WC010550

CITY OF CHICAGO
Employer/Respondent

On 3/28/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.44% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4128 RUBENS & KRESS
ROBERT B PAWLOWSKI
134 N LASALLE ST SUITE 444
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
CHRISTOPHER L JARCHOW
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

17IWCC0321

ESEQUIEL IRACHETA
Employee/Petitioner

Case #09 WC 20467
#14 WC 10550

V.

CITY OF CHICAGO
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on February 29, 2016. After reviewing all of the issues, the stipulations of the parties and the evidence, it is hereby found and ordered as follows:

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 September 14, 2007, and November 23, 2012, the respondent was operating under and subject to the provisions of the Act. The dates are the subject matters of claim #09 WC 20467 and 14 WC 10550, respectively.

- On those dates, an employee-employer relationship existed between the petitioner and respondent.

- Timely notice of the accidents was given to the respondent.

- In the year preceding the injuries, the petitioner earned $61,945.56 and $69,930.13, respectively; the average weekly wages were $1,191.26 and $1,344.81, respectively.

- At the time of injuries, the petitioner was 54 and 59 years of age, single with no children under 18.

- The petitioner agreed that the respondent is not liable for any medical services provided to the petitioner for claim #14 WC 10550.

ORDER:

- The respondent shall pay the petitioner the sum of $712.55/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 man as a whole for claim #14 WC 10550.

- The respondent shall pay the petitioner compensation that has accrued from November 23, 2012, through February 29, 2016, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for his lumbar spine from November 23, 2012, through March 20, 2014, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his cervical spine and other conditions were not related to the November 23, 2012, work injury and are 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.

- The petitioner's request for benefits for claim #09 WC 20467 is denied and the claim is dismissed.

- The petitioner's request for penalties and fees is denied.

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

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

Robert E. Williams

Signature of Arbitrator

March 28, 2016
Date

MAR 2 8 2016

FINDINGS OF FACTS:

The petitioner, a tree trimmer for the respondent's forestry bureau, seeks benefits for an incident on September 14, 2007, which is the subject matter of claim #09 WC 20467. There are no emergency, urgent or other medical records in evidence for any complaints, symptoms or medical care contemporaneous with September 14th.

On January 17, 2008, Dr. Maday performed a right knee arthroscopy and partial medial meniscectomy on the petitioner at Mercy Hospital. An MRI of the petitioner's left shoulder at Mercy Hospital on June 10, 2008, revealed moderate to severe tendinopathy of the distal supraspinatus and anterior infraspinatus with a suggestion of a full-thickness pinhole tear of the supraspinatus tendon versus a partial-thickness tear. Dr. Gregory Nicholson of Midwest Orthopaedics at Rush evaluated the petitioner and on July 9, 2008, opined that a January 2008 MRI revealed a high signal throughout the subacromial bursa and a small full-thickness rotator cuff tear. He noted that his examination revealed a marked positive impingement and Yergason sign and Speed test. On September 29, 2008, Dr. Nicholson performed a left shoulder arthroscopic rotator cuff repair and subacromial decompression at Rush Oak Park Hospital. Dr. Nicholson noted on February 17, 2009, that the petitioner had full rotation and 5/5 strength but needed work conditioning. A lumbar MRI on April 2, 2009, revealed a broad-based left paracentral disc herniation at L5-S1 with no evidence of nerve root compression, a circumferential disc bulge at L4-5 and facet arthrosis.

On April 20, 2009, Dr. Raab evaluated the petitioner's right knee and opined that a right knee MRI on November 8, 2007 showed no evidence of a medial meniscal tear. On May 11, 2009, Dr. Kern Singh at Midwest Orthopedics at Rush evaluated the

petitioner's back and opined that an April 2009 lumbar MRI revealed a loss of disc height at L4-5 and L5-S1 with disc space collapse and bilateral facet arthropathy causing mild to moderate central and foraminal stenosis, left greater than right, at L4-5 and L5-S1. His diagnosis was degenerative disc disease and spinal stenosis at L4-5 and L5-S1. Dr. Singh recommended physical therapy for four weeks. After four weeks of therapy, on June 8, 2009, Dr. Singh noted persistent complaints of left leg and left-sided buttock pain and recommended epidural steroid injections. On June 15, 2009, Dr. Singh reiterated his recommendation for epidural injections and released the petitioner with light-duty restrictions.

The petitioner started care at Fullerton Occupational Medicine & Urgent Care on January 12, 2010, for blood pressure and other medical problems. He reported low back pain among other problems on February 19, 2010. A cervical MRI on August 11, 2010, revealed a central subligamentous C3-4 disc herniation indenting the anterior aspect of the thecal sac, a central subligamentous C4-5 disc herniation indenting the anterior aspect of the thecal sac, a broad left-sided C5-6 disc herniation indenting the anterior aspect of the thecal sac and a concentric bulge at C6-7. An EMG test in August 2010, revealed left C5-C6 and left L5-S1 radiculopathy. The doctor's impressions on August 20, 2010, were cervical and lumber herniations. Dr. Sheldon Lazar evaluated the petitioner on July 29, 2011, and opined that the petitioner should have a permanent 25-pound lifting restriction due to his cervical and lumbar conditions. A lumbar MRI on January 3, 2012, revealed mild/moderate spinal canal and moderate bilateral foraminal stenosis at L5-S1, severe spinal canal and bilateral foraminal stenosis at L4-5, a left posterolateral disc herniation

at L5-S1 with moderate right and severe left foraminal stenosis, severe stenosis of the left lateral recess and compression on the traversing left S1 nerve root.

The petitioner seeks benefits for an incident on November 23, 2012, which is the subject matter of claim #14 WC 10550. On January 4, 2013, the petitioner saw Dr. Theodore Fisher of Illinois Bone and Joint Institute and reported feeling a snap in his back lifting a limb on November 23, 2012. He reported having immediate pain, radiating pain in his left lower leg, lateral thigh, leg and foot, numbness in his toe and cramping in his calf. He also reported waxing and waning symptoms and the use of Naproxen and cold packs. The diagnosis was a disc herniation at L5-S1 and L4-L5, for which medication, home exercise and physical therapy was recommended. On February 4, 2013, an epidural steroid injection was recommended.

On June 24, 2013, the petitioner saw Dr. Avi Bernstein at The Spine Center for back and neck pain and reported increased low back pain after bending to pick up a branch on November 23, 2012. Dr. Bernstein opined that a January 13, 2012, MRI demonstrated some degenerative changes associated with bulging from L3 to S1 and left-sided bulging at both L4-5 and L5-S1. On October 3, 2013, Dr. Bernstein opined that MRIs on July 1, 2013, showed minor disc bulging and some impingement of the anterior cervical cord without spinal cord compression at C4-5; and multilevel degenerative changes from L3 to S1 with disc space narrowing, especially at L4-5 and L5-S1, a left-sided disc protrusion/herniation at L5-S1 and a central disc protrusion contributing to spinal stenosis at L4-5. Dr. Bernstein opined that the cervical findings were benign and recommended lumbar epidural steroid injections. The petitioner received a left L5 and S1 transforaminal epidural injection on December 18, 2013, from Dr. Noren. The petitioner

reported benefit from the injection on January 23, 2014. He was given a second injection on February 10, 2014. On March 20, 2014, the petitioner's only complaint was his neck pain with radiation down his left arm. An MRI on May 12, 2014, revealed multilevel degenerative changes from C4-C6 with no abnormal cord signal. Dr. Bernstein opined on May 29, 2014, that there was no obvious cord compression noted on the MRI and that the petitioner's symptoms were controlled with Tramadol. Dr. Bernstein noted that he was not recommending surgery and that the petitioner was at maximum medical improvement. A functional capacity evaluation on July 22, 2014, revealed that the petitioner was able to function at the medium physical demand level. It was noted that the petitioner could lift 62.8 pounds occasionally and 41.2 pounds above his shoulders and that his job requires a heavy physical demand level. On August 19, 2014, Dr. Bernstein released the petitioner with a medium level demand pursuant to the FCE. The petitioner saw Dr. Nicholson on July 15, 2015, and reported a re-injury to his right shoulder during an FCE in August 2014. The doctor noted that x-rays showed a significant bone spur on the distal aspect of his AC joint. Dr. Nicholson recommended an MRI and no work.

Vocamotive assisted the petitioner with some basic computer skills, creating a resume, beginning a job search and obtaining some training for security work. On October 5, 2015, the petitioner obtained a security guard position with U.S. Security and currently works at an entrance post of a bank. The petitioner is still employed and had finished his probational period.

FINDING REGARDING 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 failed to prove that he sustained an accident on September 14, 2007, arising out of and in the

course of his employment with the respondent. There are no contemporaneous medical records in evidence for a work accident on September 14, 2007. The petitioner's medical records do not support his testimony of any need for emergency, urgent or immediate medical care for the treatment of his right knee, left shoulder, lumbar spine or neck on September 14, 2007. It is not believable that the petitioner had multiple and severe injuries to his body without some debilitating problems or symptoms that required him to seek medical care. Without medical evidence of his complaints, symptoms and report and description of an injury to support his testimony and the clinical examination, medical assessment and findings and/or diagnostic results, the evidence is not sufficient to establish work injuries to his right knee, left shoulder, lumbar spine and neck on September 14, 2007. The petitioner's request for benefits for claim #09 WC 20467 is denied and the claim is dismissed.

Based upon the testimony and the evidence submitted, the petitioner proved that he sustained an accident on November 23, 2012, arising out of and in the course of his employment with the respondent. The petitioner saw Dr. Theodore Fisher on January 4, 2012, and reported feeling a snap in his back lifting a limb on November 23, 2012.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for his lumbar spine from November 23, 2012, through March 20, 2014, was reasonable and necessary and is awarded. The petitioner received left L5 and S1 transforaminal epidural injections on December 18, 2013, and February 10, 2014. On March 20, 2014, the petitioner only complained of neck pain with radiation down his left arm. The medical care rendered the petitioner for his

cervical spine and other conditions were not related to the November 23, 2012, work injury and are denied.

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

Based upon the testimony and the evidence submitted, the petitioner proved that the current condition of ill-being with his lumbar spine is only partially causally related to the work injury on November 23, 2012. The petitioner had a pre-existing degenerative lumbar condition with herniations at L5-S1 and L4-5 that was temporarily aggravated by the November 23, 2012, work injury. The lumbar MRIs on January 3, 2012, and July 1, 2013, were essentially the same with regard to the herniation at L5-S1 and the disc protrusion at L4-5. Dr. Jay Levin opined on July 23, 2014, that the lumbar MRIs showed no significant change in the petitioner's anatomy. Also, on March 20, 2014, the petitioner only complained of neck pain after a second left transforaminal epidural injection at L5-S1.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

Based on the findings, the petitioner is not entitled to temporary partial disability benefits. He did not lose any time off of work after November 23, 2012, and is not entitled to any temporary total disability benefits for claim #14 WC 10550.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner failed to prove that he is entitled to a wage differential award pursuant to Section 8(d)1 of the Act. The petitioner sustained only a temporary aggravation of his pre-existing lumbar condition as a result of the November 23, 2012, work injury.

There is no AMA impairment rating or evidence concerning the impact of the petitioner's lumbar injury in regard to his occupation, age or future earning capacity, as delineated in Section 8.1(b)(i) through (iv) of the Act, nor can any effect or weight be reasonably inferred from the evidence. Regarding Section 8.1(b)(v), the petitioner complains of pain down his right side, limited lifting ability, limited and difficulty with walking and problems with using stairs. The treating medical records reflect that the petitioner did not have any complaints regarding his lumbar spine after March 20, 2014. The weight given Section 8.1(b)(v) is 1% loss of use of the man as whole for the temporary aggravation of the petitioner's pre-existing lumbar condition.

The respondent shall pay the petitioner the sum of $712.55/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 man as a whole for claim #14 WC 10550.

FINDING REGARDING PENALTIES AND FEES:

The petitioner failed to prove that he is entitled to §19(l) and §19(k) penalties and fees. There were genuine disputes regarding the issues of accident and causal connection for both claims. The petitioner's request for penalties and fees is denied.

STATE OF ILLINOIS	)	☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Hollins,
Petitioner,

vs.

17IWCC0322

NO: 15 WC 1428

JP Morgan Chase & Co ,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 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.

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: MAY 25 2017
KWL/vf
O-5/16/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0322

HOLLINS, MARY
Employee/Petitioner

Case# **15WC001428**

14WC016420

J P MORGAN CHASE & CO
Employer/Respondent

On 2/29/2016, 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 0.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0365 BRIAN J McMANUS & ASSOC LTD
30 N LASALLE ST
SUITE 2126
CHICAGO, IL 60602

2389 GILDA & COGHLAN LTD
RYAN REGAN
901 W BURLINGTON
WESTERN SPRINGS, IL 60558

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

17IWCC0322

MARY HOLLINS
Employee/Petitioner

v.

J. P. MORGAN CHASE & CO.
Employer/Respondent

Case # **15** WC **001428**

Consolidated cases: **14 WC 016420**

An *Application for Adjustment 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 **Wheaton**, on **November 23, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0322

FINDINGS

On **October 27, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$66,123.72**; the average weekly wage was **$1,271.61**.

On the date of accident, Petitioner was **43** 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 **$19,256.47** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$19,256.47**.

Respondent is entitled to a credit of **$76,688.09** under Section 8(j) of the Act.

ORDER

The Arbitrator finds a causal connection between Petitioner's right knee condition and the slip and fall accident of October 27, 2014 through October 9, 2015, but not thereafter.

Respondent shall pay reasonable and necessary medical services related only to Petitioner's right knee condition, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $76,688.09 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $847.66/week for the period commencing October 27, 2014 through October 9, 2015, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $19,256.47 for temporary total disability benefits that have been paid

Petitioner's request for penalties/fees is denied.

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

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

Jessica C. Myatt

Signature of Arbitrator

2/22/16
Date

FEB 29 2016

STATE OF ILLINOIS)
) SS
DUPAGE COUNTY)

ILLINOIS WORKERS' COMPENSATION COMMISSION

MARY HOLLINS, Petitioner,	)	**17IWCC0322**
v.	)	Case No: **15 WC 001428** 14 WC 16420
JP MORGAN CHASE & CO. Respondent,	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

This matter was presented for hearing before Arbitrator Jessica A. Hegarty on November 23, 2015 in Wheaton, Illinois.

Petitioner has two cases that were consolidated for the purposes of trial, the Arbitrator will issue separate decisions for each case. (Arb. Ex. 1)

The issues in dispute with respect to 15 WC 001428 are:

- Accident
- Causal connection
- Medical bills
- TTD
- Penalties/Fees

FINDINGS OF FACT

Petitioner testified that she worked for Respondent since December 28, 2009 as a mortgage banker. On April 23, 2014, Petitioner was involved in an undisputed work accident (14 WC 16420) when she tripped over two boxes that were on the floor. (T. pp.12-13) Petitioner testified that she twisted her entire right side resulting in injuries to her right knee, right ankle and lower back. Petitioner treated for issues related to her right knee and ankle and was returned to work on October 27, 2014. Petitioner testified that upon her return to work, that day, she was wearing a right knee brace and using a cane. (T. pp.20-21) According to her testimony, as she was returning to her cubicle from the washroom, her right knee buckled and gave out causing her to fall forward when she landed on her elbows, striking her right knee. (T. pp.22, 71-72) Only the right knee struck the ground in addition to the forearms. (T. p.73) She felt a sharp pain in her lower back following the fall on that same day. (T. pp.22, 75) She described the

pain back pain as very sharp and of a type she had never felt before as it was the worst pain she had ever experienced. (T. pp.23, 44, 75) Petitioner noted that she had pain travel down the back of her right leg with more tingling and numbness in her toes. (T. p.23)

Downers Grove Fire Department records noted that paramedics arrived at Petitioner's workplace on October 27, 2014 where Petitioner reported she was walking when her right knee buckled and she went to the ground. Petitioner stated that "only her knee hit the ground and nothing else". Her right knee was noted to be swollen and Petitioner was unable to bare any weight on her right leg without knee pain. Petitioner was transported to Advocate Good Samaritan Hospital on that day are also Petitioner was taken to Advocate Good Samaritan Hospital where X-rays of the right knee and were negative for fracture or dislocation. She was diagnosed with an acute right knee sprain and contusion. (Px1A)

Petitioner was seen by Dr. Branovacki on October 31, 2014 when he examined her right knee, directed Petitioner to continue her pain medication and instructed Petitioner off of work. (T. p.36; Px3; Px2A)

Petitioner presented to Dr. Avula on November 6, 2014 concerning low back pain symptoms for the past two days. (T. pp.77-78; Px6A) Petitioner denied any radiating pain down her legs. (Px6A) Dr. Avula's examination revealed Petitioner's lumbosacral pain was elicited by motion, and noted Petitioner's lumbosacral spine exhibited spasms of the paraspinal muscles, left greater than right. (Px6A) Dr. Avula prescribed an X-ray of the lower back and prescribed medication for muscle spasms. (T. pp.25 73-74; Px6A) Dr. Avula instructed Petitioner to call if pain traveled down her leg below her knee or if she experienced numbness in the leg, foot, groin or rectal area, or if her pain was not resolving in two weeks. (Px6A) The lumbar spine X-rays were unremarkable. (T. p.74; PX5A)

On December 2, 2014 Dr. Branovacki performed a right knee arthroscopy with chondroplasty of the medial femoral condyle and synovectomy. (Px5) Following her right knee surgery Dr. Branovacki informed Petitioner that there was no tearing in any of the ligaments inside the right knee and that the knee arthroscopy did "not show very much wrong." (T. pp.66, 70-71; Px3; Px2A)

On December 12, 2014, Dr. Branovacki could not explain why Petitioner complained of so much pain when the knee did not look that bad when he performed surgery. (Px3; Px2A) Dr. Branovacki referred Petitioner for an EMG of the right lower extremity. (T. pp.25-26; Px3)

Petitioner was seen on January 7, 2015 by Dr. Kim at Midwest Orthopedic Consultants for nerve conduction and EMG testing. (Px2A) Dr. Kim noted no clear electrodiagnostic evidence of right lumbosacral radiculopathy or diffuse neuropathy affecting the lumbar lower extremities. (Px2A)

On January 9, 2015, Dr. Branovacki referred Petitioner for a lumbar spine MRI. (Px3; Px2A) On February 5, 2015 the lumbar spine MRI revealed mild scoliosis and spondylosis changes with minimal restrolisthesis at L3-4 and multilevel spinal, lateral recess and neural foraminal stenosis. (T. p.84; Px3A)

Petitioner testified that Dr. Branovacki referred Petitioner to Dr. Lim, a back specialist. (T. pp.26, 37-38) Dr. Lim examined Petitioner on March 4, 2015, an exam that was mostly benign except for subjective tenderness upon palpation throughout the paraspinal musculature bilaterally as well as midline through the lumbar spine. (Px2A) Dr. Lim indicated that Petitioner was not a candidate for shots or surgery for her back, and he highlighted that Petitioner had 3 out of 5 Waddell signs positive. (T. pp.82-83; Px2A) Dr. Lim recommended Petitioner undergo a FCE. (Px2A)

Petitioner returned to Dr. Avula on March 5, 2015 for follow-up on her back pain. (T. pp.80-81; Px6A) Dr. Avula noted a history of back pain since November of 2014. (T. p.81; Px6A) Petitioner denied having any radiating symptoms down her legs. (Px6A)

Petitioner testified that she did not undergo the FCE and returned to Dr. Avula to secure a new referral to Dr. Mekhail as Petitioner complained of severe pain radiating down her leg and lower back. (T. p.27) Dr. Avula's records do not reflect that she ever referred Petitioner to Dr. Mekhail and Petitioner did not return to Dr. Avula following her March 5, 2015 exam until April 15, 2015. (Px6A)

Petitioner first presented to Dr. Mekhail on March 23, 2015 with complaints of back pain radiating down the right leg to the thigh with numbness and pain. (T. p.28; Px3A) Dr. Mekhail noted that Petitioner had a negative straight leg raise and intact sensation, good posture in her back and some discomfort with range of motion of her back but none with range of motion of her hip or ankle. (Px3A) X-rays of the lumbar spine revealed good alignment of the spine with no bony pathology. (Px3A) Dr. Mekhail noted that Petitioner's MRI and EMG testing was unremarkable. (Px3A) He ordered a CT myelogram to confirm whether there existed any facet hypertrophy or bone scar. (Px3A)

On April 1, 2015, Petitioner presented to orthopedic surgeon, Dr. Steven Mash, for a Independent Medical Examination ("IME") at Respondent's request. (T. p.30; Rx1) Dr. Mash noted that Petitioner's subjective complaints were in excess of the objective findings and diagnosed Petitioner with a low back sprain/strain and status post knee arthroscopy with patellar chondroplasty. (T. p.84; Rx1) He found Petitioner revealed significant positive Waddell signs on examination, and the back examination revealed findings for symptom magnification. (Rx1) Dr. Mash further opined that Petitioner's current condition of ill being did not relate to either the April 23, 2014 or October 27, 2014 incidents and that Petitioner should be considered at MMI without impairment. (Rx1) Dr. Mash did discuss the FCE recommendation by Dr. Lim but opined that Petitioner was able to return to work without restriction. (Rx1) He also noted that all of Petitioner's treatment to date was appropriate and necessary. (Rx1)

On April 2, 2015, Petitioner underwent a CT of the lumbar spine post myelogram at Christ Hospital revealing mild degenerative disc disease at L3-4, L4-5 and L5-S1. (T. pp.40, 100-101; Px3A; Px4A) It was further noted that the exiting nerve root at L5-S1 on the right appeared to be in contact with the posterior lateral disc osteophyte complex. (Px3A; Px4A)

Petitioner returned to Dr. Avula on April 15, 2015 complaining of low back pain with some radiation to the right leg. (Px6A) Petitioner noted that her pain was worsened with activity including walking and standing for too long. (Px6A)

On May 4, 2015, Dr. Mekhail informed Petitioner that she was neurologically intact; however, Petitioner told Dr. Mekhail that she "wanted something done." (T. pp.84-85; Px3A) Dr. Mekhail ordered Petitioner undergo epidural steroid injections for the back. (Px3A) Four days later on May 8, 2015, Dr. Hussain performed a lumbar transforaminal injection at L4-5 and L5-S1, her only injection. (T. p.40; Px3A)

On May 28, 2015, Dr. Branovacki referred Petitioner for a right knee MRI. (Px3; Px2A) He also ordered venous Doppler testing for the right calf. (Px2A)

On June 4, 2015, Dr. Hussain recommended Petitioner undergo a repeat lumbar transforaminal epidural steroid injection on the right at L4-L5 and L5-S1. (Px3A)

On June 8, 2015, the venous Doppler testing revealed no evidence of deep venous thrombosis of the right lower extremity. (Px6A)

On June 11, 2015, Dr. Mekhail advised Petitioner that she could undergo another epidural injection or undergo a decompression with foraminotomy at L4-5 and L5-S1. (Px3A) Dr. Mekhail noted that the surgery would be an outpatient procedure where the recovery is fairly fast without significant restriction afterwards. (Px3A)

On June 18, 2015, Dr. Branovacki noted that Petitioner's new MRI findings revealed mild chondromalacia of the knee while also noting that Petitioner's arthroscopic findings were minimal. The doctor recommended continuation of "rehab per protocol, then wean her off work restrictions, then go back to work hopefully light duty." (Px2A)

On July 22, 2015, Dr. Mash authored a records review report in which he reviewed Petitioner's myelogram and post-myelogram CT study and Doppler ultrasound. (Rx2) Dr. Mash confirmed his prior opinion that Petitioner's condition did not relate to either the April or October incident because Petitioner's subjective complaints were not supported by objective findings, Waddell findings were significantly positive during both his and Dr. Lim's examinations, and Petitioner exhibited signs of symptom magnification. (Rx2) Dr. Mash noted that the myelogram and post-myelogram CT study were essentially normal and did not provide objective support to Petitioner's complaints. (Rx2) Dr. Mash also noted that while he felt that a FCE would support the contention that Petitioner was at MMI, he felt that the need for a FCE was not causally related to either the injuries sustained from the April or October 2014 incidents. (Rx2)

Dr. Avula referred Petitioner to neuro surgeon, Dr. Martin Luken who saw Petitioner on August 3, 2015 for assessment and advice regarding her lower back injury, lumbar degenerative disease, and proposed scheduled surgical intervention. (T. p.83; Px6A) Dr. Luken reviewed the February 6, 2015 lumbar MRI scan, the April 2, 2015 lumbar myelogram, EMG and nerve conduction studies of her legs on January 7, 2015. Dr. Luken noted that Dr. Lim was not recommending surgery.

On exam, Dr. Luken noted Petitioner "has a somewhat exaggerated lumbar lordosis and walked with a profoundly antalgic gait and a cane." The doctor further noted she had "marked tenderness to deep palpation over her right sciatic notch and tenderness over her paraspinous musculature on both sides though I could detect no definite muscle spasm." The doctor discussed the "diagnostic and management ambiguities" related to her case. (T. p.83; Px6A) He informed Petitioner that he was "not confident that surgical intervention will reliably address her pain problem, though it certainly is a reasonable management consideration." (T. p.83; Px6A) Dr. Luken highlighted that Petitioner's case was complicated by significant secondary gain issues. (T. pp.83-84; Px6A) He also highlighted that Petitioner's protracted disability was another adverse prognostic feature of her case. (T. p.84; Px6A)

On August 18, 2015, Dr. Mekhail performed at Christ Hospital a decompression laminotomy and foraminotomy on the right at L4-5 and L5-S1 with a partial cystectomy for Petitioner's diagnoses of right L4-S1 stenosis, right lumbar radiculopathy and morbid obesity. (T. p.40; Px3A; Px4A)

Dr. Mekhail has prescribed Petitioner to undergo physical therapy and wear a back brace since performing surgery on her back. (T. p.44; Px3A) Physical therapy for the back began at Athletico Physical Therapy on September 9, 2015. (T. p.44; Px7A) Petitioner testified that at the time of hearing she was undergoing physical therapy one time per week and had undergone 15 of a prescribed 36 visits. (T. p.45)

On October 9, 2015, Petitioner returned to Dr. Branovacki complaining of increased right knee pain. (Px2A) Dr. Branovacki noted upon examination that Petitioner's right knee had no swelling, ecchymosis or deformity, had a full range of motion in all areas, 5/5 strength testing in all areas, all intact sensations, a normal gait pattern with no limp and mild medial patellar facet tenderness. (Px2A) Dr. Branovacki diagnosed Petitioner with pain in her right knee and recommended a course of Orthovisc injections. (Px2A)

Petitioner testified that she last saw Dr. Mekhail on November 9, 2015 at which time he prescribed additional therapy and valium as Petitioner was continuing to have muscle spasms in the buttock area in the lower back and tingling in her toes. (T. p.48) Petitioner testified that on November 20, 2015 she received a knee gel injection to the right knee performed by Dr. Branovacki. (T. p.46) This was her second of four planned injections. (T. p.47)

Petitioner testified that she is currently 44 years-old, is 5 feet 7 inches tall and weighs between 215 to 220 pounds. (T. p.63) Petitioner testified that the August, 2015 surgery

relieved some of her pain, but not all of it, and that she was experiencing muscle spasms in the buttock area in the lower back and tingling in her toes since the surgery. (T. p.48)

Petitioner testified that she is currently unable to stand for more than 15 or 20 minutes. (T. p.59) She also testified that it is difficult for her to bend and that she cannot lift anything (T. pp.59-60) Petitioner stated that when walking she continues to experience a lot of pain in her right knee and lower back. She testified that she was unable to work because she was unable to sit for a long time, she was unable to drive long distances and was still having numbness in the toes and lower back. (T. p.60)

Petitioner testified that her job required her to sit in her chair all day, every day. (T. p.87) Respondent introduced into evidence a copy of the job description for Petitioner's Mortgage Banker position. (Rx8) The job description paints the Mortgage Banker position as a sedentary one, although it does not make it mandatory for Petitioner to sit at her desk all day, every day. (Rx8) Upon cross-examination Petitioner admitted that her job description did not provide that sitting at her desk all day, every day, was mandatory for Petitioner to perform her job. (T. pp.88-89, Rx8) On August 26, 2014, the physical therapist at Midwest Orthopedic Consultants noted that Petitioner stated that the most challenging part of her work was walking from the parking lot to her cubicle. (T. p.91; Px3)

Petitioner admitted that there does not exist any findings in any medical records between April 23, 2014 and October 27, 2014 that reveal she had any complaints relative to her back. (T. p.85)

Petitioner testified that she received a November 16, 2015 letter from Respondent's Human Resources Department indicating that she would be terminated effective December 1, 2015. (T. pp.55-56)

CONCLUSIONS OF LAW

In support of the Arbitrator's decision that Petitioner sustained a work related accident on April 23, 2014, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner sustained an accident at work on October 27, 2014 which resulted from the weakened condition of Petitioner's right knee as a result of her earlier accident. (See Arbitrator's Decision in Case No. 14 WC -16420) This fall was witnessed by two co-employees, Brian Gage and Herbie Alvarez. (T. 34) Petitioner was on her way back from the employee washroom when her right knee gave way suddenly and unexpectedly. Petitioner's problems with her right knee started with her accident of April 23, 2014. Prior to that, Petitioner had no treatment or injuries to the right knee. (T. 12)

Petitioner's supervisor appeared at trial but was not called as a witness. The Supervisoe reportedly called an ambulance for Petitioner on the date of accident at issue.

The law with respect to an employee having a subsequent injury as a result of a weakened condition from a prior job-related accident and the weakened condition resulting therefrom is clear, namely,

> "Every natural consequence that flows from an injury that arose out of and in the course of workers' compensation claimant's employment is compensable unless caused by an independent intervening accident that brakes the chain of causation between a work-related injury and an ensuing disability or injury; that other incidents, whether work-related or not, may have aggravated the claimant's condition is irrelevant. S.H.A.820 ILCS 305/2" *Brian Vogel, Appellee vs. Industrial Commission, Et Al.* 354 Ill. App.3d 780, 821 N.E.2d 807, 209 Ill. Dec.495

When Petitioner returned to work on the accident date she was wearing a knee brace because of the instability in her right knee which resulted from her earlier accident of April 23, 2014. Dr. Nikil Verma, M.D., Respondent's Section 12 examiner, had indicated in his September 8, 2014 report on page 3 "at this point, based on the patient's job description, it is my opinion, she would be capable of performing her work activities primarily in a seated position. I would limit walking and standing to 1-2 hours per day on an intermittent basis." (Px7)

There is no evidence of an intervening accident or any other cause for Petitioner's fall at work on October 27, 2014. The evidence contained in the record supports a finding that this slip and fall resulted from the weakened condition in Mary's right knee which resulted from her accident of April 23, 2014 and for which she was actively treating at the time of this fall. At the time of this fall, surgery for the right knee had been discussed by Dr. Nikil Verma and the surgery was later performed by Dr. George Branovacki, M.D., on December 2, 2014. (See Petitioner's Exhibits #3 and #7)

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

In general, the Illinois Workers' Compensation Law holds that:

> "...an employee will not be denied benefits just because of a preexisting condition. Recovery is proper if it can be shown that the condition was aggravated by or accelerated by the employment. When a preexisting condition is present, a claimant must show that "a work-related accident 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 Commission*, 371 Ill.App.3d 882, 864 N.E.2d 266, 272, 309 Ill.Dec. 400 (5th Dist. 2007) Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003). Allowing a claimant to recover under such circumstances is a

> corollary of the principle that employment need not be the sole or primary cause of claimant's condition. *Land & Lakes Co. v. Industrial Commission*, 359 Ill.App.3d, 834 N.E.2d 583, 296 Ill.Dec. 26 (2d Dist. 2005); *St. Elizabeth's Hospital, supra.*"

With respect to Petitioner's back condition, the Arbitrator notes that Petitioner's testimony is contradicted by the contemporaneous medical records following her slip and fall accident. Petitioner testified she felt a sharp pain in her lower back following the fall on the date of accident. (T. pp.22, 75) She described the pain as very sharp and of a type she had never felt before as it was the worst pain she had ever experienced. (T. pp.23, 44, 75)

Despite the above testimony, the medical records from the Downer's Grove Fire Department and Good Samaritan Hospital from October 27, 2014 do not provide any complaints of back pain or discomfort nor did Petitioner complain of back pain or discomfort to Dr. Branovacki when she presented to him on October 31, 2014. When Petitioner finally presented to a medical professional concerning back complaints, she informed Dr. Avula on November 6, 2014 that she had low back pain symptoms *for the past two days.* Based on the above and the record considered as a whole, the Arbitrator finds that Petitioner has failed to sustain her burden with respect to her claimed back condition and the accident at issue.

Regarding Petitioner's knee, the Arbitrator finds that Petitioner suffered an aggravation and/or acceleration of her pre-existing right knee condition. Petitioner was treating for her right knee injury on the accident date, she was also wearing a knee brace and using a cane. On December 2, 2014 Dr. Branovacki performed a right knee arthroscopy with chondroplasty of the medial femoral condyle and synovectomy. (Px5)

With respect to the right knee condition, the Arbitrator notes that Petitioner is still actively treating with Dr. George Branovacki. She has had extensive physical therapy following her December 2, 2014 surgery as well as cortisone injections and now is undergoing knee gel injections from Dr. Branovacki. Dr. Branovacki's records call these injections Hyalcronic Acid Injections.

Petitioner testified that if these are unsuccessful she may require a knee replacement in the future. The Arbitrator did not see any notes from her treating surgeon regarding any prospective knee surgery. Although Dr. Branovacki has never released Mary to return to any type of work for her right knee injury, the Arbitrator notes:

- Following her right knee surgery Dr. Branovacki informed Petitioner that there was no tearing in any of the ligaments inside the right knee and that the knee arthroscopy did "not show very much wrong"; (T. pp.66, 70-71; Px3; Px2A)
- An EMG of Petitioner's lower extremities dated January 7, 2015 was essentially unremarkable;
- On June 18, 2015, Dr. Branovacki noted that Petitioner's new MRI findings revealed mild chondromalacia of the knee while also noting that

Petitioner's arthroscopic findings were minimal. The doctor recommended continuation of "rehab per protocol, then wean her off work restrictions, then go back to work hopefully light duty"; (Px2A)

- On October 9, 2015, Petitioner returned to Dr. Branovacki complaining of increased right knee pain. (Px2A) Dr. Branovacki noted upon examination that Petitioner's right knee had no swelling, ecchymosis or deformity, had a full range of motion in all areas, 5/5 strength testing in all areas, all intact sensations, a normal gait pattern with no limp and mild medial patellar facet tenderness. (Px2A) Dr. Branovacki diagnosed Petitioner with pain in her right knee and recommended a course of Orthovisc injections. (Px2A)

Based on the foregoing medical records from Petitioner's treating surgeon, the Arbitrator finds that the objective medical evidence supports a causal connection between Petitioner's knee condition and the slip and fall accident at issue through October 9, 2015, but not thereafter.

Were the medical services that were provided to Petitioner reasonable and necessary?

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

Petitioner's Exhibit 8A lists all of Petitioner's medical stemming from her October 27, 2014 accident. The Arbitrator having previously found accident and causation for Petitioner's fall of October 27, 2014 awards Petitioner only the medical contained in Exhibit #8A that relate to Petitioner's right knee treatment.

The Arbitrator grants Respondent an 8(j) credit for all amounts paid by the qualifying 8(j) group plan (pertaining only to treatment for Petitioner's right knee condition) and orders Respondent pursuant to the law to hold Petitioner harmless in any action brought by the group carrier to recoup any medical paid by the group carrier in error.

What temporary benefits are in dispute?

Having found accident and causation, the Arbitrator notes that Petitioner has been off work since the date of her second accident on October 27, 2014. Consistent with the above finding, the Arbitrator awards TTD from October 27, 2014 through October 9, 2015.

Should penalties or fees be imposed upon Respondent?

The pertinent question applicable to all of the Act's penalty provisions is whether the employer acted reasonably in failing to pay benefits. Avon Products, Inc. v. Industrial

Commission, 82 Ill.2d 297, 301 (1980) It is apparent that the intent of Sections 16, 19(l) and 19(k) is to implement the Act's purpose to penalize an employer who unreasonably, or in bad faith, delays or withholds compensation due an employee. USF Holland, Inc. v. Industrial Commission, 357 Ill.App.3d 798, 804 (2005) If an employer has a reasonable basis on which to contest liability, including the presence of reasonable, conflicting medical opinions in the case, sanctions generally will not lie. Avon Products, 82 Ill.2d at 302; USF Holland, 357 Ill.App.3d at 805. The test is whether the employer's reliance was objectively reasonable under the circumstances. Consolidated Freightways, Inc. v. Industrial Commission 136 Ill.App.3d 630, 483 NE2d 652 (1985); Electro-Motive Division v. Industrial Commission, 250 Ill.App.3d 432 (1993)

The Arbitrator adopts the findings above. Respondent terminated temporary total disability benefits on April 1, 2015, after Petitioner presented to Dr. Mash who noted that Petitioner's subjective complaints were in excess of the objective findings. He found Petitioner revealed significant positive Waddell signs on examination, and the back examination revealed findings for symptom magnification.

The Arbitrator finds that Respondent's reliance on the IME was reasonable and that Respondent's behavior does not rise to the level required by Illinois law with respect to penalties and/or fees.

STATE OF ILLINOIS	)	☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF WILLIAMSON	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Meyer,
Petitioner,
vs.

17IWCC0323

NO: 15 WC 8100

State of IL/Dept of Corrections,
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, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 10, 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.

DATED: MAY 25 2017
KWL/vf
O-5/22/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

17IWCC0323

MEYER, SCOTT
Employee/Petitioner

Case# **15WC008100**

ST OF IL DEPT OF CORRECTIONS
Employer/Respondent

On 11/10/2016, 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 0.53% 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:

0969 RICH RICH & COOKSEY PC
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0558 ASSISTANT ATTORNEY GENERAL
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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

NOV 10 2016

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)/8(a)

17IWCC0323

SCOTT MEYER
Employee/Petitioner

v.

STATE OF IL / DEPT. OF CORRECTIONS
Employer/Respondent

Case # **15** WC **08100**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **Herrin**, on **June 14, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the alleged date of accident, **December 2, 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.

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

In the year preceding the injury, Petitioner earned **$66,780.94**; the average weekly wage was **$1,284.42**.

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

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

Respondent 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 **$N/A**.

ORDER

The Petitioner has failed to prove that he sustained accidental injuries arising out of and in the course of his employment on December 2, 2014.

The Petitioner has failed to prove that his bilateral upper extremity conditions of ill being are causally related to his work duties with the Respondent.

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

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

Signature of Arbitrator

October 10, 2016
Date

ICArbDec19(b)

NOV 10 2016

STATEMENT OF FACTS

At the time of the hearing, the Petitioner was employed with Menard Correctional Center as a Laundry Manager 1, and had been for about a year. Hired in 1992, he had previously worked as a Correctional Officer (CO), from 1992 to 2008 in maximum security, and from 2008, until obtaining the laundry job, as a CO in medium security (MSU), all at Menard. He worked the day shift, 6:45 am to 3 pm. He testified that most inmate movement at Menard occurs during the day shift. Overtime could be voluntary or mandatory, and sometimes involved working double shifts. While in maximum security, the Petitioner testified that he spent the vast majority of his time working in the segregation unit, which essentially houses problem inmates. He performed bar rapping daily through 2008 for one gallery of 54 cells. The doors in segregation can be solid steel or open bars. In order to exchange materials and food, or to cuff and uncuff inmates in cells with solid doors, a 6 x 12 inch chuckhole to the cell is used. A Folger Adams key is used for these, which is significantly larger than a normal house key, and he would pull the chuckhole door down with the other hand. The Petitioner testified that chuckhole locks were old and didn't work smoothly, required forceful gripping, and that he would sometimes have to use both hands to turn the key. In segregation, cuffing and uncuffing of inmates was performed daily. Cell doors slide open as opposed to being hinged. A CO has to use a large key to take a door off deadlock, moving a large steel rod, and then use another key to turn the 2nd lock, sliding the door with the other hand. The Petitioner testified this requires lots of force and grip. As to the locks, he testified that not all of them worked smoothly. Some require both hands to turn the key, and he would also have to use his foot to "kick the door open".

During lockdown, the officers have to do the feeding, cleaning, trash, sweeping, etc that normally inmate workers perform. He testified the facility was on lockdown often, at one point for two straight years around 1996 or 1998. The Petitioner described how he used his hands and arms to perform shakedowns, which involved searching through the person and possessions of inmates. In his job in maximum security, the Petitioner testified that he has rapped bars, opened chuckholes, turned cell locks, etc. hundreds of thousands of times in his career. The Petitioner agreed that the solid steel doors in the segregation unit are not rapped, but testified that multiple galleries have doors with bars, and the steel doors still have windows with bars that have to be rapped.

In MSU, the Petitioner worked as the sole D Tunnel officer. D Tunnel is a long hallway, and the only back door access to the facility. A solid steel door must be opened with a 4" key, then another steel bar gate opens with a Folger Adams key. He would rap the bars daily, but this is done once and takes a minute. As this tunnel was the last point before access to the outdoors, he testified that the gates had to be opened hundreds of times per day, for anyone who needed to go in or out of the facility. The Petitioner testified he had to strip search every exiting inmate daily before they left for their work assignments, and he would do this on average 100 times a day.

The Petitioner testified that the medium security facility is much newer than the maximum security unit, but testified that some locks still did not work very well. He did testify that he put in a work order for the lock on the back door, noting "you couldn't hardly get it locked or unlocked at all", but he didn't state when this was or when or if it was repaired. The key that opens the front steel door in D-Tunnel is 4 times the size of a house key. The same key is used for doors to access the library, gym, etc. A Folger Adams key is used for the steel grate door, and the Petitioner testified it takes about a minute to bar rap that door, which is done once per shift. The Petitioner described the strip search process, noting no inmate could pass in the tunnel without being searched. His testimony indicated that inmates do not go through the steel grate door one at a time after strip search, but rather as a group. He does not handcuff inmates in D-Tunnel unless an inmate is being sent to segregation or the MSU is on lockdown, and he testified that there is hardly ever a lockdown there.

The Petitioner testified that he began to develop hand and arm symptoms in 2014. This included numbness and night waking with his hands and fingers numb. He initially sought care with his family physician, Dr. Fasnacht, on 11/14/14. Petitioner testified he reported a gradual onset of symptoms. The report notes he was there for a hypertension check up, noting he was diagnosed 3 years prior, but he also reported an 8 week history of gradual onset of pain and paresthesias in the bilateral hands. Part of the report notes symptoms in the last two fingers, worsened by wrist flexion and repetitive use. However, Dr. Fasnacht also noted the symptoms were in a "glove distribution" and diagnosed carpal and cubital tunnel syndromes bilaterally. The Petitioner was referred for an EMG/NCV and a neurology consult with Dr. Alam. (Px3).

Testing with Dr. Alam on 12/2/14 indicated moderately severe bilateral carpal tunnel syndrome and moderately severe bilateral cubital tunnel syndrome with no evidence of cervical radiculopathy. (Px4). Petitioner testified that this was the first time he had ever been tested for a compression neuropathy, and the first time he understood that he had a work-related condition. At his 1/6/15 follow up with Dr. Fasnacht, he was referred to orthopedic surgeon Dr. Young. (Px3).

Petitioner completed an incident report (Px6), dated 12/3/14, which indicated the diagnosis, and that his CTS was due to repetitive movement. It also states that the Petitioner has been assigned to D tunnel for over 4 years using Folger Adams keys to lock and unlock gates, bar rapping, and locking solid steel doors and numerous padlocks. The middle grill door has to be bar rapped every day, and has to remain locked so it is unlocked and relocked numerous times each day. It also states that this was reported to Major Lyerla. (Px6).

The Petitioner initially saw Dr. Young on 1/22/15. Noting the Petitioner is right handed, PAC Rennie took a history of Petitioner's symptoms (numbness, pain, loss of grip) being present for a few months, noting he was a CO and "frequently uses his hands to lock and unlock doors", and his symptoms are exacerbated by his job. The report states: "He states at work, he has used a steel pipe to lock. He also unlocks padlocks and closes steel bar gates." Examination indicated positive Tinel's and nerve compression at the bilateral wrists and elbows. (Px5). Dr. Young prepared an addendum which stated that the Petitioner's job duties over the past 5 years involved turning keys and shutting doors up to 100 to 200 times a day utilizing Folger Adams keys. He noted that Petitioner had been working at Menard for 23 years and that he had numbness and tingling with bar rapping. Despite not having undergone any conservative care, Dr. Young recommended bilateral surgeries (carpal tunnel release and ulnar nerve transposition), noting he felt it was unlikely that conservative care would offer any lasting benefit. The Petitioner was released to unrestricted work pending surgery. (Px5).

A hand questionnaire completed for Dr. Young and signed by the Petitioner indicates 100% of his work time is spent locking and unlocking steel doors and steel bar gates, padlocks and bar rapping. It also notes locking and unlocking almost 100 times per day with a Folger Adams key. Asked if his symptoms increase at work, the Petitioner indicated: "they just keep aggravating over and over as being used." (Px5). A 5/14/15 nurse's note indicates the Respondent denied the claim and that a call was placed to Petitioner to see if he wanted to schedule surgery through his personal insurance. (Px5).

Respondent had Petitioner examined by Dr. Sudekum on 9/8/15. (Rx4). It appears that Dr. Sudekum mistakenly believed that Petitioner began working in the medium security D-Tunnel in 2000, rather than 2008. While he testified that this was reported by the Petitioner, it also appears that this information was obtained from Petitioner from Dr. Sudekum's nurse, not Sudekum himself. Dr. Sudekum reported the Petitioner complained of bilateral hand numbness, primarily in the thumb, index and middle fingers, and mainly at night but also intermittently during the day. He also complained of intermittent hand cramping and bilateral medial and lateral elbow pain, decreased grip strength and lack of dexterity. The Petitioner reported a prior cervical discectomy 5 or 6 years earlier. Petitioner's BMI was 30.34. Exam indicated positive Tinel's and Phalen's testing at the wrists

and elbows. While he noted significant subjective loss of sensation, Dr. Sudekum believed this was out of proportion to the other findings on exam and what he would have expected. He noted visualization of arthritis in Petitioner's hands, and that Petitioner declined to undergo x-rays. Neurometrix NCV testing reflected moderate bilateral CTS and mild left cubital tunnel. (Rx4).

Dr. Sudekum noted Petitioner told him his D-Tunnel job involved locking and unlocking 3 large doors 200 to 300 times per day for staff and inmates, 100 strip searches per day, and bar rapping of one door. He also had to write barber passes and logs, and had to lock and unlock padlocks in the barber shop several times per shift. He reviewed a written job description for the position which indicated numerous duties, including inmate and visitor inspections, maintaining the visiting room, inspecting resident rooms and property and completing reports, serving as tower and writ officer, perimeter patrol, completion of disciplinary reports, etc. (see report of Dr. Sudekum). Dr. Sudekum noted that there are differences in what COs do at the maximum and medium security facilities, and that he had toured both facilities personally. He described his experiences at the medium security facility, but in doing so did not describe the Petitioner's specific D-tunnel position. Dr. Sudekum believed Petitioner suffered from moderate bilateral carpal tunnel syndrome and mild left cubital tunnel syndrome, however he did not believe Petitioner's employment caused or aggravated these conditions. He stated that he believed the Petitioner embellished his job description. Dr. Sudekum noted that carpal and cubital tunnel syndrome frequently develops idiopathically in the general population, and can also be due to medical comorbid factors; he noted that Petitioner had some of these, including age, obesity and hypertension. He acknowledged that Petitioner was not at maximum medical improvement for the conditions, and that he would not consider surgical treatment until Petitioner first tried 3 months of conservative care. (Rx4)

Dr. Young testified by way of deposition on 11/10/15. (Px8). A board certified orthopedic surgeon who specializes in the hand and upper extremity, he saw the Petitioner one time on 1/22/15. He testified that carpal tunnel (thumb, index and middle fingers) and cubital tunnel (ring and pinky fingers) syndromes impact different nerve distributions in the hand. He testified that occupational risk factors for the development of carpal and cubital tunnel syndrome include working with the hands or wrists in a flexed or extended position, vibration, forceful gripping, forceful pinching, and repetitive lifting. Non-occupational risk factors would include advancing age, obesity, diabetes, rheumatoid arthritis, hyperthyroidism, smoking and alcoholism. (Px8).

When he issued his report, Dr. Young testified that he felt the Petitioner's work activities "were likely the causative factor" in his development of bilateral upper extremity neuropathies. When asked to explain which duties he felt were causative and contributory, he identified bar rapping, the repetitive locking of the doors, opening and shutting of the steel doors, the turning of Folger Adams keys and cuffing and uncuffing inmates. He testified that if the Petitioner's symptoms were experienced while performing a certain activity, he would have to assume the activity "is playing a causative role or possibly just exacerbating the symptoms." (Px8, 13-14). Dr. Young did testify that the Petitioner's age put him at increased risk for developing these conditions, and that his hypertension was a minor contributing factor. (Px8).

In his evaluation of causation in this case, Dr. Young indicated he reviewed the history provided to him by the Petitioner at the visit (see the 1/22/15 report, above, from Px5), as well as the work history/hand questionnaire the Petitioner completed for him (Px5, also noted above). He testified that he also received the Petitioner's written description of his job duties and work timeline (Px7) from his attorney, which provided additional detail. (Px7). The work history timeline is consistent with the Petitioner's testimony with regard to the CO and D-tunnel officer jobs. (Px7). Dr. Young testified that the causative factors he found in these documents were turning of keys and bar rapping, as well as the completion of paperwork and cuffing/uncuffing of inmates. Dr. Young testified that carpal and cubital tunnel syndrome can have latency periods, where the condition develops

but remains asymptomatic, and that there is no set latency period or threshold because every patient is different. (Px8).

On cross exam, Dr. Young agreed that medical literature indicates people in their 40's have an increased risk of upper extremity compression neuropathies, and that Petitioner was 51 when he saw him. He also agreed that at the Petitioner's weight on 1/22/15, he was at a body mass index (BMI) over 30, and that the literature supports an increased risk with this BMI. He agreed that hypertension is also a risk factor, that the Petitioner's blood pressure was high at the 1/22/15 visit, and not well controlled with medication at that visit. (Px8). He agreed that he first reviewed the Petitioner's work history timeline and written job description the night before his deposition, and that this was after he had already issued his causation opinion in his report. He could not say how much time the Petitioner spent at work rapping bars, and agreed that the less he did the less likely it was causative, but there was no specific threshold for this determination either, while 10 seconds would probably not be enough in itself. (Px8).

Dr. Sudekum was deposed on 5/19/16 (Rx5). His testimony was essentially consistent with his report. He added that his findings of arthritis in the Petitioner's hands, as well as his prior cervical surgery and post-surgical condition, could also be contributors to his upper extremity neuropathies. He also noted that while some of the occupational risk factors for carpal and cubital tunnel syndrome are the same, some are not, specifically noting that with cubital tunnel, it is typically from direct pressure at the elbow or significant elbow flexion. For carpal tunnel, he focused on sustained heavy gripping, pinching and grasping, and/or the use of vibratory tools. With cubital tunnel, he noted hyperflexion as a factor. (Rx5)

Dr. Sudekum testified that Petitioner has several risk factors for development of carpal tunnel syndrome, including his age, history of hypertension, history of arthritis in his hands and obesity. He opined that the duties of a CO at the maximum security unit could potentially be provocative to median and ulnar neuropathies, however, because Petitioner did not have any complaints while working at that facility, he did not believe the CO work duties would cause or aggravate carpal tunnel syndrome and/or cubital tunnel syndrome for Petitioner. (Rx5).

Dr. Sudekum testified he has toured Menard, both at the maximum and medium security facilities, and has observed the job duties of CO's, including the D-tunnel area where Petitioner works, where he does strip searches and opens and closes the gate and the door. He testified that his observations of the job duties showed that the job duties were not sufficient to be associated with carpal and cubital tunnel syndrome. (Rx5).

On cross examination, he confirmed that it was his understanding the Petitioner started working at the medium security facility in 2000, not 2009. He also acknowledged that he had previously opined in other cases that some of the work activities of CO's at the maximum security facility at Menard can be contributory to carpal tunnel syndrome. (Rx5)

Currently, the Petitioner testified he has continual numbness and loss of grip strength, and that he continues to worsen. He still uses his arms and hands as a laundry supervisor. He has workers that help him, but he testified that he is hands on with putting in and taking out laundry.

The Petitioner denied being diagnosed with any of the following conditions: diabetes, gout in the upper extremities, rheumatoid arthritis, hypothyroidism. He testified he's been 6'1" and 228 pounds for a long time. He denied having hobbies that involve repetitive hand use.

The Petitioner testified he has had no prior workers' compensation claims, and no prior hand or arm treatment. Petitioner did review the Corvel Job Analysis (Px9) and Job DVD (Px12), and he agreed that they depict his job as a maximum security CO.

On cross examination, the Petitioner testified that inmates come in from another area to assist in doing his current laundry job. He testified that he operates the laundry machines himself, as they are expensive and inmates don't take good care of them. The inmates basically move the laundry bags, etc. They do load some machines, but the Petitioner testified he only gets 2 or 3 workers, so he does most of the work. A Folger Adams key is used for the 4 steel doors that access the laundry room. The job is less intense than his work as a gallery officer and D tunnel officer positions.

Major Westfall was called by the Petitioner to testify. He agreed that the Petitioner's testimony regarding his work at the maximum security and MSU facilities was accurate, and that the D-Tunnel position is unique.

Petitioner's Exhibit 9 (also Rx2) is a Job Analysis for a CO at Menard, dated 2/8/11. Petitioner's Exhibit 12 (also Rx3) is a job video, also prepared by Corvel, who was retained by the Respondent in this case. The Arbitrator has reviewed both exhibits in detail.

The Petitioner submitted his claimed medical expenses as Petitioner's Exhibit 1. Petitioner's Exhibit 10 was rejected upon Respondent's objection based on relevancy and hearsay. Petitioner's Exhibit 11 was rejected upon Respondent's objection based on relevancy and hearsay. Both of these documents involve the opinions of Dr. Sudekum in a separate case from the case at bar, and Dr. Sudekum's testimony in this case was available as Respondent's Exhibit 5. Portions of Px11 were used to question Dr. Sudekum in Rx5, and those relevant pages were attached to Rx5 at the time of the deposition.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, and WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The timing of the onset of the Petitioner's symptoms leads the Arbitrator to the conclusion that the greater weight of the evidence supports a finding that these symptoms and related conditions are not causally related to the employment. The work that the Arbitrator could have determined to potentially be causative of the Petitioner's upper extremity conditions would have occurred in the work he performed as a CO between 1992 and 2008. However, his symptoms did not begin until 2014, which is six years after he last worked on that position.

The Petitioner's job after 2008 did still involve some significant key usage. However, there is no significant evidence in this case to indicate that the locks that the Petitioner operated in the CO position in tunnel D in the minimum security unit were old or difficult to operate. Additionally, there was no testimony indicating that he used both hands to perform such keying. Yet, the Petitioner had severe conditions at the bilateral wrists and elbows. Additionally, the Arbitrator would add that the activities that work activities that are potentially causative of carpal tunnel, per Dr. Sudekum, are different than the ones that are potentially causative of cubital tunnel. In this regard, the Arbitrator particularly did not note significant elbow flexion or leaning activities in the

D tunnel job. Instead, it appears that such involvement was significantly reduced when he moved to that position versus the segregation unit, where he was consistently having to grasp and pull heavy steel doors with both hands.

He has been diagnosed with pathology in both hands/wrists and both elbows. In performing keying at the maximum security unit, the Petitioner testified that he would oftentimes have to use both hands to turn a key in a lock due to the age and condition of many of the locks, and that he had to pull heavy doors with the other hand while operating a key. That is not the case the minimum security job. It seems to the Arbitrator that he developed symptoms as his job got easier. In reviewing the work history timeline in Px7, the Petitioner specifically noted issues with the locks when he worked as a CO in maximum security, but notes no such problems with the gates or padlocks he worked with in medium security in D-tunnel. He did testify to some issues with one of the locks there, but the Arbitrator does not find this to be significant. While there were many cell doors to deal with at maximum security, which the evidence indicates was an older facility that had numerous cells and issues with locks, the MSU facility was newer and the Petitioner only had to deal with two or three doors on a significant basis. It doesn't make sense to the Arbitrator that the locks on these limited doors to the main exit tunnel would have been left in disrepair for any significant period of time.

The Petitioner noted a lot of cuffing and uncuffing of inmates in D-tunnel when maximum security was on lockdown, but did not specify how often this occurred between 2009 and 2015, nor if that is what was going on near the time his symptoms began. There was nothing indicating the use of forceful gripping or pinching or vibration or repetitive motions with strip searches. The form Petitioner initially completed for Dr. Young noted locking and unlocking in D-Tunnel was up to 100 times per day. He told Dr. Young it was 100 to 200 times per day. He testified that it was hundreds of times per day. He reported to Dr. Sudekum that it was 200 to 300 times per day.

While turning a key 300 times could well be sufficient to cause carpal tunnel, in this case it makes no sense to the Arbitrator that this would have been causative of right CTS, but not causative of left CTS and bilateral cubital tunnel. The fact that there is evidence of compression at 4 different upper extremity locations results in the Arbitrator's determination that the preponderance of the evidence indicates that these conditions are not related to the work duties. Dr. Sudekum testified that the Petitioner has several non-work factors that could contribute to the conditions, including Petitioner's age, weight and hypertension. The Arbitrator notes that the Petitioner only saw Dr. Young once, and at that time the doctor agreed he had high blood pressure that did not appear to be well controlled.

The Arbitrator also believes that, while Dr. Young explained a potential latency effect of work duties on an asymptomatic condition, the fact that five plus years passed between Petitioner's employment ending in maximum security and the onset of his symptoms leads to the conclusion that the upper extremity conditions are not related to the maximum security work duties. This is simply too long of a time for the Arbitrator to reasonably determine that a relationship exists. Oftentimes in repetitive trauma cases physicians testify that the onset of symptoms during a work activity tends to support a causal connection of a condition to an activity. The argument of a latency period tends to support an argument that a condition can be causally related no matter whether the symptoms occurred during the alleged causative activity or not, and regardless of how much time passes after that activity ends. The Arbitrator finds the latency argument in this case to be weak given the significant time that had passed between Petitioner leaving the segregation unit and the onset of his upper extremity symptoms.

WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT; WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE

PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES; and WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings that the Petitioner failed to prove accident and causation, these issues are moot, and no benefits are awarded.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ 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

Shawn Scott,
Petitioner,

vs.

Illinois state Police,
Respondent.

17IWCC0324

NO: 13 WC 18911

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 12, 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.

MAY 25 2017

DATED:
KWL/vf
O-5/22/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0324

SCOTT, SHAWN
Employee/Petitioner

Case# **13WC018911**

ILLINOIS STATE POLICE
Employer/Respondent

On 10/12/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.49% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0246 HANAGAN & McGOVERN PC
BRIAN T McGOVERN
123 S 10TH ST SUITE 601
MT VERNON, IL 62864-4029

0499 DEPT OF CENTRAL MGMT SERVICES
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
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2202 ILLINOIS STATE POLICE
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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

OCT 12 2016

DONALD A. PARDIA, 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
NATURE AND EXTENT ONLY

17IWCC0324

Shawn Scott
Employee/Petitioner

v.

Illinois State Police
Employer/Respondent

Case # 13 WC 18911

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 **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Herrin**, on **August 17, 2016**. By stipulation, the parties agree:

On the date of accident, **June 30, 2010**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$91,499.72**, and the average weekly wage was **$1,759.61**.

At the time of injury, Petitioner was **38** years of age, ***married***, with **4** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner the sum of **$664.72**/week for a further period of **25** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **5% loss of use of the person-as-a-whole.**

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

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

Melinda M. Rose Sullivan
Signature of Arbitrator

10/4/16
Date

ICArbDecN&E p 2

OCT 12 2016

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

17IWCC0324

Shawn Scott
Employee/Petitioner

Case # 13 WC 18911

v.

Consolidated cases: N/A

Illinois State Police
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he was an Illinois state trooper on June 30, 2010, and that he suffered a work-related injury on that date which was that of contact dermatitis due to the body armor that the State of Illinois required him to wear. He testified that another trooper suggested that he look at the Honeywell Spectra armor instead of the Kevlar, so he purchased the armor.

Petitioner testified that the carrier cost $150 and that he had to have a new one every five years. He testified that he has had no problems since he purchased the new vest, and that he is performing his duties with no issues.

On cross examination, Petitioner agreed that he has had "zero problems" since he purchased his own body armor with different components and that he has been able to work unimpeded with his body armor.

The medical records of Ultimed Plus were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that Petitioner was seen on June 30, 2010 at which time he complained of a rash and itching on his back and stomach for 3 weeks. The impression was that of contact dermatitis. It was noted that Petitioner was referred to Dr. Papazian. At the time of the July 19, 2010 visit, it was noted that Petitioner was being seen in follow-up for the contact dermatitis on his back and stomach. The impression was that of contact dermatitis. At the time of the July 28, 2010 visit, Petitioner was seen in follow-up of contact dermatitis on his stomach, chest and back and it was noted that his neck was itching. It was noted that Petitioner had not been wearing his vest at work. (PX1).

The medical records of Skin Care Center of Southern Illinois were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on June 4, 2009 for a rash on his stomach and back for 3 months. It was noted that Petitioner had 3 rounds of steroids and that he wore a vest for work, but had not worn his vest in 2 weeks and was better on that date. The assessment was that of contact dermatitis/folliculitis. At the time of the November 4, 2010 visit, it was noted that Petitioner's rash on his stomach and back was not as bad as it was the past summer, but was still itching a lot. Petitioner was also seen for a mole on his right abdomen on that date. At the time of the August 9, 2012 visit, it was noted that Petitioner was complaining of "breaking out" on his stomach and back, and that it happened when he wore his vest. It was noted that Petitioner had itching blisters, and that the "breaking out" stopped when he stopped wearing his vest for his job. It was noted that Petitioner had a rash when he wore body armor. (PX2).

The records of Skin Care Center of Southern Illinois reflect that Petitioner was seen on June 10, 2013, at which time Petitioner presented to discuss options regarding his body armor. It was noted that Petitioner had pink areas on his chest and back. At the time of the July 29, 2013 visit, it was noted that Petitioner needed a note saying that he could not wear his body armor due to his rash. At the time of the September 4, 2014 visit, it was noted that Petitioner was being seen for new body armor. It was noted that there was not significant inflammatory eruption. (PX2).

The records of Skin Care Center of Southern Illinois reflect that Dr. Nahass authored a letter dated September 13, 2012, indicating that Petitioner had a recurrent itchy skin eruption that involved the center/low back and abdomen that was associated with his wearing his vest. It was noted that a recent skin biopsy obtained from the back showed a pattern indicative of allergic contact dermatitis, and it was noted that Petitioner's history and physical examination was most suggestive of allergic contact dermatitis secondary to a component of the vest he wore during work. (PX2).

The medical records of St. Mary's Good Samaritan Medical Group were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The records reflect that Petitioner was seen on June 14, 2012, at which time he complained of a rash to his back and chest from wearing his bullet-proof vest. It was noted that Petitioner was tried on topical steroids in the past which only worked temporarily but did not prevent the flare up when he wore the vest again. The assessment was that of contact dermatitis, and Petitioner was referred to a dermatologist for evaluation. (PX3).

The medical records of The Dermatology Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen on October 9, 2013, at which time it was noted that he complained of a rash x 2 years likely due to the armor he wore daily as a state trooper. It was noted that Petitioner had a biopsy at an outside dermatologist consistent with spongiotic dermatitis. It was noted that Petitioner only got the rash when wearing the armor, that it was worse in the summer than the winter, that it was worse in the last 6 months and that it disappeared when he used Clobetasol and avoided the armor. It was noted that Petitioner was to undergo patch testing. At the time of the October 14, 2013 visit, it was noted that Petitioner was being for patch testing results. It was noted that there were no results from patch testing, and that an attempt would be made to obtain the list of materials in the armor. At the time of the October 17, 2013 visit, it was noted that Petitioner had a new rash on that date after wearing the armor. The assessment was that of dermatitis, likely ACD. Petitioner was to be sent to Dr. Sheinbein for more extensive patch testing. (PX4).

The records of The Dermatology Center reflect that Petitioner was seen on October 31, 2013 by Dr. Sheinbein. The assessment was that of contact dermatitis, and it was noted that Petitioner would obtain the MSDS from work. It was also noted that an 81 panel patch test was performed. At the time of the November 4, 2013 visit, it was noted that Petitioner's contact dermatitis was not active currently. It was noted that Petitioner was to continue the prescribed cream if the rash recurred. (PX4).

The medical records of Specialists in Dermatology & Cosmetic Medicine were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Dr. Samuels was of the opinion that, based on Petitioner's history, skin biopsy, and patch testing, it was his opinion that the dermatitis was related to Petitioner's exposure with the body armor, and that based on the patch testing it was his opinion that it represented a contact dermatitis. It was noted that Dr. Samuels opined that avoidance of body contact with the armor would prevent a recurrence of the injury and rash sustained in June 2010, and that Petitioner should be restricted from wearing the body armor. It was noted that if Petitioner avoided contact with the body armor, he had reached maximum medical improvement since he was no longer exposed to the body armor allergen. (PX5).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The ISP Official Action Letter was entered into evidence at the time of arbitration as Petitioner's Exhibit 7.

The Appearance of Representative was entered into evidence at the time of arbitration as Respondent's Exhibit 1.

The IME Report of Dr. Lawrence Samuels was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The report was duplicative of that as contained in Petitioner's Exhibit 5. (RX2; PX5).

CONCLUSIONS OF LAW

The parties stipulated that Petitioner sustained an accident on June 30, 2010 that arose out of and in the course of his employment with Respondent, and that Petitioner's condition of ill-being was causally connected to this injury. (AX1).

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

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

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that he is working as a state trooper for Respondent and that he testified he is capable of performing the duties associated with his position in an unimpeded fashion and with "zero problems". The Arbitrator finds that the nature and demands of his position will affect his permanent partial disability and, as such, the Arbitrator places greater on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 38 years old on his date of accident. Given the young age of Petitioner and the fact that his treating physician has not placed him under any type of restrictions, the Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iv) of Section 8.1b(b), the Arbitrator notes that, following his work injury, Petitioner returned to his pre-accident employment with Respondent and, as such, there was no evidence proffered at arbitration to demonstrate that his work accident has impaired or otherwise affected his future earnings capacity. The Arbitrator places no weight on this factor when making the permanency determination.

With respect to Subsection (v) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that he has had no problems since he purchased the new vest, and that he is performing his duties with no issues. At the time of the examination with Dr. Samuels, it was noted that Dr. Samuels opined that avoidance of body contact with the armor would prevent a recurrent of the injury and rash sustained in June 2010, and that Petitioner should be restricted from wearing the body armor. Dr. Samuels further

noted that if Petitioner avoided contact with the body armor, he had reached maximum medical improvement since he was no longer exposed to the body armor allergen. (PX5; RX2). The Arbitrator concludes that Petitioner's evidence of disability at the time of arbitration, namely his continued complaints and limitations, were corroborated by his treating records at the conclusion of his treatment. The Arbitrator accordingly places greater weight on this factor in determining permanency.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all of the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant. Based on the above factors and the record in its entirety, the Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of **5% loss of use of the person-as-a-whole** as provided in Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joaquin Garza,
Petitioner,
vs.

17IWCC0325

NO: 12 WC 41490

Illinois State University,
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 medical expenses, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 25, 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.

DATED: MAY 25 2017
KWL/vf
O-5/22/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

17IWCC0325

GARZA, JOAQUIN
Employee/Petitioner

Case# **12WC041490**

ILLINOIS STATE UNIVERSITY
Employer/Respondent

On 8/25/2016, 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 0.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

4138 ASSISTANT ATTORNEY GENERAL
WARREN WILKE
500 S SECOND ST
SPRINGFIELD, IL 62702

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

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

AUG 25 2016

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

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

17IWCC0325

JOAQUIN GARZA,
Employee/Petitioner

v.

ILLINOIS STATE UNIVERSITY,
Employer/Respondent

Case # 12 WC 41490

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Bloomington**, on **7/27/16**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **5/8/12**, 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 **$18,563.19**; the average weekly wage was **$536.63**.

On the date of accident, Petitioner was **31** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of **$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 his current condition of ill-being is causally related to the injury on 5/8/12.

Petitioner has failed to prove by preponderance of the credible evidence that the medical services he received after 5/8/12 were reasonable and necessary to cure or relieve petitioner from the effects of the accident on 5/8/12.

Petitioner has failed to prove by preponderance of the credible evidence that he is entitled to any prospective medical treatment.

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

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

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

Signature of Arbitrator

8/22/16
Date

ICArbDec19(b)

AUG 25 2016

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 31 year old cook, sustained an accidental injury that arose out of and in the course of his employment by respondent on 5/8/12. On that date while pushing a food cart weighing 250-300 pounds from the freezer to a conference room petitioner alleges he injured his low back. Petitioner testified that the incident happened at 6 am while he was moving the food carts to a conference room. He testified that the elevator was broken and they had to roll the food cart from the freezer to the Rosa Parks Conference room. Petitioner testified that he was rolling the cart with his coworkers and the floor was not level. As they were trying to get the cart over the uneven doorway, the cart rolled backwards, and petitioner, who was behind it had to stop it, lift it, and push it over the uneven doorway. He testified that the food cart was full and was about 6 feet tall. As he lifted and pushed the food cart over the doorway he felt something crack in his back. Petitioner did not pay much attention to it and kept working.

Petitioner testified that his coworkers stated that the sound was not good and he should make a report. At 8:00 am petitioner testified that his coworkers made him go and report the incident. Petitioner testified that he had pain in his low back. Petitioner denied any problems with, or treatment for his low back prior to the incident on 5/8/12. He did report some muscular pain before the accident on two occasions.

Prior to the injury petitioner used to play soccer on weekends. He testified that he stopped playing in tournaments 10 years ago. Petitioner would play 12 tournaments a year. Petitioner denied every injuring himself while playing soccer. Prior to the accident petitioner testified that he walked 1-2 miles a day. He testified that he no longer does this.

On 4/17/12, about 3 weeks prior to the accident, petitioner presented to Kathleen Lance, APN with low back pain for the past two months. He reported that it was worse in the morning when he wakes up. He also reported left foot pain from a work incident. Petitioner's examination revealed positive bony midline tenderness. He also reported tightness in his low back. Lance assessed low back pain and suspected a mechanical injury. Petitioner was referred to physical therapy.

On 4/24/12 petitioner underwent a physical therapy evaluation for his low back pain. Petitioner underwent 3 physical therapy sessions prior to the accident on 5/15/12, and 2 others on 5/15/12 and 5/22/12. He reported the onset of his pain as 4/15/12. Petitioner reported complaints of low back pain especially upon awakening in the morning. She stated that he caught a potato cart at work when a wheel came off, and since then he has had morning symptoms that get better as he moves around through the

day. He reported symptoms 25% of the day, with the pain as high as 7/10. When he awakens the pain is 4-5/10. He complained of intermittent low back pain. Petitioner was also given home exercises.

On 5/8/12 petitioner reported to the physical therapist that he had to lift a heavy cart at work and that is when his low back symptoms were created. He reported no change in his symptoms. He reported a recreation of his symptoms at work that day. He alleged a work accident.

On 5/15/12 Mark Buckley, petitioner's supervisor, completed a Supervisor's Report of Injury or Illness. He noted that on 5/8/12 petitioner was pushing a large cart of food to the front elevator through Rosa Parks Conference Room. The cart hit door jam and petitioner stated that it started to tip. Petitioner strained his back while attempting to right the cart. Buckley noted that the freight elevator was broken down and the food and supplies had to be manually transported to front passenger elevator through conference room.

On 5/15/12 petitioner reported to his physical therapist that on 5/13/12 he drove 5-6 hours to Chicago and the drive worsened his symptoms. He reported that his children will lie over him to add overpressure.

On 5/22/12 when petitioner presented to physical therapy he reported that his symptoms increased with pressure. He stated that he has a landscaping job and knows he will have more back pain if he does it. He reported a flare up of his symptoms.

On 5/29/12 additional therapy was recertified and petitioner resumed physical therapy. Petitioner stated that he was unable to work in a landscaping job.

On 6/5/12 petitioner presented to Dr. Gustavo Galue for follow-up of his low back problems. He reported mid-low back pain for the past two months. He reported that he injured it lifting heavy items at work. He stated that no report was filed. He described tightness in his back and pain in low back at midline. He complained of aching pain 5/10 in severity. He stated that he was improved from the last visit. He stated that this has never happened before. He was assessed with nonspecific acute low back pain. His exacerbating factors were identified as bending backwards. His assessment was nonspecific acute low back pain.

On 8/28/12 petitioner presented to Dr. Galue for his routine preventive health exam. He reported that he was doing well but sometimes had some lower back pain which did not cause major problems. Petitioner was instructed to follow-up in a year. On 1/25/13 petitioner returned to Dr. Galue for his back problems. He complained of back pain since May of 2012, when he had a work related accident. His

current symptoms were pain in low back which was not changed from previous visit. His exacerbating factors were bending forward and backward. Petitioner reported that he takes Advil. Petitioner reported tenderness to palpation of the midline of the lumbar spine. Dr. Galue assessed low back pain, and work related injury. He also noted that petitioner had failed physical therapy and conservative management. Dr. Galue prescribed Relafen. He also referred petitioner to Dr. Vallejo. While treating with Dr. Vallejo, petitioner continued to follow-up with Dr. Galue through 9/2/15, and his pain levels were usually in the 3-4 out 10 range. He also repeatedly reported that his exacerbating factors were bending forward and backward and standing.

On 2/8/13 petitioner presented to Dr. Vallejo. He reported an accident at work where he injured his low back. He rated his pain at a 5/10. He noted that sitting and bending increased his pain, and he had trouble sleeping. He noted that his pain stays mainly in the back and on occasion travels to the back of the right leg. He stated that his left side of the back was worse. Dr. Vallejo discussed with petitioner some possible sources of pain including low back pain, lumbar facet spondylosis, and SI joint pain. He recommended various treatment options including facet joint injection, lumbar spine MRI, and a discogram.

On 2/13/13 petitioner underwent bilateral lumbar facet joint diagnostic block at L4-L5, L5-PPR, S1 and S2. Petitioner followed up with Dr. Vallejo on 2/18/13. He stated that he had no more than 50 % relief . He only reported minimal relief.

On 9/4/13, after examining petitioner, Dr. Galue drafted a letter to "To Whom It May Concern". He noted that petitioner had been under his care since May 2012 for low back pain and had undergone several treatments and completed physical therapy with minimal improvement. He noted that petitioner had been evaluated by Dr. Vallejo, and he suggested that petitioner undergo an MRI of the lumbar spine. He was of the opinion that since petitioner had not improved with conservative treatment the next step was an imaging study to decide future treatment.

On 11/20/13 petitioner followed up with Dr. Galue. He reported his pain at 3/10. He reported that he was unable to work that week. Dr. Galue assessed petitioner with chronic low back pain. Dr. Galue drafted a letter to "To Whom It May Concern" stating that petitioner had been unable to work due to injury from 11-18-13 until 11-20-13. He also noted that petitioner had restrictions limiting him from lifting 15 pounds until seen by Dr. Vallejo.

On 12/17/13 petitioner underwent an MRI of the lumbar spine. The impression was minor left foraminal disc protrusion at L4-L5 mildly encroaching the left neural foramen. Correlate for possible left L4 radiculopathy.

On 1/8/14 petitioner returned to Dr. Vallejo. Petitioner stated that he was still working. He reported that he received no relief from the facet joint injection. He stated that he saw Dr. Galue who gave him Nabumetone and Cylobenzaprine, that helps when he sleeps. Petitioner stated that his pain limits what he can do on a daily basis. He reported that his pain is in the lower back and radiates to his bilateral extremities above the knees. He also described a numbing sensation. He stated that his pain is aggravated by movement. Dr. Vallejo discussed the results of this MRI with him. He also discussed a possible LESI discogram and biacuplasty. He strongly recommended that petitioner lose weight.

On 1/9/14 petitioner was seen at Dr. Galue's office and stated that he received some improvement from the spinal injection. He stated that his pain was decreased. Petitioner stated that he had been off for the holidays and wanted to return to work. He stated that respondent was accommodating his restrictions.

On 1/15/14 petitioner returned to Dr. Galue's office and was seen by Carolyn Roth, CNP. He reported that he had attempted to return to work twice with a significant increase in back pain. He stated that his work had not allowed light duty.

On 1/16/14 Carolyn Roth, CNP, drafted a letter to "To Whom It May Concern". She stated that petitioner was unable to work due to low back pain. She referred petitioner to physical therapy to evaluate his ability to work. Petitioner had his initial evaluation by physical therapy on 1/17/14.

On 2/10/14 petitioner was seen again by Dr. Galue. He reported that he had been off work for 3 weeks. He rated his pain at 3/10. He stated that bending forwards and backwards, and standing exacerbates his pain. Dr. Galue released petitioner to work on 2/14/14 with restrictions of working light duty, 4 hours a day for the next three weeks. He also authorized petitioner off from 1-16-14 through 2-13-14.

On 3/5/14 petitioner complained of low back pain to Dr. Vallejo. He presented for bilateral L4-L5 transforaminal epidural steroid injection. His impression was that petitioner had degenerative disc disease, obesity, minor left foramen protrusion at the L4-L5 mildly encroaching the left neural foramen, and discogenic low back pain likely at L4-L5. Dr. Vallejo discussed exercise options with petitioner to help with his pain as well as strengthening of the muscles in the lumbar spine. Petitioner reported more

back pain than leg pain and no tenderness in the lumbar paraspinal muscle or the sacral sulcus. Dr. Vallejo performed bilateral L4-L5 lumbar transforaminal epidural steroid injections.

On 5/28/14 the evidence deposition of Dr. Vallejo was taken on behalf of petitioner. Dr. Vallejo is certified in anesthesiology and pain medicine. He opined that a disc rupture was the likely source of petitioner's pain. His most likely diagnostic was discogenic pain or intradiscal disc rupture. Dr. Vallejo was of the opinion that petitioner had no pain before the claimed accident. Based on this he was of the opinion that petitioner's low back condition could be related to his accident. However, he stated that it was difficult for him to establish a relationship since he did not know exactly what was causing petitioner's pain. He was of the opinion that a discogram could potentially tell him the source of petitioner's pain. Dr. Vallejo was of the opinion that if petitioner has a disc rupture the standard treatment is a lumbar fusion. However, due to petitioner's age, he was not recommending that for petitioner. Dr. Vallejo never gave petitioner any restrictions and did not take him off work. He stated they never gives patients restrictions. Dr. Vallejo could not offer a prognosis at this time.

On cross examination, Dr. Vallejo stated that a biacuplasty is a form of radio frequency where the posterior part of the disc, where more commonly the disc is ruptured, is heated up, trying to destroy any nerve receptors pain, nerve endings in that area, and hopefully change the structure of the collagen in the disc to close the gaps. Dr. Vallejo was of the opinion that petitioner did not play soccer.

On 6/5/14 petitioner underwent a Section 12 examination performed by Dr. Timothy Charles Payne, at the request of the respondent. Petitioner gave a history of injuring his back on 5/8/12 while employed by respondent as a cook. He reported that he was moving a cart with a load of frozen chicken with two other people. He reported that they were moving it on a floor that was uneven and the cart became stuck and he twisted his back and developed the onset of pain in the lower back and the midline with the pain radiating to the left side. Petitioner stated that he did not have a major problem initially, but did start having ongoing complaints of pain. Petitioner reported no relief with physical therapy. Petitioner denied any problems with his back. Petitioner stated that as a cook he has to lift objects weighing 5-15 pounds. He reported that he constantly stoops, bends and turns and twists. Petitioner complained of pain radiating from the midline of the back to the left side and radiating pain to the right side of his back, left greater than right. He denied any radiating pain to his legs.

Following a record review and physical examination, Dr. Payne was of the opinion that petitioner sustained a lumbosacral spine strain. He noted ongoing signs of stiffness and some deconditioning in the lumbosacral spine. He was of the opinion that the MRI study of 12/17/13 did not reveal any acute

structural injury to the lumbar spine and revealed pre-existing degenerative changes only. He was of the opinion that the fact that petitioner had no relief from the injections would indicate that his complaints are not due to a discogenic injury. Dr. Payne noted that petitioner did not have significant objective findings. He also noted that petitioner had subjective complaints consistent with stiffness and deconditioning that would respond to compliance with an independent home exercise program. Dr. Payne opined that petitioner had reached maximum medical improvement. He was of the opinion that petitioner should maintain a home exercise program, and did not require any further formal treatment. He was also of the opinion that petitioner is not a surgical candidate and does not require any further diagnostic studies. Dr. Payne was of the opinion that petitioner was fully capable of performing his job duties without restrictions with no functional limitations on exam. He believed petitioner going back to work would be therapeutic in addressing his deconditioning.

On 8/14/14 petitioner followed-up with Dr. Vallejo. Petitioner reported no relief from the injection. He reported that the pain was the same or somewhat worse. He stated that any activity increases his pain. Dr. Vallejo's impression was the same. Dr. Vallejo was of the opinion that the source of petitioner's pain was likely discogenic. He ordered a discogram. Petitioner noted that he was only taking IBP for his pain when it is out of control.

On 12/8/14 Dr. Galue drafted a letter to "To Whom It May Concern". He wrote that Dr. Vallejo had recommended a discogram to identify and treat the precise area of the injury.

On 9/2/15 petitioner followed-up with Dr. Galue for his low back problems. Petitioner had not seen Dr. Galue since March 2015. He complained of pain in the lower back and numbness in the right lower extremity towards the inner thigh and calf. He rated his back pain at a 4/10.

On 2/15/15 petitioner returned to Dr. Vallejo. He rated his pain at a 6/10. On 2/17/15 petitioner underwent a discogram. It was positive at the level of L4-L5. Further confirmation with a CT-post discogram revealed a complete annular tear at the same level. Based on the findings, Dr. Vallejo was of the opinion that the L4-L5 disc rupture was the most likely source of his pain. Dr. Vallejo's recommendation was to perform a L4-L5 biacuplasty to try and avoid surgery.

On 3/9/15 and 4/6/15 petitioner followed-up with Dr. Vallejo. He reported that he felt good for a few days after the discogram. He stated that when he does the exercises that were prescribed he has pain. He described his pain as tight, sharp and stabbing. His pain was 6/10. Dr. Vallejo's impression was discogenic low back pain likely at L4-L5; minor left foramen protrusion at L4-L5 mildly encroaching the

left neural foramen; and mild obesity. Dr. Vallejo discussed treatment options which included surgery. He wanted to start with a biacuplasty, which has been clinically shown to decrease level of pain and improve activity. Petitioner's weight control was also discussed.

On 7/16/15 Dr. Vallejo drafted a letter to petitioner's attorney, Dirk May, that based on his assessment and diagnosis, as well as the fact that the petitioner did not have any pain prior to the accident, the accident was most likely the cause of petitioner's painful condition. He opined a causal connection between the accident and the petitioner's pain.

On 9/9/15 Dr. Vallejo drafted a letter "To Whom It May Concern". He noted that a discogram was performed on 2/17/15 and reported as positive at the level of L4-L5. He noted that further confirmation with a CT-post discogram revealed a complete annular tear at the same level. Based on these findings Dr. Vallejo was of the opinion that the L4-L5 disc rupture was most likely the source of petitioner's pain. He recommended a L4-L5 biacuplasty to try and avoid surgery.

On 11/9/15 Dr. Payne drafted an Addendum to his initial report following his examination of petitioner on 6/5/14 after reviewing additional records including the discogram results. He noted that the discogram and post-discographic CT scan of the lumbar spine showed an L4-L5 disk herniation. Despite the discogram, Dr. Payne opined that his opinions regarding petitioner remained the same. He reiterated that he was of the opinion that petitioner had reached maximum medical improvement, had some ongoing complaints of back pain, had increased weight and a deconditioned spine. He was of the opinion that the best course of treatment would be core conditioning and strengthening of the back. He opined that surgical intervention would not help to improve his function.

On 3/2/16 the evidence deposition of Dr. Payne, an orthopedic surgeon, at the request of the respondent. Dr. Payne specializes in the lumbar spine. Dr. Payne was of the opinion that petitioner sustained a strain that had been ongoing because he did not fully rehabilitate and recondition his spine. Dr. Payne believed that petitioner's loss of flexion, hamstring tightness and some piriformis tightness all indicate that he had some muscle stiffness affecting his lumbar spine. He opined petitioner reached maximum medical improvement and is need of a conditioning program. Dr. Payne could not opine if the foraminal protrusion was caused by the injury, or simply a degenerative process that developed. He opined that since petitioner has never had an exam that showed sever sciatic pain, no aggressive treatment was needed. Dr. Payne was of the opinion that petitioner's elevated BMI has a potentially negative impact on his function. Dr. Payne was of the opinion that petitioner's clinical exam did not correlate with a L4-L5 disc problem, so he felt that petitioner's problem was more muscular in nature. Dr. Payne was of

the opinion that petitioner sustained a strain that has been persistent in the sense that he's got some deconditioning and some complaints of pain.

On cross examination, Dr. Payne opined that petitioner reached maximum medical improvement on 6/5/14. Dr. Payne opined that if someone walks for more than 4 hours a day and does a lot of twisting, and turning, they can potentially aggravate their low back. Dr. Payne opined that there is not a great deal of scientific support to promote disc regeneration out in the mainstream of orthopedic care. Dr. Payne was of the opinion that if you wear a brace too much, you can become deconditioned. Dr. Payne was not sure what biacuplasty is, other than that it is a procedure. He was of the opinion that burning of the disc is somewhat controversial. Dr. Payne agreed with Dr. Vallejo that petitioner is not a surgical candidate.

Respondent offered into evidence the Demands of the Job for the job of cook. Petitioner's job requires him to walk, stand, and use his hands for gross manipulation 6-8 hours a day, and lift 1-10 pounds 2-4 hours a day. All of the rest of petitioner's duties were 0-2 hours a day, less than 3 times a week, or never. Petitioner is required to lift 11-50 pounds 0-2 hours a day, and lift 51-60 pounds less than 3 times a week.

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

Petitioner is alleging that his current condition of ill-being as it relates to his low back is causally related to the injury he sustained on 5/8/12. It is unrebutted that petitioner sustained an accident that arose out of and in the course of his employment by respondent on 5/8/12 while moving a food cart from the kitchen to a conference room. However, respondent claims that petitioner's current condition of ill-being as it relates to his low back is not causally related to the accident on 5/18/12. Respondent claims it is related to a preexisting lumbar spine condition.

When petitioner sustained his accident on 5/8/12 he reported to Dr. Vallejo and Dr. Payne that he had no problems with, or treatment for, his lumbar spine prior to 5/8/12. Based on this understanding Dr. Vallejo opined that it was most likely that petitioner's low back condition was related to the accident. Petitioner also reported to Dr. Payne that he had no prior problems with his low back prior to 5/8/12. Based on this understanding Dr. Payne opined that petitioner sustained a lumbosacral strain that is causally related to the injury on 5/8/12. The arbitrator gives little weight to these opinions based on the fact that petitioner clearly had problems with his lumbar spine prior to 5/8/12 and was actively treating when he the accident occurred on 5/8/12.

The credible medical records show that petitioner's testimony at trial and his past medical history to Dr. Vallejo and Dr. Payne that he had no problems with his low back prior to 5/8/12 was not truthful. On 4/17/12, just three weeks before the accident on 5/8/12, the petitioner sought treatment for low back pain that had been going on for two months. An examination revealed positive bony midline tenderness, and tightness in his low back. Petitioner was assessed with low back pain and a mechanical injury was suspected. Petitioner was prescribed physical therapy. He reported to the therapist that his onset of pain was 4/15/12, which was different from the two month history of low back pain he reported on 4/17/12. Petitioner gave a history of catching a potato cart at work when a wheel came off. He reported that since then he has had symptoms. He also reported that his pain was as high as 7/10.

Petitioner stated that he injured his low back while at work on 5/8/12. However, after that accident petitioner did not seek treatment from a doctor or at the emergency room. Instead he just reported it to his therapist at his previously scheduled therapy session related to an prior injury and preexisting condition. On 5/8/12 the petitioner told the therapist that he had to lift a heavy cart at work and that is when his low back symptoms were created. He reported that he his symptoms were unchanged.

On 5/15/12 petitioner's supervisor completed a Supervisor's Report of Injury or Illness. The accident was identified as occurring on 5/8/12 when he was pushing a large cart of food to front elevator through Rosa Parks Conference Room. It was reported that the cart hit the door jam and petitioner stated that it started to tip and strained his back while attempting to right the cart.

On 5/15/12 petitioner told his therapist that on 5/13/12 he drove 5-6 hours to Chicago and the drive worsened his symptoms. On 5/22/12 he reported to the therapist that his symptoms increased with pressure. He also stated that he had a landscaping job and knows he will have more back pain if he does it. He reported a flare up of his symptoms. At trial, petitioner denied he had a landscaping job. He stated that he had bought some equipment to start a landscaping business, but never started it because of his back pain.

It was not until a month after the accident, on 6/5/12, that petitioner presented to Dr. Galue's office for follow-up of his low back problems. At that time, he reported mid-low back problems for the past two months and stated that he injured it lifting heavy items at work. This history also puts the accident date in April, 2012, when he was already under active treatment for his low back. He rated his pain at 5/10 and reported that it was improved since his last visit in April 2012. On 8/28/12 petitioner reported that he was doing well and sometimes had some lower back pain that does not cause major problems.

Petitioner did not seek any further treatment for his low back until 5 months later on 1/25/13. At that time he reported back pain since May of 2012 following a work injury, that was unchanged from his August 2012 visit. The arbitrator finds this history is not corroborated by the credible medical records that show petitioner had injured his low back 1-2 months prior to May of 2012, and was actively treating for these back problems on 5/8/12.

Dr. Galue referred petitioner to Dr. Vallejo. Petitioner presented to Dr. Vallejo on 2/8/13. He reported an accident at work where he injured his low back. He rated his pain at a 5/10. While treating with Dr. Vallejo petitioner denied he had any back problems prior to 5/8/12. The arbitrator again finds this history is not corroborated by the credible medical records which showed petitioner had back problems as far back as February 2012, and was actively treating for these low back problems with pain as great as 7/10 when the accident occurred on 5/8/12. As a result of the inaccurate low back history petitioner provided Dr. Vallejo, the arbitrator finds the opinions of Dr. Vallejo less than persuasive given the fact that they were not based on an accurate history of petitioner's preexisting low back problems prior to 5/8/12, since petitioner did not provide any of this information to Dr. Vallejo.

Additionally, the arbitrator finds Dr. Payne did not have an accurate understanding of petitioner's preexisting low back condition prior to 5/8/12. Petitioner denied any problems with his low back prior to 5/8/12, and failed to tell Dr. Payne about the history of low back problems for a few months prior to 5/8/12, for which petitioner was actively treating for on 5/8/12.

Given the fact that petitioner failed to provide his healthcare providers with an accurate history of his preexisting low back condition prior to 5/8/12, and the fact that even after the accident, he reported to the therapist on 5/8/12 that his condition was unchanged, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related to the accident on 5/8/12. Additionally, the arbitrator finds it significant that when petitioner presented to Dr. Galue on 6/5/12 he reported mid-low back pain for the past two months. The arbitrator finds this statement consistent with the low back treatment petitioner began in April of 2012, and was actively ongoing when the accident occurred on 5/8/12. The arbitrator also notes that on 8/28/12 petitioner stated that he was doing well and reiterated this history when he followed-up on 1/25/13.

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 his current condition of ill-being is causally related to the injury on 5/8/12. The arbitrator bases this opinion primarily on the fact that petitioner was actively treating for his low back prior to 5/8/12; that petitioner on 4/17/12 reported a two month history

of back pain; that on 4/24/12 petitioner reported an onset of pain on 4/15/12 after catching a potato cart at work when a wheel came off; that petitioner never reported his preexisting low back condition to either Dr. Vallejo and Dr. Payne; and that neither Dr. Vallejo nor Dr. Payne's opinions regarding causal connection with respect to the accident on 5/8/12 and his current condition of ill-being as it relates to his low back are persuasive given that they are not based on an accurate medical history.

J. WERE THE 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?

Given that the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related to the injury on 5/8/12, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MC LEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Pamela Kistler,

Petitioner,

vs. NO: 10WC 49226

Pontiac Correctional Center,

Respondent,

17IWCC0326

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 1, 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.

17IWCC0326

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: MAY 25 2017
MJB/bm
o-5/22/17
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

KISTLER, PAMELA
Employee/Petitioner

Case# **10WC049226**

PONTIAC CORRECTIONAL CENTER
Employer/Respondent

17IWCC0326

On 11/1/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.50% 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:

0190 FERRACUTI & ASSOCIATES
PETER F FERRACUTI
110 E MAIN ST
OTTAWA, IL 61350

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

1350 CENTRAL MANAGEMENT SYSTEMS
RISK MANAGEMENT SERVICE
PO BOX 19208
SPRINGFIELD, IL 62794-9208

102 STATE EMPLOYEES RETIREMENT
01 S VETERANS PARKWAY
O BOX 19255
RINGFIELD, IL 62794-9255

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

NOV 1 - 2016

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

STATE OF ILLINOIS)
)SS.
COUNTY OF MC LEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Pamela Kistler
Employee/Petitioner

Case # 10 WC 49226

v.

Consolidated cases: n/a

Pontiac Correctional Center
Employer/Respondent

17IWCC0326

An *Application for Adjustment 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 Bloomington , on September 28, 2016. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, November 20, 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 $52,000.00; the average weekly wage was $1,000.00.

On the date of accident, Petitioner was 51 years of age, single with 0 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 $188,607.47 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $188,607.47. The parties stipulated that $76,095.62 was the amount of TTD paid from October 8, 2013, to the date of trial.

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 MRI scan, surgical consult, spinal cord stimulator, and L3-L4 discectomy, as recommended by Dr. Craig Carmichael.

Respondent shall pay Petitioner temporary total disability benefits of $666.67 per week for 155 2/7 weeks, commencing October 8, 2013, through September 28, 2016, as provided in Section 8(b) of the Act.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

October 28, 2016
Date

NOV 1 - 2016

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment for Respondent on November 20, 2010. The Application alleged that Petitioner sustained an accident that "Arose in and out of the course of employment" and that Petitioner sustained an injury to the "Man as a whole" (Arbitrator's Exhibit 4). This case was previously tried before Arbitrator Pulia in a 19(b) proceeding on December 12, 2012. Arbitrator Pulia's Decision was filed with the Workers' Compensation Commission on December 31, 2012. Arbitrator Pulia found that Petitioner's lumbar spine condition was related to the accident of November 20, 2010, and awarded temporary total disability benefits of 107 1/7 weeks (November 21, 2010, to December 10, 2012), medical bills and prospective medical treatment. The award of prospective medical treatment directed Respondent to authorize and pay for a neuropsychological evaluation prior to a dorsal column stimulator (Petitioner's Exhibit 2).

Respondent filed a review of Arbitrator Pulia's Decision to the Commission. The Commission corrected some language in Arbitrator Pulia's Decision, but otherwise affirmed and adopted her decision. The Commission Decision was entered on October 8, 2013. The Commission remanded the case to the Arbitrator (Petitioner's Exhibit 3).

When the case was tried on September 28, 2016, it was a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits of 155 2/7 weeks (October 8, 2013, to September 28, 2016) as well as prospective medical treatment. Respondent disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

At trial, counsel for Petitioner and Respondent stipulated that Respondent had paid Petitioner $188,607.47 in temporary total disability benefits; however, it was also stipulated that this included amounts paid by Respondent to Petitioner prior to October 8, 2013. Counsel for Petitioner and Respondent stipulated that they would make a determination of the amount of temporary total disability benefits that had been paid by Respondent to Petitioner from October 8, 2013, to the date of trial. The purpose of the stipulation was so that the Arbitrator could properly compute the total amount of credit Respondent was entitled to receive for payments made after October 8, 2013 (Arbitrator's Exhibit 1). The parties subsequently stipulated that the total amount of temporary total disability benefits paid by Respondent to Petitioner from October 8, 2013, to the date of trial was $76,095.62.

Petitioner was employed by Respondent as a Correctional Officer and began working for Respondent in November, 1999. Petitioner testified that on November 20, 2010, she fell down a flight of stairs and landed on her tailbone. Petitioner stated that she had a prior back problem in 2005, she received some shots and her condition improved. Petitioner did not lose any time from work because of that prior back condition and received no further medical treatment until after the accident of November 20, 2010.

As stated herein, this case was previously tried in a 19(b) proceeding on December 12, 2012. Arbitrator Pulia's Decision contained findings of fact in regard to the medical treatment received by Petitioner, Respondent's Section 12 examinations and Petitioner's complaints. Arbitrator Pulia

ordered payment of temporary total disability benefits and medical as well as prospective medical treatment which included a dorsal column stimulator (Petitioner's Exhibit 2). Arbitrator Pulia's Decision was subsequently affirmed by the Commission on October 8, 2013 (Petitioner's Exhibit 3).

At trial, most of Petitioner's testimony was in regard to the medical treatment she received following the Commission's Decision of October 8, 2013. Petitioner continued to be seen by Dr. Larry Statler, her family physician. When Dr. Statler saw Petitioner on October 18, 2013, he noted that she had chronic back pain. His record also stated that Petitioner had been approved for a dorsal column stimulator (Petitioner's Exhibit 10).

When Dr. Statler saw Petitioner on January 3, 2014, he restated his diagnosis of chronic back pain. In regard to the spinal stimulator, his record noted that Petitioner had won her case and that it had been approved, but that she was uncertain where it stood at the present time. Petitioner asked Dr. Statler to address this issue with the Workers' Comp carrier. Dr. Statler opined that Petitioner definitely needed to have the spinal stimulator so as to alleviate her chronic pain (Petitioner's Exhibit 10).

The medical records of Dr. Todd McCall, a neurologist, were received into evidence at trial. In the note of January 29, 2014, prepared by Brenna Clark, RN, it was noted that Dr. McCall last saw Petitioner on October 31, 2012, and that approval from "W/C" had been received for the dorsal column stimulator. In notes dated February 5, and February 11, 2014, RN Clark noted that she had attempted to reach Petitioner by telephone, but was unable to make contact with her (Petitioner's Exhibit 4).

RN Clark sent a letter to Petitioner dated February 11, 2014, which stated, in part, "We have received the approval for the pain psych evaluation in preparation for the dorsal column stimulator." (Petitioner's Exhibit 4).

When Petitioner was seen by Dr. Statler on March 6, 2014, he noted that she was still waiting to get her spinal stimulator and thought that everything was a "go" for that procedure. However, when Petitioner was scheduled to see the psychologist, she was informed that the paperwork for WC was not there (Petitioner's Exhibit 10).

Dr. Statler continued to see Petitioner for the next several months. When he saw Petitioner on October 16, 2014, he noted that the spinal stimulator had been approved, but that Petitioner was still waiting to hear word on when the process would start. In Dr. Statler's note of October 27, 2014, he noted that the spinal stimulator had been approved by the State and that she had paperwork regarding same. He indicated that he would make a referral to Dr. Carmichael (Petitioner's Exhibit 10).

Petitioner was seen by Dr. Craig Carmichael, an orthopedic surgeon, on December 5, 2014. At that time, Petitioner continued to complain of low back and leg pain. He noted that the plan was to have an MRI performed and that Petitioner had "some interest" in a spinal cord stimulator (Petitioner's Exhibit 13).

Petitioner was again seen by Dr. Statler on April 29, 2015. At that time, Petitioner advised that she experienced an increase in her back pain when someone playfully threw a ball at her and she involuntarily stiffened her back. He described this as an exacerbation of her pain that she had and noted that she was due to receive a spinal stimulator in the near future. Petitioner also advised Dr. Statler that the MRI that was recommended by Dr. Carmichael had been approved but not yet performed (Petitioner's Exhibit 7).

Petitioner was subsequently seen by Dr. Carmichael on June 5, 2015. At that time, the MRI had been performed and Dr. Carmichael opined that it revealed a solid fusion at L4-L5 and L5-S1, and a herniation at L3-L4. He opined that the spinal cord stimulator was a good option for Petitioner as she hoped to avoid further surgery (Petitioner's Exhibit 13).

When Dr. Carmichael saw Petitioner on June 25, 2015, he restated his findings in regard to his review of the MRI scan. However, he stated that Petitioner was interested in a discectomy at L3-L4. He recommended a surgical consult. There was no reference to the Petitioner wanting a dorsal column stimulator (Petitioner's Exhibit 13).

Dr. Carmichael again saw Petitioner on September 17, 2015. Petitioner's condition was essentially the same as it was at the time of his prior examination of her. Petitioner again expressed interested in having disc surgery at L3-L4 (Petitioner's Exhibit 13).

At the direction of Respondent, Petitioner was examined by Dr. Joseph Williams, an orthopedic surgeon, on October 12, 2015. Dr. Williams previously examined Petitioner on June 12, 2012. In connection with his examination of Petitioner, Dr. Williams reviewed medical records and the MRI scan provided to him by Respondent. Dr. Williams opined that Petitioner had chronic low back pain and noted that she had undergone fusion surgery in March, 2011, at L4-L5 and L5-S1. He also opined that Petitioner had a disc protrusion at L3-L4. In regard to causality, Dr. Williams opined that Petitioner's complaints were because of multilevel lumbar degenerative disc disease, a long history of tobacco use and having undergone breast augmentation. He further opined that no further medical treatment was necessary and that Petitioner was at MMI (Respondent's Exhibit 1).

Petitioner continued to be treated by Dr. Carmichael who saw her on October 22, 2015. At that time, Petitioner continued to have low back and leg symptoms. Because of her worsening symptoms, Dr. Carmichael recommended that another MRI scan be performed (Petitioner's Exhibit 13).

Petitioner was seen by Dr. Statler on October 30, 2015, and he noted that Dr. Carmichael had recently seen Petitioner, recommended surgery for a herniated disc and that the spinal stimulator would not help her. Dr. Statler stated that he concurred with Dr. Carmichael's judgment (Petitioner's Exhibit 11).

Petitioner was again seen by Dr. Statler on December 15, 2015, and January 8, 2016, and her symptoms remained essentially the same. In the record of January 8, 2016, Dr. Statler opined that Petitioner was not malingering and that she wanted to return to work. He again stated that he

would defer to Dr. Carmichael's surgical recommendation. Dr. Statler also ordered work conditioning (Petitioner's Exhibits 11 and 14).

Petitioner participated in work conditioning from January 29, 2016, through March 7, 2016 (Petitioner's Exhibit 19). When seen by Dr. Carmichael on February 16, 2016, February 23, 2016, and March 10, 2016, Dr. Carmichael renewed his recommendation that Petitioner have another MRI scan and a surgical consultation (Petitioner's Exhibit 11).

Petitioner was again seen by Dr. Statler on various dates from March 15, 2016, through August 24, 2016, and he restated his recommendation that Petitioner have an MRI performed. He continued to authorize the Petitioner to remain off work and again stated that Petitioner was not malingering (Petitioner's Exhibits 9 and 11).

Dr. Carmichael was deposed on May 12, 2016, and his deposition testimony was received into evidence at trial. In regard to his treatment and diagnoses of Petitioner's condition, Dr. Carmichael's testimony was consistent with his medical records. Based upon his findings on examination and the MRI, Dr. Carmichael opined that Petitioner had a fusion at L4-L5 and L5-S1, as well as a herniated disc at L3-L4 (Petitioner's Exhibit 17; pp 12-14).

In regard to treatment of Petitioner's condition, Dr. Carmichael recommended either a spinal cord stimulator or discectomy at L3-L4 as being reasonable options. In regard to causality, Dr. Carmichael stated that he disagreed with Dr. Williams' opinion and noted that Petitioner had consistently reported the injury of 2010 as being the cause of her symptoms (Petitioner's Exhibit 17; pp 14-16, 29).

When Dr. Carmichael was cross-examined, he was specifically asked what caused Petitioner's problem at L3-L4 and agreed that what caused the problem at that level was "somewhat speculation"; however, he also noted that the fusion surgery at L4-L5 and L5-S1 could have caused further stress at the L3-L4 level. He noted that it was common for the level above the fusion to develop further problems (Petitioner's Exhibit 17; pp 41-42).

Dr. Williams was deposed on July 19, 2016, and his deposition testimony was received into evidence at trial. Dr. Williams' testimony was consistent with his narrative medical report and he reaffirmed the opinions contained therein. Dr. Williams opined that Petitioner had chronic lumbar radiculopathy which he attributed to Petitioner's use of tobacco and genetic makeup. He also testified that Petitioner's complaints were out of proportion to be expected given her MRI and x-ray findings. He further stated that Petitioner could return to work and was at MMI (Respondent's Exhibit 2; pp 9-11).

On cross-examination, Dr. Williams agreed that the fall may have possibly aggravated a pre-existing condition. However, he also stated the spine looked like it did before the fall (Respondent's Exhibit 2; p 19).

At trial, Petitioner testified that she continued to have severe low back and leg pain which she did not have prior to the accident of November 20, 2010. Petitioner has not been able to return to

work since the accident of November 20, 2010. Petitioner wants to proceed with the treatment recommendations stated by Dr. Carmichael.

On cross-examination, Petitioner testified that she was not aware that Respondent had approved the spinal cord stimulator. She stated that it was her understanding that the procedure had, in fact, been denied.

Conclusions of Law

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

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of November 20, 2010.

In support of this conclusion the Arbitrator notes the following:

As noted herein, in the prior Decision of Arbitrator Pulia, as affirmed by the Commission, Petitioner's lumbar spine condition was related to the accident of November 20, 2010.

The Arbitrator is not persuaded by the opinion of Respondent's Section 12 examiner, Dr. Williams, in regard to causality. Dr. Williams' opinion was, in fact, a restatement of the same opinion he previously tendered when this case was tried before Arbitrator Pulia. Arbitrator Pulia concluded that his opinion was not as credible as the opinions of Petitioner's treating physicians. In this instance, the Arbitrator makes the same conclusion.

Dr. Carmichael opined that a fusion at L4-L5 and L5-S1 could put further stress on the level above it, L3-L4. This opinion was unrebutted.

While Petitioner had a prior low back issue in 2005, she only received some injections and did not lose any time from work as a result of that condition and sought no further medical treatment until after the accident of November 20, 2010.

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 MRI scan, surgical consult, spinal cord stimulator and L3-L4 discectomy as recommended by Dr. Carmichael.

In support of this conclusion the Arbitrator notes the following:

As noted herein, Arbitrator Pulia previously awarded prospective medical treatment to Petitioner and that Decision was affirmed by the Commission.

Further, the Arbitrator has concluded that the opinions of Petitioner's treating physicians, in particular, those of Dr. Carmichael, are more credible than those of Respondent's Section 12 examiner, Dr. Williams.

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

The Arbitrator concludes that Petitioner is entitled to further payment of temporary total disability benefits of 155 2/7 weeks, commencing October 8, 2013, through September 28, 2016.

In support of this conclusion the Arbitrator notes the following:

Petitioner has been under active medical treatment and unable to return to work and remains in need of further medical treatment.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brenda B. Jones,

Petitioner,

vs. NO: 15WC 23304

Three Z Printing Company,

17IWCC0327

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed, June 3, 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.

17IWCC0327

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: MAY 25 2017
MJB/bm
o-5/22/2017
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

JONES, BRENDA B
Employee/Petitioner

Case# **15WC023304**

THREE Z PRINTING COMPANY
Employer/Respondent

17IWCC0327

On 6/3/2016, 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 0.47% 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:

2087 MICHAEL J MEYER
404 S 4TH ST
PO BOX 129
EFFINGHAM, IL 62401

2623 McANDREWS & NORGLE LLC
MICHAEL P LATZ
53 W JACKSON BLVD SUITE 315
CHICAGO, IL 60604

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)

BRENDA B. JONES
Employee/Petitioner

v.

THREE Z PRINTING COMPANY
Employer/Respondent

Case # **15** WC **23304**

Consolidated cases:
17IWCC0327

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **March 3, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0327

FINDINGS

On the date of accident, **February 14, 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 **$24,382.36**; the average weekly wage was **$468.89**.

On the date of accident, Petitioner was **45** years of age, *married* with **1** dependent children.

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

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

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

ORDER

As explained in the Arbitration Decision, Petitioner sustained an accident which arose out of and in the course of her employment with Respondent on February 14, 2015. Petitioner failed to prove by a preponderance of the evidence that her current condition of ill-being is causally related to the accident at work on February 14, 2015. Petitioner reached maximum medical improvement on June 9, 2015. All benefits after that date are denied.

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

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

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

Signature of Arbitrator

June 1, 2016
Date

ICArbDec19(b)

JUN 3 - 2016

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

BRENDA B. JONES
Employee/Petitioner

v.

Case #: 15 WC 23304

THREE Z PRINTING COMPANY
Employer/Respondent

17IWCC0327

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On her date of accident Petitioner was 45 years old, married, with one dependent child. She was employed full time by Three Z Printing Company and been so employed since 2003. Petitioner testified that prior to her accident of February 14, 2015, she had never missed work or been placed on light or restricted duty due to any condition of her left hip or leg.

Petitioner testified that prior to the accident she had been experiencing problems with her left hip for seven years. She sought treatment on December 19, 2014, with Dr. Frichtl, a chiropractor. She testified she had had pain for seven years and had been "nursing it" and decided to find out what was going on. Prior to seeing Dr. Frichtl, the pain had been intermittent but she could bear it. She did not have pain in her left knee or thigh at that time. Petitioner testified that when she saw Dr. Frichtl he noticed there was something else going on that he did not want to get involved in, and he recommended she see Dr. Rudert, at Bonutti Clinic.

She saw Dr. Rudert on January 6, 2015, at which time he examined her and took an x-ray. He noted at that time that Petitioner's right leg was shorter than her left. He gave her an injection into her hip, in the groin area, and gave her an insert for her right shoe to help with the leg discrepancy. Petitioner testified the injection gave her relief, in that there was no pain or swelling in her hip afterwards, she was no longer limping, and she "felt like a new woman".

Petitioner testified that on the date of accident, February 14, 2015, she worked her normal shift of 5:00 a.m. to 12:00 noon. Her job that day was her normal inline job, which was a skid box job. She explained her job was to lift wrapped bundles of cards from the machine, turn around, walk to the skid box, and bend over to put the bundles in the box. The machine is about one or two feet from the box.

Petitioner testified that on the date of accident her shoe lace got hooked on a bolt underneath the machine, and when she turned to put the bundles in the skid box her footing came out from her. She landed on the rubber mat on which she had been standing, with her right knee on the mat and her left knee on the concrete. Petitioner testified that immediately after the accident her left knee hurt, as did her left hip and left thigh. She continued to work her shift that day. She testified that her symptoms after the fall differed from those she was experiencing when she saw Dr. Frichtl, in that the pain was worse and more constant. It was also more on the outer part of her hip and thigh, and her knee now hurt when it previously had not.

Petitioner continued to work after the accident, but testified she could not bend over and put the bundles in the box, and walking and sitting were hard. Her job involved standing at various machines and she had problems with her hip while doing so, especially if there was no rubber mat at the machine. Petitioner testified that prior to the visit with Dr. Frichtl in December she did have problems with her hip while standing at the machines, but that she could tolerate the pain and had lived with it for seven years.

Following the accident, Petitioner first sought medical treatment on March 5, 2015, with Dr. Omiyi at Bonutti Clinic. She testified there was a delay because she thought the pain would go away. She reported to Dr. Omiyi that she had excruciating pain and it felt like the hip socket was locking up all the time. Dr. Omiyi gave her injections in her hip and knee, which helped for a little bit. He also limited Petitioner's work to only four hour shifts and no kneeling or lunges. On June 12, 2015, her work shift was increased to six hours. Petitioner testified she had to go to six hours so she could keep her health insurance

Petitioner testified she last saw Dr. Omiyi on September 24, 2015, and that he has recommended a total left hip surgery. She would like the surgery, and testified she needed it so she can live life without pain. Since the accident of February 14, 2015, the condition of her left hip, leg, and knee is getting worse, and she testified it is hard to get in and out of vehicles, put on her socks, and do daily activities. She has not had any accidents or injuries since the accident.

Petitioner testified that the last day she worked at Three Z Printing was July 30, 2015, as she was told she needed a release from the doctor to continue working. On that day she had a conversation with Tim Smith, who is the person that fills out accident reports. The conversation took place in the press room and there were other people around who would have been able to overhear what was said. Petitioner testified that Mr. Smith informed her that since her worker's compensation case was denied she would have to leave until she could get released from her doctor. She responded that she would not get released from the doctor until she had the surgery. She left work at that time and has not worked since. On that day, July 30, 2015, the work restrictions placed by Dr. Omiyi were still in effect.

Petitioner testified that her activities of daily living have been affected by the condition of her left hip, leg, and knee. She cannot do household chores, put her socks on, clip her toenails, or be intimate with her husband. She cannot walk in grass without pain, cannot get comfortable when trying to sleep, and has trouble getting out of a chair. She testified she did not have any of these problems before her accident of February 14, 2015. At trial Petitioner was using a cane and she testified she uses the cane when she goes for a long distance or is walking around, to

help her be "sturdy". She denied using the cane prior to her work accident. She testified she continues to have knee pain, but that her hip hurts worse.

On cross-examination, Petitioner acknowledged she sought treatment from Dr. Frichtl in December, before the work accident, because she was in pain. She admitted that when she saw Dr. Frichtl she filled out an application for care, in her own hands, on which she noted that her major concern was pain from her left hip. She underlined that the pain was consistent when standing and when sitting, and she wrote out that he was walking with a limp. She admitted she told Dr. Frichtl that she had had it for years and that she saw him because it had gotten worse and was progressing, and that it was aggravated by standing on concrete all day. She admitted she told Dr. Frichtl that she was restless at night and could not sleep in her left side, and she agreed that this was in December, before her accident.

Petitioner testified that Dr. Frichtl sent her to Dr. Rudert, and when she saw Dr. Rudert he found a couple of conditions. He found degenerative osteoarthritis in the left hip, and found that one of Petitioner's legs was longer than the other. She acknowledged that was in January 2015, before her accident. She admitted she reported to Dr. Rudert that she had trouble tying her shoe laces, that her condition was aggravated by standing on concrete all day, walking, and some of the activities of daily living. She acknowledged that these conditions preexisted her accident. She agreed that after Dr. Rudert examined her he discussed the possibility that she might need a total hip replacement. Petitioner denied tripping and falling to her knees anytime in the past four years, at home or anywhere else, with the exception of when she slipped on ice at Respondent's front entrance two or three years ago. She acknowledged that the only time she has fallen in the past four years has been at her employment. Petitioner testified Dr. Omiyi has diagnosed her with only two things, dysplasia and osteoarthritis.

Petitioner confirmed she had a conversation with Tim Smith, who she understood to be the person to report to if you had an accident. She acknowledged, however, that when she fell on February 14, 2015, she did not report the accident to Mr. Smith. She testified there were witnesses to her fall. She admitted she did not seek any medical treatment for over two weeks, on March 5, 2015, because she thought the pain would go away and because she had had pain like that for seven years and it had gone away.

On re-direct examination, Petitioner testified she reported her injury to her supervisor, Dan Repking, about a week and a half later, and that she waited that long because she thought the pain would go away. She testified the pain she was having after the accident was a different kind of pain than she was experiencing before the accident, and that it never got better between the time of her accident and the when she saw Dr. Omiyi on March 5.

The parties agreed there is no specific claim for disability to Petitioner's left knee; however, Petitioner is claiming that her left hip condition affects her left knee.

Approximately two months prior to her accident at work, Petitioner presented for treatment with Dr. Jason Frichtl, a chiropractor. She saw Dr. Frichtl on December 19, 2014, at which time she completed an "Application for Care". She wrote as her major concern "hip pain". She completed a pain diagram, on which she circled the left hip in back and the outer

thigh and upper thigh and hip in front. She underlined that she had pain when standing and when sitting, and wrote "walking with a limp". Dr. Frichtl noted the date of onset was several years and that Petitioner had similar symptoms off and on for several years. He further noted she had a recent flare-up two plus days prior. Petitioner reported she had daily left hip pain, that she limped when the pain was more severe, that she was restless at night, and that she could not sleep on her left side. She denied any accident and related the cause was unknown. She related she stood on concrete all day at work. Examination showed decreased internal and external rotation of the left thigh. Dr. Frichtl recommended x-rays and a referral to Dr. Rudert at Bonutti Orthopedic. RX1.

Petitioner presented to Dr. Rudert on January 6, 2015, with a chief complaint of left hip pain. She related the pain was intermittent and related that she noticed the pain more standing and working on concrete. She described the pain as dull and throbbing, rated it at 4/10, and stated it occurred at rest, while sitting, with activity, and at night. With regard to history, Petitioner related she had had pain in her left hip for over seven years and that she had pain to the groin which increased with weight bearing. She denied any prior injury or treatment and related she stood on concrete all day. She stated it felt like her hip was out of socket and that it had been going on for years. She related that ambulating was significantly uncomfortable in the left hip and that it was difficult for her to put her socks on. RX1, PXA/Dep PX2.

Upon examination, Dr. Rudert noted that it appeared Petitioner left leg was short, but when he examined her she stood with her left leg flexed, as her right leg was one-half to three-quarters of an inch shorter than the left leg. She had pain in her left hip joint and markedly reduced range of motion of the hip. X-rays taken that day showed Petitioner had a dysplastic left hip. A "scanogram" done that day showed a significant difference in the length of Petitioner's femurs, with the right being 2.2 cm shorter. Dr. Rudert noted Petitioner could not even put her right heel down flat when she had her leg against the wall and that she had significant shortening of the right leg. He also noted Petitioner had osteoarthritis of the left hip. His overall impression was Petitioner had a dysplastic left hip and a short right leg. His treatment plan included options to work up Petitioner's hip to see what could be done, administer an intraarticular corticosteroid injection, and get an MRI of the hip. He noted they could see if shifting her weight would help her at all to take pressure off the hip, but he did not think it was going to correct the problem, due to the significant arthritic changes in her left hip. He noted consideration of an MRI of the hip would be warranted and that possible total hip replacement could be discussed. He noted consideration of trying to correct the leg length could also be given. Petitioner rated her problems as 90% hip pain, so Dr. Rudert noted he would concentrate on helping her with that. During this exam, Dr. Rudert asked one of the orthopedic specialists in the clinic, Dr. Omiyi, to step into the room for a consultation. He looked at Petitioner's leg length discrepancy, shortening of the right femur, and dysplastic left hip. Following the consultation, Dr. Rudert noted that a hip injection under fluoroscopy would be warranted and would be tried. RX1, PXA/Dep PX2.

On January 7, 2015, Dr. Rudert sent a letter to Dr. Frichtl regarding Petitioner's examination. He noted she was "an interesting patient", who had a very short right leg and a very dysplastic left hip. He noted Petitioner's right leg was almost an inch shorter than her left leg. He related Petitioner could not even put her right heel down and that to correct her leg

length discrepancy she stood with her left knee flexed all the time. He related Petitioner had markedly decreased range of motion of the left hip. RX1, PXA/Dep PX2.

On January 8, 2015, Petitioner returned to Dr. Rudert. He tried a heel lift in the office, to try and straighten Petitioner out, noting she had a short right leg. His impression was left hip osteoarthritis and short right leg at about one inch. He administered an injection into Petitioner's left hip and placed a one-quarter inch heel lift in her right shoe. She was to use the heel lift for two to three weeks, with the plan being to add a little more if it helped. Dr. Rudert noted the heel lifts would have to be added slowly to change Petitioner's gait pattern. He stated, "Hopefully we can preserve the left hip for her." PXA/Dep PX2.

Following her work accident of February 14, 2015, Petitioner sought medical treatment on March 5, 2015, with Dr. Didi Omiyi. Chief complaint was listed as left knee pain and left hip pain after falling on knees on concrete. It was noted the pain was worse with standing, sitting, walking, when her leg was bent, and laying on either side. She reported constant pain at a 7/10 in the left knee, thigh, and hip. Petitioner gave a history of falling at work on February 14, 2015, when her foot got caught. She reported she fell, landing on concrete with her left knee and on a rubber mat with her right knee. It was noted she had been seen by Dr. Rudert in the past for left hip pain and had been diagnosed with osteoarthritis of the left knee, left hip dysplasia, and leg length discrepancy of left leg being longer. It was noted Dr. Rudert gave her an intraarticular injection into the left hip "for nonoperative management of pain in the hip" and placed her in a right shoe lift. Petitioner related the injection and shoe lift helped in managing her symptoms. She further related that after her fall she had excruciating pain in her hip and knee that had not resolved in the three weeks since the accident. Her hip pain was mostly in the anterior thigh and groin and her knee pain was mostly in the anterior aspect. PXA/Dep PX2.

Dr. Omiyi's examination of the left hip revealed discomfort with range of motion. Examination of the left knee revealed limited flexion due to discomfort, medial and lateral joint line tenderness, and positive McMurray. Petitioner's leg length discrepancy was noted, with left leg longer than right. Left knee x-rays were normal, and left hip x-rays revealed hip dysplasia with degenerative changes. With regard to treatment plan, Dr. Omiyi opined it appeared Petitioner's injury severely exacerbated the osteoarthritis in her left hip. He noted her knee was symptomatic, but that the symptoms could be attributed to a contusion. Petitioner stated she was tolerating being at work as long as she did not have to do any kneeling or squatting. Dr. Omiyi recommended trying to manage Petitioner's problem nonoperatively with anti-inflammatory medication. If there was no improvement in four weeks, he would consider an MRI of the left knee and consider a repeat injection into the left hip for the degenerative joint disease. He noted, "At some point in time if her pain cannot be adequately controlled, she may need a left hip replacement." Petitioner was allowed to return to work with restrictions of no kneeling or squatting. PXA/Dep PX2.

Petitioner followed up with Dr. Omiyi on April 3, 2015, at which time she reported she had no improvement in her symptoms. She continued to have a lot of pain on the lateral aspect of her left knee and some sharp pain in the lateral aspect of her left thigh. She had difficulty working with the restrictions, had difficulty finding a comfortable position in bed, and had pain

when sitting. She stated she felt her hip could pop out of place. She reported the pain was very disabling. On examination, she had significant tenderness to palpation over the greater trochanter and had discomfort with resisted abduction of the left hip. She also had some lateral and medial joint line tenderness of the left knee, and mild effusion was noted. Dr. Omiyi's impression was left hip osteoarthritis with left hip dysplasia and hip pain, greater trochanteric bursitis, and left knee, rule out possible meniscal tear. Dr. Omiyi noted Petitioner previously received an intraarticular injection into the left hip and that she presently was most symptomatic from greater trochanteric bursitis. He administered an injection into the greater trochanteric bursa. Dr. Omiyi discussed with Petitioner the fact that she had osteoarthritis and a dysplastic hip and that she may end up needing a left total hip arthroplasty for definitive management of her hip problems. With regard to the left knee, Dr. Omiyi recommended an MRI to evaluate whether any intraarticular pathology may be causing Petitioner's symptoms. Petitioner was allowed to continue working with the same restrictions of no kneeling or squatting. PXA/Dep PX2.

On April 13, 2015, Petitioner underwent an MRI of the left knee. It was noted there were no acute changes evident. PXA/Dep PX2.

Petitioner returned to Dr. Omiyi on April 21, 2015. She reported that the injection at the last visit had not helped her pain much. She complained of significant bouts of pain when she sat for long periods of time, and she felt that when she went to get up her hip was going to pop out of place. Her groin pain was not as bad. On examination, Petitioner had discomfort with axial loading of the left hip, significant groin pain with hip abduction, tenderness to palpation over the greater trochanter, and significant discomfort with resisted hip abduction. She had a leg length discrepancy, with the left leg being about two centimeters longer than the right. Dr. Omiyi's impression was left hip dysplasia and osteoarthritis, left hip greater trochanteric bursitis, and left knee pain. Dr. Omiyi noted Petitioner was finding the pain in her left hip to be debilitating. He noted, "The symptoms of popping and subluxation of that left hip I am sure are due to degenerative changes in the hip as a result of dysplasia and loss of sphericity of that femoral head and poor coverage." He opined Petitioner had failed nonoperative management and that she would be a candidate for left total hip arthroplasty for management of her debilitating pain and dysfunction. He noted that given the dysplasia in her hip, she was at higher risk for instability because of her shallow socket. He further noted that given the fact her left leg was longer than her right, there was potential she may have an increased leg length discrepancy if he had to give her more length in order to get stability in her hip. PXA/Dep PX2.

Petitioner returned to Dr. Omiyi on May 8, 2015, and reported she was still having debilitating pain in her left hip. She was finding it difficult to perform her duties at work when she had to stand for long periods. She reported sitting caused a lot of pain and she felt the hip was subluxing out of place. She had pain in the buttock that radiated down into the groin and down the thigh toward the knee. She related she was limping as a result of the pain. On examination, Petitioner had significant discomfort and tender range of motion of the left hip. Dr. Omiyi's impression continued to be left hip dysplasia and osteoarthritis. He administered another intraarticular hip injection to attempt to get the pain under control. PXA/Dep PX2.

On May 22, 2015, Petitioner returned to Dr. Omiyi, at which time she reported 70% relief of pain with the injection at the prior visit. She stated she was able to work and was managing

her duties. She continued to complain that her hip locked up on her. She noted she was taking the previously prescribed Celebrex and it was managing her symptoms. Her examination was stable from the previous exam. Dr. Omiyi's impression was left hip osteoarthritis and hip dysplasia. She was to continue the Celebrex and continue activities as tolerated. PXA/Dep PX2.

On June 9, 2015, Petitioner was evaluated by Respondent's Section 12 examiner, Dr. James Cohen of Illinois Bone & Joint Institute. Dr. Cohen obtained a history from Petitioner that she was working, putting a bundle into the box when her shoe lace got caught and she fell. She related her left arm landed on the box, her right arm landed on the machine, her right knee landed on a rubber floor mat, and her left knee landed on the concrete floor. Petitioner stated she had immediate pain in the left knee and also had some pain in the left hip. She waited a day and a half to report the incident, but stated there were witnesses. She thought the pain would get better. She reported that most of her current pain was in the lateral aspect of her hip and that her hip would occasionally lock. She admitted she had seen Dr. Rudert in January 2015, two months prior to the accident, and that she had received an injection in the front of her hip, which gave her marked relief. Prior to the injection she had intolerable pain in her left hip for seven or eight years. With regard to the left knee, she complained of pain in the front of the knee, and further stated she got knee pain when her hip hurt. She also had some pain in her left anterior thigh. She rated her left hip pain as 8-9/10 and her left knee pain as 6-7/10. RX2.

Dr. Cohen reviewed medical records from Bonutti Clinic from January 6, 2015, through an off work slip dated June 2, 2015. He also reviewed x-rays of the pelvis dated March 5, 2015, left knee MRI of April 13, 2015, and left knee x-rays dated March 5, 2015. In addition, he performed knee x-rays in his office. Lateral view was normal, and skyline view showed dysplastic patella bilaterally with very flat trochlea and corresponding flat articular surface of the patella without significant medial facet. There was an osteophyte more prominent off the medial aspect of the patella on the left knee than on the right. RX2.

Examination revealed Petitioner had an antalgic gait and presented with the use of a cane. She had significant knee valgus bilaterally, more pronounced on the left. Left hip range of motion was limited and painful. She had trochanteric tenderness bilaterally, moderate on the right and rather severe on the left. There was no crepitus or popping palpable in the hip. There was no effusion in either knee, no focal tenderness, and no laxity. Petitioner was able to stair step bilaterally, with moderate to advanced patellofemoral crepitus when doing so. RX2.

Based on his review of medical records, the history presented by Petitioner, and his physical examination of Petitioner, Dr. Cohen opined as to the following. The accident of February 14, 2015, resulted in a contusion of Petitioner's left knee. She had pre-existing bilateral chondromalacia of the patella, as evidenced by significant crepitus with stair stepping on examination. With regard to the left knee, Dr. Cohen believed an intraarticular injection of a steroid and lidocaine solution would be reasonable, for therapeutic and diagnostic purposes. It may give Petitioner some pain relief from the chondromalacia, and if it did not than it was likely all her knee pain was emanating from her hip. He believed the latter to be the case. RX2.

With regard to Petitioner's left hip, Dr. Cohen opined Petitioner had severe pre-existing and symptomatic arthritis of a dysplastic left hip. The basis for his opinion was a combination of

three factors. First, Petitioner's history, in which she stated she was having severe pain in her left hip for seven years prior to Dr. Rudert's injection in January 2015. This was confirmed by her medical record of January 6, 2015. Second, Petitioner stated she had marked relief from the intraarticular steroid injection on January 8, 2015. Third, x-rays showed Petitioner had marked dysplasia of her hip with arthritic changes. Dr. Cohen opined that Petitioner's underlying arthritic condition of her left hip was not altered in any way from her fall on February 14, 2015. He further opined, "It is possible she had some return of her symptoms from the fall, but I would have expected complaints of hip pain immediately after the fall with her current complaints of hip pain in the 9/10 range. Furthermore, regardless of the incident of February 15, 2015, she would have had a return of her symptoms and the resulting treatment would have been necessitated regardless of the fall." Dr. Cohen believed it would be reasonable to try a repeat intraarticular injection into her hip, as a temporizing measure, irrespective of causation. He did not disagree with Dr. Omiyi regarding a hip replacement, but would not relate it to the accident of February 14, 2015. RX2.

Dr. Cohen opined that the injection into Petitioner's left knee would be related to her work accident, but believed the left knee pain was more probably coming from her hip. He opined that her hip condition was not related to the work accident, but rather was related to chronic left hip arthritis, secondary to dysplasia. He did not believe Petitioner needed any work restrictions with regard to the work accident. Other than the knee injection, which was partially diagnostic to determine if the knee pain was from the knee or the hip, Dr. Cohen opined Petitioner had reached maximum medical improvement for the work accident. RX2.

Having found Petitioner to be at MMI, Dr. Cohen provided an AMA impairment rating for Petitioner's left knee. Having opined that Petitioner's left hip condition was unrelated to her work accident, he did not prepare an impairment rating for the hip. Dr. Cohen prepared the knee impairment rating according to the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition. He began by utilizing the knee regional grid, table 16-3, page 509, and assigned the diagnosis of contusion of the knee. In that he felt crepitus on exam of both knees, she was assigned to Class I. There was no motion deficit, resulting in a lower extremity impairment range of 0% to 2% based on modifying factors. Using functional history adjustment table 16-6, page 516, he assigned Petitioner a Grade II modifier. The basis was that she had an antalgic gait and used a cane, although he believed that her gait and use of a cane were related to her hip. Using physical examination adjustment table 16-7, he assigned a Grade I modifier, based on her palpable crepitus. Using clinical studies adjustment table 16-8, he assigned Grade I modifier. He assigned this modifier despite there being no chondral narrowing, but assigned her a mild problem based on her congenital flat trochlea. Using the net adjustment formula on page 521, Dr. Cohen assigned a +1 modifier. Returning to the knee regional grid on page 509, the result was a 1% lower extremity impairment, which yielded a 1% whole person impairment. RX2

On June 16, 2015, Petitioner followed up with Dr. Omiyi. She related that to maintain her insurance at work she had to work at least six hours a day, and that she was going to try to deal with her pain in order to do so. She reported she had significant pain that woke her up at night and significant pain after being on her feet for long periods of time. The Celebrex helped to somewhat manage her symptoms. Her examination was unchanged, and Dr. Omiyi's impression continued to be left hip dysplasia and osteoarthritis. PXA/Dep PX2.

Petitioner returned to Dr. Omiyi on July 31, 2015, and took Dr. Cohen's IME report with her. She had continued complaints of pain her knee and hip. It was noted she had previously had injections but was unable to recall whether or not they did anything for pain in her knee. She related she was currently off work and had been told she couldn't go back to work until she had been released from care. Dr. Omiyi's impression continued to be left knee pain and left hip osteoarthritis and dysplasia. He opined that Petitioner had a pre-existing left hip condition and was doing fairly well until her fall at work. With regard to her left knee, he opined she may have a contusion or chondromalacia that is independently causing pain. What was more likely, and what Dr. Cohen concurred with, was that the pain in the left knee was radiating from the left hip. To help delineate the symptoms, Dr. Omiyi recommended injection into the left knee for both diagnostic and therapeutic purposes. On August 13, 2015, Petitioner underwent a cortisone injection into the left knee. PXA/Dep PX2.

Petitioner returned to Dr. Omiyi on August 28, 2015, and reported the injection had relieved some of the pressure in her knee. She had no improvement of the pain in her left hip, and noted it was locking up and grinding. Physical examination was deferred and Dr. Omiyi's impression remained unchanged at left knee pain and left hip osteoarthritis and dysplasia. He continued to recommend left total hip arthroplasty. He opined that Petitioner's hip symptoms had been aggravated by her fall at work, stating she had been significantly debilitated by pain since that time. He did not believe she would be able to return to work full duty without surgical intervention, due to the debilitating pain and nature of severe osteoarthritis. She followed up with Dr. Omiyi on September 24, 2015, and reported her left knee pain was slightly improved but her left hip was still painful, popping, and catching. She reported an incident of significant swelling in the left ankle a couple days after being on her feet for a long period of time. Dr. Omiyi's impression was left knee pain, left ankle swelling, and left hip dysplasia and osteoarthritis. He continued to recommend left hip arthroplasty. Petitioner was to follow up in six weeks; however, she testified at trial that she had not returned. PXA/Dep PX2.

Dr. Omiyi testified by way of deposition on October 29, 2015. He is an orthopedic surgeon with Bonutti Clinic and has been licensed in Illinois since 2014. According to his Curriculum Vitae, he has completed Part I of certification from the American Board of Orthopaedic Surgeons. Records from Bonutti Clinic were admitted as Exhibit 2, which included notes from January 6 and 8, 2015, when Petitioner was under the care of Dr. Rudert. PXA.

On January 6, 2015, Dr. Omiyi consulted with Petitioner during an appointment she had with Dr. Rudert. On January 8, 2015, Dr. Rudert administered an intraarticular steroid injection. Dr. Omiyi testified a steroid is an anti-inflammatory medication, used to treat pain and inflammation. The injection is done under an x-ray machine to make sure that it gets into the hip joint itself. PXA.

Dr. Omiyi testified the first time he saw Petitioner after the injection was on March 5, 2015, at which time she gave a history of an accident at work on February 14, 2015. She described she got her foot caught and fell, landing on concrete with her left knee and on a rubber mat with her right knee. She complained of an aggravation of her left hip pain and also left knee pain when examined that day. Treatment was an anti-inflammatory to help with the acute

symptoms, and consideration was given to a repeat hip injection and an MRI of the knee. Dr. Omiyi testified Petitioner's symptoms had changed from her previous visit with Dr. Rudert. She reported a return of pain in her left hip, her groin, and her anterior thigh. He further testified Petitioner reported significant relief of her symptoms following the injection by Dr. Rudert, and that she was able to get back to her daily activities, her work, and standing for long periods of time. She was doing well after the injection. PXA.

Dr. Omiyi testified he continued to treat and evaluate Petitioner up to September 24, 2015. Treatment of the hip and knee consisted of anti-inflammatory medicine, injections, and activity modification. Based on Petitioner's complaints and his evaluations, examinations, and findings, he developed a diagnosis of left hip dysplasia and osteoarthritis, which he opined was aggravated by Petitioner's injury. He also diagnosed left knee pain, but indicated his evaluations and diagnostic studies did not show any structural damage to the knee. PXA.

Dr. Omiyi testified that dysplasia is a condition whereby the hip socket has not formed around the ball of the hip completely. He explained that osteoarthritis is a degenerative condition which involves a wearing out of the normal articular cartilage of a joint, in this case a hip joint, which leads to pain, instability, and the like. He testified that both conditions preexisted Petitioner's accident of February 14, 2015. PXA.

Dr. Omiyi testified he administered a bursal injection into the greater trochanter of Petitioner's left hip on April 3, 2015. He explained this was a different injection than the one administered by Dr. Rudert on January, and was to treat inflammation or bursitis. Petitioner reported the injection did not help her pain. On April 21, 2015, Dr. Omiyi recommended a left hip replacement, because of the condition of her hip with regard to the dysplasia and osteoarthritis, and because her symptoms had not improved with nonoperative management. He believed she would benefit from surgical management as the definitive treatment for her condition. He testified he continued to recommend the surgery. PXA.

Dr. Omiyi testified he administered an injection into Petitioner's left knee on August 13, 2015, due to persistent pain in the knee. He believed the pain was likely radiating from the hip, as the MRI and his evaluations had not shown any structural damage to the knee. The injection was to help determine the origin of the pain, as well as to provide pain relief. While Petitioner had some improvement in the pressure in her knee, Dr. Omiyi opined that the knee pain was radiating from her hip. He last examined Petitioner on September 24, 2015, and was not aware of whether she had an appointment scheduled. He believed they had discussed the need for her to follow up. PXA.

Within a reasonable degree of medical certainty, Dr. Omiyi testified Petitioner's accident of February 14, 2015, aggravated her preexisting condition of left hip pain. He based his opinion on Petitioner's history that she was doing well with treatment of her symptoms prior to the accident, that since the accident her symptoms had returned and worsened, and that she had continued to fail nonoperative management. He further opined that the aggravation of her left hip condition from the accident was a permanent aggravation, in that Petitioner was still having symptoms, and that her current condition in the left hip was causally related to her accident of February 14, 2015. He opined that the pain she was experiencing in her left knee was radiating

from the left hip, and noted there was no record prior to the accident that she had any knee problem. Dr. Omiyi testified Petitioner's left hip replacement is medically necessary in order to treat her debilitating pain, that the surgery would treat the problem, and that the surgery was necessary due to Petitioner's work accident. He testified that the treatment rendered from March 15, 2015, through September 14, 2015, was medically necessary and causally related to the work accident. He opined that Petitioner had reached maximum medical treatment with her current treatment and that she required surgery to improve any further. PXA.

The Arbitrator notes that Petitioner's Attorney presented a statement of charges from Bonutti Clinic at the time of deposition, but did not offer same into evidence at that time. In that the statement of charges was included in the deposition transcript, which was admitted at trial without objection, the Arbitrator does consider the evidence and gives it its proper weight.

On cross-examination, Dr. Omiyi testified he did not review any records of treatment or examinations prior to the first examination at Bonutti Clinic on January 6, 2015. He did review the history Petitioner gave to Dr. Rudert on that date, and it was part of the record he relied upon in making his opinions. He came in to the room after Petitioner gave the history to Dr. Rudert, but he testified they reviewed the components of it while he was in the room. He agreed Petitioner gave a history that she had had hip pain for over seven years, that the pain was in her groin and increased with weight bearing, that she had no prior injury or treatment, and that she felt her hip joint was out of socket. He personally heard Petitioner say this had been going on for years, that when she walked it aggravated her hip, and that it was difficult for her to put her sock on. Dr. Omiyi testified these are more symptoms of osteoarthritis, rather than of dysplasia, but that dysplasia could lead to that. PXA.

Dr. Omiyi agreed the diagnosis of dysplasia was made after Petitioner's first examination on January 6, 2015. He explained that dysplasia refers to a shallow socket, that it is a congenital condition, and that it was the way Petitioner's hip formed as she grew. He noted Petitioner had one leg longer than the other, but testified that condition does not specifically contribute to dysplasia. He further opined there was not a clear correlation between the leg length discrepancy in this case and the osteoarthritis in the hip. He indicated it is usually the other way around, whereby osteoarthritis in the hip leads to a leg length discrepancy. Dr. Omiyi did agree with the diagnosis of dysplasia when he first saw Petitioner on January 6, 2015. PXA.

Dr. Omiyi testified he reviewed the record of January 8, 2015, by Dr. Rudert, and agreed the impression at that time was left hip osteoarthritis. He confirmed that his current diagnosis, which led to his recommendation for a total hip replacement, was also osteoarthritis. He testified that Dr. Rupert's plan to put a heel lift in Petitioner's right shoe was for the purpose of correcting the leg length discrepancy, to help improve the symptoms in her left hip which were aggravated when she walked. On that day, Dr. Rudert noted, "Hopefully we can preserve the left hip for her." Dr. Omiyi testified he did not know whether that statement indicated that Dr. Rudert was already thinking about the total hip replacement. He did not recall if Dr. Rudert ever told him that Petitioner might need a total hip replacement, but believed they discussed that it might be a treatment option for her. He could not say for certain what Dr. Rudert was referring to, and testified it could mean he wanted to prevent her from having further injury or further wearing of the joints, or to control the symptoms to the point where she doesn't need any further treatment.

He conceded it could also reasonably mean that Petitioner was in danger of having to have a left hip replacement. PXA.

Dr. Omiyi testified he took a history from Petitioner on March 5, 2015, at which time she stated she fell at work onto her left knee on concrete. She stated her foot got caught, but he did not recall what she got it caught on. As far as he was aware, Petitioner did not give any history of seeking treatment between her accident on February 14 and when she saw him on March 5. He testified that Petitioner's traumatic fall aggravated the pain she was having in her left hip. He further testified it is possible, in situations like this, to have a trauma that can cause immediate pain or that can cause progressively worse pain as time goes by. PXA.

Dr. Omiyi testified that the symptoms Petitioner had on March 5, 2015, were excruciating pain in the anterior aspect of the her thigh and in the groin, and pain in the knee. Prior to the accident, her complaint was pain in the groin with weight bearing and ambulation. Dr. Omiyi characterized there to be "slight differences in the way it was described" on January 6 versus March 5. He conceded, however, that when Petitioner first saw Dr. Rudert on January 6, she said she had had hip pain for over seven years. He conceded that she said she had pain to the groin that increased with weight bearing. He agreed that the MRI of the left knee showed no pathology of an injury to the knee. With regard to Petitioner's history that tying her shoes caused pain, Dr. Omiyi testified that in order to tie your shoes you have to manipulate or move the hip, and externally rotate it and flex it. Having hip pain makes it difficult to perform those movements. PXA.

Dr. Omiyi conceded it was possible that Petitioner would need a total hip replacement whether the accident of February 14, 2015, occurred or not, and given the fact that Dr. Rudert opined that the treatment he prescribed was trying to preserve Petitioner's hip. Dr. Omiyi conceded that, based on his medical experience, if someone suffered a traumatic accident which significantly worsened a condition, he would expect them to seek treatment for that traumatic accident. PXA.

On re-direct examination, Dr. Omiyi testified that the medical record of January 6, 2015, noted Petitioner's symptoms were intermittent and that her pain level was 4/10. Whereas, on March 5, 2015, her symptoms were constant and her pain level was 7/10. He further testified there was no record of knee pain on January 6, but knee pain was noted on March 5. He opined that Petitioner's knee pain was something radiating from the hip. PXA.

On re-cross examination, Dr. Omiyi agreed that Petitioner suffered a contusion to the left knee, which did not result in a permanent injury. PXA.

CONCLUSIONS OF LAW

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

In support of the Arbitrator's decision relating to issue (C), whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

To obtain compensation under the Illinois Workers' Compensation Act, a claimant must show by a preponderance of the evidence that he suffered a disabling injury arising out of and in the course of his employment. 805 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1013 (1st Dist. 2011); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57 (1989).

The Arbitrator finds that Petitioner has met her burden of proof in establishing that an accident occurred which arose out of and in the course of her employment. In so concluding, the Arbitrator finds significant that Petitioner gave a consistent history of the accident to all of the treating and examining physicians and at trial. In addition, Petitioner's testimony concerning the facts of the occurrence was unrebutted.

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

A claimant has the burden of proving by a preponderance of the credible evidence all elements of the claim, including that any alleged state of ill-being was caused by a workplace accident. *Parro v. Industrial Commission*, 260 Ill.App.3d 551, 553 (1st Dist. 1994). Liability cannot be premised upon imagination, speculation, or conjecture, but must arise from facts established by a preponderance of the evidence. *Illinois Bell Tel. Co. v. Industrial Comm'n*, 265 Ill.App.3d 681, 685 (1st Dist. 1994).

It has long been recognized that, in preexisting condition cases, recovery will depend on the employee's ability to show that the work-related accidental injury aggravated or accelerated the preexisting disease, such that the employee's current condition of ill-being can be said to have been causally connected to the work injury and not simply the result of a normal degenerative process of the preexisting condition. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 204-206 (2003). The existence of health problems of an employee prior to a work-related injury neither deprives the employee of a right to benefits nor relieves the employee of the burden of proving a causal connection between the employment and the subsequent health problems. *Neal v. Industrial Comm'n*, 141 Ill.App.3d 289, 296 (1st Dist. 1986).

The Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that her current left hip, left leg, and left knee conditions are causally related to her work accident of February 14, 2015. In so concluding, the Arbitrator finds significant the chronological chain of events, and further finds the opinion of Dr. Cohen to be more persuasive than that of Dr. Omiyi.

Petitioner testified, and the record is clear, that she had left hip pain for more than seven years prior to the work accident. She further testified that prior to the accident she "could bear" the pain. Yet, the record is clear that her pain became so intolerable in December 2014 that she

sought medical treatment with Dr. Frichtl on December 19, 2014, eight weeks prior to the accident. By Petitioner's own testimony, Dr. Frichtl "noticed there was something else going on there that he didn't want to really get involved in", and he referred her to Dr. Rudert. When she saw Dr. Rudert on January 6, 2015, he noted severe pain and markedly reduced range of motion in Petitioner's hip, along with a substantial difference in the length of her legs. He noted the difference was so bad that Petitioner could not even put her right heel flat on the floor when standing against the wall, and that she stood with her left leg flexed to even out the discrepancy.

Petitioner testified that her symptoms and limitations after the fall at work were different than those before the fall. Dr. Omiyi testified as to the same; however conceded on cross-examination that there were only "some slight differences in the way it was described". The Arbitrator notes that while treating with Dr. Frichtl and Dr. Rudert prior to the accident of February 14, 2015, Petitioner's complaints were as follows:

1. Pain in left hip (front and back), outer thigh, and front upper thigh
2. Pain when standing, sitting, walking, at rest, and with activity
3. Walked with a limp (antalgic gait)
4. Restless at night, could not get comfortable sleeping, could not sleep on left side
5. Pain was dull, throbbing, intermittent, and rated at 4/10
6. Pain to groin that increased with weight bearing
7. Was hard to put socks on
8. Pain present for more than seven years
9. Left hip felt like it was out of the socket

The Arbitrator further notes that objective findings and diagnoses by Dr. Frichtl, Dr. Rudert, and/or Dr. Omiyi prior to Petitioner's accident were as follows:

1. Decreased range of motion with increased pain in left hip
2. Leg length discrepancy, with right leg nearly one inch shorter than left
3. Tenderness in greater trochanteric bursa
4. Left hip dysplasia (a shallow socket, congenital in nature)
5. Left hip osteoarthritis

The Arbitrator finds significant that following Petitioner's work accident of February 14, 2015, her complaints were identical to the complaints she had prior to the accident, as listed above. Petitioner's testimony that she did not have any of these problems before the accident is simply not credible. The only additional complaints were left knee pain, constant left hip pain, sometimes sharp pain, and pain rating of 7/10. The Arbitrator notes that these additional complaints were primarily recorded in the two to three months immediately following the accident, in the acute phase of injury. The Arbitrator further finds significant that the objective findings and diagnoses by Dr. Omiyi following the work accident were identical to those prior to the accident, with the exception of the new diagnosis of left knee contusion.

Finally, the Arbitrator finds significant that Petitioner's likely need for a total hip replacement was recognized and recorded by Dr. Rudert on January 6 and January 8, 2015. On January 6, Dr. Rudert noted, "Possible total hip replacement could be discussed." On January 8, he noted, "Hopefully we can preserve the left hip for her." Although Dr. Omiyi testified that this second statement was "a fairly vague statement and could refer to multiple different things", the Arbitrator is not persuaded and does not find it to be vague in the least. Dr. Omiyi reluctantly

admitted during testimony that it was possible that Petitioner would likely need a total hip replacement whether the accident of February 14, 2015, had occurred or not. He refused to address the fact that Petitioner did not seek treatment for nearly three weeks following the accident, although did reluctantly concede that following a traumatic accident which significantly worsened a condition, it would be expected the patient would seek treatment. The Arbitrator finds Dr. Omiyi's opinion and testimony with regard to causal connection to not be persuasive.

Dr. Cohen, on the other hand, clearly identified that Petitioner's complaints following her accident were the same as those prior to the accident. He further clearly recognized that Petitioner's objective findings and diagnoses following the accident were the same as those prior to the accident, with one exception. Dr. Cohen opined that Petitioner sustained a contusion to her left knee in the accident of February 14, 2015. He also noted that she had pre-existing bilateral chondromalacia, as evidenced by significant crepitus with stair stepping on exam. He believed it would be reasonable for Petitioner to have an intraarticular steroid and lidocaine injection in her left knee, for both therapeutic and diagnostic purposes. He opined, however, that Petitioner's knee complaints were actually emanating from her hip.

Dr. Cohen opined that Petitioner had severe pre-existing, symptomatic arthritis and dysplasia in her left hip, based on her history, her medical records before and after the accident, and her diagnostic studies. He opined it was possible she had some return of symptoms from the fall at work, but stated he would have expected her to have immediate complaints and treatment, which was not the case. Given her history, Dr. Cohen opined that regardless of her work accident Petitioner would have had a return of her symptoms, and the resulting treatment would have been necessary. He did not disagree with Dr. Omiyi regarding a hip replacement, but opined that the need for it was not related to the work accident of February 14, 2015.

The Arbitrator finds Dr. Cohen to be persuasive, and his opinions are given greater weight than those of Dr. Omiyi. Dr. Cohen's opinions took into consideration the fact that Petitioner's complaints and diagnoses after the accident were identical to those prior to the accident, the fact that Petitioner's condition prior to the accident was advanced and symptomatic, and the fact that following the accident Petitioner did not seek medical treatment for nearly three weeks. The Arbitrator finds all of these facts and Dr. Cohen's opinions to be probative of a lack of causal relationship to the work accident with regard to Petitioner's current condition of her left hip, left leg, and left knee.

Based on the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner has failed to prove by a preponderance of the evidence that her current condition of ill-being and need for treatment relative to her left hip, left leg, and left knee are causally related to her work accident of February 14, 2015. The Arbitrator further finds that Petitioner reached maximum medical improvement on June 9, 2015, that being the date of the independent medical evaluation by Dr. Cohen.

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

In light of the Arbitrator's finding above with respect to issue (F), the Arbitrator finds that Petitioner is not entitled to ongoing medical care for her left hip, left leg, and left knee.

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

In light of the Arbitrator's finding above with respect to issue (F), the Arbitrator finds that Petitioner is not entitled to temporary total disability benefits. The Arbitrator finds Petitioner reached maximum medical improvement on June 9, 2015.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with correction	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rigoberto Lopez,

Petitioner,

vs.

NO: 15 WC 37771

Amtab,

17IWCC0328

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice provided to all parties, the Commission after considering the issues of causal relationship, medical expenses both incurred and prospective, and temporary total disability benefits, and being advised of the facts and the law reverses the Decision of the Arbitrator. The Commission further remands this case to the Arbitrator for further proceedings for a determination of an amount of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

STATEMENT OF FACTS

Accident is not in dispute. At the July 19, 2016 arbitration hearing, Petitioner, a welder testified on September 23, 2015 while welding a 7 to 10 pound item, he sustained a burn to his right hand due to a defective glove causing him to jerk his right arm backwards. T. 9–11. Petitioner testified he had not previously injured his shoulder or neck. T. 11. Petitioner testified he felt an immediate onset of pain in his right shoulder and neck. T. 11. Petitioner testified he sought treatment from Dryer Medical Clinic, Occupational Health Services (hereinafter "DMC") at the direction of the Respondent. T. 12.

The medical records evidence Petitioner sought treatment at DMC on September 24, 2015 and provided a consistent history of accident. PX1. Petitioner complained of pain in his right shoulder, laterally, as well as extending into his neck. PX1. Dr. Christofersen diagnosed a right shoulder strain; recommended conservative treatment; and released Petitioner to return to work with a 10 pound lifting restriction for the right arm and no overhead lifting. PX1.

Petitioner testified he returned to work within his light duty restrictions and continued to work with light duty restrictions throughout his treatment with DMC. T. 25.

Petitioner returned to DMC on October 2, 2015 complaining of increased pain extending from his shoulder down his arm. Dr. Christofersen continued the diagnosis of right shoulder strain; recommended conservative treatment including physical therapy; and continued the same restrictions for modified duty. PX1.

Petitioner returned to DMC on October 16, 2015 complaining of continued pain especially in the upper thoracic area through the neck and posterior shoulder. Dr. Christofersen continued the diagnosis of shoulder strain, but noted no significant shoulder pathology and commented the cause may be the neck; recommended continued physical therapy; and continued the same restrictions for modified duty. PX1.

Petitioner returned to DMC on October 21, 2015 with continued complaints of pain in the posterior shoulder and upper back. Dr. Christofersen diagnosed both a right shoulder strain and cervical strain; recommended continued physical therapy and a cervical MRI given Petitioner's pain complaints; and continued the same restrictions for modified duty. PX1.

Petitioner returned to DMC on October 30, 2015 with continued complaints of pain in the upper back near the base of the neck without complaints of pain in the shoulder area. Dr. Christofersen continued to diagnose a right shoulder and cervical strain; continued to recommend a cervical MRI; and continued the same restrictions for modified duty. PX1.

On November 7, 2015 a cervical MRI was undertaken which evidenced an essentially normal MRI (no herniations) but mild diffuse low signal throughout the bone marrow with anemia. Clinical correlation was advised as to this condition. PX1.

Petitioner returned to DMC on November 10, 2015 with continued complaints of pain. Dr. Christofersen reviewed the MRI results and recommended Petitioner seek treatment from his primary care physician regarding "the mild diffuse low signal throughout the bone marrow which can be seen with anemia." Dr. Christofersen noted minimal objective findings despite Petitioner's continued complaints. Dr. Christofersen released Petitioner to return to work full duty and discharged him from care. PX1.

Later that same day, Petitioner sought care from Dr. Snook, a chiropractor at New Life Medical Center. Petitioner provided a history of his work injury and voiced complaints of pain in his neck and shoulder. Petitioner advised Dr. Snook that his cervical MRI had been reported as normal which is inconsistent with Dr. Christofersen's recommendations. Dr. Snook diagnosed cervical sprain, cervical pain, cervical radiculopathy, right shoulder sprain, right shoulder pain, and right shoulder joint stiffness. Dr. Snook recommended a course of conservative treatment consisting of chiropractic spinal correction and chiropractic physical therapy four times per week for three weeks. Dr. Snook authorized Petitioner off work. PX2.

On December 3, 2015 Dr. Snook reevaluated Petitioner who continued to complain of pain. Dr. Snook recommended ongoing chiropractic care three times per week for a month and continued to authorize Petitioner off work. PX3.

At the direction of Dr. Snook, Petitioner underwent a right shoulder MRI on November 19, 2015 which evidenced probable tendinitis and/or bursitis with the remainder of the exam being unremarkable. PX2;RX5. At the direction of Dr. Snook, Petitioner underwent an EMG/NCV of the right upper extremity on November 24, 2015 which was essentially normal. PX2; RX6. On December 3, 2015 Dr. Snook referred Petitioner to be evaluated by an orthopedic physician. PX2.

On December 15, 2015 Petitioner was evaluated by Dr. Ronald Silver on Dr. Snook's referral. Dr. Silver diagnosed rotator cuff impingement; provided a cortisone injection; prescribed medications; recommended ongoing physical therapy; and authorized Petitioner off work. PX3.

On January 29, 2016 Dr. Silver reevaluated Petitioner who continued to complain of a painful shoulder with no indication of pain relief from the cortisone injection. Dr. Silver recommended arthroscopic surgery due to the rotator cuff impingement as well as continued physical therapy and medications and continued to authorize Petitioner off work. On March 4, 2016 Dr. Silver reevaluated petitioner and made the exact same recommendation as indicated on January 29, 2016 but ordered drug testing. PX3.

Thereafter on March 21, 2016 Petitioner was evaluated by Dr. Kevin Walsh pursuant to Section 12 of the Act at the Respondent's request. Dr. Walsh obtained a history; performed a physical examination; and reviewed Petitioner's prior records including the MRI of the right shoulder. Dr. Walsh concluded Petitioner suffers from pain which was unrelated to the injury of September 23, 2015. Dr. Walsh opined the MRI did not clearly evidence rotator cuff tendinitis and/or bursitis. Moreover impingement syndrome is not caused by the mechanism of injury as described by the Petitioner but due to repetitive strenuous overhead activities. Dr. Walsh further opined if Petitioner suffered from impingement syndrome, the cortisone injection would have provided temporary pain relief, but Petitioner denied any such relief. Dr. Walsh concluded surgery was neither reasonable nor necessary, and Petitioner was able to return to work full duty and had been so able since released by Dr. Christofersen on November 10, 2015. RX8.

17IWCC0328

On April 15, 2016 Petitioner returned to Dr. Silver with continued complaints of pain. Dr. Silver again recommended surgery as all conservative measures including the steroid injection, pain medication, anti-inflammatory medication, and physical therapy had failed. For the first time in Dr. Silver's records, there is mention of temporary pain relief from the injection provided on December 5, 2015. Further the drug screening undertaken on March 4, 2016 was negative for tramadol, hydrocodone, and their derivatives which were inconsistent with use of the prescribed medication. Dr. Silver last evaluated Petitioner on May 27, 2016 with the same surgical recommendation and reasoning offered during the April 15, 2016 visit. PX3.

While treating with Dr. Silver, Petitioner continued to receive chiropractic care and treatment at New Life Medical Center through June 13, 2016. PX2. Dr. Walsh prepared an addendum report on July 4, 2016 relative to a records review and corresponding medical bills and opined the chiropractic treatment was neither reasonable nor necessary and the charges excessive. Dr. Walsh also opined the prescription charges from RX Development were unreasonable and excessive. RX7.

On direct examination Petitioner testified he attempted to return to work full duty after his release by Dr. Christofersen, but the pain was too strong. T. 15. On redirect examination Petitioner testified he attempted to return to work full duty for two days, but the pain was too intense. T. 29. On cross-examination Petitioner testified after working light duty for approximately six weeks, he stopped working completely at the direction of the doctors at New Life Medical Center. T. 27-28. Petitioner testified he advised Dr. Silver he desired to undertake the recommended surgery. T. 18.

The Commission makes the following factual findings:

*Petitioner is not credible.

*Petitioner's testimony on direct and redirect examinations regarding his alleged brief return to work full duty is not credible.

*Petitioner suffers from a shoulder strain which resolved on or about November 10, 2015.

*All treatment after Petitioner's November 10, 2015 visit with Dr. Christofersen is denied as unrelated and neither reasonable nor necessary.

CONCLUSIONS OF LAW

The Commission finds the Petitioner failed to prove a causal relationship between his accident of September 23, 2015 and his current condition of ill-being and need for treatment. "[T]he Commission is not bound by the arbitrator's findings and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. [citation omitted]." *R.A. Cullinan and Sons v. The Industrial Commission*, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240 (1991). The "interpretation of the testimony of medical witnesses is particularly within the province of the Industrial Commission. [citation omitted]." *A.O. Smith Corporation v. The Industrial Commission*, 51 Ill. 2d 533, 537, 283 N.E.2d 875 (1972).

Petitioner testified in great detail on redirect examination about his attempted return to work for two days and his inability to hold the welding gun or wear the mask. T. 29. Such testimony is completely contradicted by Petitioner's testimony on cross-examination wherein he admitted, after being released to full duty work, he chose not to work based on the advice of his doctors at New Life Medical Center. T. 27. This testimony is supported by the medical records as well as the stipulation sheet offered into evidence at trial. Dr. Christofersen released Petitioner to return to work full duty on November 10, 2015. PX1. On that same day, Petitioner presented to Dr. Snook at New Life Medical Center who authorized Petitioner off work. PX3. More importantly, the stipulation sheet evidences Petitioner's first claimed day of missed work is November 10, 2015. Petitioner's testimony regarding an attempted return to full duty work is simply not credible.

Petitioner's credibility is further compromised by statements made to his medical providers. Dr. Snook's November 10, 2015 record documents Petitioner advised him a cervical MRI was performed, and Petitioner was advised the results were normal. PX2. This is not true. On November 10, 2015 the medical records evidence Dr. Christofersen evaluated Petitioner and advised him of the results of the MRI and Petitioner's need to consult with his primary care physician. PX1. More importantly, Petitioner advised Dr. Silver of severe pain in his shoulder throughout his treatment. PX3. Accordingly Dr. Silver prescribed multiple medications: Terocin Patch, Ultram (tramadol), Mobic (meloxicam), Protonix, and Verdrocet (hydrocodone). On March 11, 2016 Dr. Silver reviewed blood testing which indicated no use of either Ultram (tramadol) or hydrocodone which was inconsistent with prescribed medication. PX3. (It is noted during Petitioner's treatment with Dr. Silver, Dr. Silver prescribed 450 pills of Verdrocet and 300 pills of Tramadol. RX4). Such lack of use of the prescribed medication belies Petitioner's multiple histories to his medical providers as well as his testimony at trial of severe pain. Further, Dr. Silver performed a cortisone injection on December 5, 2015 which provided no pain relief as evidenced by Dr. Silver's medical records of January 29, 2016 and March 4, 2016 which memorializes Petitioner's continued complaints of severe pain. PX3. However, during the April 15, 2016 visit more than four months after the injection, Dr. Silver notes a temporary relief of pain following the injection. Again such history is difficult to believe as Petitioner advised Dr. Walsh on March 21, 2016 that the injection provided no relief. RX8. Dr. Walsh further opined if Petitioner suffered from impingement syndrome, the cortisone injection would have provided temporary relief. Only after this opinion does Petitioner suddenly remember the temporary pain relief. Such is not believable, and Petitioner is not credible.

The Commission weighs the competing medical opinions of Dr. Walsh and Dr. Silver and affords greater weight to the opinions of Dr. Walsh finding such opinions more persuasive. Dr. Walsh evaluated Petitioner on March 21, 2016 at which time he obtained a history of accident; reviewed Petitioner's prior treating medical records; reviewed Petitioner's job description; and performed a physical examination. Dr. Walsh is of the opinion Petitioner's subjective complaints are disproportionate to the objective findings. Specifically Dr. Walsh reviewed the MRI performed on November 19, 2015 which showed neither evidence of a rotator

cuff tear nor evidence of tendinitis and/or bursitis. Further Dr. Walsh's physical examination was essentially negative except for subjective complaints of pain. RX8.

Dr. Walsh opined the mechanism of injury described by Petitioner is not a competent cause of impingement syndrome. Further Dr. Walsh indicated if Petitioner suffered from impingement syndrome, a cortisone injection would have provided temporary relief, and no such relief was experienced by the Petitioner. Given the disproportionate nature between Petitioner's subjective complaints and the objective findings of which there were none as well as the mechanism of injury, Dr. Walsh opined Petitioner suffered from a shoulder strain which resolved on or about November 10, 2015. RX8.

Unlike Dr. Walsh, Dr. Silver appears to predicate his entire opinion on Petitioner's subjective complaints of pain. As detailed above, Petitioner is not credible. An expert's opinion is only as valid as the facts upon which it is based. *Gross v. Illinois Workers' Compensation Commission*, 2011 IL App (4th) 100615WC. Further Dr. Silver provides no explanation regarding his diagnosis of impingement syndrome and the mechanism of injury and its failure to cause such condition.

Section 8(a) of the Illinois Workers' Compensation Act entitles a claimant to recover medical expenses which are reasonable, necessary, and causally related to an accident. *820 ILCS 305/8(a)* (West 2010); *Zarley v. The Industrial Commission*, 84 Ill. 2d 380, 418 N.E.2d 718 (1981). The same standard applies to prospective medical care. *Homebrite Ace Hardware v. The Industrial Commission*, 351 Ill. App. 3d 333, 814 N.E.2d 126 (2004). Petitioner sustained a shoulder strain due to his accident of September 23, 2015 with maximum medical improvement being reached by November 10, 2015. As such all treatment following Petitioner's discharge from care by Dr. Christofersen on November 10, 2015 is neither reasonable nor necessary nor is it causally related to Petitioner's accident. Additionally, Dr. Walsh reviewed the medical records and the medical bills stemming from Petitioner's treatment including treatment with New Life Medical Center and Dr. Silver as well as the prescription expenses from RX Development Assoc. Inc. and found all such treatment neither reasonable nor necessary. RX7. Dr. Walsh further opined the chiropractic treatments from New Life Medical Center as well as the prescription expenses from RX Development Assoc. Inc. were excessive and unwarranted. RX7. As previously stated, the Commission adopts the opinions of Dr. Walsh. As such all medical bills incurred following the November 10, 2015 finding by Dr. Christofersen of maximum medical improvement are hereby denied including the following: 1) New Life Medical Center in the amount of $26,380.00; 2) Dr. Gregory Thurston of New Life Medical Center in the amount of $4,904.00; 3) Dr. Ronald Silver of Northshore Orthopedics in the amount of $1,053.00; 4) RX Development Assoc. Inc. in the amount of $17,703.25; 5) Infinite Strategic Innovations in the amount of $509.60; and 6) Imaging Centers of America in the amount of $1,400.00. Relative to the bill from Dryer Medical Center balance due in the amount of $776.00 is awarded pursuant to Sections 8(a) and 8.2 of the Act to the extent it may be outstanding. It is noted the print date of the bill is February 5, 2016 so all payments may not be reflected.

17IWCC0328

"To show entitlement to TTD benefits, claimant must prove not only that he did not work, but that he was unable to work. [citation omitted]." *City of Granite City v. The Industrial Commission*, 279 Ill. App. 3d 1087, 1090, 666 N.E.2d 827 (1996). Petitioner was released to full duty by Dr. Christofersen on November 10, 2015. As such, Petitioner was able to work but chose not to do so. Further "[t]he dispositive test is whether the claimant's condition has stabilized, that is, whether the claimant has reached maximum medical improvement. [citation omitted]." *Mechanical Devices v. The Industrial Commission*, 344 Ill. App. 3d 752, 759. Petitioner reached maximum medical improvement as of November 10, 2015. As such, no temporary total disability benefits are awarded beyond November 10, 2015.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's September 29, 2016 decision is reversed for the reasons stated herein.

IT IS FURTHERED ORDERED BY THE COMMISSION that the Respondent pay the medical bill from Dryer Medical Clinic balance due of $776.00 pursuant to Section 8(a) and Section 8.2 of the Act.

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

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

Bond for the 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: MAY 26 2017
LEC/maw
o04/12/17
43

L. Elizabeth Coppoletti

Joshua D. Luskin

Charles J. DeVriendt

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

Vernell Dixon,
Petitioner,
vs.
Chicago Transit Authority,
Respondent,

NO: 14 WC 35831

17IWCC0329

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, medical expenses, nature and extent of Petitioner's permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

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

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

DATED: MAY 26 2017

L. Elizabeth Coppoletti

LEC/mas
o5/17/17
43

L. Elizabeth Coppoletti

Michael J. Brennan

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DIXON, VERNELL
Employee/Petitioner

Case# **14WC035831**

17IWCC0329

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

On 9/13/2016, 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 0.54% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5327 MICHAEL HIGGINS
6204 W 63RD ST
CHICAGO, IL 60638

0515 CHICAGO TRANSIT AUTHORITY
ARGY KOUTSIKOS
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

17IWCC0329

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

Vernell Dixon
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # 14 WC 35831

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago** , on **June 23, 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 _____

17IWCC0329

FINDINGS

On **6-23-16**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$66,300.00**; the average weekly wage was **$1,275.00**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

The Petitioner has not proven, by a preponderance of the evidence, that an accident occurred which arose out of and in the course of his employment by Respondent therefore, no benefits are awarded pursuant to the Act.

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

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

FINDINGS OF FACT

The disputed issues in this matter are 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; and 5) the nature and extent of Petitioner's injury. *See,* AX1.

Petitioner's testimony

Vernell Dixon ("Petitioner"), is a 45 year old bus operator, employed by the Chicago Transit Authority ("Respondent") as of 2004. On October 9, 2014, the petitioner was assigned to the 79th Street route, which starts at Wentworth (Lake Front) and goes to Ford City. Petitioner testified that on said date, he made his relief stop at 79th and Wentworth at approximately 1:00 to 1:30 p.m., starting on the second-half of his work day, and proceeded in route to the Red Line stop. (T. 46-47) As he approached the Red Line stop, a young lady and man boarded the bus. The woman used her CTA card to pay her fare and tapped the card again to pay for her male companion. The fare for the male companion did not register and petitioner advised the couple of that fact. (T. 13-14, 17)

The woman disputed that her CTA card did not have sufficient funds to cover her male companion's fare. Petitioner testified if a customer fails to pay the fare, he is to ask that the fare be paid; if the fare is not paid upon the first request he is to request payment for a second time. If the passenger does not pay the fare upon second request then the bus operator is to continue in service with that customer still on board; the bus operator is not to engage in any physical contact with the customer to secure the fare nor is the operator to attempt to physically eject the customer from the bus. (T. 49-51)

Petitioner testified that after he advised the couple of the unpaid fare, the women walked away but the man threatened him. The man stayed on the bus, then got off the bus, then re-boarded the bus. Petitioner then closed the bus doors as he was getting ready to pull away from the service stop. (T. 18-19)

Petitioner testified after the man re-boarded the bus ... "He spit on me"...(T. 19) Petitioner testified when he was spit on, the male passenger was standing by the closed front door and facing him. (T. 56) Petitioner had his seat belt on and the safety shield engaged; the top of the shield extended approximately five inches above petitioner's head when seated and came down to approximately mid-thigh level-its width went up to behind the fare box. (T. 58-61)

Petitioner testified that after the man spit on him, he... "was feeling for his safety... because as he was spitting, he made a gesture of coming towards me... so I went and tried to protect myself". (T. 21) Petitioner testified that he went ahead and initiated a physical altercation with the male passenger because he was ... " fearing not knowing what he was going—capable of what he was going to do". (T. 21)

Petitioner stated that he was not struck nor was there any physical contact made onto his person by the male passenger before petitioner unfastened his seat belt, opened the shield door and got out of his seat. (T. 62-63). After the man re-boarded the bus, Petitioner left his seat and continued to stare at the man. Petitioner testified that during that time, the man never turned away from him and

towards the door, nor did the man try to push the door open in order to exit. (T. 63-64). The front door of the bus was closed during the altercation. (T. 25)

After Petitioner initiated physical contact, the male passenger fought back and his female companion came up behind Petitioner, put her arm around his neck and put petitioner in a choke hold. (T. 23) Petitioner testified as he was in the chokehold the male passenger was punching him in the face then he was pulled back and fell to the floor. The woman released him from the chokehold and both of the aforesaid passengers got off the bus as Petitioner lay on the floor. (T. 24-25, 66-67) After the couple left the bus, Petitioner got up from the floor, called the CTA control center and CPD, who responded to the scene.

Petitioner was transported to St. Bernard Hospital where he stated that he felt neck pain and was shaken by the event. (T. 28) Petitioner was seen at Concentra the following day and thereafter sought treatment at Illinois Orthopedic Network, for neck pain. (T. 28-29) He was referred to H and M Medical for physical therapy, where he noticed that his neck was tense and he had pain, particularly when sleeping in a certain position. (T. 31, 75-76) Petitioner also sought treatment with Dr. Kelley in order to feel safe again at work. (T. 33, 39-40). He gave a history to all the health providers of where he was struck when physical contact was made upon his person. (T. 66) Petitioner testified that he gave a history to Dr. Kelley of what occurred and what threatening comments were made by the male passenger. (T. 64-65) Petitioner testified that he had no other injuries as a result of the incident in question. (T. 32).

While under doctor's care, he was kept off work until December 11, 2014, when he was release to modified duty for approximately one week before he returned to full duty as a bus operator. (T. 40-41). After he returned to driving a bus he noticed that he was more on edge and more aware of his surroundings. (T. 41) Petitioner testified at present he feels physically drained as he has to put a lot of energy into not having any altercations with anyone. He has neck cramps on the right side and headaches in the forehead area, that happen out of the blue. (T. 42-43, 65-66).

Video Footage

Respondent's exhibit 2 was introduced into evidence and the parties stipulated that the video footage depicts the petitioner and the incident in question. The first video's run time is from 13:43:24 to 14:00:21 and in relevant part, depicts the incident as follows: at 13:49:42, Petitioner boards the bus to make his relief; at 13:50:57 the petitioner closes the safety shield around the driver's area; at 13:55:14 Petitioner opens the front door at the service stop for the Red Line and multiple passengers are on the sidewalk awaiting to board.

At 13:56:40 a female, wearing a black leather jacket, boards the bus and stands by the driver's area when her male companion, wearing a white jacket with a backpack on his back, boards the bus with a baby in a stroller at 13:57:18 and stands by the fare box. At 13:57:56, the man and woman walk to the

first bench seat on the curb side of the bus, secure the stroller and return to the area directly in front of the safety shield by 13:58:43; appearing to be conversing with the petitioner without any excitement or abrupt gestures. At 13:59:16 to 13:59:19, the male exits and re-boards the bus: at 13:59:20 the male walks closer to the driver's area as Petitioner closes the front door by 13:59:22, at which time the male walks backwards to the edge of the step, by the closed door. At 13:59:23.212 the male closes his mouth and ejects spit towards the driver's seat area at 13:59:23.218;[1] thereafter the man turns to his left slightly, then proceeds to push the closed front door with his shoulder. The man continues to attempt to open the front door while the front of his body is facing flush against the door, without success at 13:59:24.727.

From 13:59:24.885 to 13:59:27.388, the man looks back at the driver's area, turns his body with the left shoulder against the door and puts up both hands to deflect blows from the petitioner. At 13:59:24.304, the safety shield swings open. From 13:59:27.388 to 13:59:27.815, the petitioner is viewed repeatedly striking the man; a physical altercation ensues and continues until the front doors are opened by a young man standing on the sidewalk outside the bus at 13:59:37, when the male passenger disengages from the altercation and runs off the bus at 13:59:41.

During the altercation, at approximately 13:59:32, the female appears behind Petitioner with her arm around his neck, pulling him away from her companion. By 13:59:45, the female appears to put her hand up slightly as if to protect herself from any physical contact from petitioner; at 14:00:17 the female exits the front door with the stroller. The second portion of the video footage runs from 14:00:17 to 14:13:23 and depicts Petitioner after the incident: he sits in the front passenger seat and uses the phone, talks to a few passengers that boarded; and at that time, appears excited agitated and angry as he appears to be discussing the event.

Medical Records

Petitioner was initially interviewed about any resulting injuries when the Chicago Fire Department ambulance arrived at the scene. He reported a history of being... "*thrown to the ground and hit in the face and spit on. Upon assessment pt c/o shoulder pain. Denies any LOC or neck or back pain.*" (P. Ex. 5) Petitioner was transported to St. Bernard Hospital where he complained of right sided neck soreness and pain after... "*A BUS PASSENGER GRABBED ME ON MY NECK & HE SPIT ON MY FACE.*"(P. Ex. 1). Petitioner rated his neck pain at 4; no edema was noted on his person, his emotional status was recorded as "calm/relaxed" with the medical determination that he did not need a mental status exam. Petitioner was diagnosed with a cervical sprain, exposure to bodily fluid.

The next day petitioner was seen at Concentra where he complained of right posterior neck stiffness that radiates down to the bilateral paraspinal muscles; no numbness, tingling or weakness. Petitioner was to remain off work for the rest of his shift and back to regular duty next shift. (R. Ex. 1).

[1] It is uncertain as to what if anything the ejected spit made contact with as the shield was engaged and petitioner did not testify that the spit actually made contact with any portion of his person.

Also on October 10, 2014, Petitioner sought treatment with Dr. Sajjad Murtaza, Illinois Orthopedic Network. Petitioner gave a history of being put in a chokehold from behind and having his neck extended backwards, resulting in neck and mid-back (thoracic) pain; and denying any radiation of the pain. On physical examination petitioner was noted to be in no acute distress, mood and affect normal, tenderness along the paracervical musculature with hypertonicity and spasms and tenderness along the thoracic muscles. Petitioner was diagnosed with a cervical and thoracic strain, prescribed physical therapy and taken off work.[2] (P. Ex. 2).

On October 23, 2014, Petitioner followed-up with Dr. Murtaza where he complained of pain level 5/10; no significant amount of weakness in the distal cervical areas, but difficulty twisting and turning his neck and rotational pain to the right and left with tight trapezius and rhomboids. An MRI of the cervical spine was ordered and completed on January 5, 2015, with findings consistent with degenerative disc disease,[3] predominantly at C5-6 and C6-7. Petitioner remained under Dr. Murtaza's care through December 11, 2014, when it was noted that he had no cervical spine or neck pain, with the treatment rendered. Petitioner was released to return to work.

Petitioner was initially evaluated by Dr. Daniel Kelley on October 13, 2014, where he presented with the history of a fare dispute. Petitioner relayed that the male passenger verbally threatened him stating... "stop hollering at my girl or you're going to be eating out of a straw. I should spit on you.", then spit in his face, and then initiated a physical assault. [4] Petitioner further gave a history that he... "got up to protect myself because he was over the protective shield. I thought he was going to attack me. That's when we got into a physical altercation." (R. Ex. 4).

Petitioner stated that since the incident he had sleep disturbance, sweats, agitation, fatigue, anxiety, dysphoria, hyperarousal and headaches. Petitioner denied a past psychiatric history; he endorsed aggressive/assertive tendencies which may compromise interpersonal and behavioral functioning; he endorsed a response set critical item suggesting thoughts or fantasies of hurting someone. Dr. Kelley diagnosed the petitioner as having adjustment disorder with mixed anxiety and depressed mood. As of December 1, 2014, Dr. Kelley terminated services and released the petitioner to return to work in a full duty capacity.

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[2] Physical therapy services rendered at H and M Medical included treatment to the lower back and left leg. Those areas were never complained of as resulting from the incident nor does it coincide with petitioner's testimony that his physical injuries were limited to his neck and headaches. (P. Ex. 3)

[3] The MRI imaging establishes disc dehydration at C5-6 and C6-7 consistent with a degenerative disc disease and not an acute condition.

[4] From the video evidence it is clear that petitioner initiated the physical assault and the history given to Dr. Kelley is not accurate.

17IWCC0329

CONCLUSIONS OF LAW

Decisions by the Commission cannot be based upon speculation or conjecture, *Deere and Company v. Industrial Commission*, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a causal connection between work and alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill. App.3d 43, 556 N.E.2d 261, 144 Ill.Dec.794 (4th Dist. 1989).

The burden is on the petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin v. Industrial Commission*, 91, Ill.2d 288, 63 Ill. Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v. Industrial Commission*, 8 Ill.2d 407, 134 N.E.2d 307(1956). It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d.207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved credible. *Caterpillar Tractor v. Industrial Commission*, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all facts and circumstances that might not justify an award. *Neal v. Industrial Commission*, 141 Ill.App3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of all facts and circumstanced support the decision. *See generally, Gallentine v Industrial Commission*, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), see also *Seiber v Industrial Commission*, 82 Ill.2d 87, 411 N.E.2d 249 (9180), Caterpillar *v Industrial Commission*, 73 Ill.2d 311,383 N.E. 2d 220 (9178). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence, and assign weight to the witness' testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253 403 N.E.2d 221, 223 (1980); *Hosteny v Workers' Compensation Commission*, 397 Ill.App. 3d 665, 674 (2009).

Petitioner bears the burden of establishing that an accident "arose out of" and "in the course" of his employment. Courts generally consider traveling employees differently from other employees when

considering whether an injury arose out of and in the course of employment. *Hoffman v. Industrial Comm'n*, 109 Ill. 2d 194, 486 N.E. 2d 889, 93 Ill. Dec. 356 (1985). The courts have defined a "traveling employee" as one who is required to travel away from his employer's premises in order to perform his job. *Wright v. Industrial Comm'n*, 62 Ill. 2d 65, 338 N.E. 2d 379(1975). However, a finding that a particular employee is a traveling employee does not relieve him from the burden of proving that his injury arose out of and is in the course of his employment. *Jensen v. Industrial Comm'n*, 305 Ill. App. 3d 274, 711 N.E. 2d 1129, 238 Ill. Dec. 468(1st Dist., 1999).

Petitioner's injury is not compensable unless it "arises out of" and is "in the course of" his employment. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 548 N.E. 2d 1033, 139 Ill. Dec. 477 (1989). An injury "arises out of" petitioner's employment when there is a causal connection between the employment and the injury; the origin or cause of the injury must be some risk connected with, or incidental to, the employment. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 578 N.E. 2d 921, 161 Ill. Dec. 275 (1991). Injuries sustained on an employer's premises, or at a place where the employee might reasonably have been performing his duties, and while the employee is at work, are generally deemed to have been received in the course of the employment. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 57, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989).

Risks to employees fall into three categories: 1) risks distinctly associated with the employment, i.e., a risk common to the general public but to a greater degree or the risk of injury must be a risk peculiar to the work; 2) risks personal to the employee; and 3) neutral risks that have no particular employment or personal characteristic- injury results from hazard to which employee would have been equally exposed to apart from his employment). *Orsini v. Industrial Comm'n,* 117 Ill. 2d 38, 109 Ill. Dec. 166, 509 N.E. 2d 1005 (1987);*Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 133 Ill. Dec. 454, 541N.E.2d 665(1989); *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 881 N.E. 2d 523, 317 Ill. Dec. 355 (1st Dist., 2007).

Typically, an injury "arises out of" one's employment if, at the time of the occurrence, the employee was performing acts the employer instructed him to perform, acts which he might reasonably be expected to perform incidental to his assigned duties, or acts which he had a common law or statutory duty to perform. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E. 2d 665, 133 Ill. Dec. 454 (1989). The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 509 N.E. 2d 1005, 109 Ill. Dec. 166 (1987). An injury is received "in the course of" one's employment when it occurs within the period of employment, at a place the employee may be reasonably in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto. *Scheffler Greenhouses, Inc. v. Industrial Comm'n,* 66 Ill. 2d 361, 362 N.E. 2d 325, 5 Ill. Dec. 854 (1977).

In the instant case, there is no dispute that Petitioner was acting in the course of his employment at the time he picked up the unknown female/male couple at the Red Line stop. After the passengers

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boarded, Petitioner requested twice that the fare be paid, as was standard operating procedure. When the passenger did not pay the fare, the petitioner closed the front door and was about to proceed in pulling out and continuing his route while the couple stood by the driver's area. The male passenger at that time stood by the front door step facing the driver's seat and spat toward the petitioner. It is difficult to determine from the hard drive whether any of the spit actually made contact with the petitioner as the safety shield was engaged; given the dimensions of the shield the spit could only make contact with petitioner's exposed pant leg. Petitioner never testified if the spit made contact with any exposed skin.[5] Nonetheless, after the man spit towards Petitioner from the front door area, the man turned to face the front door in an attempt to push it open and leave, thus no longer interacting with the petitioner.

Once the male passenger turned his back to Petitioner and attempted to exit the bus, the petitioner's subsequent actions cannot be deemed to have been in furtherance of his employment. What transpired thereafter were not actions by the petitioner in the performance of his work duties, but an act of exacting retribution or punishment onto the passenger, a deviation from his employment. What transpired after Petitioner performed his duty was a personal risk undertaken by the petitioner. When Petitioner left his seat to go after the passenger; when he attempted to hit the passenger while he stood by the door; when he started the physical altercation that caused the injury to his neck, his injury was no longer arising out of or in the course of his employment.

After the passenger spat towards Petitioner, who was seated and behind the safety shield, the hard drive footage establishes the events as they unfolded: Petitioner took his seat belt off, open the safety shield door and came out swinging at the passenger, who was protecting his face from being struck and trying to get out of the door. It is at that time the hard drive footage depicts the first physical contact between Petitioner and the passenger. At that time, the petitioner makes the first physical contact with the male passenger that evolved into the woman passenger trying to pull Petitioner off her companion; and when Petitioner testified he sustained injuries to his neck.

Alternatively, the "aggressor defense" is applicable to this claim and bars Petitioner from recovering any benefits under the Act. The "aggressor defense" provides that injuries suffered by the aggressor in a fight related to the employer's work are not compensable under the Act as it breaks the causal connect between the employment and the injury. *Franklin v. Industrial Comm'n,* 211 Ill. 2d 272, 811 N.E.2d 684, 285 Ill. Dec. 197 (2004).The rationale for the "aggressor defense" is that the claimant's "own rashness" negates the causal connection between employment and the injury so that the work is neither the proximate nor a contributing cause of the injury. *Bassgar v. Industrial Comm'n,* 394 Ill. App. 3d 1079, 917 N.E.2d 579, 334 Ill. Dec. 753 (3rd Dist., 2009). Who made the first physical contact, while important in identifying the aggressor, is not decisive. Rather, the parties' conduct must be

[5] There are several different versions of where and when petitioner was spit on, from the CFD EMS report that states it was after the altercation started compared to Dr. Kelley's history of being spit on in the face while the man was situated over the protective shield, which caused petitioner to feel he had to protect himself and thus the physical altercation ensued..

examined in light of the totality of circumstances. *Ford Motor Co. v. Industrial Comm'n,* 78 Ill 2d. 260, 399 N.E. 2d 1280, 35 Ill. Dec. 752 (1980)

In *Bassgar,* the Appellate Court found that there were two separate acts of aggression when it examined the parties' conduct in light of the totality of circumstances. The first act of aggression was when claimant's supervisor tackled the claimant, forcing him against a table, where his left arm wedged between the table and his body resulting in a fracture to the arm. After that occurred claimant's supervisor walked away, decided to retreat from the physical contact; withdraw from the fight, thus any danger to the claimant passed. Yet rather than leave the supervisor alone, claimant decided to follow him and more mayhem ensued. The Court deemed a second act of aggression began when claimant pursued his supervisor after the latter had retreated.[6]

As in *Bassgar*, the events that occurred on October 9, 2014, involved two separate acts of aggressions. Arguably the first act of aggression occurred when the passenger spat toward the petitioner while standing at the front door. The second act of aggression occurred when Petitioner chose to pursue the passenger, who had retreated and was trying to exit the front door; not in self-defense but to exact punishment or to retaliate. Petitioner's actions are consistent with Dr. Kelley's assessment of Petitioner's endorsed aggressive/assertive tendencies; which may compromise interpersonal and behavioral functioning.

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

The Arbitrator concludes that Petitioner has not proven, by a preponderance of the evidence, that an accident occurred, which arose out of and in the course of his employment. He failed to prove that he suffered compensable accidental injuries, as said injury occurred during the second, separate act of aggression/altercation that Petitioner.

Specifically, once the male passenger spat towards Petitioner and retreated, the reason for the first dispute ended as did any threat and altercation directed towards petitioner. Petitioner's reasons for leaving his seat and attacking the male passenger were not work- related. Petitioner claimed the physical altercation occurred, after he was spat on and in defense of his person however, there are no facts in evidence to support any ongoing threat to the petitioner or any of the passengers on board the bus. Accordingly Petitioner's injuries are not compensable under the Act.

As the petitioner has not proven that an accident occurred that arose out of and in the course of his employment by Respondent, the other disputed issues are moot and will not be addressed.

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[6] *Bassgar* cites: *People v. Shappert,* 34 Ill. App. 3d 683, 340 N.E.2d 282 (1975) finding that the right to defend oneself does not permit the pursuit and injuring of an aggressor after the aggressor has abandoned the quarrel.
People v. Armstrong, 273 Ill. App. 3d 531, 653 N.E. 2d 17, 210 Ill. Dec. 430 (1995) stating that where the initial aggressor completely withdraws from an altercation, the victim's subsequent actions constitute a separate aggression.

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ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
14WC35831
SIGNATURE PAGE

Signature of Arbitrator

September 8, 2016
Date of Decision

SEP 13 2016

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

RICK RIFFER,

Petitioner,

17IWCC0330

vs.

NO: 12 WC 11737

CHICAGO TITLE INSURANCE CO.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, average weekly wage/benefit rate, medical expenses, and the nature and extent of Petitioner's permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Decision of the Arbitrator regarding the issues of causal connection, average weekly wage/benefit rate, and medical expenses. However, for the reasons outlined below, the Commission modifies the Decision of the Arbitrator regarding the nature and extent of Petitioner's permanent partial disability.

Findings of Fact and Conclusions of Law

1. On March 22, 2012, Petitioner was involved in a major motor vehicle accident while delivering documents from a real estate closing he performed for Respondent earlier that day. Petitioner had to be extracted from the car and was taken by ambulance to a hospital Emergency Department.

2. A thoracic/lumbar CT showed fractures of the left transverse process of L4 and L5. A cervical CT appears to be normal. Pelvis x-rays and CT revealed fractures of the left pubic rami as well as of the right superior pubic ramus, with no dislocation of the hip and symphysis and SI joints intact.

3. At the hospital, Dr. Bernstein was consulted about the left L4 & L5 transverse process fractures. He noted that "the spine fractures are benign fractures that will heal without incident or consequences." He was happy to re-consult as needed. Apparently no follow up examination or treatment for the lumbar compression fracture was necessary. During his treatment, Petitioner also had glass removed from his left arm.

4. On March 26, 2012, Dr. Jimenez performed anterior pelvic external repair using two half pins and left sacroiliac screw fixation into the sacrum for pelvic ring disruption, bilateral superior and anterior pubic ramus fractures, and left sacra alfa fracture zone 1. Dr. Jimenez removed the external fixator on May 15, 2012.

5. On April 2, 2012, Petitioner was discharged from hospital to Glenview Terrace, a skilled nursing facility, with instructions about home care of pelvis fracture, lumbar fracture, arm abrasions, use of compression stockings, and self-injection of Lovenex, an anti-clotting medication, and making the home safe/protection against falls.

6. Petitioner was discharged from Glenview Terrace on June 7, 2012 and was evaluated for outpatient physical therapy on June 29, 2012. It was noted he was now ready to begin weightbearing on the left side. Petitioner's goal was to get back to work as quickly as possible.

7. By November 11, 2012, during physical therapy Petitioner reported not feeling any pain but still had some weakness. He thought he was able to continue with home exercises. Petitioner was discharged to a home exercise program even though all goals had not been met through formal physical therapy.

8. Petitioner continued to treat with Dr. Jimenez. On May 8, 2014, Dr. Jimenez noted that "this was a high-energy injury which produces fairly significant initial pain with disability, nonweightbearing for 3 months and then a long spell of physical therapy. He is still symptomatic with some pelvic pain and back pain, and he will always have issues as a function of a high energy pelvic ring disruption, but he is improving, and we expect so." The screw was well positioned and the "pelvis is beautifully aligned." He also noted "he has issues which will create some permanency, but for a severe and devastating injury, he is doing quite well."

9. On July 21, 2015. Petitioner returned to Dr. Jimenez for routine evaluation and treatment. The screw was still in good position, but Petitioner still had some mild anterior-superior iliac spine tenderness. He was significantly improved with no signs of significant deficit in the arms or legs. Petitioner would continue to move forward with range of motion and strengthening. Dr. Jimenez released Petitioner and would see him on an as needed basis.

10. On January 7, 2015, Dr. Zoellick testified by deposition. He is board certified in orthopedics and practices general orthopedics. He was certified to perform AMA impairment ratings by the American Academy of Disability Evaluating Physicians and had performed about 20 such ratings to date. At Respondent's request he evaluated Petitioner and performed a Section 12 medical examination with an impairment rating. He was charged with evaluating Petitioner pelvis and lumbar spine, but not his left arm.

11. Dr. Zoellick's examination appears to have been normal except for decreased sensation in the anterior aspect of the left pelvic area. There was no tenderness in the hip or lumbar spine. Dr. Zoellick's current diagnosis was pelvic fracture, post internal and external fixation, healed left L4-5 transverse process fracture, and healed left hip abrasion. These conditions were all the result of the reported motor vehicle accident, all medical treatment he received was reasonable and necessary to treat his work injuries, and he was currently at maximum medical improvement from his work injuries.

12. Dr. Zoellick explained the general process of performing an AMA impairment rating. The diagnosis of pelvic fracture was modified by the Pain Disability Questionnaire score of 35, as determined by Petitioner's subjective answers. That score is in the mid to low level of impairment due to pain and translated into a grade modifier of 1. His examination resulted in a grade modifier of 0 because there was no tenderness and the examination was relatively unremarkable overall. However, the initial CT moved the grade modifier to grade 2. The resulting analysis arrived at an impairment rating of 2% of the MAW for the pelvis fractures. Regarding the transverse lumbar fracture, the PDQ and examination modifiers were the same. The default impairment rating for the lumbar fracture was 7% but that was modified down 1 for an overall impairment rating of 6% of the MAW for the lumbar fracture. By adding the impairment rating for the 2 diagnoses, Dr. Zoellick arrived at a total impairment rating of 8% of the MAW.

13. On cross examination, Dr. Zoellick agreed that Petitioner's injuries, including multiple pelvis fractures, were sustained in a high energy motor vehicle accident. He also agreed that he sustained a significant pelvis injury and Dr. Jimenez referred to it as "severe," However, "he did quite well" after treatment. Dr. Zoellick does not surgically treat patients with such injuries. He generally refers such patients to Dr. Jimenez because he is a specialist in pelvic trauma. Dr. Zoellick would not comment on his opinion about whether the pelvis fractures should have a greater impairment rating than the lumbar fracture, which was untreated. He agreed that Petitioner may be at higher risk for arthritis than someone with no fractures, "but everything looks good." In addition, the incidence of arthritis in non-displaced fractures is not that much greater than absent such fractures.

14. During arbitration, Petitioner testified he was released to return to work on August 27, 2012. He was able to drive at that time and had no work restrictions, though he still walked with crutches. He was able to walk without crutches in November or December 2012.

15. Petitioner also testified that currently he had some pain and stiffness in his left arm like having a flu shot. He tries to stretch his arm, but it hurts if he lifts too high. He has difficulty lifting anything over 10 pounds with his left arm. He does not normally have to lift over 10 lbs in his work but he notices the problem with household activities, such as mowing the lawn or shoveling snow. He has difficulty pulling things out of a cabinet. His hip makes it difficult to get into and out of a car, which affects his work. There is limited range of motion and pain with lateral motion. The stiffness in the pelvis is more pronounced with bending. Bending forward also hurts his lumbar spine. He has to ambulate stairs more slowly. He used to bowl about 10 times a year and only tried it once since the accident. The bending and twisting required in bowling causes pain. He still enjoys walking, but he has to walk more slowly.

The Arbitrator awarded Petitioner medical expenses submitted into evidence, 22&3/7 weeks of temporary total disability benefits, and a total of 400.3 weeks of permanent partial disability benefits representing loss of 75% of the person-as-a-whole (60% pelvis/hip & 15% lumbar spine) and loss of 10% of the left arm. In arriving at this award, the Arbitrator specifically gave little weight to the AMA impairment rating of Dr. Zoellick because he did not take into account Petitioner's multiple pelvis fractures. The Arbitrator stressed Petitioner's continuing difficulties and that Dr. Zoellick agreed that Petitioner suffered a significant injury to his pelvis and resulted in actual disability higher than the lumbar spine injury.

The Commission finds that the permanent partial disability award was excessive. The Commission is cognizant that Petitioner suffered a severe injury to his pelvis in a high-energy motor vehicle collision. He had extensive medical treatment and endured a long and extremely unpleasant recuperation requiring long-term immobilization and extensive therapy. Nevertheless, his treating doctor, Dr. Jimenez, and Respondent's Section 12 medical examiner, Dr. Zoellick, both noted that Petitioner was doing quite well after the severe injury and had an excellent result from the surgical repair.

Petitioner was off work for a total of about five months and was able to return to his previous occupation without restriction at that time. At that time Petitioner was able to drive without difficulty and perhaps most importantly, he suffered no loss of potential earnings due to the injury. The Commission notes that the loss of 15% of the person-as-a-whole for the lumbar compression fracture seems particularly high because it required no treatment, and Dr. Bernstein noted that "the spine fractures are benign fractures that will heal without incident or consequences." Likewise, the extent of his current complaints regarding his left arm involved soreness/stiffness akin to having a flu shot.

Finally, his general functionality, Petitioner testified that his ongoing difficulty in his performing heavy household chores, getting into and out of a car, continuing with his hobby of bowling, and experiencing reduced pelvic range of motion. All in all the Commission concludes that Petitioner's ongoing complaints do not rise to the level one would expect to result in a permanent partial disability award of loss of 75% of the person-as-a-whole.

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Therefore, based on Dr. Zoellick's AMA rating of loss of 8% of the person-as-a-whole, the lack of any loss of earning potential, the excellent results achieved through treatment, and the limited evidence of severe ongoing permanent impairment and/or disability, the Commission concludes that a total award of 187.65 weeks of permanent partial disability benefits is appropriate in the claim now before us. This award represents loss of 30% of the person-as-a-whole for the multiple pelvis fractures, loss of 5% of the person-as-a-whole for the lumbar compression fracture, and loss of 5% of use of the left arm. The Decision of the Arbitrator is modified accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $789.67 per week for a period of 22&3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $710.71 per week for a period of 187.65 weeks, for the reason that the injuries sustained caused the loss of 35% of the person-as-a-whole (representing loss of 30% of the person-as-a-whole for the pelvis fractures and loss of 5% of the person-as-a-whole for the lumbar fracture), as provided in §8(d)(2) of the Act, and loss of 5% of the left arm, as provided in §8(e)(10) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical expenses submitted in PX11 under §8(a) of the Act pursuant to the applicable 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.

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 proceeding for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: MAY 26 2017

Deborah L. Simpson

Deborah L. Simpson

David L. Gore

David L. Gore

Stephen J. Mathis

Stephen J. Mathis

DLS/dw
O-5/18/17
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0330

RIFFER, RICK C
Employee/Petitioner

Case# 12WC011737

CHICAGO TITLE INSURANCE CO; THE HARTFORD A/K/A HARTFORD INSURANCE CO AND FIDELITY NATIONAL MANAGEMENT SERVICES INC
Employer/Respondent

On 8/2/2016, 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 0.39% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

1876 PAUL W GRAUER & ASSOCIATES
EDWARD ADAM CZAPLA
1300 WOODFIELD RD
SCHAUMBURG, IL 60173

0560 WIEDNER & McAULIFFE LTD
EMILY E BORG
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

17IWCC0330

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

RICK C. RIFFER
Employee/Petitioner
v.
CHICAGO TITLE INSURANCE CO.; THE HARTFORD, a/k/a HARTFORD INSURANCE CO. and FIDELITY NATIONAL MANAGEMENT SERVICES, INC.
Employer/Respondent

Case # **12** WC **11737**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt CARLSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **February 8, 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:

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FINDINGS

On 03/22/12, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ 21,660 the average weekly wage was $ 1,184.51.

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

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

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

Respondent shall be given a credit of $ 5,855.14 for TTD, $ 0 for TPD, $ 0 for maintenance, and $ 1,518 for 8(d)(2) statutory loss benefits, for a total credit of $ 7,373.14.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE ATTACHED.

ORDER

Respondent shall pay petitioner the reasonable and necessary medical expenses admitted into evidence (Px.11 through Px. 32) along with petitioner's co-payments, pursuant to the Medical Fee Schedule, as provided in Sections 8 and 8.2 of the Act.

Respondent shall pay petitioner temporary total disability benefits of **$789.67**/week for **22 3/7** weeks, as provided in Section 8(b) of the Act.

Respondent shall pay petitioner permanent partial disability benefits of $710.71 /week for a period of 300 weeks, because the injuries sustained caused a **60%** loss of the person as a whole for multiple pelvic fractures, as provided in Section 8(d)(2) of the Act; permanent partial disability benefits of $710.71 /week for a period of 75 weeks, because the injuries sustained caused a **15%** loss of the person as a whole for the lumbar spine injuries, as provided in section 8(d)(2) of thc Act; and permanent partial disability benefits of $710.71 /week for a period of 25.3 weeks, because the injuries sustained caused a **10%** loss of an arm, as provided in section 8(e)(10) 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

08-02-16
Date

AUG 2 - 2016

FINDINGS OF FACT

Petitioner, a fifty year old, loan closer, was injured in a motor vehicle collision on March 22, 2012 while working for Respondent, Chicago Title Insurance Co., a/k/a Fidelity National Management Services, Inc., (herein referred to as Chicago Title) (Tr. 10-11, 21). Petitioner had conducted a closing for Chicago Title at the Harris Bank in downtown Lake Forest, Illinois on the afternoon of March 22, 2012. (Tr. 21). After discussing the closing documents and obtaining the buyers signatures on the documents Petitioner drove directly to the closest FedEx office in Vernon Hills, Illinois to mail the closing documents to Chicago Title. (Tr. 22).

While en route to the FedEx office Petitioner was involved in a motor vehicle collision in Lake Forest, Illinois. (Tr. 22-23). Petitioner was traveling west bound on Route 60 approaching the intersection with Route 43 when another motorist made a sudden left-hand turn into his vehicle. (Tr. 23-24). Petitioner's Toyota Matrix was struck directly on the driver's side doors by a Toyota Land Cruiser. (Tr. 24). Photographs of Petitioner's vehicle depicting the extensive property damage resulting from the collision were admitted into evidence. (Tr. 26-27 and Px. 58-60). Petitioner described the force of the impact as "tremendous, nothing like I've ever experienced before". (Tr. 27).

The impact from the oncoming vehicle struck Petitioner on his left hip and low back. (Tr. 27). Shattered glass from the car window lacerated Petitioner's face and left arm as depicted in Px. 57. (Tr. 27 and 29).

The "jaws of life" were used to remove Petitioner from the vehicle and he was placed on a stretcher and taken by ambulance to Northwestern Lake Forest Hospital.

(Tr. 27). X-rays revealed pelvic fractures including right and left inferior pubic ramus fractures; right and left superior pubic ramus fractures; left acetabular fracture; left iliac wing fracture and vertical sacral fracture. (Px. 1). CT scan of the abdomen and pelvis revealed multiple nondisplaced pelvic bone fractures and a small pelvic hematoma. (Px. 1). Petitioner was transferred by ambulance to Lutheran General Hospital for a higher level of care. (Px. 7).

X-rays of the left humerus revealed multiple foreign bodies within the subcutaneous fat and soft tissue overlying the middle and distal thirds of the left humerus. At least six punctate foreign bodies were identified which have the appearance of glass. (Px. 8). X-rays of the pelvis revealed fractures of the left pubic rami and fracture of the right superior pubic ramus. (Px. 8). CT scan of the pelvis revealed comminuted fracture of the right pubic bone with fracture at the right superior ramus; fracture at the anterior pillar of the left acetabulum; and bilateral nondisplaced fractures of the posterior aspect of each inferior pubic ramus. (Px. 8). Fracture was seen extending through the left wing of the sacrum with accompanying fracture seen through the posterior portion of the left iliac bone (Px. 8). CT scan of the lumbar spine revealed fractures involving left transverse process of L4 and L5 along with the fractures involving the lateral aspect of the left wing of the sacrum. (Px. 8).

The initial history recorded states "50 y/o M s/p MVC at 40 mph (T bone driver's side) at 3p. who was transferred from Lake Forest Hospital for pelvic fractures." (Px. 9). Petitioner was given morphine for pain.

Dr. Avi Bernstein, an orthopedic spine specialists, examined Petitioner at Lutheran General Hospital and noted the left L4 and left L5 transverse process fractures along with the left iliac sacral fracture and left iliac wing fracture. (Px. 9).

Dr. Matthew Jimenez, an orthopedic specialist, was brought in to assess Petitioner's pelvic fractures. The preoperative diagnosis was:

1. Pelvic ring disruption;
2. Anterior pelvic ring disruption comprised of bilateral superior and inferior pubic ramus fractures;
3. Left sacral ala fracture. (Px. 9)

On March 26, 2012 Dr. Jimenez performed the following surgery:

1. Anterior pelvic external fixation using two separate supra-acetabular half pins;
2. Left sacroiliac screw fixation into the sacrum using a fully threaded 7.8 cannulated screw with a washer. (Px. 9).

After securing the left sacral ala fracture with the 7.8 cannulated screw and washer Dr. Jimenez installed the external pelvic fixator to reduce the multiple pelvic fractures. (Px. 9). 2 separate supra-acetabular screws were inserted into the supra-acetabular region. 5mm half pins were placed in the supra-acetabular region bilaterally, engaging the pelvic brim and sciatic buttress. (Px. 9). The external fixator was them constructed anteriorly using pin to bar clamps. (Px. 9). The steel fixator exited Petitioner's pelvis on either side and was secured with a crisscross set of bar clamps. (Px. 56).

Post-operatively Petitioner remained bed ridden, restricted by the external pelvic fixator. Petitioner began occupational therapy. Petitioner was discharged from Lutheran General Hospital on April 2, 2012 and transferred by ambulance to Glenview Terrace Nursing Center.

Petitioner was not able to ambulate in the external pelvic fixator and remained confined to the bed. (Tr. 33, 35). Physical therapy was started for the shoulders, elbows, hand, right hip, knee and ankle but no physical therapy to Petitioner's left hip, knee or ankle. (Px. 2). Petitioner received rehabilitation and nursing home care at Glenview Terrace from April 2, 2012 through June 7, 2012. Petitioner remained non-weight bearing while in the external pelvic fixator. (Tr. 36).

Petitioner saw Dr. Jimenez post-operatively on April 19, 2012. (Px. 3). X-rays confirmed the left S1 screw was well aligned and the anterior pelvic external fixator in good position. (Px. 3). Petitioner's stitches were removed and he remained non-weight bearing. (Px. 3).

On May 17, 2012 Dr. Jimenez removed the external fixator. (Px. 3). Petitioner remained non-weight bearing. A course of strength and range of motion exercises were ordered for the left leg. (Px. 3).

On June 7, 2012 Petitioner was discharged from Glenview Terrace and returned home. (Px. 10). From June 9 through June 23, 2012 Petitioner received at home physical therapy. (Px. 5). Initially, Petitioner relied on a wheeled walker to get around and slowly progressed to crutches. (Px. 6).

On June 28, 2012 Dr. Jimenez ordered formal physical therapy treatment for Petitioner's left lower extremity and allowed weight bearing as tolerated. (Px. 3). Petitioner completed 42 physical therapy sessions at Midwest Physical Therapy between June 30 and November 12, 2012. (Px. 6).

Dr. Jimenez examined Petitioner on August 23, 2012. X-rays revealed the pelvic fractures were in good alignment. (Px. 3). Dr. Jimenez ordered additional physical

therapy and released Petitioner to return to work without restrictions on August 27, 2012. (Px. 3). Petitioner testified he started weight bearing in August. (Tr. 41).

Petitioner returned to work for Respondent while still walking with crutches. (Tr. 41-42). Petitioner resumed loan closing activities for Respondent and the other title companies. (Tr. 43).

Petitioner returned to see Dr. Jimenez on March 7, 2013 complaining of residual pain in the peri gluteal region. (Px. 3). X-rays showed the pelvis was well aligned and the sacroiliac screw in good position. (Px. 3). Dr. Jimenez recommended strength and range of motion exercises and scheduled Petitioner to see him back on a regularly scheduled appointment, once a year. (Px. 3).

Petitioner saw Dr. Goldstein on May 2, 2013 complaining of soreness in the left arm with glass. (Px. 4). X-rays revealed 3 foreign bodies in the mid arm representing glass with a fourth punctate density. (Px. 4). Petitioner was also seen at Lutheran General Hospital on July 15, 2013 for glass fragments in his left upper arm. (Px. 9).

Dr. Jimenez re-examined Petitioner on May 8, 2014. Petitioner was "still symptomatic with some pelvic pain and back pain, and he will always have issues as a function of a high energy pelvic ring disruption, but he is improving". (Px. 3). Petitioner last saw Dr. Jimenez on July 21, 2015 complaining of mild-anterior superior iliac spine tenderness, worse with activity and somewhat relieved by rest. (Px. 3). X-rays revealed the pelvic fractures healed and the hardware in good position. (Px. 3).

WITH RESPECT TO ISSUE A - WAS RESPONDENT OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKERS' COMPENSATION OR OCCUPATIONAL DISEASES ACT? THE ARBITRATOR FINDS AS FOLLOWS:

Section 2 of the Act imposes liability on employers for injuries to employees arising out of and in the course of employment. 820 ILCS 305/2 (West 2012). Section 1(b)(2) of the Act defines "employee" as:

> "Every person in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois, persons whose employment results in fatal or non-fatal injuries within the State of Illinois where the contract of hire is made outside of the State of Illinois, and persons whose employment is principally localized within the State of Illinois, regardless of the place of the accident or the place where the contract of hire was made * * *." 820 ILCS 305/1(b)(2)
>
> Section 1(b)(3) of the Act provides:
>
> "An employee or his dependents under this Act who shall have a cause of action by reason of any injury, disablement or death arising out of and in the course of his employment may elect to pursue his remedy in the State where injured or disabled, or in the State where the contract of hire is made, or in the State where the employment is principally localized." 820 ILCS 305/1(b)(3)

Therefore, based upon the Arbitrators finding of an employer/employee relationship between Chicago Title and Petitioner, the Arbitrator finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act.

WITH RESPECT TO ISSUE B - WAS THERE AN EMPLOYEE-EMPLOYER RELATIONSHIP? THE ARBITRATOR FINDS AS FOLLOWS:

Determining whether an employer/employee relationship exists is a factual question based upon a number of considerations. *Bauer v. Industrial Commission*, 51 Ill.2d

169, 282 N.E.2d 448 (1972). Without the existence of an employer/employee relationship, the injured worker will not be afforded benefits under the Act.

In *Ware v. Industrial Commission*, 318 Ill.App 3d 1117, 1122, 252 Ill.Dec. 711, 743 N.E.2d 579 1st Dist. 2000, the Court set forth the following factors to be considered in determining whether a person is an employee or independent contractor:

> "No 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 [80 Ill.Dec. 421, 465 N.E.2d 533] (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 v. Industrial Comm'n*, 51 Ill.2d 169. 172 [282 N.E.2d 448] (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 v. Industrial Comm'n*, 93 Ill.2d 66, 71 [66 Ill.Dec. 342, 442 N.E.2d 903] (1982); *Peesel v. Industrial Comm'n*, 224 Ill.App.3d 711. 716 [166 Ill.Dec. 752, 586 N.E.2d 710] (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 [69 Ill.Dec. 187, 447 N.E.2d 404] (1983). Finally, a factor of lesser weight is the label the parties place, upon their relationship. *Earley v. Industrial Com'n*, 197 Ill.App.3d 309 at 317, [143 Ill.Dec. 126, 553 N.E.2d 1112 (1990)]. 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 [181 Ill.Dec. 312, 608 N.E.2d 385] (1992)."

Petitioner did contract work as a loan closer for five to seven other title companies. (Tr. 13). Petitioner was paid per closing and received a 1099 statements from each of them. (Tr. 12 and 47-53).

In the fall of 2011 Petitioner was contacted by Tammy Freese at Chicago Title and interviewed for the position of loan closer. (Tr. 11-12). Petitioner completed a written

"Employment Application" for Chicago Title. (Tr. 70 and Rx. 2). The "Employment Application" contains the following declaration:

> "The company is an Equal Opportunity Employer and fully subscribes to, as well as practices, the principles of Equal Employment Opportunity. Therefore, we do not discriminate on the basis of race, color, religion, sex, national origin, age, disability, citizenship, marital status, sexual orientation or any other characteristic protected by the law in the recruitment, section, placement, training, compensation and promotion of our **employees**" (Rx. 2, p.1).

Petitioner was offered a position of employment with Chicago Title and was hired as a loan closer. (Tr. 17-18, 20). In November 2011 Petitioner started doing closings for Chicago Title, predominately refinances. (Tr. 11 and 14). As to which party controlled the manner in which the work was performed, Petitioner testified that Chicago Title scheduled the date and location of the closing with the borrower. (Tr. 14). Petitioner worked out of his house. (Tr. 19). Chicago Title prepared the closing documents. Chicago Title emailed Petitioner the completed closing documents. (Tr. 15, 19). It was Petitioner's decision whether or not to accept an assignment. (Tr. 19).

Pursuant to the "Employment Application" Petitioner agreed **"that if employed by the Company, I will be subject to the provisions and benefits as contained in the Company Employee Handbook"** (Rx. 2, p.2). Petitioner further affirmed that **"I agree to comply with all company policies"**. (Rx. 2, p.2). Finally, Petitioner agreed that **"I may be required to work overtime hours or hours outside a normally defined work day or work week"**. (Rx. 2, p.2).

Petitioner would print out the closing documents, meet with the borrowers and walk them through the closing papers. (Tr. 14-15). After obtaining the borrowers

signature and completing the closing Petitioner was required by Chicago Title to FedEx the closing documents back to them with a prepaid FedEx label. (Tr. 14-15, 22 and 72).

The work performed by Petitioner in closing the loan and completing the refinance was instrumental to Chicago Title's business as a real estate title company. Petitioner had no customers of his own. Petitioner served the buyers designated by Chicago Title. Petitioner was paid $100 per closing. (Tr. 20). Chicago Title paid Petitioner twice a month by direct deposit. (Tr. 90). Petitioner drove his vehicle to and from the closings and was responsible for the gas. (Tr. 20). Petitioner had not incorporated any business as a loan closer. (Tr. 105-106).

Pursuant to the "Employment Application" both Petitioner and Respondent had the right to terminate the employment at any time, with our without notice. (Rx. 2, P.2).

Further indicative of an employer/employee relationship between Petitioner and Chicago Title was the lack of any particular skill required for Petitioner to perform his loan closing duties. Chicago Title prepared the closing documents, scheduled the closing, and provided Petitioner with the prepaid FedEx postage label. (Tr. 22). Petitioner merely met with the borrowers to explain the closing documents and notarize their signatures. (Tr. 14). Petitioner only needed a computer and a vehicle to perform the closings. (Tr. 20). Thus, Chicago Title prepared the instrumentalities needed to conduct business. *Wenholdt v. Industrial Comm'n*, 95 Ill.2d 76, 69 Ill.Dec. 187, 447 N.E.2d 404 (1983).

Petitioner's earnings from Chicago Title were taxed and Petitioner received a W-2 forms from Chicago Title in 2011 and 2012 indicating that Chicago Title was his employer. (Tr. 18 and Px. 44 and 50). Federal and State income taxes were withheld

from Petitioner's earnings along with Medicare and Social Security benefits. (Px. 44 and 50 and Rx. 1). Moreover, Chicago Title issued Petitioner 401(k) benefits. (Tr. 72).

Finally, regarding the label the parties placed upon their relationship the Arbitrator notes the "**Employee Statement of Earnings**" prepared by Chicago Title lists the **Employee Name** and **Employee Number** on the statement. (Rx. 1). The "Employment Application" has a signature line for "Applicant or Employee". (Rx. 2, p.2). Moreover, the "Employment Application" requests Petitioner's "**Employment Information**" and further states "that if I am hired, my employment is 'At Will' and will be for no definite period of time, regardless of the periods of the payment of my wages . . . I acknowledge that no Company representative has made any promises or agreements that are in conflict with this at-will employment relationship". (Rx. 2, p.2).

Petitioner testified that "Chicago Title hires closers as employees." (Tr. 18). Petitioner considers himself to be a traveling employee for Chicago Title. (Tr. 98) No one testified for Respondent disputing Petitioner's testimony.

Generally, the question of whether one is an agent or employee versus an independent contractor is one of fact. *Lang v. Silva*, 306 Ill.App.3d 960, 972, 240 Ill.Dec. 21, 715 N.E.2d 708 (1999). However, the question may be decided as a matter of Law when the relationship is so clear as to be indisputable. *Stewart v. Jones*, 742 N.E.2d 896, 903, 318 Ill.App.3d 552, 252 Ill.Dec. 358 (2001).

There is overwhelming evidence demonstrating that Petitioner was an employee of Chicago Title. Chicago Title supplied Petitioner with the completed closing documents to present to the buyers for signature. Chicago Title required Petitioner to FedEx the signed documents following the closing. (Tr. 72). Petitioner signed an "Employment Application" subjecting him to the provisions and benefits contained in

the Company Employee Handbook and agreeing to comply with all company policies. (Rx. 2, p.2). The "Employment Application" defines the relationship between the parties as an "**at-will employment relationship**". (Rx. 2, p.2).

Moreover, Respondent admits "The claim was accepted within weeks of the accident. Petitioner was advised in writing that the claim was accepted." (Respondent's motion to confine medical expenses award paragraph 7). Petitioner's earnings were taxed and he received W-2 tax forms. (Tr. 18). Petitioner's testimony that he was hired as a traveling employee for Chicago Title was unrefuted. In light of this uncontroverted evidence, it is so clear as to be indisputable that Petitioner was an employee of Chicago Title. *Stewart v. Jones*, 742 N.E.2d 896, 904, 318 Ill.App.3d 552, 252 Ill.Dec. 358 (2001).

Therefore, based upon the totality of the evidence, the Arbitrator finds that there was an employer/employee relationship between Chicago Title and Petitioner at the time of the March 22, 2012 motor vehicle collision.

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

A "traveling employee" is one who is required to travel away from his employer's premises in order to perform his job. *Jensen v. Industrial Commission*, 305 Ill. App.3d 274, 278, 238 Ill.Dec. 468, 711 N.E.2d 1129 (1999). It is not necessary for an individual to be a traveling salesman or a company representative who covers a large geographic area in order to be considered a traveling employee. *Hoffman v. Industrial Commission*, 128 Ill. App. 3d 290, 293, 83 Ill.Dec. 381, 470 N.E.2d 507 (1984), Aff'd, 109 Ill. 2d 194, 93 Ill.Dec. 356, 486 N.E.2d 889 (1985). Rather, a traveling employee is any

employee for whom travel is an essential element of his employment. *Urban v. Industrial Commission*, 34 Ill. 2d 159, 163, 214 N.E.2d 737 (1966).

It is clear from Petitioner's testimony that his job duties required him to travel from his home to and from the real estate closings scheduled by Respondent. Thus, travel was clearly an essential element of the Petitioner's job, rendering him a traveling employee as a matter of law. *Kertis v. IWCC*, 991 N.E.2d 868, 873, 372 Ill.Dec. 378 (2013), see *Urban v. Industrial Commission*, 34 Ill. 2d 159, 163, 214 N.E.2d 737, *Hoffman v. Industrial Commission*, 128 Ill. App. 3d 290, 293, 83 Ill.Dec. 381, 470 N.E.2d 507 (1984).

The determination of whether any injury to a traveling employee arose out of and in the course of employment is governed by different rules than are applicable to other employees. *Hoffman v. Industrial Commission*, 109 Ill.2d, 194, 199, 93 Ill.Dec. 356, 486 N.E.2d 889 (1985). As a general rule, a traveling employee is held to be in the course of his employment from the time that he leaves home until he returns. *Urban v. Industrial Commission*, 34 Ill.2d 159, 162-163, 214 N.E.2d 737 (1966). However, a finding that Petitioner is a traveling employee does not relieve him from the burden of proving that his injury arose out of an in the course of employment. *Hoffman v. Industrial Commission*, 109 Ill. 2d at 199, 93 Ill.Dec. 356, 486 N.E.2d 889 (1985).

The test for determining whether an injury to a traveling employee arose out of and in the course of his employment is the reasonableness of the conduct in which he was engaged and whether the conduct might normally be anticipated or foreseen by the employer. *Cox v. IWCC*, 406 Ill. App. 3d 541, 941 N.E.2d 961, 966, 347 Ill. Dec. 92, 97 (2011) and *Howell Tractor* and *Equipment Co. v. Industrial Commission*, 78 Ill.2d 567, 573-574, 38 Ill. Dec 127, 403 N.E.2d 215 (1980). Under such an analysis, a traveling employee may be compensated for an injury as long as the injury was sustained while he was

engaged in an activity which was both reasonable and foreseeable. *Wright v. Industrial Commission*, 62 Ill.2d 65, 71, 338 N.E.2d 379 (1975).

In this case, Petitioner's job duties required him to travel from his home to the location of the real estate closing. Chicago Title must have anticipated that Petitioner would be driving from his home to the site of the closing and back. Moreover, Chicago Title required Petitioner to FedEx the closing documents back to them within 24 hours. (Tr. 72-73). Chicago Title provided Petitioner the prepaid FedEx postage label to mail back the closing documents. Therefore, it was not unreasonable or unforeseeable that Petitioner would drive directly to the FedEx office in Vernon Hills, Illinois following the completion of the closing in Lake Forest, Illinois. Petitioner testified that this was the closest FedEx office. (Tr. 73). Consequently, the Arbitrator finds Petitioner's injuries arose out of and in the course of his employment with Respondent.

WITH RESPECT TO ISSUE F - IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY? THE ARBITRATOR FINDS AS FOLLOWS:

There is no dispute that Petitioner's multiple pelvic fractures, lumbar transverse process fractures and left arm injuries are causally related to the March 22, 2012 motor vehicle collision. Petitioner was struck on his left side by the oncoming vehicle. The "jaws of life" were used to remove Petitioner from his vehicle and he was taken by ambulance to Northwestern Lake Forest Hospital. (Tr. 27). Petitioner had no such prior injuries and was working without any physical restrictions before the motor vehicle collision. (Tr. 28-29).

Dr. Jimenez described Petitioner's injuries as "a high energy pelvic ring disruption" consistent with a motor vehicle collision. (Px. 3). Moreover, Dr. Zoellick

opined that Petitioner's injuries were causally related to the motor vehicle collision. (Rx. 9, p.13). Therefore, the Arbitrator finds that Petitioner's current condition of ill-being is causally connected to the March 22, 2012 motor vehicle collision.

WITH RESPECT TO ISSUE G - WHAT WERE PETITIONER'S EARNINGS? THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner was working for five to seven title companies in the fall of 2011 when he was hired by Respondent. (Tr. 13). Petitioner advised Respondent at that time that he was working contract for other title companies. (Tr.18-19).

Petitioner was paid $100 per closing at Chicago Title. (Tr.20). Petitioner's W-2 wage statements for 2011 and 2012 from Chicago Title were admitted into evidence. (Tr. 47-48, 51 Px. 44 and 50). Petitioner's 1099 statements for 2011 and 2012 from the other title companies were also admitted into evidence. (Tr. 48-53, Px. 45, 46, 47, 48, 49, 51, 52 and 53.) Petitioner's schedule varied from week to week. (Tr. 57-58). Petitioner worked between 3 and 6 days a week depending on the demand for work. (Tr. 57). Each day could be totally different. (Tr. 16).

Petitioner kept a tally of his work on an Excel spreadsheet. (Tr. 12-13, 17 and Px. 55). The spreadsheet was used to keep track of the closings Petitioner did on a particular day and listed the date, file number, borrowers name, location and fee. (Tr. 16-17 and Px. 55). Petitioner kept track of the fees generated and filled in the amounts when paid. (Tr. 53-54). The entries on the spreadsheet were made contemporaneously with the closings and reflect <u>all</u> earnings Petitioner received between November 15, 2011, when Petitioner started at Chicago Title, and the March 22, 2012 motor vehicle

collision. (Tr. 55-57). Petitioner testified that the spreadsheet is a true and accurate copy of the spreadsheet Petitioner maintained on his computer. (Tr. 58).

The first closing Petitioner completed for Respondent was on November 15, 2011. (Rx. 55). Petitioner missed 5 or more days from work between November 15, 2011 and March 21, 2012. (Px. 55). Where the employment prior to the injury extended over a period of less than 52 weeks the method of dividing the earnings during that period by the number of weeks and parts thereof shall be followed. 820 ILCS 305/10. Petitioner worked 128 days or 18 2/7 weeks during that period. Petitioner earned $6,950 from Respondent and had concurrent earnings of $14,710.00. (Px. 55). Petitioner's combined earnings for the period was $21,660. Therefore, Pursuant to Section 10 of the Act Petitioner's average weekly wage is **$1,184.51** ($21,660 ÷ 18.286 = $1,184.51)

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

There is no dispute that the medial treatment Petitioner received was reasonable and necessary. Petitioner submitted the medical expenses for his treatment through his wife's Blue Cross Blue Shield Group Health Plan. (Tr. 58-59). Petitioner also paid co-payments pursuant to the Group Health Plan. (Tr. 59). Petitioner's following medical bills were admitted into evidence.

Px. 11 Northwestern Lake Forest Hospital;
Px. 12 Midwest Physical and Hand Therapy;
Px. 13 City of Lake Forest;
Px. 14 Murphy Ambulance Service;
Px. 15 Global Medical Imaging;
Px. 16 Consolidated Pathology;

Px. 17 The Spine Center;
Px. 18 Advanced Radiology Consultants;
Px. 19 Midwest Diagnostic Pathology;
Px. 20 Park Ridge Anesthesia;
Px. 21 Superior Ambulance;
Px. 22 Advocate Health Centers;
Px. 23 Ascot Diagnostic Services;
Px. 24 Prbot Medical of Chicago;
Px. 25 Elk Grove Internal Medicare Assoc.;
Px. 26 Alexian Brothers Medical Center;
Px. 27 Elk Grove Radiology;
Px. 28 Advocate Medical Group;
Px. 29 Illinois Bone and Joint Institute;
Px. 30 Glenview Terrace;
Px. 31 Advocate Lutheran general Hospital; and
Px. 32 Advocate Home Health

Based upon the Arbitrator's findings of causal connection along with Dr. Zoellick's testimony that the medical treatment Petitioner received was reasonable and necessary, the Arbitrator finds that Respondent is liable and shall pay the medical expenses contained in Px. 11 through Px. 32 including the co-payments, that were incurred in the care and treatment of Petitioner's injuries pursuant to the medical fee schedule and Section 8 and 8.2 of the Act.

WITH RESPECT TO ISSUE K - WHAT TEMPORARY BENEFITS ARE IN DISPUTE? THE ARBITRATOR FINDS AS FOLLOWS:

Based upon the Arbitrator's finding of causal connection the Arbitrator finds that Petitioner is entitled to temporary total disability benefits as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the Petitioner. Petitioner was restricted from all work activity following the March 22, 2012 motor vehicle collision until he was released to return to work on August 27, 2012. Therefore,

Respondent shall pay Petitioner temporary total disability benefits of $795.90/week for 22 3/7 weeks.

WITH RESPECT TO ISSUE L - WHAT IS THE NATURE AND EXTENT OF THE INJURY? THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to Section 8.1b of the Act, the following criteria and factors must be considered in assessing permanent partial disability:

In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) The reported level of impairment as assessed pursuant to the current edition of the AMA "Guides to the Evaluation of Permanent Impairment";

(ii) The occupation of the injured employee;

(iii) The age of the employee at the time of the injury;

(iv) The employee's future earning capacity; and

(v) Evidence of disability corroborated by the treating medical records.

The Act provides that no single enumerated factor shall be the sole determinant of disability.

With respect to factor (i), Respondent obtained an AMA impairment opinion from Dr. David Zoellick, who examined Petitioner and reviewed some of his medical records. Relying upon a diagnosis of "pelvic fracture, status post internal and external fixation", Dr. Zoellick opined that Petitioner sustained a 2% impairment of the pelvis. (Rx. 9, p.13 and 20). The Arbitrator notes, however, Petitioner's actual diagnosis was pelvic fractures including right and left inferior pubic ramus fractures; right and left superior pubic ramus fractures; left acetabular fracture; left iliac wing fracture and

vertical sacral fracture. (Px. 1). Dr. Zoellick did not review the X-ray films or CT scans of Petitioner's pelvis. (Rx. 9, p.34-38, 40).

Regarding Petitioner's spinal injuries, Dr. Zoellick testified that Petitioner sustained a 6% impairment of the whole person based upon a diagnosis of left L4 and L5 transverse process fractures. (Rx. 9, p.13 and 24). Dr. Zoellick's combined impairment rating was 8% of a person. (Rx. 9, p.25). 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. Because of Dr. Zoellick's failure to use the full and complete diagnosis for Petitioner's multiple pelvic fractures, the Arbitrator gives lesser weight to this factor.

Regarding factor (ii), the Arbitrator notes that Petitioner's work as a loan closer is not physically demanding.

Regarding factor (iii), the Arbitrator notes that Petitioner was fifty years old at the time of the injury.

In terms of factor (iv), Petitioner returned to work without restrictions as a loan closer for Respondent, however, Petitioner is earning less now than he was making at the time of his injury. (Tr. 83).

Finally regarding factor (v) the medical records reveal that Petitioner sustained multiple pelvic fractures including right and left inferior pubic ramus fractures; right and left superior pubic ramus fractures; left acetabular fractures; left iliac sacral fracture and left iliac wing fracture. (Px. 1). Petitioner also sustained fractures involving the left transverse process at L4 and L5. (Px. 8). Petitioner sustained a laceration and soft tissue injuries to his left arm which was embedded with glass fragments. (Px. 8).

Dr. Jimenez performed surgery stabilizing the left sacral ala fracture with a 7.8 cannulated screw and washer. (Px. 9). The pelvic ring fractures were stabilized with an anterior pelvic external fixation. (Px. 9).

Post-operatively, Petitioner remained bed ridden, restricted by the external fixator and was discharged after **12** days of hospitalization. (Px. 9). Petitioner was transferred to a nursing home where he spent the next **10** weeks receiving occupational and physical therapy. (Px. 10).

Petitioner was in the external fixator for **8** weeks and remained restricted to a 70° angle. (Px. 3). On May 17, 2012, Petitioner underwent surgery to remove the external fixator. (Px. 3) Petitioner remained non-weight bearing. Petitioner was discharged from Glenview Terrace Nursing Home on June 7, 2012 and returned home. (Px. 10). Petitioner received at home physical therapy. (Px. 5). Petitioner relied on a walker and slowly advanced to crutches. (Px. 6).

After **14** weeks of non weight bearing, Petitioner was allowed to begin weight bearing as tolerated on June 28, 2012 and started outpatient physical therapy. (Px. 6). Petitioner completed 42 physical therapy sessions over the next **5** months. (Px. 6).

Petitioner was released to return to work without restrictions on August 27, 2012. (Px. 3). Petitioner returned to work while still on crutches. (Tr. 41-42). Petitioner sees Dr. Jimenez annually for his ongoing pelvis and back pain.

On May 8, 2014, Dr. Jimenez reported Petitioner "is still symptomatic with some pelvic pain and back pain, and he will always have issues as a function of a high energy pelvic ring disruption. He has issues which will create some permanency, but for a severe and devastating injury he is doing quite well." (Px. 3).

Petitioner testified he has soreness and stiffness in the pelvis where the screw was inserted. (Tr. 44). The screw will "click" as Petitioner walks up or down the stairs. (Tr. 65). Petitioner has difficulty moving laterally, bending forward, and getting in and out of a vehicle. (Tr. 44 and 62). Petitioner has limitations in the range of motion of his hips and experiences stiffness in the left hip even in the absence of activity. (Tr. 63-64).

Dr. Zoellick agreed that the disability in the pelvis and hips is greater than the lumbar spine. (Rx. 9, p.57). Dr. Zoellick testified that this was a "significant" injury to the pelvis. (Rx. 9, p.51). Petitioner has an increased risk of arthritis because the fractures extended into the acetabulum. (Rx. 9, p.58).

Petitioner experiences low back pain with bending and has difficulty mowing the lawn, pushing the snow blower and shoveling snow. (Tr. 65). Petitioner is no longer able to bowl due to the twisting motion. (Tr. 66).

Petitioner continues to experience left arm stiffness and pain. (Tr. 44 and 60). Petitioner has difficulty reaching up high. (Tr. 60). Petitioner received medical treatment in May and July 2013 for soreness in the left arm. (Px. 4). Glass remains embedded in Petitioner's left arm from the motor vehicle collision. (Tr. 102).

The evidence of Petitioner's disability is corroborated by the treating medical records along with Petitioner's unrefuted testimony. Therefore, The Arbitrator gives greater weight to this factor.

Based on the foregoing testimony and medical records admitted into evidence the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **60%** loss of the person as whole pursuant to Section 8(d)(2) of the Act for the multiple pelvic fractures sustained. Petitioner is also entitled to permanent partial disability to the extent of **15%** loss of the person as a whole pursuant to Section 8(d)(2) of the Act for

the lumbar spine injuries. Finally, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **10%** loss of an arm pursuant to Section 8(e)(10) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sandy Carey,

Petitioner,

vs. NO. 12WC 24931

Northern Illinois University,

Respondent.

17IWCC0331

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 29, 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.

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: MAY 26 2017
SJM/sj
o-5/11/17

Stephen J. Mathis

Deborah L. Simpson

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CAREY, SANDY
Employee/Petitioner

Case# **12WC024931**

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

17IWCC0331

On 9/29/2016, 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 0.42% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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 LAW
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

5782 ASSISTANT ATTORNEY GENERAL
KELLY KAMSTRA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

SEP 29 2016

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

STATE OF ILLINOIS)SS.

COUNTY OF Winnebago)

17IWCC0331

- [ ] 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

Sandy Carey
Employee/Petitioner

v.

Northern Illinois University
Employer/Respondent

Case # **12 WC 24931**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Rockford, Illinois**, on **August 18, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD

L. [x] What is the nature and extent of the injury?

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other

FINDINGS

On the date of accident, **October 23, 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 these accidents *was* given to Respondent.

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

In the year preceding the injury, Petitioner's average weekly wage was **$550.00**.

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

ORDER

- The respondent shall pay the Petitioner the sum of **$330.00** / week for a period of **14.25** weeks, as provided in Sections 8(e) of the Act, because the injuries sustained caused **7-1/2% loss of use of the right hand.**

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

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

Signature of Arbitrator

9/28/16
Date

ICArbDec

SEP 29 2016

STATEMENT OF FACTS

Petitioner testified that she had worked as a cook for Respondent since 1999. She worked the job on a full-time basis, having summers off. Petitioner work hours were from 11 am - 7:30 pm, 5 days a week, with occasional overtime on Saturday. She served approximately 1300 students during a given day. Petitioner provided that her job required that she use her hands constantly throughout her day. Petitioner testified that her job duties included lifting fryer baskets and turning them over, making specialty sandwiches, and stirring large vats of macaroni and cheese. She would flip burgers and omelets and hand roll wraps. When making macaroni and cheese, approximately 80 pounds of noodles had to be stirred. Petitioner testified that she performed a similar motion, twisting her hand at the wrist, when flipping baskets of fries or baskets of chicken, and when flipping omelets. Petitioner also provided she had to lift pans and pull them out of ovens throughout her day.

Petitioner testified that she developed numbness and tingling in her right hand. Her symptoms began slowly and gradually increased in severity to the point that her hand would wake her up. On October 24, 2011, Petitioner presented at Fox Valley Family Practice Center with right wrist carpal tunnel complaints. Records submitted show her symptoms included right hand tingling, numbness, and weakness radiating to her forearm. The onset was years ago which Petitioner described as worsening. Also noted was "pt has carpal tunnel per a test 8 years ago pt states her right hand is getting much worse at night..." An EMG was recommended and performed on November 23, 2011. The EMG evidenced moderate-to-severe carpal tunnel syndrome in the right hand and a mild C7 radiculopathy on the right side. (PX 1)

Records submitted show Petitioner returned to Fox Valley Family Practice Center on February 7, 2012 and February 23, 2012. She sought treatment for unrelated cough and foot complaints. There is no mention of carpal tunnel or right wrist complaints during these visits. (PX 1)

At Respondent's request, Petitioner was seen by Dr. Mark S. Cohen for a Section 12 examination on June 18, 2012. In his report Dr. Cohen indicated that he obtained a history, reviewed a copy of Petitioner's job description, as well as Petitioner's medical records. Dr. Cohen noted Petitioner provided that she had been working as a college cook for fourteen (14) years. He indicated that the last seven (7) to eight (8) years she worked mainly flipping omelets, making specialty sandwiches, rolling wraps and serving food. Dr. Cohen recorded that Petitioner provided that she had right hand symptoms for many years and originally her hand would "fall asleep" while she was driving. The doctor also recorded that Petitioner provided that slowly her symptoms had gotten worse. Following a physical examination, Dr. Cohen opined that Petitioner suffered from carpal tunnel syndrome in her right wrist. (RX 1)

Dr. Cohen elaborated on some common risk factors related to carpal tunnel syndrome. He noted that Petitioner has several of these risk factors including obesity and diabetes. He also noted that carpal tunnel is also associated with occupational activities involving forceful and repetitive gripping and squeezing against resistance throughout the day. He indicated that simple repetitive use of one's hands does not cause carpal tunnel syndrome. Dr. Cohen stated in his report that he did not relate Petitioner's carpal tunnel syndrome to her workplace activities. He went on to opine that just because an individual's carpal tunnel symptoms may manifest themselves at work; it does not imply a cause-and-effect relationship to those activities performed. He agreed with the diagnosis of carpal tunnel syndrome and agreed that a release procedure would be reasonable. Dr. Cohen noted that unless her job activities specifically involved forceful and repetitive grasping and

squeezing against resistance throughout her workday, he would not relate her condition to her job activities. (RX 1)

On April 2, 2013, Petitioner presented to Castle Orthopedics and Sports Medicine where she saw Dr. Suresh Velagapudi. Petitioner described right hand pain, numbness, and tingling for about 8 years. She noted that she worked for NIU as a cook in various areas, such as an omelet bar, making macaroni in a large vat, and doing other activities with active motion related to her wrist. It was noted that her hand felt better at the end of the weekend or during breaks from work. Dr. Velagapudi felt that Petitioner's symptoms were consistent with right carpal tunnel syndrome. The doctor stated, "I do not think her work caused her to develop carpal tunnel syndrome, but based on her history, very likely that there was some aggravation related to that and certainly her other causes, one would consider that of diabetes and time as contributing to her developing carpal tunnel syndrome." He recommended she undergo release of her carpal tunnel. (PX 2)

Petitioner was seen by Dr. Jeffery Coe for a Section 12 examination on May 13, 2014. In addition to providing a report, Dr. Coe also testified via deposition in this matter. Dr. Coe testified that in addition to perform an examination, he reviewed Petitioner's medical records that began in 2011 and continued through 2013. Additionally, he reviewed the Section 12 report of Dr. Cohen. Dr. Coe provided that he obtained a history that Petitioner worked as a cook for 15 years, which required repetitive and forceful use of her hands. He noted she would prepare food, cook, clean, stock, and serve. He noted the grill work, in which she flipped and reached while holding fryer baskets, rolling wraps, and taking heavy bowls and trays out of stoves in particular. He described her hand work as continuous throughout her shift. Dr. Coe assessed Petitioner with right carpal tunnel syndrome. Dr. Coe offered the opinion that there was a causal relationship between Petitioner's work activities and her condition of symptomatic right carpal tunnel syndrome. Dr. Coe specifically stated, "...I want to be clear here, I talked to Miss Carey about what she did. I questioned her about what she did as a cook. I haven't seen a job description. I believe that Dr. Cohen actually had a written job description from the University. I didn't have that, but I have more information in Miss Carey's re-telling of what she did...I've gone through this whole list of things that she did. Preparation, cooking, serving, stocking, cleaning. I've talked to you about some of the specific activity that she talked about. Sandwich making, lifting fry baskets, flipping omelettes and so on. What she describes in my opinion is repetitive and forceful use of her hands throughout her 37 and a half hour per week...I cannot see how this job could be interpreted in any other way..." The doctor went on to add that the extent or amount of forcefulness to cause or aggravate carpal tunnel syndrome can vary from person to person depending upon that person's physiological makeup. (PX 3)

Dr. Coe testified that conditions such as Petitioner's diagnosed diabetes mellitus and obesity can increase a person's risk for development of carpal tunnel syndrome. He also provided that they do not ensure the inevitability of carpal tunnel syndrome. (PX 3)

Petitioner did not miss any time from work. Petitioner testified that in 2012, she was promoted to a manager position. Petitioner provided that the job change alleviated a lot of her symptoms as she no longer did a lot of repetitive motion with her hands. Petitioner provided that at times, she will cover for another worker, performing the cooking jobs. When doing so, she experiences similar symptoms. If she uses her hand for such repetitive activity, it continues to fall asleep. Petitioner notes that her right hand continues to be weaker than it was. She uses her left hand more than she used to. Petitioner testified that in the past, she enjoyed hand sewing or crocheting. She can no longer do either without her right hand falling asleep. If she drives a long distance, her hand will fall asleep. Petitioner testified that she does not believe she wants the surgery performed now. She wanted it done when she was performing the cook job as it greatly interfered with that position. Now that she is a manager and is three (3) years from retirement, she prefers to live with her ongoing symptoms.

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:

Relying on the records of the treating physicians and Dr. Coe's opinions, along with Petitioner's credible testimony, the Arbitrator finds that a repetitive trauma accident occurred that arose out of and in the course of Petitioner's employment by Respondent through October 23, 2011.

It is clear from the medical records and Petitioner's credible testimony that she performed nearly constant use of with her hands while performing her work as a cook for Respondent for approximately 15 years. Petitioner sufficiently described repetitive and forceful use of her hands while performing the various aspects of her job, which included flipping omelets and fry baskets, hand making sandwiches and wraps, and stirring of large vats of pasta. Both Dr. Coe and the treating orthopedic, Dr. Velagapudi offered the opinion that Petitioner performed repetitive and forceful work activities throughout her day for Respondent.

It has been well-established that "the fact that an employee may have suffered from a preexisting condition will not preclude an award if the condition was aggravated or accelerated by the employment. The employee need not prove employment was the sole causative factor or even that it was the principal causative factor, but only that it was a causative factor in the resulting injury." Williams v. Industrial Com., 85 Ill. 2d 117, 122 (1981). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193 (2003).

Petitioner's records support a causal relationship between her repetitive work activities and her carpal tunnel syndrome. Petitioner consistently and credibly described the repetitive use of her hands to the doctors. The Arbitrator is persuaded by the opinion of Dr. Velagapudi that while her work activities did not cause her carpal tunnel syndrome, they very likely aggravated it. Dr. Coe concurred offering the opinion that Petitioner's work activities were a causative factor in the development of her condition. The Arbitrator notes that Dr. Cohen did not indicate that work activities such as Petitioner's could not be causative of carpal tunnel syndrome, but found that based on her description, they were not sufficiently forceful or performed with sufficient repetition.

Based on all the above, the Arbitrator finds that Petitioner sustained her burden of proving that a repetitive trauma accident occurred that arose out of and in the course of Petitioner's employment with Respondent through October 23, 2011. The Arbitrator further finds that Petitioner's present right wrist condition of ill-being is causally related to her October 23, 2011 repetitive trauma injury.

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

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

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

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 cook waitress at the time of the accident. Currently, she has been promoted to a supervisory position that does not require as much repetitive hand use. The Arbitrator therefore gives little weight to this factor.

With regard to subsection (iii) of §8.1b(b), the age of the employee at the time of the injury, the Arbitrator notes that Petitioner was 52 years old at the time of the accident. Petitioner is an individual who is in her fifth decade of life and will live with her permanent disability for a shorter period than a younger individual. As such, the Arbitrator gives little weight on this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has been promoted to a supervisory position. Although not specifically addressed, the Arbitrator infers that an increase in salary was attached to said promotion. As such, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner credibly testified to ongoing hand symptoms, though less frequently now that she has been promoted to a position requiring less repetitive hand use. Petitioner described ongoing weakness and numbness with repetition. As such, she no longer sews or crochets. She has difficulty driving long distances as her hand becomes numb. While surgery was recommended, and would be reasonable, Petitioner is currently willing to live with her symptoms as she is nearing retirement. As such, the Arbitrator therefore gives some weight to this factor.

Based on all the above, the Arbitrator finds Petitioner sustained 7-1/2% loss of use of the right hand pursuant to section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Pedro Alcantar,

Petitioner,

vs.

NO. 15WC 23047

Aryzta Kitchen,

Respondent.

17IWCC0332

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, permanent disability, 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 9, 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.

17IWCC0332

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 26 2017
SJM/sj
o-5/18/2017
44

Stephen J. Mathis

David L. Gore

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0332

ALCANTAR, PEDRO
Employee/Petitioner

Case# **15WC023047**

ARYZTA KITCHEN
Employer/Respondent

On 9/9/2016, 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:

0059 BAUM RUFFOLO &MARZAL
V NADREW MARZAL
33 N LASALLE ST SUITE 1710
CHICAGO, IL 60602

0445 RODDY LAW LTD
ROBERT J DOHERTY
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

17IWCC0532

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

Pedro Alcantar
Employee/Petitioner
v.
Aryzta Kitchen.
Employer/Respondent

Case # **15** WC **23047**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine M. Ory**, Arbitrator of the Commission, in the city of **New Lenox**, on **May 6, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On June 26, 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 **$8,343.63**; the average weekly wage was **$414.24.**

On the date of accident, Petitioner was **26** 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.

To date, Respondent has paid $ **0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

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

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

ORDER

Medical Benefits

Respondent shall pay the bills totaling **$19,046.81**, subject to the fee schedule and pursuant to §8 and §8.2 and subject to credit for any payments made by respondent for the claimed bills.

Temporary Total Disability

Respondent shall pay TTD from **August 5, 2015 through September 2, 2015**, which is **4-1/7 weeks TTD** at the rate of $286.00.

Permanent Disability

Respondent shall pay the sum of $286.00 per week for a period of 13.36 weeks, as provided in §8 (e) 11 of the Act, because the injuries sustained caused **8% loss of use of the right foot.**

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

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

Christine Roy

09/08/2016

Signature of Arbitrator — Date

ICArbDec p. 2

SEP - 9 2016

 17IWCC0332

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Pedro Alcantar	)	
Petitioner,	)	
vs.	)	**No. 15 WC 23047**
Aryzta Kitchen	)	
Respondent.	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in New Lenox on May 6, 2016. The parties agree that on June 26, 2015, the Petitioner and the Respondent were operating under the provisions of the Illinois Worker's Compensation or Occupational Diseases Act, that their relationship was one of employee and employer. They agree that Respondent was given notice of the accident within time limits stated in the Act. They agree that in the year preceding the injuries, the Petitioner earned $8,343.63 and that his average weekly wage, as calculated pursuant to §10 of the Act is $414.24.

At issue in this hearing is as follows:

1. Whether petitioner sustained accidental injuries or was last exposed to an occupational disease that arose out of and in the course of his employment with respondent.
2. Whether petitioner's current condition of ill-being is causally connected to this injury or exposure.
3. Whether respondent is liable for the unpaid medical bills.
4. Whether temporary total disability is due petitioner.
5. The Nature and Extent of Injury.

The Petitioner does not speak English; his native language is Spanish. He testified with the assistance of Mariano Torrespico, a certified interpreter, qualified to translate Spanish to English and English to Spanish. After being duly qualified and accepted by both parties, Mr. Torrespico served as an interpreter for the Petitioner.

STATEMENT OF FACTS

Petitioner had been employed by respondent since February, 2015. He began as a sanitation worker, washing machines. Petitioner testified that on June 26, 2015, he was working in the production area; picking up cardboard. There were several forklifts in the area. Petitioner initially testified the accident occurred before he put the cardboard on a pile.

Petitioner testified forklift operator, Kris [Mig], ran over petitioner's right foot with the front wheels of the forklift. Petitioner advised Kris in Spanish that he had "stepped on his foot". Petitioner testified that after the occurrence, he was not able to walk and had to use a trash can as support. Petitioner testified his supervisor, Emanuel, found him and asked him what happened. He told Emanuel that the forklift driver stepped on his foot. Emanuel and Erma carried him to

the office where he sat down for an hour. Amiee then called a cab to take him to Physicians Immediate Care.

The doctors at Physicians Immediate Care examined the foot, gave him a ortho boot and drug test and then discharged him. Petitioner went home, took the pain pills and went to bed. He was unable to sleep due to pain in the right foot. He returned to work on Monday. He had been given restrictions by the doctors at Immediate Care Physicians of sit-down work only. He worked the rest of the week with the restrictions.

On July 3, 2015 he returned to Physicians Immediate Care. Petitioner testified his foot looked bad at that time. He was told to continue wearing the boot and maintain sitting restrictions. Petitioner returned to the clinic on July 6, 2015. While on light duty, petitioner was not allowed into the plant proper. He cleaned offices.

On July 13, 2015 he was again seen at Physicians' Immediate Care. He testified his flesh had turned purple and was beginning to fall off. He was again put on work restrictions. It was at this time petitioner went to see an attorney. Photos of petitioner's foot were shown to his attorney. He was immediately sent to St. Mary and Elizabeth Hospitals on July 16, 2015. At the hospital, blood was drawn and X-rays were taken.

Petitioner went to orthopedic surgeon, Dr. David Schaeffer on July 22, 2015. Dr. Schaeffer cleaned the foot, administered ointments, prescribed pain pills and sent him for physical therapy. Petitioner was told to continue wearing the boot. Dr. Schaeffer released petitioner to return to sedentary work only. Petitioner returned to work the next day and was given a job cleaning offices that required walking.

An MRI was done on July 27, 2015. He followed up with Dr. Schaeffer on August 6, 2015. Petitioner advised Dr. Schaeffer that respondent was not abiding by the work restrictions. Therefore, Dr. Schaeffer ordered petitioner completely off work. Dr. Schaeffer also continued the physical therapy at Premier Physical Therapy. On September 2, 2015 Dr. Schaeffer released petitioner to return to sedentary work.

Petitioner returned to work on September 3, 2015 cleaning. The foot was improving. Petitioner noticed his foot hurt after one to two hours of work. On September 30, 2015, petitioner returned to full-duty work and has continued to work for respondent.

Petitioner last saw Dr. Schaeffer on November 11, 2015. At that time, Dr. Schaeffer told petitioner if he had further problems then he would consider injections.

Petitioner worked a year in sanitation and then promoted to machine operator earning more money. Petitioner testified that his foot hurts after a half a day on his feet. When he walks up and down he has pain in his instep and small toe.

On cross-examination petitioner testified he had put cardboard in a pile when accident occurred. Petitioner thought he had a squeegee in his hand and was using it when his foot was run over by the forklift. The forklift stayed on the foot for a few seconds and then went off. Petitioner testified he spoke with the forklift driver, Kris, and told him what he had done.

Petitioner testified that after Emanuel and Erma took him to the office, Aimee completed a report, looked at his foot and called him a cab to take him to Physicians Immediate Care. Petitioner denied prior injuries to his right foot. Petitioner testified that by July 6, 2015 his foot was turning purple.

Petitioner further testified that he did not actually talk directly to Aimee, but rather to Norma, who translated for him.

Petitioner denied that when he was on light duty that he performed any office work such as shredding documents, filing or working on the computer. The only thing he did besides clean

was watch a video one day. Petitioner did not know what the alchemy program was. While on light duty, petitioner walked stairs four to six times a day in order to perform cleaning.

In order to expedite the trial, an offer of proof was made as to the testimony of Maria Anguiano, a manager for respondent. She would testify that petitioner was given a light duty assignment of doing paper work, shredding and working on computer.

Medical Bills (PX.1)

Itemized bills incurred by petitioner totaling $19,046.81

Petitioner's Foot Photos (PX.2)

A & B -rejected as petitioner failed to identify when the photos were taken.

C Photo of petitioner's foot taken on date of the accident.

Michigan Ave. Medical Associates/Dr. David Schafer/Eq MD Records (PX.3)

Petitioner was first seen by Dr. Shafer on July 22, 2015 for an acute onset of right foot pain following an injury that occurred at work on June 26, 2015. Petitioner provided the following history: "On the date of the injury he was picking up some trash when his foot was run over by a forklift".

Dr. Shafer noted significant swelling and blistering had formed. An ulceration was noted over the dorsal foot which appeared clean. Dr. Shafer agreed with the earlier recommendation for an MRI to rule out any further pathology due to the severity of the soft tissue injury. He also ordered physical therapy. Dr. Shafer released petitioner to sedentary work only.

Petitioner returned to Dr. Shafer on August 5, 2015. Petitioner reported to Dr. Shafer that respondent had been non-compliant with work restrictions and has him standing all day and going up and down stairs. Dr. Shafer found the non-compliance in providing light duty to petitioner was detrimental to petitioner's overall recovery. Therefore, Dr. Shafer determined petitioner was medically unable to work in any capacity. Physical therapy was continued.

Petitioner returned to Dr. Shafer on September 2, 2015. Dr. Shafer reported improvement with therapy. Dr. Shafer released petitioner to light duty work and to continue physical therapy.

On September 30, 2015 Dr. Shafer petitioner reported persistent pain over the laceration site and the bottom or plantar aspect of the foot when he is on his feet for more than two to three hours at time. Dr. Shafer transitioned petitioner to a home exercise program and released him to return back to regular duty work activities.

On November 11, 2015 Dr. Shafer released petitioner from his care. He noted petitioner had residual sensitivity over the lacerations as well as permanent scarring. Dr. Shafer did not believe petitioner would benefit from any plastic-type surgeries, but advised if problems persist petitioner may benefit from a cortisone injection.

July 27, 2015 MRI Report from MRI Lincoln Imaging Center (PX.4)

The findings on the MRI were reported as bony contusions 5th toe phalanges

Physicians Immediate Care Records (PX.5)

Petitioner was first examined by the doctors at Physicians Immediate Care on June 26, 2015. His history was consistent with the work accident. The diagnosis was foot contusion. A walking boot was dispensed.

Petitioner returned to Physicians Immediate Care on June 27, 2015. The diagnosed remained the same.

On July 3, 2015, severe right foot ecchymosis and swelling was noted. An MRI was ordered.

On July 6, 2015, diagnosis remained as contusions. Bruising was noted.

On July 13, 2015, in addition to contusion, the diagnosis now included open wood foot complication. MRI of the foot was again ordered.

Presence Saints Mary and Elizabeth Medical Center Records (PX.6)

Petitioner presented to the emergency room of Saint Mary of Nazareth Hospital on July 16, 2015 with wound infection which he related to an injury a month prior when his foot was run over at work. Petitioner related that at the time there was bruised and swollen and a small abrasion to lateral right fifth toe. Petitioner related that since that time there was increased swelling and pain and further skin breakdown. Diagnosis was subacute foot ulcer from trauma. The wound was cleaned and dressed.

Premier Therapy Records (PX.7)

The records confirm petitioner received physical therapy at Premier from July 22, 2015 until discharged on September 30, 2015.

Video (RX.1)

The video shows petitioner pushing a garbage can and goes around the back of some boxes as the forklift operator comes in front of petitioner. The petitioner is blocked by the forklift in the video. Petitioner emerges from around the right side of the forklift with a piece of cardboard in his hand. Petitioner walks over and placed the cardboard on a pile. Petitioner then walked over to the forklift operator and both the forklift operator and petitioner look down during their discussion. Petitioner then walked off out of view.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

The Arbitrator observed that petitioner, at times, seemed to struggle with the understanding of the questions even through an interpreter.

C. In support of the Arbitrator's decision with regard to whether an Accident occurred which arose out of and in the course of petitioner's employment with respondent, the Arbitrator makes the following finding:

The respondent relied solely on a video that purportedly showed no accident occurred as claimed by the petitioner. The Arbitrator notes, however, the video does not give a clear and accurate view of the petitioner the entire time he interacted with the forklift operator. Because the forklift was blocking the view of the petitioner during a portion of the video, it is not possible to determine if the forklift had run over petitioner's right foot or not at the time.

The video is consistent with petitioner's testimony in that he testified he had not yet put the cardboard on the pile when the accident occurred. And, also, after petitioner dropped the cardboard on the pile he went to the forklift driver and a discussion ensued. During the

discussion petitioner and the forklift driver both looked down. This is consistent with petitioner's testimony that he advised Kris [the forklift driver] that he had run over his foot.

The two inconsistencies in petitioner's testimony as compared with the video are: the fact that it did not appear petitioner had a squeegee in his hand at the time his foot was run over and he was not seen using a trash can to walk.

As the petitioner cannot be viewed at the time of the purported occurrence, it is hard to determine one way or another whether petitioner had a squeegee in his hand at the time his foot was run over, or even if his foot was run over. Furthermore, petitioner testified he was not sure he had a squeegee in his hand.

Also, petitioner testified he tried to walk and had to use a trash can as a support, and yet the video shows he walked off under his own power. However, petitioner seems to be favoring his right foot as he walked out of view. In addition, he only took a few steps before he was off the video. Therefore, due to the short time petitioner was on the video after the purported occurrence, there is no way to determine by the video if petitioner used the trash can to aid in his walking any time after the occurrence. The only evidence that a trash can was used was petitioner's unrebutted testimony.

The Arbitrator notes that Kris, the forklift driver was not called as witness to refute or to clarify any discrepancies in petitioner's testimony as compared with the video.

Respondent's defense that no accident occurred is also called into question in that petitioner went immediately to the office, with the assistance of Erma and his supervisor, Emanuel, to report the injury. The injury was reported to Aimee Provost who then sent petitioner to Physicians Immediate Care. There would be no reason to send petitioner for treatment if there was no evidence of an injury. The fact that Erma, Emanuel and Aimee were not called as witnesses to refute petitioner's claim as to the post-accident events, also calls into question respondent's defense.

The history at Physicians Immediate Care is consistent with petitioner's testimony. The findings by the doctors as to the condition of petitioner's foot at the time of petitioner's initial evaluation at Physicians Immediate Care within an hour or two after the accident, of large ecchymosis to lateral dorsal foot especially over the fifth digit with swelling and tenderness, is consistent with the accidental injury.

The records from Presence St. Mary Hospital emergency room of July 16, 2015 and Dr. David Shafer's records contain a consistent history of the work accident.

Finally, the resultant injury is consistent with the accident as described by petitioner. There is no evidence that suggests petitioner had injured the foot in any other way than by the work accident of June 26, 2015.

For the aforementioned reasons, the Arbitrator finds petitioner sustained injuries to his right foot from an accident that arose out of and in the course of his employment on June 26, 2015 when his right foot was run over by a fork lift at work.

F. In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following finding:

Petitioner denied prior injuries to his right foot. The claimed injury to his right foot is consistent with the accident as described; that being it was run over by a forklift. The medical records of Physicians Immediate Care, the emergency room records from Presence St. Mary Hospital, and the records of Dr. David Shafer confirm petitioner sustained a crushing injury to

his right foot that was diagnosed as a contusion and laceration that lead to an ulceration of the foot which was caused by the work accident of June 26, 2015. The Arbitrator therefore finds petitioner's contusion and ulceration of the right foot was caused by the work accident of June 26, 2015.

J. In support of the Arbitrator's decision with regard to the medical bills incurred, the Arbitrator finds the following:

Respondent offered no evidence to refute the reasonableness or necessity of the injury. The Arbitrator, having found in favor of petitioner on the issue of liability, awards the following medical bills, in accordance with §8 and §8.2 of the Act:

$8,685.00 Premier Therapy
$2,069.36 Eq MD
$1,506.00 Michigan Avenue Medical Associates
$2,100.00 MRI Lincoln Imaging Center
$3,286.00 Saints Mary and Elizabeth Medical Center
$1,400.45 Physicians Immediate Care

In support of the Arbitrator's decision with regard to temporary benefits, the Arbitrator finds the following:

Dr. David Shafer determined petitioner was medically unable to work as of August 5, 2015. Dr. Shafer did not release petitioner to return to work until September 3, 2015. Respondent offered no evidence to dispute Dr. Shafer's determination of total disability from August 5, 2015 through September 2, 2015.

Therefore, the Arbitrator awards temporary total disability from August 5, 2015 through September 2, 2015, which is 4-1/7 weeks at the minimum rate of $286.00 per week,

L. In support of the Arbitrator's decision with regard to the nature and extent of injury, the Arbitrator finds the following:

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:

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. Therefore, the Arbitrator can give no weight to this factor.

With regard to (ii) of §8.1b (b) the occupation of the injured employee, the Arbitrator notes petitioner is employed as a maintenance man and was capable of returning to his regular employment as of September 30, 2015 and has continued to work since his return to work with some complaints of pain but able to work full time nonetheless. Therefore, the Arbitrator gives less weight to this factor.

With regard to (iii) of §8.1b (b) the age of the employee at the time of the injury was 26 years of age. The Arbitrator notes the petitioner has a work life of approximately forty years ahead of him. Therefore, the Arbitrator gives greater weight to this factor.

With regard to (iv) of §8.1b (b) the employee's future earning capacity, the Arbitrator notes petitioner has been able to work since September 2, 2015 and, in fact, was promoted to

17IWCC0332

machine operator and earning more than what he earned as a maintenance man. The Arbitrator therefore gives little weight to this factor.

With regard to (v) of §8.1b (b) evidence of disability corroborated by the treating medical records, the Arbitrator notes that at the time petitioner was released from Dr. Shafer's care on November 11, 2015, he continued to have residual sensitivity over the lacerations that Dr. Shafer thought would resolve over time. Petitioner had full range of motion, no instability and full strength. Dr. Shafer indicated if problems persist with scarring, cortisone injections may be considered. The Arbitrator therefore gives less 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 8% loss of use of the right foot pursuant to § 8 (e) 11 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William L. Reed Jr,

Petitioner,

vs.

NO: 11 WC 13746

Kilker Roofing & Construction and Dan Rutherford
as the Illinois State Treasurer, as Ex Officio Custodian of the
Illinois Injured Workers' Benefit Fund A/K/A IWBF

Respondent,

17IWCC0333

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 12, 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.

17IWCC0333

IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

DATED: MAY 30 2017
O051117
DLG/mw
045

David L. Gore

Deborah Simpson

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REED JR, WILLIAM L
Employee/Petitioner

Case# **11WC013746**

KILKER ROOFING & CONSTRUCTION AND RUTHERFORD, DAN AS THE ILLINOIS STATE TREASURER AS EX OFFICIO CUSTODIAN OF THE ILLINOIS INJURED WORKERS' BENEFIT FUND A/K/A IWBF
Employer/Respondent

17IWCC0333

On 10/12/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.49% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

1053 JOSEPH L SAMUELSON PC
5111 W MAIN ST
BELLEVILLE, IL 62226

0000 KILKER ROOFING & CONSTRUCTION
108 WAYNE DR
BELLEVILLE, IL 62223

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

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

WILLIAM L. REED, JR.
Employee/Petitioner

v.

KILKER ROOFING & CONSTRUCTION and Dan Rutherford, as the Illinois State Treasurer, as Ex Officio Custodian of the ILLINOIS INJURED WORKERS' BENEFIT FUND a/k/a IWBF
Employer/Respondent

Case # 11 WC 13746

Consolidated cases: _____

17IWCC0333

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christina Hemenway**, Arbitrator of the Commission, in the city of **Collinsville**, on **May 20, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 31, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$0**; the average weekly wage was **$0**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

As explained in the Arbitration Decision, Respondent was operating under and subject to the Illinois Workers' Compensation Act, and an employer/employee relationship existed between Respondent and Petitioner. However, Petitioner failed to prove by a preponderance of the evidence that he sustained an accident that arose out of and in the course of his employment on March 31, 2011. All benefits are denied. The Arbitrator makes no findings regarding the remaining issues.

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

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

Signature of Arbitrator

October 9, 2016
Date

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

WILLIAM L. REED, JR.
Employee/Petitioner

17IWCC0333

v.

Case #: 11 WC 13746

KILKER ROOFING & CONSTRUCTION and Dan Rutherford, as the Illinois State Treasurer, as Ex Officio Custodian of the ILLINOIS INJURED WORKERS' BENEFIT FUND a/k/a IWBF
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner asserts he was employed by Respondent Kilker Roofing and Construction on March 31, 2011, and that he sustained accidental injuries arising out of and in the course of his employment. Norman Kilker was present at trial and testified on his own behalf. Mr. Kilker denies the existence of an employer/employee relationship between himself and Petitioner, but acknowledges that he did not possess Workers' Compensation insurance at the relevant time. The Injured Workers' Benefit Fund ("the Fund") was named as a party and was represented at trial by the Attorney General's office.

The parties stipulated that the medical bills incurred and listed in Petitioner's Exhibit 11 were causally related to Petitioner's injury sustained on March 31, 2011, and that reasonableness would be determined by the medical fee schedule. The parties further stipulated that Petitioner was temporarily and totally disabled from March 31, 2011, through July 5, 2011, a period of 13 6/7 weeks. As to both the medical bills and TTD, the Fund disputes its liability for same and demanded proof of an employer/employee relationship and accident in consideration thereof.

Petitioner testified he was working for Kilker Roofing and Construction on March 31, 2011. He identified the company's advertising flyer, marked as Petitioner's Exhibit 13, Deposition Exhibit 1, and indicated it was the same company he worked for. Petitioner's brother Wesley worked for Respondent, and gave Petitioner's phone number to Respondent. Petitioner testified he was contacted by Norman Kilker, who "needed some help on a job", and he agreed to work for him at the rate of $20 per hour. His son was also going to work for Respondent, at the rate of $10 per hour. Petitioner's first day working for Respondent was March 30, 2011, and he worked eight or nine hours that day. His second day working, March 31, 2011, was the date of the accident.

Petitioner testified that he and his son were working at a residential apartment building, a job contracted for by Respondent. His job was to get up on the roof, tear off the roof, and re-paper and re-shingle it. All of the tools and equipment were furnished by Respondent, and Petitioner brought none of his own. Prior to the start of the work day, on both days, Petitioner met Respondent at a filling station and followed him to the job site. He testified that Mr. Kilker was present on both days, supervised the work, and directed Petitioner and his son on what to do and how to do it.

On the date of accident, March 31, 2011, Petitioner and his son were instructed to tear off the roof. At some point Mr. Kilker advised he was leaving to go get more materials, and they were left at the job site. Petitioner and his son were tearing off the roof and putting it on a tarp. They each grabbed an end of the tarp and threw it off the roof, toward the dumpster below. Petitioner's arm became entangled in the tarp, pulling him off the roof and down to the ground, about ten feet below. He landed on his left side, injuring his left heel, left wrist, and left shoulder. He sat for a few minutes to catch his breath and could not stand on his left side. He eventually got back on the roof by hopping up the ladder, and proceeded to shingle the area he had previously torn off. Mr. Kilker later arrived back and Petitioner reported what had happened. Mr. Kilker left the job site again and did not return that day.

Petitioner called someone to help him get off the roof, and he went to St. Elizabeth's Hospital for treatment. He underwent a CT scan, his ankle was put in a brace, and his wrist was wrapped. He was referred to Dr. Rushford, an orthopedic specialist, with whom he treated until July 5, 2011. With regard to treatment, Dr. Rushford put him in a boot for his ankle and gave him pain medication. He also put Petitioner in a wrist splint. Petitioner testified he underwent a CT scan of his shoulder and surgery was recommended, but he could not have the surgery due to receiving his granddaughter. Surgery has not taken place to date.

Petitioner testified that at no time was he contacted by anyone from Kilker Roofing and Construction, or their workers' compensation insurance carrier. He did not receive any disability or medical benefits from Respondent, and some of his medical bills were paid through the State of Illinois. Following his release by Dr. Rushford on July 5, 2011, Petitioner called Respondent several times to attempt to return to work. He did not get a return call, however, and has never returned to work for Respondent. He testified he has tried to get back to work since that time, and has been doing general construction work. Petitioner denied having any subsequent accidents or injuries to his left foot, heel, knee, wrist, or shoulder, or his low back or neck. He further denied having any problems with those body parts prior to this accident.

Petitioner was released by Dr. Rushford in July 2011, but sought additional treatment at the hospital on November 4, 2011. He testified he had shooting pain in his left shoulder, and did not know if he was having a heart attack or just what. He underwent an MRI at that time. His understanding was that the pain was shooting from the ligament or tendon in the shoulder, which Petitioner's counsel described as the "torn labrum that had never been fixed".

With regard to his current complaints, Petitioner testified his left shoulder shoots constant pain into his chest area and he has upper neck problems. He also has shooting pains in his lower

back. With regard to his left wrist and thumb, he testified it "doesn't work right anymore", like it's out of socket or something. With regard to his left ankle, he testified it gives out on him if he's walking, and there's a possibility he might fall. With regard to his left foot, he has pain in the heel that shoots up his leg to about the calf.

On cross-examination, Petitioner testified that prior to talking with Respondent he made his living doing home repair, remodeling, painting, roofing, and various other jobs. He did not work for a company and got his projects by "hearsay", one job at a time. He testified that when he talked to Mr. Kilker he stated he "had to have $20 an hour" and that his brother Wes told Mr. Kilker that he would not work for less than $20 an hour. Petitioner acknowledged that he and Mr. Kilker did not discuss whether they would work together after the completion of the March 2011 roofing project, and his understanding was that he would work from job to job. He did not have an agreement with Mr. Kilker regarding how many hours he would work, because it was unclear how long it would take to complete the project. Petitioner testified he did not fill out any kind of employment paperwork with Kilker Roofing and Construction, he was not required to wear a uniform, and he did not have any taxes withheld from his pay.

Petitioner testified he continues to work in the construction industry, on a job-by-job basis. However, since the accident he only does ground level work, as he is scared his ankle will give out if he is working on a higher level. He is still able to carry tools, paint cans, and heavier items such as a toilet. He does get assistance from one of his eight children if there is something heavy that he cannot lift or carry on his own. He testified he has never returned to a full duty/40 hour work week, and has considered applying for disability.

Respondent Norman Kilker was called as a witness by the Fund. He testified that in 2011 his full-time employment was as a corrections officer at St. Clair County Jail in Belleville. He was also the owner and sole full-time employee of a roofing company, Kilker Roofing and Construction. He had a standing verbal contract with a real estate management company in O'Fallon, through which he would bid individual roofing jobs. After accepting a project, he would contact his crew and go to the job site. He testified he "was always supervising". He explained that his crew "kind of varied because in the roofing business people come and people go and it went from day to day who I hired or who would come work with me". Mr. Kilker testified the size of the jobs varied and that he did not use the same amount of people on every job. He would measure the job and then would get the necessary people together to do the job. If he could not get people together, he would do it himself. If he found people to be reliable he would use them on more than one job, and if they were not reliable he would not use them again.

Respondent testified that Petitioner's brother Wes worked with him, that Wes told him his brother needed to make some money, and he gave his number to Wes to give to Petitioner. Respondent was about to start a job, and he spoke to Petitioner and asked about his experience. Petitioner indicated he was a "laborer" and Mr. Kilker indicated that would be fine, that Petitioner could do the tear off and Respondent could do the shingling. Mr. Kilker testified that he agreed to pay Petitioner $12 per hour, and denied that he had ever paid a laborer $20 per hour. There was no agreement on the number of hours Petitioner would work, as it was dependent upon the weather. There was no agreement about a working relationship after the completion of

that job, except that Respondent said "we'll start the job and we'll see how things go". He testified it was contingent on what jobs he had to do after that.

Respondent testified Petitioner was not required to wear a uniform and no taxes were withheld from his pay. Respondent provided the tools and materials and determined when the work day would begin and end. Mr. Kilker testified he was generally on site when his crews were working and gave instructions and made decisions about how their work was performed. With regard to Petitioner, he stated he had not done a lot of roof tear off but would give it a try. Mr. Kilker testified he specifically told Petitioner to carry the shingles over to the dumpster and throw them in, and to not use the tarp to throw them over. Petitioner's decision to use the tarp was his decision alone.

On cross-examination, Mr. Kilker testified he had workers' compensation insurance "from time to time", but conceded he did not have it on the day of Petitioner's accident. He candidly admitted that not having insurance was a conscious decision he had made, as owner of Kilker Roofing and Construction.

Mr. Kilker testified that the job in question was a roofing job at a duplex, for which he had contracted directly with the real estate management company, a company he had previously done a lot of work for. The company paid by check, made payable to Respondent. None of the crew members had any contact with the real estate management company. Mr. Kilker testified that Kilker Roofing and Construction had a construction license issued by the State of Illinois and, when needed, would obtain appropriate building permits. The job in question, however, did not require a permit. Mr. Kilker confirmed that he personally hired the crew, supervised their work, and furnished all the materials and tools. He controlled Petitioner's work hours and, regardless of the dispute in the hourly pay, he did agree to pay Petitioner for the hours worked for Respondent. He conceded he had no pay records and no tax records for Petitioner, and did not file a 1099 with the IRS for Petitioner or any other crew member on the particular job in question. He paid Petitioner and the crew with cash and did not file any tax forms for the cash payments. Respondent had no record of the cash payments to either Petitioner or any other member of the crew.

Mr. Kilker testified he was aware of Petitioner's accident on March 31, 2011. When asked if he had ever spoken with Petitioner since the date of the accident, Mr. Kilker testified he did speak with Petitioner at some point after that day, and paid him for the hours he had worked. He conceded that Petitioner was unable to return to work for Respondent due to his injuries, and that he did not pay Petitioner for his lost time, nor did he pay for any of his medical treatment.

Mr. Kilker identified the flyer, marked as Petitioner's Exhibit 13, Deposition Exhibit 1, as the flyer used by Respondent. The flyer stated he established Kilker Roofing and Construction in 1981, and he acknowledged he had been doing this type of work for 30 years and was the sole owner. He acknowledged that the flyer stated that he personally supervised the crew each day, which he hoped was a strong selling point.

Petitioner called as a rebuttal witness Wesley Reed, his twin brother. Mr. Reed testified that he worked for Respondent off and on for about five years. In March 2011 Norm Kilker had

work at an apartment complex, the amount of which was overwhelming, and Mr. Reed asked if he could bring help in, and told Respondent about his brother. Mr. Kilker met with Petitioner, discussed wages, and hired him and his son Charley. Mr. Reed testified he was being paid $17 an hour, and that he told Mr. Kilker his brother would be looking to get paid $20 an hour.

On cross-examination, Mr. Reed conceded he did not actually see his brother get paid, did not know the actual amount he was paid, and did not know the number of hours he worked. He explained that he worked for Respondent off and on because would quit and go work for others, then would go back to Respondent when called by Mr. Kilker. He testified that sometimes Mr. Kilker would leave the job site for various reasons, leaving him to do the work without direct supervision. He noted that Mr. Kilker worked for the county jail in the afternoon, so would leave the workers on the job site while he went to that job. He testified he worked 40 hours or more a week for Respondent, and there was always enough work to keep busy.

Following the accident, Petitioner presented to the Emergency Room at St. Elizabeth's Hospital at approximately 2:45 p.m. on March 31, 2011. The intake sheet lists Petitioner's Employer as "self employed" and his insurance as Medicaid Illinois. In the Occurrence/Accident Information section, it was noted that the accident occurred at "home/Belleville" and the nature of the accident was "cleaning gutt" (presumably meaning gutters). It was further noted that Petitioner "fell off ladder 12 feet onto concrete". The Physician Record notes "pt (patient) was cleaning out his gutters when he fell from a 12' ladder landing on his back". It was noted Petitioner had injury to his neck, back, left knee and ankle, and left arm, with moderate to severe pain. He underwent multiple x-rays. Left ankle x-rays revealed a comminuted fracture of the os calsis with both anterior and posterior components noted, and no fibula or tibia fracture. Left knee x-rays revealed probable bipartite patella. Left elbow x-rays were negative. Cervical x-rays revealed chronic changes and degeneration but no fractures. Thoracic x-rays showed moderate scoliosis but no fractures. Lumbar x-rays were normal except for an old superior endplate deformity of the L1 vertebral body. Petitioner underwent CT angiography of the chest, abdomen and pelvis. It revealed emphysema in both lungs and chronic infiltrates and fibrosis in the lung bases, and was negative for the abdomen and pelvis. With regard to treatment, Petitioner was put in a knee immobilizer and was to be nonweightbearing and on crutches. He was referred to Dr. James Rushford for follow up care. PX1.

On April 5, 2011, Petitioner presented to Dr. James Rushford, at which time he reported that he had fallen off a roof and landed on his left foot and left knee, and complained of pain in both areas at a level of 10/10. He reported he smoked marijuana at night in order to sleep, and that the pain was better with sleep. His medical history included emphysema, a fractured ankle, and a fractured right wrist. It was noted he was a roofer. On examination, he had swelling about the left foot and ankle region and sensation was intact. He had trace effusion of the left knee but no bruising. He tolerated range of motion of the knee and the tibiotalar joint without difficulty. Dr. Rushford's impression was sprain of the left knee and closed fracture of the calcaneus. He instructed Petitioner to continue in the CAM walker and to be nonweightbearing, and he ordered a CT scan of the left calcaneus to assess the need for surgery. PX2.

That same day, April 5, Petitioner presented to St. Elizabeth's Hospital at approximately 2:30 p.m. The intake sheet continued to list his Employer as "self employed" and his insurance

as Medicaid Illinois. However, the Occurrence/Accident Information now indicated that the accident occurred at "work", in the city of O'Fallon, and the nature of the accident was "fell off roof". Left knee x-rays were repeated and compared to those done on March 31. It was noted they again demonstrated findings consistent with a bipartite patella, and it was recommended that the area be correlated clinically. Left heel x-rays were also done, which revealed a comminuted impacted fracture through the calcaneus. PX3.

On April 7, 2011, Petitioner again presented to St. Elizabeth's Hospital. The intake sheet now listed his Employer as "Kilker Roofing". The Occurrence/Accident Information now listed the location of accident as "Shiloh/Kilker", the city as Shiloh, and the nature of accident as "fell off roof". Medicaid Illinois was still listed as the insurance. Petitioner underwent a CT scan of the left foot, which revealed a markedly comminuted fracture of the calcaneus which involved all the articular surfaces and extended throughout the entire calcaneus. PX4.

On April 15, 2011, Petitioner followed up with Dr. Rushford and at that time reported decreased knee pain, but continued to rate it at 7/10. On examination, he had decreased swelling in the left knee, foot, and ankle regions. Dr. Rushford reviewed the CT scan with Petitioner. His assessments were highly comminuted fracture of the left calcaneus and sprain of the left knee. He instructed Petitioner to remain nonweightbearing on his left heel, and advised that putting weight on the foot would cause the calcaneus to collapse. He noted Petitioner may develop late subtalar joint arthritis and decreased range of motion, and that decreased range of motion of his subtalar joint was almost a certainty. He further noted Petitioner may require late subtalar joint fusion if he had persistent discomfort. He was to return in four weeks. PX2.

On May 11, 2011, Petitioner presented to the Emergency Room at St. Elizabeth's Hospital at approximately 3:50 p.m. with complaints of chest pain. The intake sheet listed his Employer as "unemployed" and his insurance as Medicaid Illinois. He reported left sided chest pain which had begun the prior day and had gotten worse overnight, and which now radiated down his left arm and up into the neck and front left shoulder. He reported a previous mild heart attack about a year prior and chest pains since that time. He also reported he fell off a roof March 31 and shattered his left ankle. Petitioner underwent blood labs, an EKG, and chest x-rays, which were normal. It was noted he discharged himself against medical advice at approximately 8:03 p.m. PX5.

On May 13, 2011, Petitioner followed up with Dr. Rushford. It was noted his left knee sprain was largely resolving. He reported he had been using one crutch for ambulation. It was noted his greatest issue was pain in his left shoulder, and he reported he was seen in the emergency room but signed himself out before completing a stress test. Petitioner requested stronger pain medication and stated his shoulder pain was causing difficulties. Dr. Rushford declined to prescribe stronger pain medication, but did give him a prescription for a wheelchair so he did not have to walk or use his shoulder. On examination, flexion and abduction of the left shoulder were 110 degrees, as compared to 160 degrees for each with the right shoulder. He had positive drop arm test for pain but not weakness, and had minimal tenderness over the AC joint. Speed's test was equivocal, and Neer and Hawkins tests provoked pain. Left shoulder x-rays were taken at St. Elizabeth's Hospital, which revealed mild spurring of the humeral head but no fracture or dislocation. Repeat left heel x-rays were also taken, which showed increased healing

of the comminuted calcaneal fracture. PX6. Dr. Rushford's assessment was healing left calcaneus fracture and sprain of left shoulder as a result of a fall, with possible partial thickness or small full thickness rotator cuff tear. Dr. Rushford noted, "The patient is given a work excuse. There is some question as to whether or not this is ultimately going to be paid via the Worker's Comp. We will allow our business office to deal with those issues." He prescribed pain medications and ordered an MRI of the shoulder. Petitioner was to continue in the CAM walker for the calcaneus fracture. PX2.

Petitioner underwent a left shoulder MRI at St. Elizabeth's Hospital on May 23, 2011. It revealed: (1) intact rotator cuff; (2) moderate glenohumeral joint degenerative changes; (3) extensive posterior labral tear with large paralabral cyst; and (4) mild acromioclavicular joint degenerative change. PX7.

On June 3, 2011, Petitioner followed up with Dr. Rushford. He reported his knee had not caused any further discomfort, and his heel pain was at a level of only 3/10. Left heel x-rays that day showed healing changes and no interval displacement. PX8. Petitioner's biggest complaint was his left shoulder. Dr. Rushford reviewed the MRI and noted the findings. On examination, Petitioner had an exaggerated pain response to light touch about the left shoulder. There was no gross deformity, and specifically no gross atrophy of the supraspinatus or infraspinatus muscles. Impression was left shoulder sprain/strain, underlying arthritis of the glenohumeral joint and AC joint, tear of the posterior labrum, and large paralabral cyst extending into the suprascapular space. Dr. Rushford ordered guided aspiration of the cyst, along with injection of steroid and local anesthetic. He noted Petitioner's left knee was resolved. As to his left heel, Petitioner was not using the CAM walker and was allowed to weightbear as tolerated. Dr. Rushford opined that Petitioner may require surgery on the shoulder to deal with the labral tear, either with a resection or a repair. Petitioner was kept off work and to return in one month. PX2.

On June 15, 2011, Petitioner underwent fluoroscopic injection into the left shoulder joint. The radiologist noted he contacted Dr. Rushford after reviewing the MRI, and it was decided to perform the injection only, and follow up in a week to see if aspiration of the paralabral cyst would be needed. PX9.

Petitioner returned to Dr. Rushford on July 1, 2011, and reported his pain was much diminished in his left shoulder, left knee, and left heel. He advised he was ready to return to work with no restrictions. On examination, he had full range of motion with both shoulders and drop arm test was negative. Range of motion of the left knee provoked no pain, and he had no effusion or increased swelling. He had no tenderness to palpation of the left heel. Dr. Rushford noted all injures had resolved and Petitioner was released with activities as tolerated and no restrictions. He was given a full return to work as of July 5, 2011. It was noted Petitioner did have a large supraglenoid cyst, and that if the pain recurred he would be directed for fluoroscopic guided aspiration, as suggested by the radiologist. PX2.

On November 4, 2011, Petitioner presented to St. Elizabeth's' Hospital for MRI's of the cervical and thoracic spine regions. The ordering physician was Dr. Ellen McDermott. The cervical MRI noted history of neck and arm pain, as well as bilateral arm and hand numbness. The MRI revealed multilevel degenerative disc disease at C4-5, C5-6, and C6-7. There was also

a small central and left-sided disc protrusion at C3-4, causing mild impingement on the left C4 nerve root, but no cord compression. The thoracic MRI noted history of back pain and numbness. The MRI revealed marked levoscoliosis of the mid-thoracic spine with associated multilevel degenerative disc disease but no cord compression lesion. The Arbitrator notes there are no medical records in evidence from Dr. McDermott, such that it is unclear the relevance of these MRI's to Petitioner's case. PX10.

Petitioner submitted into evidence a letter dated November 14, 2011, from Shelton Wilson, Senior Investigator of the Insurance Compliance Department of the Illinois Workers' Compensation Commission. The letter states a search was done of the NCCI Proof of Coverage online database and found no policy information showing proof of workers' compensation insurance on March 31, 2011, for Kilker Roofing and Construction, 108 Wayne Drive, Belleville, IL 62223. PX12.

Charles Reed testified by way of deposition on December 28, 2011. He is the son of Petitioner William Reed. He testified he is a laborer and works with his father, "helping him out doing odd-and-end jobs that he gets". Mr. Reed identified a business flyer from Kilker Roofing and Construction, marked as Deposition Exhibit 1, and testified he was working for Kilker on March 31, 2011. On that date he was tearing off and re-shingling a roof in the Shiloh, Illinois, area. He had been working for Kilker for three days and had not previously worked for them. He was being paid $10 an hour. He testified that his father (Petitioner) and his uncle (Wesley Reed) were also working for Kilker. His uncle had worked for Respondent in the past, and when Respondent needed some help, his uncle got Petitioner and Mr. Reed the work. On March 31, 2011, he and his father were on the job site, along with Norman Kilker, but his uncle was not. Mr. Reed identified Norman Kilker as the owner of Kilker Roofing and Construction, and testified that Mr. Kilker was supervising the work being done. PX13.

Mr. Reed testified that on March 31, 2011, he and his father were tearing off the roof, and toting the shingles over by the dumpster and sliding them off the roof. He testified, "I guess my dad had slipped on the grate and he had fell off the roof...I seen him fall off the roof...He fell at least ten feet." Mr. Reed testified he then climbed down the ladder and went to his father's aid. He was not doing well and could not stand on his foot. Mr. Reed testified, "He had to sit there the rest of the time and wait for my stepmom to come and get him because he couldn't drive." His stepmother, Petitioner's wife, arrived and drove Petitioner to the hospital. Mr. Reed stayed on the job to wait for Mr. Kilker to return. He testified that Mr. Kilker was present when Petitioner fell, but had left the job site about ten or fifteen minutes after that. Mr. Reed testified that the job site was a residence, but neither the homeowner nor the neighbors were around at the time of Petitioner's fall. The only people present at that time were Petitioner, Mr. Kilker, and himself. PX13.

The Arbitrator notes that Mr. Reed's deposition was taken without the presence or participation of counsel for either Respondent or the Injured Workers' Benefit Fund. There was, therefore, no cross-examination of his testimony.

CONCLUSIONS OF LAW

A claimant has the burden of proving by a preponderance of the credible evidence all elements of the claim. *Parro v. Industrial Comm'n*, 260 Ill.App.3d 551, 553 (1st Dist. 1994). Liability cannot be premised upon imagination, speculation, or conjecture, but must arise from facts established by a preponderance of the evidence. *Illinois Bell Tel. Co. v. Industrial Comm'n*, 265 Ill.App.3d 681, 685 (1st Dist. 1994).

In support of the Arbitrator's decision relating to issue (A), whether Respondent was operating under and subject to the Illinois Workers' Compensation Act, the Arbitrator finds the following:

The Act provides for automatic application of its provisions to any business deemed to be hazardous under Section 3. Specific to this case, Sections 3(1) and 3(2) provide for application of the Act to any business engaged in (1) The erection, maintaining, removing, remodeling, altering or demolishing of any structure, or (2) Construction, excavating or electrical work.

It is undisputed that on March 31, 2011, Respondent operated a roofing and construction business, as evidenced by its business flyer and by the testimony of Petitioner, witnesses Wesley Reed and Charles Reed, and Norman Kilker himself.

The Arbitrator finds that the nature of Respondent's business falls within the definition of "hazardous", as defined in Section 3, and that Respondent was therefore operating under and subject to the Illinois Workers' Compensation Act.

In support of the Arbitrator's decision relating to issue (B), whether there was an employer-employee relationship, the Arbitrator finds the following:

It is well-settled that in assessing whether an employer-employee relationship exists, there are several factors to be considered: whether the employer may control the manner in which the person performs the work; whether the employer dictates the person's schedule; whether the employer pays the person hourly, whether the employer withholds income and social security taxes from the person's compensation, whether the employer may discharge the person at will; whether the employer supplies the person with materials and equipment, and whether the employer's general business encompasses the person's work. Of these factors, the right to control the work is perhaps the most important single factor in determining the nature of the relationship. *Roberson v. Industrial Comm'n*, 225 Il.2d 159, 175 (2007); *Bauer v. Industrial Comm'n*, 51 Ill.2d 169, 171-172 (1972).

The Arbitrator finds that Petitioner has met his burden of proof in establishing that an employer-employee relationship existed between himself and Respondent. In so concluding, the Arbitrator assessed each of the relevant factors and found the overwhelming weight of the evidence indicated that such a relationship existed.

With regard to control over the work, Petitioner testified that Respondent was present on the job site, supervised the work being done, and directed Petitioner and his son on what to do

and how to do it. More telling, Respondent himself testified he was generally on site when his crews were working, that he gave instructions, and that he made decisions about how their work was performed. He further testified that he specifically told Petitioner to carry the shingles over to the dumpster and throw them in, that Petitioner wanted to put them in a tarp, and that he "told him definitely not to" do so, as he "didn't want it done that way". In addition, Respondent's own business flyer advertises "personal supervision of crew each day", which he admitted and hoped was a strong selling point for potential customers. This level of control is indicative of an employer/employee relationship.

Respondent dictated the schedule, to the extent that it was not dictated by the weather. He supplied all of the tools, materials, and equipment, and Petitioner supplied none. It was undisputed that Petitioner was paid by the hour and paid only for those hours which he worked. With regard to whether Respondent's "general business" encompasses Petitioner's work, the focus must be on the business of Kilker Roofing and Construction, rather than Mr. Kilker's primary employment as a corrections officer. For it is the nature of *Respondent's* business that is at issue, not the nature of a job held elsewhere by the owner, as Respondent has suggested. The fact that Kilker Roofing and Construction was a side business for Mr. Kilker is not germane. Respondent's general business was roofing and construction which encompasses the work Petitioner was hired to do, namely to tear off a roof. All of these factors are indicative of an employer/employee relationship.

The two remaining factors are not so indicative, or are at least equivocal. It is undisputed that Petitioner was paid cash for the work he did and that no income tax, Social Security tax, or the like was withheld by Respondent. Such an arrangement is indicative of an independent contractor relationship. With regard to whether Respondent could discharge Petitioner at will, the issue was not directly addressed by testimony. However, the duration of the work appeared to be tied to the individual project in question. Work tied directly to a specific job or finite series of jobs indicates an independent contractor relationship.

Though no single factor is determinative, when applying them all to the facts of this case, the Arbitrator finds they overwhelmingly evidence an employer/employee relationship.

In support of the Arbitrator's decision relating to issue (C), whether Petitioner sustained an accidental injury that arose out of and in the course of his employment, the Arbitrator finds the following:

To obtain compensation under the Illinois Workers' Compensation Act, a claimant must show by a preponderance of the evidence that he suffered a disabling injury arising out of and in the course of his employment. 805 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1013 (1st Dist. 2011).

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained an accident which arose out of and in the course of his employment with Respondent. In so concluding, the Arbitrator finds compelling the stark inconsistencies in the testimony, the medical records, and the record as a whole.

Petitioner testified very clearly that he and his son Charles were tearing off the roof and putting the shingles on a tarp, and then each of them grabbed an end of the tarp to throw it off the roof and into the dumpster. According to Petitioner, when they threw the tarp off the roof, "the tarp kept ahold of my arm and took me off with it". Petitioner went on to testify that he sat on the ground for a few minutes to catch his breath and then, even though he could not stand on his left side, he got back up on the roof by hopping up the ladder, and proceeded to continue working until help came. He further testified that prior to his fall Respondent had left the job site and so was not present when he fell. Petitioner's son Charles, however, testified to a very different scenario. Charles testified that he and Petitioner were tearing off roof shingles and "toting the shingles over to where the dumpster was and we would, you know, slide them off the roof...I guess my dad slipped on the grate and fell off the roof". Charles went on to testify that he climbed down the ladder to the ground to help his father, and that Petitioner "had to sit there the rest of the time and wait for my stepmom to come and get him because he couldn't drive". Charles further testified that Respondent was present when Petitioner fell, but left the job site ten or fifteen minutes after that.

At no time during his testimony did Charles mention anything about a tarp being on the roof, the shingles being loaded onto the tarp, the tarp being thrown off the roof, or Petitioner getting tangled in the tarp and being pulled off the roof by the tarp. Rather, his testimony was, "I guess my dad slipped on the grate and fell off the roof." In addition, Charles testified that following Petitioner's fall off the roof "he had to sit there the rest of the time". At no time during his testimony did Charles mention his father hopping up the ladder to get back on the roof to continue working. Finally, Charles testified Respondent was present at the time his dad fell, but left shortly thereafter. The stories told by Petitioner and his son Charles are so divergent, that the Arbitrator finds neither of them to be credible.

Conversely, the Arbitrator finds Respondent Norman Kilker was very candid in his testimony. He was forthright in admitting he did not carry workers' compensation insurance as a conscious decision and did not file tax forms with regard to the cash payments made to his workers. While the Arbitrator certainly questions Respondent's business practices, Mr. Kilker's testimony regarding those practices was candid and credible. In closely reviewing his testimony, the Arbitrator is struck by the fact that he was not asked if he was at the job site the day Petitioner allegedly fell, nor was he asked if he saw Petitioner fall. Rather, he was asked if he was "aware of the accident that occurred on March 31, 2011", to which he answered yes. He was also asked if he had ever spoken with Petitioner since the accident, and he answered yes, that he "went to pay him". He was not asked what his knowledge was of the accident itself, as respects how it occurred or how Petitioner reported it occurred. He agreed with Petitioner's counsel that he was aware that Petitioner could not work because of his injuries from falling off the roof. At no time did Respondent testify as to his knowledge of the facts of the accident. The history of the fall is important, for obvious reasons, but also in light of the medical records, to which the Arbitrator now turns.

Petitioner first sought medical treatment on March 31, 2011, at St. Elizabeth's Hospital emergency room. The intake sheet noted, as reported by Petitioner, that he was self employed and that his insurance was Medicaid. It further noted that Petitioner was cleaning gutters at his

home in Belleville when he fell 12 feet off a ladder and onto concrete. The Physician's Record also noted, as reported by Petitioner, that he was cleaning out his gutters when he fell from a 12 foot ladder and landed on his back. This history of the accident, given shortly after it occurred, is very specific, and very different from the history Petitioner testified to at trial.

Five days later, on April 5, 2011, Petitioner saw Dr. Rushford and also had repeat x-rays at St. Elizabeth's Hospital. He reported to Dr. Rushford that he was a roofer and that he had fallen off a roof (as opposed to a 12 foot ladder) and landed on his left foot and knee. There is no further detail regarding the accident. The intake sheet from the hospital continued to list Petitioner as self employed and insured through Medicaid. However, the history of the accident had changed. Petitioner now reported that his accident occurred at work, in the city of O'Fallon, when he fell off a roof (as opposed to a 12 foot ladder). The Arbitrator notes with interest that April 5, 2011, was also the date Petitioner signed the Application for Adjustment of Claim. The Arbitrator finds it suspect that Petitioner's history of the accident changed contemporaneous with his signing the Application.

Two days later, on April 7, 2011, Petitioner presented to the hospital for a CT scan. The intake sheet on that day now listed the Employer as "Kilker Roofing" and the location of his accident as "Shiloh/Kilker".

As with the testimony at trial, the medical records are rife with inconsistencies regarding the history of the accident. Petitioner made no attempt in his testimony to explain any of the inconsistencies.

The Arbitrator finds Petitioner to not be credible and it would appear that he misrepresented the facts of his accident. Based upon the record in its entirety, the Arbitrator finds the inconsistencies to be compelling and dispositive with regard to the issue of accident, and finds Petitioner did not sustain an accident which arose out of and in the course of his employment with Respondent. All other issues are rendered moot and the Arbitrator makes no findings regarding same.

STATE OF ILLINOIS)
) SS.
COUNTY 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

Lenora Rogers,

Petitioner,

vs. No. 12 WC 21264

State of Illinois/Elizabeth Ludeman Center,

Respondent.

17IWCC0334

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 and §19(l) penalties, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission disagrees with the Arbitrator's award of section 19(l) penalties. At the outset of the arbitration hearing on August 17, 2016, the parties stipulated that Petitioner was paid statutory (duty related, see 5 ILCS 345/1) disability benefits from April 21, 2012 through December 12, 2014. Petitioner claimed temporary total disability benefits from December 13, 2014 through the date of the arbitration hearing. In that regard, the parties represented they had "recalculated the Petitioner's average weekly wage which appears to be higher than what she is currently being paid at." Petitioner testified that beginning in December of 2014 she received temporary total disability checks every two weeks in the sum of $1,188.32. Petitioner thought she was being underpaid. When asked about her earnings, Petitioner did not testify with any specificity to her average weekly wage, other than stating she had worked mandatory overtime

and acknowledging that the parties ultimately stipulated to an average weekly wage of $1,269.90. Petitioner testified she became aware of the underpayment of temporary total disability benefits "a couple of months" after December of 2014. However, she did not make Respondent aware of the underpayment until her attorney filed a petition for penalties and attorney fees shortly before the arbitration hearing. An e-mail exchange between Petitioner's and Respondent's counsel shows that as of December of 2015 the attorneys were unaware of any underpayment of temporary total disability benefits. With respect to the nonpayment of certain medical bills, the Commission notes a longstanding dispute between the parties regarding causation, although the parties did narrow the causation dispute on the eve of the arbitration hearing. Under the circumstances, an award of section 19(l) penalties is improper. See Antunes v. Norwood Paper and Superior Personnel, 15 IWCC 0499; Villalobos v. Strive Group, 14 IWCC 1017; and Gravitt v. Petco, 14 IWCC 0814.

All else is affirmed and adopted. The Commission notes that, among the voluminous medical records, we did review the X-ray report from July of 2011 which figured in Dr. Hennessy's opinion.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 10, 2016, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $846.60 per week for a period of 225 5/7 weeks, from April 21, 2012 through August 17, 2016, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any. Respondent shall be given a credit for all temporary total disability and statutory disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $16,931.21 pursuant to §§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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide prospective medical care in the form of the right total knee replacement surgery recommended by Dr. Mehl, including any incidental care.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of penalties under §19(l) is vacated.

17IWCC0334

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: MAY 31 2017
o-05/18/2017
SM/sk
44

Stephen Mathis

David L. Gore

Deborah Simpson

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

ROGERS, LENORA
Employee/Petitioner

Case# **12WC021264**

ELIZABETH LUDEMAN CENTER DHS/SOI
Employer/Respondent

17IWCC0334

On 11/10/2016, 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 0.53% 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:

1067 ANKIN LAW OFFICE LLC
DEREK S LAX
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

5875 ASSISTANT ATTORNEY GENERAL
STEPHANIE KEVIL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

NOV 10 2016

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

17IWCC0334

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)

LENORA ROGERS,
Employee/Petitioner,

v.

ELIZABETH LUDEMAN CENTER DHS/ STATE OF ILLINOIS,
Employer/Respondent.

Case # 12 WC 21264

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**, Illinois on **8/17/16**. 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? *causation of knee replacement only
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Prospective medical care**

17IWCC0334

FINDINGS

On the date of accident, **11/20/11**, 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 **$66,035.22**; the average weekly wage was **$1,269.90**.

On the date of accident, Petitioner was **55** 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 **$50,543.22** for TTD, $0 for TPD, $0 for maintenance, and **$116,830.80** for Extended Benefits paid under 5 ILCS 345/1, for a total credit of **$167,374.02**.

ORDER

Respondent shall pay to Petitioner temporary total disability benefits of **$846.60/week** for **225-5/7th weeks**, commencing **April 21, 2012** through **August 17, 2016**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$50,543.22** for TTD and **$116,830.80** for Extended Benefits paid under 5 ILCS 345/1, for a total credit of **$167,374.02**.

Respondent shall pay reasonable and necessary medical services of **$16,931.21**, subject to Sections 8(a) and 8.2 of the Act. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent shall be given a credit for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for Petitioner's right total knee replacement as recommended by Dr. Mehl, including any and all incidental care thereto.

Respondent shall pay to Petitioner penalties of $0, as provided in Section 16 of the Act; $0, as provided in Section 19(k) of the Act, and **$10,000.00**, as provided in Section 19(l) of the Act.

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

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

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

Signature of Arbitrator

11-8-2016
Date

ICArbDec19(b)

NOV 10 2016

17IWCC0334

FINDINGS OF FACT

Background

On June 19, 2012, Lenora Rogers ("Petitioner") filed her application for adjustment of claim alleging injuries both knees and back, arising out of and in the course of her employment against Elizabeth Ludeman Center DHS/State of Illinois ("Respondent") occurring on September 20, 2011. Ax2. On the record, Petitioner made an oral motion to correct the date of accident from September 20, 2011 to November 20, 2011, explaining the discrepancy as a scrivener's error. Respondent had no objection and the Arbitrator allowed the amendment and ordered that the record reflect the correct date of accident as November 20, 2011.

On July 15, 2016, following several pre-trials and continuances, Petitioner filed her petition for immediate hearing pursuant to Section 19(b) of the Act, 8(a) petition for additional medical care and treatment and petition for fees and penalties against Respondent wherein she alleged underpayment of disability benefits and refusal to pay for medical bills otherwise agreed to.

Following several continuances on procedural grounds, the parties proceeded to arbitration on August 17, 2016 on the following disputed issues: causal connection as to knee replacement surgery, liability for unpaid medical bills, temporary total disability, penalties and fees and prospective medical care. Ax1.

Testimonial and Medical Evidence

Petitioner testified she worked for Respondent as a Mental Health Technician for 31 years. Her job involved working with mentally and physically disabled patients and assisting with their daily living such as hygiene, daily care needs and lifting them.

At trial, the parties did not dispute that on November 20, 2011, Petitioner suffered injuries at work. Specifically, Petitioner testified that while escorting patients, one of the patients attacked her, grabbed her collar and was hitting and pulling Petitioner at the same time. She was pulled to the floor and recalled being hit again. She recalled landing on her knee when she was pulled down and that the patient was over her back still hitting her. The parties do not dispute that proper notice of the accident was given to Petitioner's supervisor. An accident report was completed. Rx2. Petitioner then began an extensive course of treatment to her lumbar spine and bilateral knees.

On November 20, 2011, Petitioner was seen on an emergency basis at South Suburban. Px18. Petitioner gave a history of being attacked by an inmate at work. She stated she was hit on her face knee and back. Diagnosis was acute contusion to the face, back and right knee. Respondent authorized treatment with Advocate Occupational Health for Petitioner's work-related injury. *Id.* at 43. Petitioner was then placed off of work until she returned working light duty for Respondent on November 25, 2011. Petitioner testified her light duty work was mostly administrative rather than physical in nature.

On November 21, 2011, Petitioner presented to Advocate Occupational. Px8. She gave a similar history of being struck by a client and falling down. On exam, there was no swelling or bruising over the facial area, the neck was supple, there were trigger points over the scapula and upper back and Petitioner was tender over the patellar area. Diagnosis was facial contusion, back strain and contusion. Petitioner was removed from work and given a 15 pound lifting restriction effective November 25.

On November 29, 2011, x-rays of the knees were consistent with osteoarthritis, demonstrating tri-compartment degenerative changes with severe joint space narrowing involving the lateral compartments bilaterally worse on the right. Also noted, osteophyte formation was present as well as subchondral sclerosis. Diagnosis was unchanged. X-rays of the cervical spine were also taken.

On November 29, 2011, Petitioner returned to Advocate Occupational. On exam, there was low back pain and range of motion was limited. Straight leg raise (SLR) was negative bilaterally. Bilateral knee flexion was to 120° and parapatellar tenderness was noted. Diagnosis was unchanged and the doctor added neck strain. The doctor prescribed physical therapy and light duty. The doctor further noted that diagnostic testing results showed degenerative changes of the knees bilaterally.

On December 1, 2011, Petitioner was evaluated at Accelerated Rehab Center per Dr. Mark Veldman's recommendation. Px11. Diagnosis was lumbar sprain/strain, neck sprain/strain and contusion of the knee. Petitioner reported soreness in her bilateral knees, low back pain and low back pain into the bilateral thighs. She reported increased pain in the knees with going from sitting to a standing position. Prolonged standing increased back pain. Petitioner continued with physical therapy to all three body parts through February 24, 2012. Petitioner returned to Advocate Occupational on December 15th and 28th, where she was largely unchanged in terms of progress and diagnosis. She remained under and was working light duty.

2012

From January 13, 2012 to February 10, 2012, Petitioner returned to Advocate Occupational. She reported discomfort in the knees and back and noticed that bending, standing and walking made it worse. She further expressed discomfort in the lateral aspect of both knees with bending. The back continued to bother her with standing and walking. Diagnosis and light duty work restrictions were unchanged. She was to continue physical therapy via Accelerated.

Petitioner testified that she sought her own opinion of Dr. David Mehl on February 22, 2012, who previously performed a right knee arthroscopy on Petitioner on July 19, 2005. Px3, 10b, 13. For the 2005 knee surgery, Petitioner was placed at MMI on or about October 11, 2005. Px13. She wanted a second opinion to see if that is all that was wrong with her knees as she was still experiencing cracking and popping along with pain in the knee. The doctor reviewed Petitioner's history. She noted that she had some arthritis pain in the years following her initial right knee surgery in 2005. On exam both medial and lateral joint line tenderness was noted bilaterally. She had positive McMurray's of the menisci bilaterally. She had severe crepitus present bilaterally. Range of motion was limited on the right and left knees, both at 5° to 100°. No instability was noted. X-rays taken before showed 50-60% lateral joint space narrowing with large osteophytes present. X-rays of the left knee taken in the office that same date also showed 40% lateral joint space narrowing with moderate osteophytes present. Patellofemoral tracking was normal on the left and moderate spurring was present. Petitioner was diagnosed with moderate bilateral knee degenerative joint disease and possible new work-related bilateral knee meniscal tears. Dr. Mehl ordered her to continue working light duty and to follow up after MRI's.

On February 27, 2012, Petitioner followed up with Advocate Occupational. Petitioner had residual soreness in the anterior knees. On exam, lumbar spine revealed limited range of motion, negative SLR bilaterally and normal strength in the lower extremities. Diagnosis and light duty were unchanged.

On March 6, 2012, MRI of the left knee demonstrated moderate degenerative joint disease affecting the lateral compartment with grade 3 chondromalacia, complex tearing of the meniscus, osteophytosis and degenerative marrow change of the tibial plateau, chondromalacia with underlying subchondral marrow change

of the mid-portion of the patella, joint effusion and small Baker's cyst. The study was compared to the previous radiographs of February 22, 2012. MRI of the right knee revealed severe degenerative joint disease of the lateral compartment with maceration of the posterior horn and body of the lateral meniscus, grade 4 chondromalacia, osteophytosis and subchondral sclerosis along with moderately sized joint effusion and moderately sized Baker cyst. It was compared to radiographs dated July 2011. Dr. Mehl noted the recent MRIs and that Petitioner had fallen on both knees at work in November 2011 and "therefore has caused these lateral meniscus tears from that fall." The doctor opined she would require bilateral knee arthroscopies, partial lateral discectomy, chondroplasty and aspiration of both cysts.

On March 9, 2012, Petitioner returned to Advocate Occupational. She reported pain in both knees and her back. Pain was 8/10. Diagnosis is unchanged and the doctor added left lateral meniscal tear and right knee meniscal injury. Light duty continued.

Petitioner testified she followed up again with Dr. Mehl on April 2, 2012 where authorization and approval was given for both procedures. Dr. Mehl released Petitioner to sitting work only. On April 9, Advocate Occupational continued light duty. Px8. The plan was for an MRI of the lumbar spine.

On April 21, 2012, Petitioner underwent and Dr. Mehl performed a left knee arthroscopy, partial lateral meniscectomy, diffuse chondroplasty and aspiration of the Baker's cyst. Px10, Px15, Px17. Pre and post-operative diagnosis was moderate degenerative disease, lateral meniscus tear and Baker's cyst. Petitioner confirmed she began losing time from work on the date of her left knee surgery.

From May 1, 2012 through July 6, 2012, Petitioner attended physical therapy at St. James Physical Therapy for the left knee. Px14. On May 9, 2012, Petitioner returned to Advocate Occupational. She still awaited authorization for the MRI of the lumbar spine. Diagnosis was unchanged. Petitioner remained off of work per Dr. Mehl. On May 23, 2012, MRI of the lumbar spine showed mild grade one anterolisthesis of L4 on L5 resulting in mild neural foraminal narrowing and disc bulge at L5-S1 resulting in compression of the exiting left nerve root and narrowing of the thecal sac.

On May 30, 2012, Petitioner returned to Dr. Mehl. Impression was unchanged. Petitioner remained off work and was ordered to continue therapy and medication. The doctor further noted that Petitioner had a back condition which was also work-related and he recommended she see Dr. William Payne. In June 2012, Petitioner remained off of work per Dr. Mehl. The recommended treatment was right knee surgery.

On June 27, 2012, Petitioner returned to Dr. Mehl for the left knee. Px16. On exam, range of motion was improved from 0 to 125°. Impression was status post left knee arthroscopy, moderate left knee degenerative joint disease and persistent right knee medial meniscal tear along with Baker's cyst. The plan was to continue physical therapy and remain off of work. The doctor opined Petitioner now needed surgery for the right knee by way of arthroscopy, partial medial meniscectomy, chondroplasty and aspiration of the Baker's cyst. Petitioner's left knee physical therapy ended July 6, 2012.

On July 24, 2012, Petitioner first saw Dr. William Payne at the referral of Dr. Mehl for the low back. Px9, 16. The doctor noted Petitioner's history of accident. He read the MRI of the lumbar spine to show a grade 1 spondylolisthesis at L4-5 with mild foraminal narrowing, left paracentral disc bulge at L5-S1 with compression to the left nerve root. Assessment was left leg radiculopathy. The plan was for an epidural at L5-S1, physical therapy, facet blocks and medications. Petitioner remained off of work.

On August 21, 2012, Petitioner returned to Dr. Payne. Px16. She was unimproved. She had not yet received physical therapy or an epidural. Assessment was unchanged Petitioner remained off work. On August 23, 2012, Petitioner began physical therapy for the low back with St. James. Px14. It was discontinued October 22, 2012.

On September 15, 2012, Petitioner underwent and Dr. Mehl performed right knee arthroscopy with partial medial and lateral meniscectomies, diffuse chondroplasty, excision of loose bodies and aspiration of Baker's cyst. Px10a. Intraoperatively, the doctor noted significant grade 3 chondromalacia present throughout the patellar and the femoral articular surfaces. Chondroplasty was performed. The doctor noted some areas of grade 4 chondromalacia in the patellofemoral joint as well. Synovial tear on the posterior medial meniscus was observed. There was grade 2 chondromalacia present throughout the medial tibial and femur and chondroplasty was performed. A bone spur was removed from the medial femoral condyle. The lateral compartment revealed complex comminuted tear involving the entire lateral meniscus. There was grade 4 chondromalacia involving the entire lateral tibia and femur as well. Extensive partial lateral meniscectomy was carried out and chondroplasty performed where there were loose bodies (cartilage).

On September 17, 2012, Dr. Mehl ordered Petitioner remain off of work. Petitioner began a course of physical therapy for the right knee with St. James. Px14. On September 18, 2012, Petitioner returned to Dr. Payne. She denied improvement with the low back or leg pain. Sitting increased back pain. She endorsed tingling in the lower part of the right leg. She rated her pain 8/10. Assessment was low back pain and spondylolisthesis. The plan was for CT discogram, refill of medications and epidural at L5-S1. She was removed from work. On September 24, 2012, Petitioner saw Dr. Mehl for the right knee. The doctor noted moderately severe right knee degenerative joint disease. She was to start physical therapy tomorrow.

On October 15, 2012, Petitioner returned to Dr. Mehl for the right knee. Px16. The plan was to continue physical therapy and to remain off work. He noted that she would be a candidate for Synvisc injections in the future when she had a complete recovery. On October 16, 2012, Petitioner returned to Dr. Payne for the low back. She was released to light duty for the low back beginning October 17, 2012. Petitioner still had pain and noticed some tingling in the lower part of the right leg. She had associated stiffness. She continued to have difficulty sleeping. On October 17, 2012, CT of the lumbar spine demonstrated mild to moderate degenerative disc and facet disease most significant at L4-5 without contrast extravasation at the injected levels. On October 18, 2012, Petitioner was removed from work. On October 23, 2012, Petitioner returned to Dr. Payne. She was status post provocative lumbar discography at L3-4, L4-5 and L5-S1.

On November 14, 2012, Petitioner returned to Dr. Mehl for the right knee. Px16. Impression was status post right knee arthroscopy with further improvement along with moderately severe right knee degenerative joint disease. She remained off of work. Two months after right knee surgery, on November 14, 2012, Petitioner began physical therapy at St. James. Px14. Physical therapy for the right knee continued through December 11, 2012. Subjectively, Petitioner reported improvement but that pain remained 6/10. On November 20, 2012, Petitioner returned to Dr. Payne. She reported ongoing low back and that she was not currently in physical therapy for the low back. She reported back pain and bilateral leg pain when sitting too long. The plan was for surgery. Petitioner remained off of work.

On December 14, 2012, Petitioner returned to Dr. Mehl for the right knee. Px16. The doctor noted that Petitioner was discontinued from right knee therapy. The doctor did not believe Petitioner had yet recovered from her right knee surgery. On exam, she showed persistent swelling and stiffness. Range of motion was limited to 115°. Strength is limited to 70%. Impression was limited recovery and moderately severe right knee

degenerative joint disease. The doctor concluded Petitioner had not yet reached maximum medical improvement from the knee surgery. He felt she needed additional therapy although that had been suspended. Petitioner remained off work.

On December 21, 2012, Petitioner underwent a section 12 evaluation with Dr. Babak Lami. Rx7. The doctor opined that Petitioner's diagnosis was L4-5 and L5-S1 degenerative disc disease with a mild L4-5 spondylolisthesis. He noted Petitioner's symptoms were mostly back pain with a component of radiculitis. Petitioner denied any prior ongoing problems to the low back and he found her to be credible. He opined that her pre-existing lumbar condition was aggravated by the work accident. Regarding treatment, the doctor opined that Petitioner had the option of a trial epidural steroid injection or spinal decompression and fusion. Regarding Dr. Payne's recommended fusion approach, Dr. Lami noted it was one way of accomplishing the same objective and that it was reasonable and related to the work accident. Regarding the spine, Petitioner was able to return to work with no lifting more than 20 pounds and repetitive lifting. The doctor deferred any restrictions for the knee. On December 18, 2012, Dr. Payne assessed positive discogram with radiculopathy with spondylolisthesis. The plan was for fusion. She was removed from work. During this time, Petitioner continued to receive benefits.

2013

On January 10, 2013, Petitioner returned to Dr. Payne. She was unchanged and remained off work for the low back. Px9, 16. On February 7, 2013, Petitioner returned to Dr. Payne. *Id.* She continued to have pain in the lower back area along with numbness and tingling. Recommendations and work status were unchanged. On February 22, 2013, Petitioner returned to Dr. Mehl. He noted she continued with significant pain and that all physical therapy was denied two months ago. Petitioner was status post right knee arthroscopy with incomplete recovery. She also had moderately severe right knee degenerative joint disease. The doctor noted that she had failed all conservative treatment and was now indicated for total knee replacement. The doctor noted she was unable to work indefinitely. She was given a refill of medication. New x-rays were needed.

On March 7, 2013, Petitioner saw Dr. Payne. Px9, 16. Assessment was low back pain. The plan was for fusion. The doctor awaited insurance approval. In the interim, the doctor recommended a TENS unit and refill of medications. Petitioner remained off work for the low back. On March 20, 2013 Dr. Mehl continued to right knee replacement and she remained off of work. On April 4 and May 2, 2013, Petitioner returned to Dr. Payne. She was unchanged and noted she had not yet received a TENS unit or a back brace. On May 30 and June 27, 2013, Petitioner returned to Dr. Payne, unchanged. Petitioner remained off of work. Px9, 16.

On July 31, 2013, Petitioner returned to Dr. Payne. Px9, 16. Spine surgery was approved but there was no approval from Sharon in work comp. Recommendations were unchanged. He noted injections had been denied. On September 5, 2013, Petitioner returned to Dr. Payne for the low back. Px9. The doctor noted Petitioner's pain had been waxing and waning. Recommendations were unchanged. On October 3, 2013, Petitioner returned to Dr. Payne. She was unable to get physical therapy because it had not yet been approved. On November 5, 2013, Petitioner again saw Dr. Payne. Px16. Petitioner was unchanged in regards to her low back complaints. The plan was for lumbar fusion at L4-5 and L5-S1 and a new MRI. The doctor noted that surgery had been approved.

2014

On January 6, 2014, Petitioner underwent and Dr. Payne performed axial and posterior fusions from L4-5 to L5-S1 with bone grafting. Px16. She was discharged on January 10, 2014. Px4, 7. On January 30, 2014,

Petitioner returned to Dr. Payne in follow-up and was admitted to Franciscan Alliance to rule out DVT complications following surgery. Px7:2148, Px16.

On February 18 and March 20, 2014, Petitioner returned to Dr. Payne. Px16. She reported pain down the right leg to the foot. Petitioner was referred to physical therapy and to the pain clinic. Petitioner began therapy for the lumbar spine with St. James. Px7:2206. On March 13, 2014, Petitioner underwent injection with Dr. Adlaka. *Id.* at 2298. Dr. Adlaka diagnosed axial low back pain, radiculopathy, degenerative disc disease and post-laminectomy syndrome.

On May 1 and June 12, 2014 Petitioner followed up with Dr. Payne. Px16. She was experiencing pain radiating to the right leg and foot. The pain was mild and aggravated by bending. There was stiffness and swelling present. Petitioner endorsed numbness and tingling. The doctor noted Petitioner was improving following nerve block in April with Dr. Adlaka. Px16.

On July 23, 2014, Petitioner underwent medical evaluation with Dr. Ryan Hennessy at the request of Respondent. Rx6. The doctor took a history and noted x-rays of the bilateral knees that were performed of bilateral knees in July 2011. The doctor reviewed the MRIs from March 2012, noting that there was moderate to severe lateral osteoarthritis bilaterally, with chondromalacia in the patellofemoral joint. He noted tears in both knees to varying degrees.

The doctor opined that with regard to the bilateral knee arthroscopies, those were related to the accident. However, the doctor felt that it was clear she had severe osteoarthritis of both knees particularly in the lateral compartments and was noted to have bilateral genu valgum proximate to the time of injury which indicated the arthritis was quite progressed by the time the accident had occurred. Given her weight, the genu valgum with severe osteoarthritis findings, it was a doctor's opinion that Petitioner was going to have a new replacement regardless of the intervening accident of November 20, 2011.

With regard to the lumbar spine, the doctor opined that Petitioner's spondylolisthesis and degenerative disease and spinal stenosis from L4 through S1 predated the accident. He noted there was no particular mention of radiculopathy until July 24, 2012 by Dr. Payne, which spoke against aggravation. Thus, treatment for the lumbar spine was medically appropriate but unrelated to the work accident.

The doctor concluded Petitioner sustained a lumbar strain as a result of the work accident that reached maximum medical improvement on February 22, 2012 with Dr. Mehl. The doctor opined the left knee reached maximum medical improvement on June 27, 2012 when no further mention of the left knee was made by Dr. Mehl. Dr. Hennessy opined the right knee reached maximum medical improvement on March 30, 2013 with Dr. Mehl and there was no acceleration of osteoarthritis as it was already severe in a moderately overweight woman.

On July 17, 2014, Petitioner saw Dr. Payne and reported pain down the right leg. Px16. The plan was for additional physical therapy, selective nerve root block on the right at L5-S1, use of a cane to ambulate, Lyrica, Ambien and follow-up. On July 31, 2014, Petitioner underwent right sided L4 and L5 TESI with Dr. Adlaka. Px7:3304. Dr. Adlaka discussed possible dorsal column spine stimulator. *Id.* Through-out July, Petitioner continued with spine therapy per Dr. Payne. *Id.*

On August 14, 2014, Petitioner followed up with Dr. Payne. Px16. She reported back pain radiating to the right leg along with numbness and tingling. The plan was for continued pain management, consideration of

aqua therapy, continued use of a back brace, use of a cane to ambulate, Lyrica, a second lumbar injection at L5-S1, work note and follow up.

On September 25, 2014, Petitioner returned to Dr. Payne. Px16. She recently had had a second epidural steroid injection at L5 S1 and Petitioner believed that was helping. She reported continued right leg numbness when sitting too long or lying on the right side. She was performing home exercise on her own. The plan was for aqua therapy, lumbar injection, EMG, MRI of the lumbar spine to rule out foraminal stenosis, physical therapy and follow-up.

On October 15, 2014, Petitioner underwent a right-sided L4-5 epidural injection with Dr. Adlaka. Px16. On October 16, 2014, EMG showed a right S1 radiculopathy. There was evidence peripheral neuropathy consistent with diabetic polyneuropathy. Petitioner then returned to Dr. Payne. Px16. The plan was for CT myelogram with attention to the L5-S1 right side. On November 20, 2014, Petitioner saw Dr. Payne, who noted now chronic back pain. Px16. Plans were unchanged. On December 18, 2014, Petitioner returned to Dr. Payne. Assessment and recommendations were unchanged.

2015

On January 15, 2015, Dr. Payne's recommendations were still unchanged. Px16. On March 4, 2015, the parties took the evidence deposition of Dr. Ryan Hennessy. Rx6. The doctor concluded that Petitioner had bilateral knee osteoarthritis with deformity indicating end-stage arthritis and meniscal tears probably pre-existing the accident. Regarding the lumbar spine, he testified Petitioner had degenerative changes of spondylolisthesis and facet arthropathy at L4-5 and L5-S1, which predated the accident. The doctor opined that Petitioner was treating in July 2011 before the accident but agreed that "the fall, however, would be a capable cause of either exacerbating temporarily or aggravating permanently either the meniscal tears and possibly the arthritis." *Id.* at 27:5-8. He concluded that Petitioner had an exacerbation of the meniscal tears but not the arthritis. The arthritis was not altered, accelerated or aggravated due predominately to the knees reaching full range of motion. The doctor concluded that Petitioner already had severe arthritis prior to the accident. The doctor opined that the osteoarthritis was not causally connected to the work accident. He further associated her pre-existing right knee conditions with her weight. The doctor stated Petitioner reached maximum medical improvement but on cross agreed that Dr. Mehl noted the work comp carrier had been unresponsive.

On March 16, 2015, the parties took the evidence deposition of Dr. Mehl. Px6. Regarding the right knee, the doctor testified in part that when he saw her in February 2013, she failed all conservative care and was a candidate for total knee replacement. He testified the last time he saw her was on March 20, 2013. He noted she had been "denied." The doctor testified that Petitioner would benefit from a total knee replacement and that she should see a good amount of pain relief and improvement of quality of life. When asked whether the need for the totally replacement was causally related to her work accident, the doctor noted the prior 2005 surgery, at which time he noted some degenerative disease and a torn lateral meniscus but that based on this injury and the injury findings at the time of the 2012 surgery, it was his opinion that the knee was made worse and that sustained further injury that caused it to be significantly worse with respect to the quality of the cartilage in the knee both meniscal and articular. He further opined that Petitioner had "exacerbated this pre-existing arthritic condition in her right knee to the point now or as of two years ago she requires a knee replacement." In addressing Dr. Hennessy's opinion that Petitioner would have needed the total knee replacement regardless of the work accident, the doctor testified that it was his opinion that Petitioner was functional, working and doing fine until the accident of November 2011. The doctor also explained that at the time of the 2005 right knee surgery, only the lateral side was involved whereas the 2012 surgery involved the lateral side and medial side, as

well as the chipping off of loose articular cartilage from the knee bone. He testified Petitioner might have needed a replacement at some point in the future but he opined the work accident hastened the need for that replacement.

Regarding the July 2011 treatment, the doctor concluded that it was either a typographical error or something else. The doctor stated that he does not have any notes of seen Petitioner in July 2011 and x-rayed her knees the doctor testified that he could not locate any treatment between 2005 and 2012. He could not comment on whether she could return to work now. The doctor further stated that he recommended additional evaluation, repeat x-rays and he was still the opinion that she's a total knee replacement along with all of the cost and recovery that it normally entails. The doctor opined that all the treatments he is provided to Petitioner to date have been reasonable and necessary.

In June 2015, Petitioner was re-evaluated by therapists for the low back. Px7:4578. She was noted to have improved however still demonstrated Trendelenburg gait bilaterally and strength deficits. Aquatic therapy was recommended. On June 24, 2015, Petitioner saw Dr. Adlaka once again for a left sided L4 TESI. Px7:4626. Diagnoses was axial low back pain, lumbar radiculopathy, lumbar degenerative disc disease and post-laminectomy syndrome.

On August 6, 2015, several months after the deposition of Drs. Mehl and Hennessy, counsel for Respondent emailed counsel for Petitioner and indicated Respondent elected to accept the opinions of Dr. Hennessy on the back and reject Dr. Lami's opinions on the back. It elected to adopt the opinions of Dr. Hennessy as to the knees. On August 19, 2015, Petitioner saw Dr. Adlaka for a caudal epidural steroid injection. Px7:4724. Diagnosis was unchanged.

Petitioner testified and the records show that the Petitioner began receiving temporary total disability payments on December 13, 2014 which continue through the date of trial. Petitioner further testified that since July of 2014 following her Section 12 exam, she had been forced to attempt to use her group health insurance for continued care for her work injuries. Petitioner testified there were unpaid bills for her lumbar spine. She further testified her group health paid some bills and she paid out of pocket for some bills. Petitioner testified that this has caused her undue stress, hindered her treatment and has further limited her healing process. Petitioner testified that she has extreme difficulty getting her treatment approved and her providers have made countless attempts that have gone unanswered.

Petitioner testified she valued her employment with Respondent and that if granted the right total knee replacement, she would proceed. Petitioner confirmed she had never been prescribed a right total knee replacement prior to this accident and she did testify that she had been working full duty since her prior arthroscopy in 2005.

Testimony of Latricia Glover

Respondent offered the testimony of Latricia Glover ("Glover"), a Claims Supervisor for TriStar. Glover testified that she has been with TriStar for over three (3) years but that she does not manage claims for the State of Illinois, nor is she the Claims Supervisor of the adjuster of this claim, Shauna Cassidy. Glover testified that the claim is managed out of North Carolina and that Linda Saunders is the Claims Supervisor over the claims of the State of Illinois. Glover, on cross examination, could not explain why the Claims Supervisor of this specific claim could appear at trial. Glover testified she could not explain how Petitioner's wage was calculated or how wages were submitted from the State of Illinois to TriStar. Glover testified that she was not

familiar with the Petitioner's claim prior to that of trial and was not aware of the disputes at issue in this particular claim. Glover was able to identify Rx3 as payments made on a claim. She confirmed that the total amount issued for TTD is the total checks less stop payments. Glover testified she could not state whether Petitioner's average weekly wage was derived from CMS or Tri-Star figures or whether they were recalculated.

CONCLUSIONS OF LAW

Credibility Assessment

The Arbitrator finds Petitioner's testimony regarding her injury, course of treatment, pre-accident medical history, current condition and receipt of benefits to be credible and forthright. The Arbitrator finds Glover's testimony knowledgeable regarding Tri-Star's operations. Glover lost some credibility, however, in that her tone was short and combative under cross examination.

ISSUE (F) Is Petitioner's current condition of ill-being causally related to the injury? *causation of knee replacement only
ISSUE (K) Is Petitioner entitled to any prospective medical care?

At trial, the parties noted that the causation dispute was as to the right knee replacement surgery only. Ax1. Although the parties stipulated and otherwise represented to the Court that Petitioner's low back condition and left knee conditions were not in dispute as to causation, the Arbitrator nonetheless finds it necessary to make findings and conclusions of law as to those conditions, given that the disputed issues of medical liability, temporary total, credits and penalties and fees necessarily encompass those conditions. Further, both parties submitted evidence and opinions regarding the low back and left knee.

A. Low Back

The Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that her low back/lumbar spine condition at L4-5 and L5-S1 is causally related to her undisputed work accident of November 20, 2011. Petitioner credibly testified that when she was attacked at work, she suffered direct blows to her low back and this description consistent with both initial and subsequent treatment records.

Despite Respondent's counsel's representation that it did not intend to adopt the opinions of Dr. Hennessy regarding the low back, the Arbitrator nonetheless concludes that Dr. Hennessy's opinions as to the low back are entitled to less weight than the opinions of Drs. Payne and Lami. Dr. Hennessy based his low back causation opinion primarily on the fact that he concluded there was no mention of radiculopathy until July 24, 2012. Rx6. However, Accelerated Rehab had noted as early as December 1, 2011 low back complaints along with increased pain in her bilateral thighs. Px11. Further, Petitioner reported a burning sensation into the lateral aspect of her bilateral knees and was worried something else may be going on. *Id.* Thus, the evidence suggests the presence of a radiculopathy or radiculitis not diagnosed until later. This assessment is supported by Dr. Lami's opinion, which noted Petitioner's symptoms were mostly back pain with the component of radiculitis. Dr. Lami's opinions are also supported by the medical evidence.

Drs. Payne and Lami, on the other hand, both found Petitioner's pre-existing lumbar spine conditions at L4-5 and L5-S1 were aggravated by her work accident. The Arbitrator finds these opinions persuasive and further that Petitioner's medical history is devoid of any problems, symptoms, complaints or treatment to the low back before the work accident. Further, Petitioner's mechanism of injury is consistent with and supported by Drs. Payne and Lami's conclusions. Finally, the Arbitrator notes and adopts the parties' stipulations

regarding causation as to the low back. Therefore, the Arbitrator finds that Petitioner's low back conditions are causally related to her work accident. Petitioner does not seek prospective medical treatment for the low back.

B. Left knee

The Arbitrator concludes that Petitioner has proven by a preponderance of the credible evidence that her left knee condition is causally related to her work accident. Petitioner's medical history shows that Petitioner had no prior injuries, symptoms or treatment relative to the left knee and that Petitioner immediately reported left knee pain following the November 20, 2011 work accident. Petitioner underwent left knee arthroscopy with Dr. Mehl in April 2012 and last treated for the left knee on July 6, 2012 via physical therapy. The Arbitrator notes Petitioner's left knee condition has reached maximum medical improvement as there is no treatment after June 2012 relative to the left knee. Drs. Mehl and Hennessy have causally related Petitioner's left knee to the work accident and the Arbitrator adopts those opinions as to the left knee. Considering the record as a whole, the causal opinions of Drs. Mehl and Hennessy on the left knee as well as the parties' stipulations, the Arbitrator concludes Petitioner's left knee is causally related to her work accident.

C. Right Knee

The Arbitrator incorporates the findings of fact as though fully set forth herein. The Arbitrator has carefully reviewed all testimonial and all medical evidence and opinions, which were voluminous in nature, and concludes that Petitioner has proven by a preponderance of the evidence that her right knee conditions, as specified by Dr. Mehl, are causally related to her work accident. Petitioner testified credibly at trial that she had a consistent course of medical treatment, that her pain has not subsided, and that she had not had a previous recommendation for a right total knee replacement before this accident occurred.

Dr. Mehl testified that he could not locate any July 2011 medical treatment note and/or x-ray for the knees. He credibly testified that it was his opinion that the reference was simply a typographical error. The doctor confirmed that he could locate any treatment for Petitioner for the right knee from 2005 through 2012. The Arbitrator is persuaded that Petitioner had not treated between 2005 and 2012 for her right knee. The Arbitrator reviewed thousands of medical records submitted into evidence and, as Dr. Mehl correctly pointed out, there is no medical treatment from 2005 to 2012 for the right knee. At trial, Respondent did not produce or point to any July 2011 medical note regarding right knee treatment or x-ray. At most, Respondent relies on the following notation in Dr. Mehl's February 22, 2012 medical note: "X-rays taken before the work in July of 201 [sic] . . ." Px17. The note is obviously grammatically incorrect but it cannot be said to refer to 2011 or to refer to an x-ray of the right or left knee. Despite Respondent's and Dr. Hennessy's opinion that Petitioner treated for the right knee in July 2011, that is simply not the case.

Dr. Mehl's opinion that Petitioner was functional and otherwise asymptomatic is consistent with the lack of medical treatment between 2005 and 2012. Further, the doctor stated that Petitioner's work accident made Petitioner's right knee worse in terms of the quality of the cartilage, credibly explaining that the 2012 right knee surgery intra-operatively confirmed the loosening of articular cartilage resulting in loose bodies, whereas the 2005 right knee surgery had no such loose bodies and only involved the lateral meniscus. Dr. Mehl explained that further damage to the articular cartilage with generation of loose bodies from that damage exacerbated the underlying degenerative condition causing the need for the right total knee replacement. Px3:22-23. The Arbitrator finds that the evidence supports a conclusion that Petitioner's condition was functional and otherwise in a state of good health for the right knee prior to her work accident.

17IWCC0334

Dr. Hennessy's report, on the other hand, concluded that "it was clear she had severe osteoarthritis of both knees, particularly in the lateral compartments," and that "she was noted to have bilateral genu valgum proximate to the time of injury, which clearly indicated the arthritis was quite progressed by the time the accident occurred," and further that, "she was going to have knee replacement [sic] regardless of the intervening accident on November 20, 2011." Rx6. The doctor also noted that Petitioner was already treating for the right knee shortly before the work accident. The Arbitrator is not persuaded by this opinion as the doctor noted he had no medical records pre-dating the work accident and thus, it is unclear how Dr. Hennessy concluded Petitioner was going to have knee replacement surgery regardless as there is no pre-accident medical treatment records confirming osteoarthritis or recommending such surgery. Even if Dr. Hennessy's opinion that Petitioner would have needed a knee replacement regardless was given weight, Dr. Mehl and the medical record nevertheless support a conclusion the work accident accelerated the need for surgery. It also bears worth noting that following Petitioner's 2012 right knee surgery, Petitioner's rehabilitation efforts were stalled as post-operative care was not approved and otherwise delayed. Dr. Mehl's medical notes repeatedly addressed this issue and the Arbitrator finds this fact as contributing to Petitioner's overall failure of conservative care and the need for a total knee replacement.

The Arbitrator also does not find the argument that Petitioner's obesity caused or contributed to a degenerative right knee condition compelling enough to find in favor of Respondent. Even if obesity had played a role in the development of Petitioner's right knee condition, the law only requires that the work accident be a causative factor and the Arbitrator finds that Dr. Mehl has adequately addressed that.

Regarding the need for further care, Petitioner testified credibly at trial that she had a consistent course of medical treatment, that her pain has not subsided, and that she had not had a previous recommendation for a right total knee replacement. Dr. Mehl first noted on February 22, 2013 that Petitioner's conservative treatment had failed – her therapy had been denied and it was noted Petitioner had an incomplete recovery to the right knee. The doctor opined that Petitioner would benefit from a right total knee replacement. In this regard, Dr. Hennessy's opinions are consistent with Dr. Mehl's and differ only as to causation. The Arbitrator agrees with the opinions of the Petitioner's treating physicians over the opinion of Dr. Hennessy as to causal relationship.

Based on the foregoing, the Arbitrator concludes that Petitioner's current condition of ill-being with respect to the right knee and her need for a right total knee replacement is causally related to the November 20, 2011 undisputed work accident. Respondent shall authorize and pay for Petitioner's right total knee replacement as recommended by Dr. Mehl, including any and all incidental care thereto.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, the parties disputed liability for unpaid medical bills. The Arbitrator notes neither party claimed a group payment credit and Petitioner does not seek out of pocket reimbursement. Ax1. As stated previously, although the stipulations between the parties indicated that causation was in dispute as to total knee replacement only, the Arbitrator must address the lumbar spine and left knee, as there are unpaid medical bills Petitioner asserts as unpaid and related to the work accident. Per Ax1 and Px4, Petitioner asserts the following unpaid medical bills:

Petitioner alleged unpaid bills for Specialty Physicians of Illinois in the amount of **$567.21** for services with Dr. Payne for the lumbar spine. Having found in favor of Petitioner on the issue of the lumbar spine and further in light of the stipulations at trial, the Arbitrator awards these bills to Petitioner.

Petitioner alleged unpaid bills for St. James Hospital in the amount of $16,809.23 for physical therapy services for both the lumbar spine and the right knee from September 6, 2012 through July 31, 2014. Px4, Px7, Px16. Having found in favor of Petitioner as to the lumbar spine and right knee; and further in light of the stipulations at trial, the Arbitrator ***awards*** the St. James Hospital bill as follows:

4/18/12	$117.00 for physical therapy
9/6/12-9/25/12	$3,924.00 for physical therapy

The Arbitrator ***denies*** the following St. James Hospital bills as duplicate or paid charges, because they also appear in the Franciscan Alliance charges:

2/18/14	$1,041.00 for DVT testing
3/4/14-3/28/14	$3,656.00 for physical therapy
7/23/14-7/31/14	$1,926.00 for physical therapy
7/31/14	$6,145.23 for lumbar injection

Petitioner further alleged unpaid bills from Franciscan Alliance in the amount of $11,520.55 for treatment related to the lumbar spine. Ax1, Px4. Having found in favor of Petitioner as to the lumbar spine and right knee; and further in light of the stipulations at trial, the Arbitrator ***awards*** the Franciscan Alliance bill as follows:

2/18/14	$1,041.00 for DVT testing
3/4/14-3/28/14	$3,656.00 for physical therapy
7/23/14-7/31/14	$1,926.00 for physical therapy
7/31/14	$200.00 for lumbar injection (balance after BCBS payment)
6/24/15	$190.00 for lumbar injection (balance after BCBS and patient payment)
8/19/15	$175.00 for caudal injection (balance after BCBS payment)

The Arbitrator ***denies*** the following Franciscan Alliance charges as unrelated and/or otherwise unsupported by any medical record:

12/21/15	$2,492.55 for hospital adjustment – no date of service listed
12/21/15	$117.00 for hospital adjustment – no date of service listed
1/27/16	$1,723.00 for gastric testing

Petitioner further alleged a balance due and owing to Dr. Adlaka/Pain Control Associates of **$5,135.00** for treatment related to the lumbar spine in the form of pain management and injections. Records support ongoing need for lumbar medical treatment both before and following spinal fusion. Having found in favor of Petitioner as to the lumbar spine and right knee; and further in light of the stipulations at trial, the Arbitrator awards to Petitioner these bills as reasonable and necessary.

In summary for all bills herein discussed, Respondent shall pay reasonable and necessary medical services of **$16,931.21**, subject to Sections 8(a) and 8.2 of the Act. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule

payment calculations to Petitioner. See, *Springfield Urban League v. Ill. Workers' Comp. Comm'n*, 2013 IL App (4th) 120219WC.

ISSUE (L) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, the parties disputed the issue of temporary total disability (TTD) benefits. The parties stipulated to an average weekly wage of $1,269.90. Ax1. The parties arrive at this figure by utilizing Petitioner's pay from November 21, 2010 through November 20, 2011. Rx4. Petitioner asserts that while she was paid temporary total disability from December 13, 2-14 through the date of arbitration, she was paid at the incorrect TTD rate.[1] Ax1. Based on the alleged underpayment, Petitioner seeks penalties and fees, which are further addressed below. The parties agree that from April 21, 2012 through December 12, 2014, Petitioner was paid Extended Benefits (disability) pursuant to 5 ILCS 345/1[2]. Respondent asserts a credit against TTD in the amount for TTD paid as well as credit for the Extended Benefits (disability) paid from April 21, 2012 through December 12, 2014. Ax1.

Based on the record as a whole, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits as a result of her injuries to her low back/lumbar spine, right knee and left knee suffered as a result of her work accident of November 20, 2011. In adopting Petitioner's treatment records and the opinions of Drs. Mehl and Payne, the Arbitrator finds that Petitioner was temporarily totally disabled from April 21, 2012, the date of Petitioner's first knee surgery through the date of Arbitration. Records credibly reflect that during this time, Petitioner was in treatment for her right knee, left knee and lumbar spine and was unable to return to work. Prior to April 21, 2012, Petitioner testified she was working light duty for Respondent performing mostly desk work. The Arbitrator takes specific note of the Petitioner's credible attempt to try to work light duty through the pain from the start of her claim until surgery was first authorized.

Consistent with Petitioner's testimony, Petitioner was paid TTD in the amount of approximately $1,188.32 every two weeks, which equates to $594.16 of TTD per week. Rx3. Thereafter, beginning on December 16, 2014, Petitioner was paid what Respondent considered to be maintenance in the same approximate amounts through the date of Arbitration. Px1, Rx3. The Arbitrator notes that these figures are not in conformance to Petitioner's stipulated TTD rate and therefore an underpayment has occurred.

The parties stipulated to a TTD credit in the amount of $49,354.90. Ax1. Based upon the evidence submitted, the Arbitrator finds the stipulations on Ax1 unsupported by the evidence and finds that Respondent's TTD credit is actually **$50,622.44** based as follows in Rx3: $10,694.90 in TTD paid ($55,296.53 - $44,601.63) plus $39,927.54 in maintenance paid ($43,492.50 - $3,564.96).

Respondent also seeks a credit for Extended Benefits (disability) paid from April 21, 2012 through December 12, 2014 (138 weeks) against any award of TTD but did not specify an amount. Ax1. Section (d) of the Public Employee Disability Act provides, in part:

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[1] Section 10 states that the average weekly wage should be based upon the last day of the employee's last full pay period, which would have yielded an average weekly wage of $1,369.06.

[2] The Public Employee Disability Act covers, in part, employees working within a state mental or developmental disabilities institution and provides for continuing payments on the same basis as she was paid before an injury suffered in the line of duty.

"Any salary compensation due the injured person from workers' compensation or any salary due him from any type of insurance which may be carried by the employing public entity shall revert to that entity during the time for which continuing compensation is paid to him under this Act."

5 ILCS 345/1(d). Thus, the amount to be reverted back to Respondent is the equivalent of Petitioner's TTD benefit. Petitioner's testimony confirmed that she received Extended Benefits (disability) and that as a result, she returned all TTD checks to Respondent's workers' compensation administrator thereby avoiding double recovery. Her testimony is supported by Rx3, which reflects voided or stopped payments in conformance with this fact. Based on the foregoing as well as the parties' stipulations, Respondent is entitled to an 8(j) credit for such disability benefits paid in the amount of **$116,830.80** (138 weeks x $846.60 stipulated TTD rate).

In summary, the Arbitrator concludes that Respondent shall pay to Petitioner temporary total disability benefits of **$846.60/week** for **225-5/7th weeks**, commencing **April 21, 2012** through **August 17, 2016**, as provided in Section 8(b) of the Act. Against this award period, Respondent shall be given a credit of **$50,543.22** for TTD paid and **$116,830.80** for Extended Benefits paid under 5 ILCS 345/1, for a total credit of **$167,374.02**. Further, despite neither party addressing group credits under 8(j) at trial, the Arbitrator notes Petitioner's testimony that she used her group health insurance to pay for her care as well as medical bills documenting payment by BCBS as warranting deviation from the stipulations at trial. Therefore, Respondent shall be given a credit for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

ISSUE (M) Should penalties or fees be imposed upon Respondent?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Section 19(l) provides, in relevant part, that: "In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." Thus, 19 (l) penalties are in the nature of a late fee. Assessment of the penalty is mandatory if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay. *Mechanical Devices v. Indus. Comm'n*, 344 Ill. App. 3d 752, 763 (4th Dist. 2003). The test for determining whether the employer or its carrier had adequate justification for delaying payment is that of objective reasonableness. *D.J. Masonry Co. v. Indus. Comm'n*, 295 Ill. App. 3d 924, 935 (1st Dist. 1998). Generally, an employer's reasonable and good-faith challenge to liability does not warrant the imposition of penalties. *Id.* When the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties ordinarily are not imposed. *Id.*

Section 19(k), on the other hand, provides for penalties when: "There has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay[.]" 820 ILCS 305/19(k). An award of such penalties is discretionary and is usually assessed when a benefit payment delay is deliberate or results from bad faith or improper purpose. *McMahan v. Indus. Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545 (1998).

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

Regarding underpaid TTD, the Arbitrator notes Respondent's conflicting positions at trial; namely that on the one hand Respondent appears to rely in part on its administrator's AWW and TTD calculations in paying the original TTD benefit. See Px4, Rx3. On the other hand, Respondent paid Petitioner $1,188.32 in bi-weekly TTD benefits, which would yield an AWW of $891.24 and a TTD rate of $594.16. See Px1, Rx3. These figures do not comport with the information in Px4 or even the stipulated AWW in Ax1. Medical evidence shows that during this time, Petitioner has remained off of work due largely to active and ongoing treatment to the lumbar spine, which was not in dispute according to Respondent's stipulations at trial and Respondent's representations outlined in various email correspondence between representatives for the parties. See Ax1 and Px3.

Respondent has offered no explanation or justification why TTD was underpaid – it did not make an opening statement at trial explaining underpayment; it filed no response to Petitioner's 19(b) petition and/or petition for fees and penalties; it offered no testimonial or documentary evidence to shed light on how TTD was calculated or why TTD was paid at the incorrect rate from December 13, 2014 through the date of Arbitration; it did not make any good faith challenge to liability nor did it state that it relied up on any medical opinion and it did not attempt to reconcile the various conflicting numerical calculations outlined above. Moreover, Respondent had access to Petitioner's wage records as shown in Rx4 and failed to correct the underpayment. In the Arbitrator's view, unreasonable underpayment of TTD is tantamount to non-payment and delay of TTD. The Arbitrator concludes that Respondent has failed to provide any adequate explanation or justification for such underpayment and therefore no objective reasonableness exists. The Arbitrator notes that Respondent was on notice of some discrepancy in payments as suggested by the email from Respondent's counsel dated December 1, 2015 stating that according to its records, Petitioner was receiving maintenance "properly" yet did produce any explanation at trial. In the Arbitrator's view, this not only suggests notice of a rate issue but also that Petitioner had made Respondent aware prior to the date of this email. Moreover, the parties undertook multiple continuances for trial in order to narrow the issues for trial and despite arriving at a stipulated AWW, Respondent failed to correct the underpayment and/or adequately justify the continuance of the underpayment.

Regarding unpaid medical bills, the Arbitrator concludes Respondent also failed to adequately provide justification for non-payment of medical bills related to Petitioner's lumbar spine and knee. At trial, Respondent clarified a dispute had arisen only as to causation for a total knee replacement and therefore it is unclear to the Arbitrator why Petitioner's medical bills remain unpaid for treatment that is otherwise stipulated to. Again, the parties undertook multiple continuances to narrow issues for trial and no explanation has been given by Respondent as to why Petitioner's medical bills remain unpaid.

Therefore, the Arbitrator awards mandatory 19(l) penalties from December 13, 2014 through the date of Arbitration on August 17, 2016, which equals the maximum penalty of **$10,000.00**. This penalty also includes consideration for Respondent's failure to pay Petitioner's outstanding medical bills as noted above.

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Regarding Respondent's failure to pay medical bills and authorize treatment for which Petitioner asserts no real controversy exists, the Arbitrator declines to award further 19(k) penalties and/or attorney's fees. First, no showing has been made that Respondent's delay was deliberate, in bad faith or for improper purpose. Second, the evidence shows a genuine dispute existed as to the need for ongoing treatment for the right knee based upon an error in Dr. Mehl's medical note and based upon competing medical opinions as to the acceleration of the need for a total knee replacement.

Signature of Arbitrator

11-8-2016
Date

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 D. MILLS,

Petitioner,

vs.

NO: 15 WC 15861

17IWCC0335

ARAMARK @ MILLIKIN UNIVERSITY,

Respondent,

DECISION AND OPINION ON REVIEW

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

The Commission strikes the second to last paragraph on page ten of the Decision relating to a chain of events analysis. We emphasize that the medical causation opinion of Dr. Sams is persuasive along with his recommendation for the left ankle fusion surgery. We also strike the word "authorize" in the Order section regarding prospective medical care and replace it with the word "order."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 20, 2016, is hereby affirmed and adopted with the clarifications noted above.

17IWCC0335

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,000.00. 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: MAY 31 2017

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

SE/
O: 4/4/17
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

MILLS, JAMES D
Employee/Petitioner

Case# **15WC015861**

ARAMARK @ MILLIKIN UNIVERSITY
Employer/Respondent

17IWCC0335

On 4/20/2016, 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 0.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in 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 & CARIO LTD
JAMES J NAWROCKI
ONE E WACKER DR 38TH FL
CHICAGO, IL 60601

0560 WIEDNER & McAULIFFE LTD
TIMOTHY S McNALLY
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

17IWCC0335

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JAMES D. MILLS
Employee/Petitioner

v.

ARAMARK @ MILLIKIN UNIVERSITY
Employer/Respondent

Case # **15** WC **15861**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Springfield**, on **February 18, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of 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 _____

17IWCC0335

FINDINGS

On the date of accident, **4/22/2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$29,952.00**; the average weekly wage was **$576.00**.

On the date of accident, Petitioner was **65** years of age, ***married*** with **0** dependent children.

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

ORDER

Petitioner is awarded prospective medical care as recommended by Dr. Sams and Respondent shall provide and authorize said treatment.

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

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

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

Signature of Arbitrator

April 13, 2016
Date

ICArbDec19(b)

APR 20 2016

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds:

Petitioner was involved in an undisputed accident on April 22, 2014. At that time he was working for Respondent and tripped over a mulch hose falling forward and hurting his left ankle and right wrist. Petitioner did not seek any medical treatment until May 13, 2014 when he presented to DMH Corporate Health Services/Occupational Medicine Clinic complaining of a shooting pain in his left ankle and on top of his foot. Petitioner was examined by PA-C Sarah Sheers. Petitioner described the pain as being intermittent with movement, especially walking. He described his pain as "9-10/10." Petitioner denied any further problems with his wrist. Petitioner reported that he had originally hoped the ankle would heal without the need for medical attention but it hadn't. Petitioner's pain was located on the anteromedial left side with radiation up his lower leg and he noticed a great amount of pain with steps. Wrapping the ankle seemed to make the pain worse. Petitioner also noticed some tingling just distal to the medial malleolous. Petitioner was wearing his shoe very loosely or he would notice increased pain. Petitioner also reported daily swelling that would improve overnight but resume after being on his feet all day. Petitioner was diagnosed with a left ankle sprain, given medication, and told to wear shoes with good ankle support. He was allowed to continue regular duty. His accident was noted to be workers' compensation. (PX 1)

Petitioner returned to PA-C Sheers at the Occupational Medicine Clinic on May 23, 2014 reporting ongoing pain which he described as "stabbing and burning" like a hot knife. He denied any improvement since his first visit and described crunching and popping when walking. Petitioner was very concerned as he had a church trip to Africa coming up on June 11th. An MRI was ordered and he was advised he could find an over the counter ankle brace to help with swelling and support. X-rays were read as showing degenerative joint disease with significant tibial talar joint and talar tilt. (PX 1)

Petitioner underwent an MRI of his left ankle on June 5, 2014. It revealed marked degenerative changes of the tibiotalar joint and extensive edema throughout the talus. An abnormal subchondral signal was seen somewhat crescentic in nature with some flattening of the talar dome. Findings suggested avascular necrosis and a chondral fracture. Additional abnormal signals suggested a combination of degenerative changes and stress related changes. Joint effusion and extensive soft tissue swelling was apparent. A strain injury or partial tear of the talofibular ligaments was noted. Tendinopathy and tenosynovitis was also seen within the posterior tibialis and the flexor digitorum and flexor halluces. (PX 1)

Petitioner followed up with PA-C Sheers at the Occupational Medicine Clinic on June 9, 2014, reporting ongoing pain located in the left ankle and on top of his foot, described as moderate to intense in severity and intermittent with movement. Petitioner noticed worsening symptoms when walking, bearing weight, walking on uneven surfaces or down stairs. He continued to complain of significant pain on the anterior superior aspect of his ankle despite wearing an ankle brace that did help with swelling and provide some support. On physical examination Petitioner was noted to have mild swelling, tenderness to palpation at the superior anterior ankle, and limited range of motion due to pain. Petitioner was referred to Dr. Sams. He remained on regular duty at work. (PX 1)

Petitioner presented to Dr. Sams at the Decatur Orthopedic Center on June 10, 2014. Petitioner reported that his ankle was better than what it was before but he occasionally noted intense pain and, at other times, a throbbing pain. He had been wearing an ankle brace for a month with little to any relief and he was getting ready to leave for Africa the following week and was looking for something to help provide relief while gone. Petitioner reported a significant history of multiple ankle sprains in the past. Petitioner was noted to be walking with an antalgic gait and there was some effusion and limited range of motion. Dr. Sams felt Petitioner's x-rays showed severe osteoarthritis of his ankle joint. He was given an injection and new lace-up ankle brace. He was to return as needed. (PX1)

Petitioner returned to see Dr. Sams on August 19, 2014 for his ongoing left ankle pain. He reported little to no relief from the injection as well as "cracking" and "popping" when stepping up with his ankle. Petitioner reported that the brace pinched his ankle and did not really help. It was Dr. Sams' impression that Petitioner was experiencing left ankle pain due to severe osteoarthritis of his ankle joint. Petitioner was advised that his treatment options included doing nothing or undergoing an ankle fusion. The doctor recommended that he live with it until he could no longer tolerate it. He also offered to refer Petitioner to a foot and ankle specialist in Springfield.

At the request of Respondent, Petitioner was examined in Chicago by Dr. George Holmes on October 15, 2014. Petitioner gave a history of his work accident and summarized his treatment to date. Dr. Holmes was seeing Petitioner in conjunction with a surgical recommendation. Petitioner was noted to have point tenderness over the anteromedial aspect of his ankle, sharp stabbing pain and pain when he walked, crackling with every step, and increasing pain with weight bearing activities and uneven ground. He was taking Ibuprofen four times a day and using a brace. Petitioner had been working his regular duty with Respondent allowing him to "adjust his working."

Dr. Holmes was of the opinion that Petitioner had significant tibiotalar arthritic changes and possibly avascular changes in his left ankle. He felt the MRI and x-ray findings were of longstanding duration and well preceded the work accident. He acknowledged being presented with no evidence of any subjective complaints prior to the reported work accident and that the

findings were not caused or "significantly on a structural basis" impacted by the injury. He felt Petitioner was using both lower extremities equally as there was no calf atrophy. Petitioner had no evidence of ankle indicative of an acute ongoing structural aggravation process. He noted Petitioner was being able to ride on a mower and other appliances at work and didn't have to use a clutch with his left foot.

Dr. Holmes did not feel Petitioner needed an ankle fusion because he was only taking Ibuprofen and wearing an off-the-shelf lace-up brace rather than a custom brace. He explained that ankle fusions are usually reserved for patients who fail bracing, are having significant impaired function, or are taking significant medications in order to get through the day. In contrast, he noted Petitioner was taking Ibuprofen, using a non-custom brace and performing his usual duties.

Dr. Holmes did not feel Petitioner would benefit from an arthroscopic debridement as there is usually only short-term benefit in cases of severe degenerative joint disease. He also did not feel Petitioner would benefit from an arthrodesis without first trying a period of immobilization with a cast. If a great amount of his pain was eliminated with the use of a cast it would bode well for the potential use of an AFO brace or a custom made Arizona type brace for pain relief. Dr. Holmes was of the opinion that Petitioner's condition in his foot/ankle was causally related to his work accident. (RX 1, dep. ex. 2, p. 4/5)

Dr. Holmes also felt Petitioner's prognosis was quite good. From a structural point of view he felt Petitioner's pre-existing condition was essentially temporarily aggravated but he did not feel the MRI suggested any permanent aggravation. He did not feel Petitioner was yet at maximum medical improvement but surgery was "not yet" warranted. Dr. Holmes agreed that Petitioner could continue working full duty noting the "understanding" with Respondent that there were some exceptions being made to let Petitioner get through the work day. He also agreed that Petitioner should not operate a clutch nor should he work extensively on inclines or uneven surfaces standing on his feet. Once he was able to potentially get an AFO brace, it might be best for him to work with a hinged one. The doctor also felt ongoing use of anti-inflammatory medication would be reasonable. (RX 1, dep. ex. 2)

Petitioner returned to see Dr. Sams on November 7, 2014 with continued left ankle pain which he denied experiencing prior to his work injury. He voiced no new complaints just no resolution to his discomfort. He was wearing the lace-up ankle brace and taking non-steroidal anti-inflammatory medication. Petitioner reported undergoing an examination in Chicago and that his workers' compensation provider had denied the fusion procedure. As such, Dr. Sams recommended proceeding with a lace-up Arizona brace or a solid ankle AFO. The plan was to see how he did for three months and if there wasn't significant lasting relief, an ankle fusion would be considered. (PX 1)

As instructed, Petitioner returned to see Dr. Sams on February 17, 2015. He had been trying a solid ankle AFO but not doing well as the AFO provided no relief. Petitioner reported being unable to sleep at night due to the pain and had been sleeping with the brace on at night and elevated on a pillow. He was taking Meloxicam. On exam, Petitioner's left ankle was swollen and range of motion was extremely painful. Dr. Sams recommended that Petitioner try the AFO for another month and, if still in pain, surgical consideration would be warranted. Dr. Sams felt Petitioner would be an excellent candidate for an ankle fusion. (PX 1)

Petitioner returned to Dr. Sams on March 20, 2015 reporting no relief from the AFO. Dr. Sams noted little change in his condition with ongoing nighttime pain and difficulty with weigh bearing, activity, and stairs. Swelling was present along with tenderness to palpation. Dr. Sams recommended an ankle fusion involving the tibiotalar joint. (PX 1)

Dr. Holmes was asked to issue another report on April 3, 2015 after reviewing additional records pertaining to Petitioner and to specifically address whether the surgery being recommended by Dr. Sams was necessary and causally related to Petitioner's work accident. Dr. Holmes felt Petitioner should be treated with a cast and if it completely eliminated or largely eliminated his pain he would be a candidate for an ankle arthrodesis. If the cast did not negate the pain that would indicate the possibility of an underlying neurologic cause for the pain and if one proceeded with a fusion, the pain would persist. He did not feel that Petitioner needed an ankle fusion due to the injury herein as he deemed it a "relatively benign sprain with no objective data that it aggravated or accelerated his underlying severe arthritis in the ankle." Thus, if Petitioner needed an ankle arthrodesis in the future it would be related to his pre-existing ankle arthritis and its extensive nature and not the work accident. (RX 1, dep. ex. 3)

At the request of Petitioner's attorney, Dr. Sams issued a narrative report on May 29, 2015. (PX 2, Dep. Ex. 2) In his report Dr. Sams outlined Petitioner's history, including a description of the accident and Petitioner's treatment to date. It was his understanding that Petitioner had tripped over a hose and initially believed he had only sprained his ankle but it failed to get better. Uneven terrain seemed to bother him especially and he had tried wearing a counter brace as well as oral anti-inflammatory medications. Petitioner had no history of pre-existing ankle pain prior to his accident although he had suffered multiple ankle sprains when younger. Dr. Sams noted that Petitioner's x-ray taken at the time of their first visit confirmed severe osteoarthritis of the ankle joint consisting of the tibiotalar articulation. Dr. Sams acknowledged his conversation with Petitioner in which he explained that his accident did not cause the degree of arthritis shown on the x-ray but it had exacerbated it. They attempted an intra-articular steroid injection as well as a new lace-up ankle brace but neither provided any meaningful relief. At the time of their August 19, 2014 visit, Dr. Sams discussed the possibility of ankle surgery but recommended that Petitioner live with the condition until it was intolerable. He was also offered a second opinion. (PX 2, Dep. Ex. 2)

Dr. Sams further wrote that thereafter Petitioner was "fairly lost [to him]" and underwent an exam with Dr. Holmes who noted in his report that he recommended Petitioner try a period of immobilization with a cast prior to any arthrodesis. Dr. Sams wrote, "Immediately following the statement he then suggested he could try an AFO brace or a custom-made Arizona type brace for pain relief." (PX 2, Dep. Ex. 2, para. 2) Thereafter Dr. Sams had Petitioner utilize a rigid AFO with weight bearing as tolerated. Petitioner received the ABO brace on December 19, 2014 and despite wearing the brace 24 hours a day except for showering, remained in pain. As of March 20, 2015 Dr. Sams noted Petitioner was not only reporting pain but also disappointment and frustration with his ankle. (PX 2, Dep. Ex. 2)

Dr. Sams further noted that Petitioner's objective physical exam findings and radiographic findings have been consistent with severe end-stage osteoarthritis of the tibioltalar joint and all conservative treatment options have been exhausted. Dr. Sams felt Petitioner would be an excellent candidate for an ankle fusion and no other procedure would provide him with any reasonable chance of pain relief and a return of quality of life. With regard to the opinions of Dr. Holmes as expressed by him in his letter of April 3, 2015, he disagreed with the need for casting stating that a custom molded solid ankle AFO worn all hours of the day with the exception of bathing is just as effective as cast immobilization. He agreed that cast immobilization would be warranted if patience compliance were an issue but that wasn't the case with Petitioner. To Dr. Sams' knowledge there were no high level studies for ankle arthritis comparing the relative motion allowed of cast immobilization v. a rigid ankle AFO. Dr. Sams further took exception to Dr. Holmes' use of the phrase "from a textbook standpoint" (in his initial report) noting that another textbook has reported little being written about non-operative treatment of diffuse ankle arthritis. (PX 2, Dep. ex. 2)

Dr. Sams concluded his narrative report stating that Petitioner lacked any pain prior to his accident and while he had to have had a significant amount of arthritis in his ankle prior to the accident it was asymptomatic and since his accident his pain has been "debilitating." Petitioner had tried all reasonable non-operative measures and any further "delay in treating him with the definitive treatment which is an ankle arthrodesis is only going to diminish his physical and mental health." (PX 2, Dep. Ex. 2)

The deposition of Dr. Sams was taken on August 13, 2015. Dr. Sams testified that he is an orthopedic surgeon. Dr. Sams testified consistent with his office notes regarding his care and treatment of Petitioner. Dr. Sams acknowledged that he did not review Petitioner's left ankle MRI. He felt Petitioner essentially had an arthritic joint in his ankle that had been worsened since the injury. They initially tried conservative treatment measures including modifying his activities, trying ankle braces, oral medications, and an injection. He did not recommend an ankle replacement because the long-term and mid-term results aren't good enough for an active gentleman such as Petitioner. (PX 2)

Dr. Sams was unaware of any treatment to Petitioner's left ankle prior to his work accident. Dr. Sams clearly felt Petitioner had arthritis in his ankle before his accident but his pain has been exacerbated to the point he couldn't control the inflammation. Dr. Sams further testified that he was given the opportunity to review Dr. Holmes' report of October 15, 2014 and that they did just what Dr. Holmes suggested – ie. tried the AFO brace. With regard to Dr. Holmes' suggestion of April 2015 that Petitioner be casted rather than in an AFO brace, he testified that it would not have mattered as it would have made no difference whether he was casted or braced. He explained that there was no scientific evidence in medicine to support a cast over a brace as either method immobilized the tibiotalar joint. Dr. Sams was of the opinion that if the brace was properly being worn, a cast would be unnecessary and he would only use a cast if patient compliance was an issue but he's never had any concerns regarding Petitioner's compliance or desire to get better. (PX 2)

Dr. Sams also took issue with Dr. Holmes' opinion that Petitioner has a "benign strain" as that is not the condition he is treating; rather, he is treating arthritis that has been exacerbated by, possibly, a sprain. He also disagreed with Dr. Holmes' opinion that a fusion would be unrelated to the work accident. Petitioner had no symptoms before his accident and his osteoarthritis has been worsened by it. He needs an ankle fusion to get relief and move on with his life. When he last examined Petitioner, Dr. Sams noted Petitioner was miserable and he was concerned about Petitioner's overall mental state. He was cancelling vacations, unable to play with his grandchildren and very unhappy with his quality of life. Dr. Sams knew Petitioner was wearing the AFO brace because when it was removed Petitioner was lacking any tan to his skin. More recent x-rays have revealed he has very limited surface area to distribute the weight across when he stands on his foot and he is having collapse of his talus and it was exacerbated by the accident. (PX 1, pp. 1 – 30)

On cross-examination Dr. Sams clarified that he had since seen Petitioner's MRI. He also acknowledged Petitioner's prior ankle sprains but was unaware of any treatment associated with them. He acknowledged that one could not ascertain if the swelling seen on Petitioner's MRI was chronic or acute. He further explained that the abnormal subchondral signal with crescent sign and flattening of the talar dome on the MRI was evidence of a fracture. He also acknowledged that if Petitioner had not had the accident but was in his current condition he would still recommend a fusion. He also explained that the brace doesn't allow for complete immobilization. There is still some movement but the fusion would end that. (PX 2, pp. 30-38)

On redirect examination Dr. Sams testified that the work injury has accelerated the need for Petitioner's fusion. (PX 2, pp. 39-40)

The deposition of Dr. George Holmes was taken on December 15, 2015. (RX 1) Dr. Holmes is a board certified orthopedic surgeon based at Rush University Medical Center who specializes in foot and ankle surgery. He performs approximately 250 – 300 foot/ankle surgeries per year. About 10 percent of his weekly practice centers around medicolegal evaluations. Dr.

Holmes testified concerning his earlier written reports pertaining to Petitioner. It was his understanding that Petitioner injured his left ankle on March 22, 2014 when he was performing some mulching work, had a blower, and tripped over a hose, twisting his left ankle. Dr. Holmes testified that he reviewed records from Occupational Health. At the time of his initial exam of October 15, 2014 Petitioner's ankle was stable, his range of motion was functional, and he could appreciate no swelling. X-rays taken that day showed a tibial talar tilt (ie. the ankle was out of alignment) as well as osteoarthritic changes. He also noted a possible subluxation of the tibia in relationship to the talus on the lateral view. Soft tissues appeared normal. No fractures or dislocations were appreciated. Dr. Holmes also reviewed Petitioner's MRI scan report noting it demonstrated degenerative changes of the tibial talar (ankle) joint. There was an abnormal subchondral signal and a crescent sign and flattening of the talar dome, the former of which suggests avascular necrosis or dead bone. There was also avascular necrosis suggested with an osteochondral fracture. Petitioner also had signs of tendinopathy or degenerative peroneal tendons. (RX 1, pp. 1 – 11)

Dr. Holmes was of the opinion that Petitioner had tibial talar arthritis and avascular necrotic changes in his ankle. He did not feel that his diagnosis was "based upon [Petitioner's] work accident." (RX 2, p. 11) He acknowledged that from a structural standpoint Petitioner's pre-existing ankle condition was temporarily aggravated; however, he did not find any features on the MRI suggesting any permanent aggravation. As the doctor explained it, the MRI scan did not show any collateral damage "that would be needed to cause any further damage to the joint or to the arthritis." (RX 1, p. 12) He added, "...the MRI did not show that the patient had any significant aggravation, other than a very mild sprain, if that,..." (RX 1, p. 13)

Dr. Holmes further testified that Petitioner's physical examination revealed no swelling in the ankle thus suggesting to him that there was no reactivity or healing that Petitioner's body was going through. Furthermore, Petitioner's lack of atrophy meant that both extremities were being used equally. He felt Petitioner's overall prognosis was good and that Petitioner simply needed more time to heal, but no further interventions. He reiterated that he did not feel Petitioner was a surgical candidate. (RX 1, pp. 13 – 14)]

Dr. Holmes further testified about speaking with Petitioner about the temporary use of a cast and about possibly thereafter considering using an AFO brace or an Arizona brace. Dr. Holmes explained that the brace or cast is meant to help evaluate, in part, the need for a fusion surgery and the underlying cause of Petitioner's pain. If Petitioner's ankle were casted there should be a 90 percent probability that his pain would go away. If the pain doesn't resolve one must look for another source of the pain. If he did well with the cast and it alleviated his pain, he would have been a good candidate for a brace. (RX 1, pp. 14-15)

Dr. Holmes went on to explain that while the cast would simulate the fusion, an AFO brace or Arizona brace would not. One starts with the cast because the cast has stronger

immobilization than the brace. If a patient uses the brace he can remove it to sleep or to shower. The cast prohibits that and fits "like a glove." (RX 1, pp. 15-16)

Dr. Holmes also testified regarding his addendum report of April 3, 2015. As part of that report he reviewed Dr. Sams' records and x-rays from Dr. Sams. Dr. Holmes testified that Dr. Sams' report of February 17, 2015 suggested that Petitioner was not doing well with a solid AFO brace but casting had not been attempted. Dr. Holmes was of the opinion that there was no objective data indicating any aggravation or acceleration of Petitioner's severe arthritis – that is, all of Petitioner's symptoms in April of 2015 were related to his degenerative ankle condition. In explaining why he felt Petitioner's aggravation was a temporary one, Dr. Holmes alluded to slapping someone on the shoulder and feeling an "ouch" as opposed to being a football player who fell on his shoulder and injured his ribs and got pulled for the season. According to Dr. Holmes, those are different types of aggravations. He testified, "So if I hit you in your shoulder, and you say it's a temporary aggravation, it could be fleeting, it could be a week, it could be a day, it could be five minutes." (RX 1, p. 18) He added, "The MRI, initial x-rays showed severe arthritis. There is no evidence that that severe arthritis…was in any way permanently aggravating the guy's walking." (RX 1, p. 18) Dr. Holmes reiterated that Petitioner's ankle is stable and there's no swelling or calf atrophy. In sum, since the MRI failed to show "collateral damage." Dr. Holmes felt there was no permanent aggravation to Petitioner's ankle. (RX 1, p. 19)

Dr. Holmes testified that Petitioner required no further care, such as surgery, for his ankle. He could take anti-inflammatories or wear a stocking or brace if he wished. He added that Petitioner could still try the cast to see if it improved his pain and then proceed from there depending upon the results. (RX 1, pp. 21-22)

On cross-examination Dr. Holmes acknowledged that he has only seen Petitioner on one occasion.

According to Dr. Holmes, Petitioner's physical examination was entirely normal and he couldn't provide an objective "parameter" that would support the subjective complaints. (RX 1, p. 27) Dr. Holmes further testified that he would not be surprised if x-rays showed further progression of Petitioner's arthritis and that Petitioner might be experiencing more intense and chronic pain. He also acknowledged that he didn't review the actual ankle MRI. He disagreed that a finding of an abnormal signal within the anterior and posterior talofibular ligament, consistent with at least a partial tear, would suggest an aggravation as "almost all patients" with ankle arthritis have that finding. (RX 1, p. 28)

Petitioner's attorney next asked Dr. Holmes if the presence of edema on the MRI would be of any significance and, after reviewing the report, he testified that the edema being discussed was edema of the muscle and bone, not soft tissue and would go along with the avascular necrosis. Furthermore, he felt the additional edema within the distal tibia and the subchondral region and joint effusion would be consistent with arthritis. (RX 1, p. 30)

Dr. Holmes was also asked about how he "draws the line" between a temporary aggravation and a permanent one, and he replied that in Petitioner's case he drew a fairly "broad line." He explained that if someone tells him they cannot walk on their leg and he finds no swelling or atrophy then he knows they are using the leg. He added that if he could be provided with any sign of atrophy, swelling, the MRI findings, or x-ray findings he might conclude Petitioner had an acute aggravation but he is unaware of anything. (RX 1, p. 32) He added that it wouldn't take more than "one or two parameters" to get him to change his mind but he can't find those parameters. (RX 1, p. 33)

When asked if he would be in a better position to assess the overall nature of Petitioner's ankle condition over than of Dr. Sams who has seen him several times, Dr. Holmes responded that he didn't know. (RX 1, p. 35) Thereafter, Dr. Holmes indicated he was done with the deposition. (RX 1, p. 35)

Petitioner's case proceeded to arbitration on February 18, 2016. At the beginning of the hearing the disputed issues were accident, causal connection, and prospective medical care with issues concerning lost time and medical bills were reserved by the parties for a future hearing. Petitioner was the sole witness testifying at the hearing. After hearing Petitioner's testimony on direct examination regarding the details of an accident on April 22, 2014 Respondent stipulated to accident.

Petitioner testified that he was working for Respondent on April 22, 2014 as a groundskeeper and was applying mulch with a hose that was 35 – 40 feet in length and 4 – 6 inches in diameter. Petitioner explained that as he was applying mulch he turned around and stepped on the hose and fell forward. His left ankle and foot flexed up and backwards toward his shin and it hurt quite a bit. Petitioner testified that he reported the accident and continued working despite the pain as he thought he had simply sprained his ankle. Petitioner further testified that his ankle remained swollen after the accident and it was hard to walk on it. He "hobbled" around.

Petitioner testified that after Dr. Sams recommended a fusion, he was sent for an examination with Dr. Holmes in Chicago. Petitioner testified that he saw Dr. Holmes' report and disagreed with the doctor's notation that there was no ankle swelling. According to Petitioner, his ankle was swollen like a balloon. After the surgery was denied, Petitioner kept treating with Dr. Sams. He wears an AFO brace throughout the day except for when he showers. According to Petitioner the brace keeps his foot and leg moving in the same direction.

Before the closing of proofs Petitioner took off his AFO brace and walked across the hearing room with a very painful and visible limp. He had to use desks/tables in the hearing room for stability.

Petitioner testified that he has not been pain free since the day of the accident. When he walks, it hurts. He wishes to have surgery authorized as he would like to be pain free. Petitioner

further testified that since wearing the brace he has noticed his right Achilles tendon is starting to hurt a great deal. Petitioner also testified that he walks different now – limping and being almost unable to put weight on his left foot. He goes up steps one at a time with both feet having to be on the same step before he attempts the next one.

Petitioner acknowledged he has lost no time from work on account of his injury. He explained that his supervisor has altered his job duties and he doesn't do much walking. Rather, he sits on a tractor or uses a "gator."

Petitioner testified that prior to April 22, 2014 he had not been diagnosed or treated for any left ankle problems, except for some possible ankle sprains/strains when he participated in athletics 20 to 30 years earlier; however, even then, he underwent no treatment.

At the start of cross-examination, Respondent's counsel stipulated to accident. When asked about prior ankle injuries, Petitioner explained that he probably had some while playing sports when he was younger. He had never worn a brace before the accident and he's never been placed in a full cast. His right wrist is fine. Petitioner acknowledged going on a mission trip to Africa and "hobbling" around. He didn't cancel it because it had been paid for already and people made special accommodations for him.

The Arbitrator concludes:

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

Petitioner's current condition of ill-being in his left ankle and foot is causally related to his accident of April 22, 2014. In so concluding the Arbitrator relies upon a chain of events, the treating medical records, Petitioner's very credible testimony, and the opinions of Dr. Sams over those of Dr. Holmes. The April 22, 2014 work accident aggravated Petitioner's pre-existing, but asymptomatic, osteoarthritis, and is the proximate cause of Petitioner's current condition of ill-being in his foot/ankle.

In Illinois, it is well settled that, a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability can be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. International Harvester v. Industrial Commission, 93 Ill. 2d 59, 442 N.E.2d 908, 66 Ill. Dec. 347 (1982).

Moreover, an employer takes his employees as he finds them and the fact that a pre-existing condition is aggravated, exacerbated, or accelerated by an accidental injury will not bar compensation so long as the employment was also a causative factor. The sole limitation to this general rule is that where the employee's health has so deteriorated that any normal daily activity is an overexertion or where the activity engaged in present risks no greater than those to which the general public is exposed. See Rock Road Const. Co. vs Industrial Commission, 37 Ill.2d 123, 227 N.E. 2d 65 (1967) and Quality Wood Products v. Industrial Commission, 97 Ill.2d 417, 454 N.E. 2d 668, 73 Ill. Dec. 571 (1983).

In this case, it is undisputed that prior to April 22, 2014, Petitioner had never treated for any problem referable to his left ankle. There seems to be no dispute that Petitioner had pre-existing severe ankle arthritis; however, he had not undergone any treatment nor had he been experiencing any pain. Petitioner was working full duty for Respondent prior to and at the time of the accident. Petitioner did not merely twist his ankle at the time of the accident; rather, the upward flexing of Petitioner's foot when he tripped over the hose was quite traumatic and he has been experiencing pain and disability ever since. Petitioner credibly testified to the mechanism of injury and, in general, he was an extremely credible witness.

It cannot be overlooked that, to date, all of Petitioner's medical care has been orchestrated by Respondent. Respondent sent Petitioner to the Occupational Medicine Clinic at Decatur Memorial Hospital and, in turn, staff there referred Petitioner to Dr. Sams. Respondent subsequently sent Petitioner to Dr. Holmes for an independent medical examination. The purpose of the first examination with Dr. Holmes was to address causation and treatment recommendations based upon a generic statement in an earlier treatment note that at some point Petitioner might be a candidate for an ankle fusion procedure.

Regarding the issue of causation Dr. Holmes and Dr. Sams appear to differ on whether Petitioner has suffered a temporary or permanent aggravation of his pre-existing arthritic condition. Dr. Sams' opinion is that there has been a severe aggravation based upon Petitioner's asymptomatic condition pre-accident and debilitating condition and pain since then. His opinions in both his narrative report and in his deposition were consistent, well-reasoned, and persuasive.

In contrast, Dr. Holmes had an incorrect understanding of the mechanism of Petitioner's injury. Petitioner didn't twist his ankle. Rather, as Petitioner described it, he stepped wrong on the hose and felt his foot go upwards towards his shin. Petitioner's mechanism of injury was more severe than Dr. Holmes may have understood.

Dr. Holmes, as an examining physician, only saw Petitioner on one occasion. At that time, he felt Petitioner's condition and symptoms were attributable to the work accident and his only real difference of opinion was whether Petitioner needed to undergo a fusion. His subsequent change of opinion on causation was not based upon an examination of Petitioner. His belief that Petitioner's aggravation was only a temporary one was far less persuasive and in his deposition testimony he acknowledged that if there were some ongoing objective evidence of swelling, atrophy, etc. he would acknowledge that Petitioner had sustained more than a temporary aggravation. That evidence is clearly set forth in the records of Dr. Sams and, while Dr. Holmes was furnished those records, he never addressed them in their entirety. If one looks at the March 20, 2015 office note of Dr. Sams, he documents Petitioner's ankle is swollen and he has tenderness to palpation , no dorsiflexion, and painful plantar flexion. On February 17, 2015 Petitioner's ankle was swollen. Dr. Holmes did not address the fact Petitioner was walking with an antalgic gait when seen by Dr. Sams on June 10, 2014. In sum, Dr. Holmes completely ignored discussing or addressing the objective findings found in Dr. Sams' office notes, preferring instead to rely upon the purported absence of objective findings when he examined Petitioner one time on October 15, 2014 (an exam Petitioner took issue with at trial). Furthermore, Dr. Holmes never reviewed the actual MRI film. While Dr. Holmes may have equated Petitioner's injury to a "slap to the shoulder" and he saw no evidence that Petitioner's

walking was being permanently aggravated, Petitioner's treating medical records and testimony at trial indicated otherwise.

Based upon the foregoing, the Arbitrator finds the testimony and opinions of Dr. Sams to be more persuasive than that of Dr. Holmes. Petitioner met his burden of proof on the issue of causation regarding his ankle. It appears that any injury to Petitioner's right wrist has resolved.

In support of the Arbitrator's decision regarding Issue (K), is Petitioner entitled to any prospective medical care, the Arbitrator concludes:

Petitioner is awarded prospective medical care as recommended by Dr. Sams. Petitioner has exhausted all conservative care and the only viable option left to him is the left ankle fusion recommended by Dr. Sams.

In awarding prospective care as recommended by Dr. Sams, the Arbitrator incorporates her findings on causal connection as set forth above. In addition she notes the following.

Dr. Holmes is of the opinion that Petitioner does not need to undergo an ankle fusion because he has not attempted casting and immobilization of his ankle. Dr. Holmes, as an examining physician, only saw Petitioner on one occasion. At that time, he felt Petitioner's condition and symptoms were attributable to the work accident and his only real difference of opinion with Dr. Sams was whether Petitioner needed to undergo a fusion. First, he stated in his October 15, 2014 report that, "at this time" Petitioner didn't need to proceed with a fusion (which Dr. Sams wasn't truly recommending that Petitioner even undergo at that specific time as he told him to live with the condition as long as he could). He also recommended that prior to any surgery Petitioner first attempt a period of immobilization with a cast stating that if "a great percentage of his pain was eliminated with the use of a cast, this would bode well for the potential use of an AFO brace or a custom made Arizona type of brace for pain relief. " (RX 2, Res. Ex. 2, pp. 3-4/5) Dr. Holmes even noted his preference of an AFO brace. Immediately thereafter, he noted his opinion in favor of causation. He further wrote in his initial report that Petitioner had not reached maximum medical improvement pending his response to "the cast, AFO brace, or Arizona brace." (RX 2, Res. Ex. 2, p. 4/5) Thus, one could reasonably infer from Dr. Holmes' initial report that he was recommending cast immobilization to determine if Petitioner should try an AFO brace or custom made Arizona type brace, the former of which was his personal preference.

After the October examination with Dr. Holmes, Respondent denied authorization for a fusion procedure. Dr. Sams, being informed of the exam with Dr. Holmes and the lack of authorization for a fusion, recommended proceeding with the brace and Respondent authorized it. Dr. Sams' actions seem completely consistent with Dr. Holmes' recommendations and if Respondent had an issue with it, it could have easily denied approval for the AFO brace and insisted on the use of the cast; however, it did not. Again, Respondent has been directing Petitioner's care from the outset.

Both doctors testified on the issue of a cast versus the AFO brace. Dr. Holmes seemed to feel the cast was the most reasonable mode of treatment as it would completely immobilize Petitioner's ankle thereby limiting any concerns or issues of patient compliance. However, Dr.

Holmes persuasively and credibly explained that Petitioner presented no compliance issues and that he believed Petitioner was wearing the AFO brace (Dr. Holmes' preferred type of brace) 24 hours a day except for showering.

Dr. Holmes appeared to place emphasis on Petitioner's lack of atrophy or evidence of disuse. However, Petitioner did not claim he was unable to use his left ankle/foot. To the contrary, he has kept on working as best he can and his employer has accommodated him to some degree. He testified to "hobbling around" and his testimony was unrebutted. In the end, Dr. Sams' belief that "[a]ny further delay in treating him with the definitive treatment which is an ankle arthrodesis is only going to diminish his physical and mental health" is supported by the doctor's office notes and records. That, combined with Petitioner's credible testimony as to the impact of this accident and his efforts to continue living and working with his ankle "as is" and Dr. Holmes' equivocal testimony suffice to support an award of prospective care.

Accordingly, pursuant to the case of Plantation Mfg. vs. Industrial Commission. 294 Ill.App3d 705, 691 N.E. 2d 13, 229 Ill. Dec 77 (2d Dist 1997), Respondent is ordered to pay all necessary, reasonable, and related costs associated with Petitioner's left ankle fusion and any post-surgical treatment.

****

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

Timothy E. Simmons,
Petitioner,

vs.

NO: 15 WC 14703

17IWCC0336

Cintas Fire Protection ,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and the nature and extent of the injury, 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 underlying facts of this claim were well laid out in the Arbitrator's Decision, which is incorporated herein, and the Arbitrator's findings of fact are adopted. The Arbitrator's determination as to causal connection between the original injury and the injuries sustained is likewise adopted. With regard to the nature and extent of the injury, however, the Commission reviews and weighs the facts somewhat differently than did the Arbitrator.

First, the Arbitrator reviewed and weighed the five factors delineated in Section 8.1b of the Act in making his determination. The Act specifies these factors are intended to be considered specifically in the context of permanent partial disability; in other words, in cases involving a determination of benefits under Sections 8(d) or 8(e). In cases involving awards under Section 8(c) for disfigurement, any benefits under Sections 8(d), 8(e), and 8(f) are statutorily foreclosed per Section 8(c). Accordingly, the five-factors analysis as performed by the Arbitrator is given no weight in making our determination for purposes of 8(c) benefits.

17IWCC0336

The Commission has seen the extent of the claimant's injuries and resultant disfigurement. The claimant has scarring on his left foot, ankle, calf, and shin. The scars are discolored and rough-hewn as compared to both the surrounding skin and to his opposite foot and leg. Noticeable skin dryness and flakiness over the scar site is readily apparent. His calf appears slightly atrophied compared to the right side. The areas are sensitive to touch and the scarring cannot be exposed to sunlight for any significant length of time. The claimant uses lotions to address persistent dryness and tightness of the skin, which alleviates but does not wholly relieve the symptoms.

The Commission notes the extent and persistence of the scarring, and upon consideration of the totality of the evidence concludes that an award of 100 weeks disfigurement pursuant to Section 8(c) of the Act is appropriate.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,005.71 per week for a period of 17-5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 100 weeks, as provided in §8(c) of the Act, for the reason that the injuries sustained caused permanent disfigurement to the claimant.

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: MAY 31 2017

Joshua D. Luskin

Charles J. DeVriendt

o-05/17/17
jdl/ac
68

17IWCC0336

DISSENT

I believe the arbitrator was correct in his use of the five factor analysis as outlined by Section 8.1b of the Act as disability benefits should be awarded pursuant to Section 8(e) of the Act. Accordingly, I respectfully dissent.

Petitioner testified he is employed as an SSR/fire technician whose job duties required climbing and standing on ladders as well as crawling and squatting. T. 10-11. Petitioner testified since his injury he experiences difficulty with extended periods of standing; an inability to run; and difficulty with ladder climbing. T. 19-20; 24. Petitioner further testified to feeling tightness, fatigue, and burning in his leg as well as numbness in his leg. T. 19-20. The medical records evidence Petitioner suffered from 2nd and 3rd degree burns requiring an Epifix Graft as well as a chronic left ankle ulcer with necrosis of the muscle. PX4.

Dr. Vora who evaluated Petitioner pursuant to Section 12 of the Act testified Petitioner suffered from sural neuritis as well as neuritis along the calf and leg which he described as localized nerve damage. RX1, p.12. Dr. Vora further testified when performing an AMA impairment rating from a burn or scar with corresponding nerve dysfunction, the skin impairment rating is combined with a lower extremity impairment rating. RX1, p.48-49. In viewing Petitioner's left leg on May 17, 2017, some atrophy of the calf was noted. As such disability should be determined pursuant to Section 8(e) of the Act.

As such I weigh the following five factors accordingly:

1) AMA Impairment Rating- Dr. Vora after examining Petitioner and reviewing the medical records and utilizing the AMA Guide arrived at and impairment rating of 5% of a whole person. Dr. Vora conceded during his testimony if a burn or scar exists along with nerve dysfunction, the skin impairment rating should be added to the lower extremity impairment rating. Such combined rating was not performed by Dr. Vora. As such I assign lesser weight to this factor.

2) Occupation of Petitioner- Petitioner testified he is SSR/fire technician whose job duties required climbing and standing on ladders as well as crawling and squatting. T. 10-11. Petitioner testified to some difficulty with ladders but was able to perform his full duty work and had been doing so since his release to full duty since August of 2015. T. 24; 28. As such I assign lesser weight to this factor given his ongoing abilities to perform his job.

3) Age of Petitioner- The Stipulation Sheet memorializes Petitioner was 41 years of age at the time of the accident. As such Petitioner has a significant work life expectancy which will require him to manage the effects of his injury for a greater period of time. As such I assign greater weight to this factor.

4) Petitioner's Future Earning Capacity- Petitioner testified since returning to work, he has not suffered any wage loss. T. 38. As such I assign lesser weight to this factor.

17IWCC0336

5) Evidence of Disability/Treating Records- Petitioner testified to ongoing difficulties with his leg specifically tightness, fatigue, burning, and numbness in his leg. T. 19-20. Petitioner testified to utilizing over the counter medications for pain treatment as well as a lotion and compression stockings. T. 21; 34; 38. Petitioner's treatment records with Dr. Pacaccio corroborate his testimony. As such I assign greater weight to this factor.

Based upon the above numerated factors as well as the record taken as a whole, I would award Petitioner permanent partial disability benefits of $735.37/week for the period of 64.5 weeks, because the injuries sustained caused the loss of use of 30% of the left leg, as provided by Section 8(e) of the Act. Accordingly, I dissent.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SIMMONS, TIMOTHY E
Employee/Petitioner

Case# **15WC014703**

CINTAS FIRE PROTECTION
Employer/Respondent

17IWCC0336

On 11/10/2016, 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 0.53% 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:

0147 CULLEN HASKINS NICHOLSON ET AL
CHARLES G HASKINS JR
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

0075 POWER & CRONIN LTD
DANIEL ARTMAN
900 COMMERCE DR SUITE 900
OAK BROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Timothy E. Simmons
Employee/Petitioner

Case # 15WC014703

v.

17IWCC0336

Cintas Fire Protection
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **October 27, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0939

FINDINGS

On **03/03/2015**, 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 $78,445.64; the average weekly wage was $1,508.57.

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

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

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

Respondent shall be given a credit of $17,815.44 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $17,815.44.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,005.71/week for 17 5/7 weeks, commencing 03/04/2015 through 07/05/2015, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $735.37/week for 120 weeks, because the injuries sustained caused the disfigurement of the left leg, as provided in Section 8(c) of the Act.

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

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

David A. Kane
Signature of Arbitrator

November 10, 2016
Date

NOV 10 2016

Attachment to Arbitration Decision

Timothy E. Simmons
Employee/Petitioner

Case No. 15WC014703

v.

17IWCC0336

Cintas Fire Protection
Employer/Respondent

In support of the Arbitrator's decision relating to all issues, the Arbitrator finds the following facts:

1) On March 3, 2015 Petitioner was employed as a Sales Service Representative (SSR)/Fire Technician for Respondent. He had been so employed since October of 2003. He installs and inspects fire suppression systems, fire extinguishers and emergency lighting. He is required to be on his feet, climb ladders, walk, squat and crawl. He typically is required to carry approximately 25 lbs. but could lift up to 170 lbs. He typically starts early in the morning and will work into the evening depending upon the job.
2) Prior to March 3, 2015 he had never injured nor had scarring to his left lower leg.
3) On that date his left leg was injured when he was servicing the fire suppression system at an Olive Garden Restaurant. At 7 a.m. in the morning his foot slipped into a deep fryer filled with oil. The oil was hot as the fryer was on. He was taken by ambulance to Christ Hospital in Oak Lawn (PX1). He received emergency room treatment and diagnosis was first, second and third degree burns. He was given pain medication, fluids and his wounds were

dressed. It was recommended that he follow up with his primary care physician (PX1).

4) Later that evening his pain was increasing and his wound was looking worse so he went to the local emergency room at Valley West Community Hospital. He was given additional medication and new dressing was applied. It was recommended that he follow up with his primary care physician, Dr. Englehart (PX2). Petitioner contacted his primary care physician and he was referred to Dr. Asihene, a wound specialist. Petitioner saw Dr. Asihene on March 9, 2015. The wounds were cleansed and re-dressed and it was recommended that Petitioner follow up with a burn clinic (PX3).
5) Petitioner was seen by Loyola University Medical Center on multiple dates. Ultimately Loyola recommended the option of surgical skin grafting (PX5). Petitioner sought a second opinion and consulted with Dr. Douglas Pacaccio who recommended EpiFix grafting. Petitioner ultimately opted to treat with Dr. Pacaccio and beginning on April 30, 2015 underwent a staged series of EpiFix grafting procedures (PX4).
6) On November 3, 2015 Dr. Pacaccio recommended Petitioner follow up in 6 months and Petitioner testified that he did.
7) Petitioner was examined at the request of Respondent pursuant to Section 12 by Dr. Anand Vora on April 1, 2016. Dr. Vora's examination revealed area of secondary soft tissue healing of large eschar burn lesion measuring along the entire lateral compartment of the left leg and to the lateral ankle and hindfoot in 10 centimeters at its greatest length, and 3 inches in diameter at its greatest diameter at the mid-calf level. The doctor noted pain

and stated the skin had healed in a thickened, hyperindurated nature. There was complete loss of sensation with pinprick and 2 point discrimination objectively in the entire soft tissue burn which had healed with secondary healed tissue and loss of sensation in the sural nerve distribution (RX1, pg11). The remainder of the distal sensation was intact. There was a separate lesion on the anterior ankle along the midline measuring one centimeter by one centimeter with secondary eschar and thickening. There was complete loss of feeling with objective testing and pin prick (RX2).

8) Dr. Vora also performed an impairment rating and indicated that the rating was 5% loss of use of the whole person (PX2).

9) Dr. Vora testified by vehicle of evidence deposition on August 26, 2016 (RX1). Dr. Vora indicated that second degree burns are also referred to as partial thickness burns and they involve the epidermis and part of the dermis layer of the skin. A third degree burn is sometimes referred to as a full thickness burn wherein the outer layer, the epidermis and the layer beneath the dermis are destroyed as well as nerve endings along with the dermis (RX1, pg26). Dr. Vora stated that Petitioner reported that he utilized pain relievers and that on the written information sheet Petitioner indicated that he continued to utilize lotions (RX1, pg22). Dr. Vora noted that Petitioner complained that boots would irritate the area of the scarring and Petitioner would wear socks going above the boots. Petitioner also complained of morning pain and swelling (RX1, pg24). Dr. Vora indicated that in any area that was burned there is a loss of sensation (RX1, pg25). The doctor continued that in areas where there is nerve damage that Petitioner will continue

to experience diminished resistance to mechanical, chemical and thermal trauma (RX1, pg36). The doctor indicated that the complaints Petitioner experiences clearly are the result of the incident of March 3, 2015 (RX1, pp29-30). Dr. Vora indicated that the areas of scarring were hyperindurated which means they were not only thickened but thickened to a greater extent and that in the areas where the grafting was performed it is impossible for Petitioner to sweat or hair to exist (RX1, pp42-43).

10) Dr. Vora performed AMA impairment rating and concluded that Petitioner sustained impairment to the extent of 5% of whole body (RX2). Dr. Vora agreed that impairment does not equate to the term disability (RX1, pg31). The doctor continued that the impairment ratings deal with activities of daily living (ADL) which are things like dressing, bathing, showering, eating, feeding, etc. (RX1, pp36-37). The doctor continued that activities of daily living do not include such things as being required to stand in one position for a period of time or being seated for a period of time without being able to move about (RX1, pg45). The doctor testified that he arrived at the impairment rating of 5% loss of the whole body by utilizing the skin disorder table 8.2 appearing on page 166 of the guides (RX1, pg14). The doctor indicated that he did not combine the above skin impairment rating with impairment rating from the chapter on the lower extremities (RX1, pg46). The doctor admitted that at page 163 of the guides under the section of scars and skin grafts that it is mandated that "when an impairment resulting from a burn or scar is based upon peripheral nerve dysfunction or loss of range of motion" the skin impairment should

be evaluated separately and then combined with the impairment rating from Chapter 16, the lower extremities.

11) Petitioner was released to perform light duty beginning July 6, 2015 and ultimately resumed regular duties on September 2, 2015. Petitioner and Respondent agree that all temporary total disability was paid and Respondent indicates that it has or will resolve any issues regarding payment of temporary partial disability and reimbursement of out-of-pocket expenses.

12) Petitioner complains that an area of his mid-calf along the scar line is very sensitive when the area is bumped. On the front or anterior portion of the ankle he has no feeling at all. Petitioner is sensitive to temperature extremes. In the cold he notices a tingling sensation and a numbness type of sensation. When it is extremely hot he notices itching type of sensation. Petitioner complains of numbness, burning and itching in the morning when he awakens. There is tiredness and fatigue which requires him to move around in order to alleviate. If he stands too long he notices pain and numbness in the leg. This is when he is showering or shaving as well as when he is required to stand on a ladder in one position at work or be in one position for a period of time. If Petitioner is seated for a long time (such as when he is riding in a car for a long time) it takes him a while to alleviate numbness and tingling by moving about. Petitioner is very sensitive and wears a minimum of 45 SPF screen when he is wearing shorts. He also utilizes runner sleeves or high socks and some socks are irritating. He uses cotton and looser fitting socks. Petitioner applies over the counter

lotions and moisturizers and takes over the counter pain medications.

13) The Arbitrator had an opportunity to view Petitioner's area of scarring and Petitioner offered as Petitioner's exhibit 6 a group consisting of 10 photographs taken the evening before this case was presented. Respondent noted that the scarring in the photos is lighter than what was actually viewed when Petitioner's scarring was viewed at Arbitration on October 27, 2016. There is extensive scarring about the left lower leg particularly on the lateral posterior portion from approximately mid-calf down to the ankle area. On the front of the ankle there is area of marked scarring as well as on the rear portion of the lower leg just above the ankle.

Findings

In support of the Arbitrator's decision relating to item F, causation, the Arbitrator finds the following facts:

Based upon Petitioner's testimony as well as all of the medical records including the opinions of Dr. Vora, the Arbitrator finds a causal connection exists between the accident of March 3, 2015 and the disfigurement and its residuals on Petitioner's left leg, foot and ankle.

In support of the Arbitrator's decision relating to item L, nature and extent of injury, the Arbitrator finds the following facts:

The Arbitrator adopts as if is fully set forth herein all of the above contained findings.

1) While the Arbitrator notes there was an impairment rating completed, the Arbitrator feels that this case is properly

compensable under Section 8(c) as Petitioner's residuals clearly result from the scarring and disfigurement caused by the accident. The Arbitrator does note that Dr. Vora did not perform additional impairment rating relative to the lower extremity (in RX2 Dr. Vora stated there was a loss of motion in the sural distribution and a loss of sensation about the scarring and the sural nerve distribution) and thus the doctor did not comply with the mandates of the guides.

2) The Arbitrator finds that Petitioner's complaints are credible and finds the burns caused extensive scarring resulting in significant residuals.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 5% of the whole person as determined by Dr. Vora, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (RX1). 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. The doctor noted all of the residuals which are disabling but do not impact activities of daily living. Because of this and the extensive scarring, the Arbitrator therefore gives *lesser* 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 SSR/Fire Technician at the time of the accident and that he *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator

notes Petitioner's job requirements. Because of the same, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 41 years old at the time of the accident. Because of significant work life expectancy, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has not suffered any loss of earning capacity. Because of the other residuals, the Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the significant residuals of the injury. Therefore, the Arbitrator gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained disfigurement in the amount of 120 weeks pursuant to §8(c) of the Act.